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OF THE

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[illegible]

Henry J. Kaiser Company *and* Charles E. Clendenin

Journeymen Pipe Fitters Local No. 392, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO *and* Charles E. Clendenin. Cases 9-CA-14823 and 9-CB-4456

October 19, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 31, 1980, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, the General Counsel and Charging Party Charles E. Clendenin filed exceptions and supporting briefs; Henry J. Kaiser Company (herein also called Respondent Employer or Kaiser) and Journeymen Pipe Fitters Local No. 392, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (herein also called Respondent Union), filed answering briefs; and Respondent Union filed cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

We agree with the Administrative Law Judge's finding that Respondent Union, *inter alia*, violated Section 8(b)(1)(A) of the Act by its unlawful failure to accept and/or process a grievance on behalf of its member Charles E. Clendenin.[2] However, we find that, in order to remedy that violation, the Administrative Law Judge should have included an order requiring Respondent Union to pursue Clendenin's grievance in good faith with due diligence and to make Clendenin whole for any loss of earnings he may have suffered as a result of Respondent Union's unlawful conduct.

The Administrative Law Judge found that it would be inappropriate to grant such a remedy here because the Company would most likely assert that Clendenin's grievance was now time barred and that Clendenin could not in any event demonstrate that his discharge was contrary to the collective-bargaining agreement. However, in devising an appropriate remedy for a union's unlawful refusal to process a grievance, the Board has not made a backpay award conditional on the merits of the grievance.[3] The fact that Clendenin's discharge may not have been unlawful, here, has nothing to do with the fact that Respondent Union violated the Act by failing to process Clendenin's grievance. As the Administrative Law Judge points out in his Decision:

> [M]erely because the Company took disciplinary action which does not violate the Act does not mean that an arbitrator might not have deemed the discipline unwarranted or too severe. An arbitrator is not bound by the same factual findings that I have made; he may do industrial justice and may effectuate a compromise of a grievance, whereas the Board may not.

It is uncertain whether the processing of Clendenin's grievance would have resulted in a milder form of discipline or any discipline at all. This uncertainty results from Respondent Union's unlawful action. Where, as here, such an uncertainty requires resolution, at least for the purposes of determining monetary responsibility, we deem it only proper to resolve the question in favor of the discriminatee and against the wrongdoer.[4] Since Respondent Union did not prove that had it processed Clendenin's grievance Clendenin still would have been terminated, we shall resolve the uncertainty in favor of Clendenin and find that Clendenin is entitled to at least some backpay. However, Respondent Union's backpay liability must be limited to any loss Clendenin suffered as a result of the refusal to consider and process his grievance. That grievance now appears to be time barred under the terms of the applicable collective-bargaining agreement, but

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[1] Both the General Counsel and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the last paragraph in the section of his Decision entitled "The Union's Failure To Process the Grievance," the Administrative Law Judge inadvertently found that the "Union violated Section 8(a)(b)(1)(A) of the Act." This should read that the "Union violated Section 8(b)(1)(A) of the Act."

[2] The grievance concerned Clendenin's disciplinary discharge by Kaiser on or about January 28, 1980. Clendenin's discharge was also the subject of an 8(a)(3) charge which was consolidated with the instant charge, but was found to be without merit by the Administrative Law Judge herein.

[3] See *Local Union No. 2088, International Brotherhood of Electrical Workers, AFL-CIO (Federal Electric Corporation)*, 218 NLRB 396, 397 (1975).

[4] *Laborers International Union of North America, Local 324, AFL-CIO (Centex Homes of California Incorporated)*, 234 NLRB 367 (1978).

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Respondent Union may be able to prevail upon Kaiser to waive those time limits. Accordingly, we shall order Respondent Union to make Clendenin whole for any loss of earnings he may have suffered as a result of his discharge by Henry J. Kaiser Company from the date of his discharge, January 28, 1980, until the earlier of the following occurs: Respondent Union secures consideration of his grievance by Kaiser and thereafter pursues it in good faith and with due diligence, or Clendenin is reinstated by Kaiser or obtains substantially equivalent employment.[5] *Centex Homes of California, supra*; *United Steelworkers of America, AFL-CIO (Inter-Royal Corp.)*, 223 NLRB 1184 (1976). Backpay shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent Employer, Henry J. Kaiser Company, Moscow, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, and that the Respondent Union, Journeymen Pipe Fitters Local No. 392, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Cincinnati, Ohio, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraphs B,2,(a) and (b), and reletter the subsequent paragraphs accordingly:

"(a) Request Henry J. Kaiser Company to reinstate Charles E. Clendenin to his former position or, if it no longer exists, to a substantially equivalent position. If Henry J. Kaiser Company refuses to reinstate him, ask it to consider a grievance over his January 28, 1980, discharge, and thereafter pursue his grievance in good faith with all due diligence.

"(b) Make Charles E. Clendenin whole for any loss of earnings he may have suffered as a result of his discharge by Henry J. Kaiser Company from January 28, 1980, until such time as he is reinstated by Henry J. Kaiser Company or obtains other substantially equivalent employment or Respondent Union secures consideration of his grievance by Kaiser and thereafter pursues it will all due diligence, whichever is sooner, together with interest, to be computed in the manner set forth in the Board's Decision and Order."

2. Substitute the attached Appendix B for that of the Administrative Law Judge.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail or refuse to fairly represent any employee we represent in the processing and filing of grievances.

WE WILL NOT coercively interrogate employees in preparation for defense of unfair labor practice proceedings without first obtaining voluntary participation by said employees and without first giving said employees assurances against reprisals if they choose not to participate in said interviews.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL request Henry J. Kaiser Company to reinstate Charles E. Clendenin to his former position or, if it no longer exists, to a substantially equivalent position. If Henry J. Kaiser Company refuses to reinstate him, WE WILL ask it to consider a grievance over his January 28, 1980, discharge and thereafter pursue his grievance in good faith with all due diligence.

WE WILL make Charles E. Clendenin whole for any loss of earnings he may have suffered as a result of his discharge by Henry J. Kaiser Company from January 28, 1980, until such time as he is reinstated by Henry J. Kaiser Company or obtains other substantially equivalent employment or we secure consideration of his grievance by Kaiser and thereafter pursue it with all due diligence, whichever is sooner, together with interest.

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[5] Counsel for the General Counsel further asserts that attorney's fees should be granted to Clendenin in order that he might be represented by his own attorney during any grievance arbitration proceeding. We find, however, that our modified Order herein provides adequate incentive for Respondent Union so that it will responsibly represent Clendenin's grievance.

If Respondent Union secures consideration of Clendenin's grievance by Kaiser, Member Fanning would terminate Respondent Union's backpay liability at that point unless Respondent Union fails to process the grievance in good faith and with due diligence.

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on backpay due based on the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

JOURNEYMEN PIPE FITTERS LOCAL NO. 392, AFFILIATED WITH THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard by me in Cincinnati, Ohio, on September 8-10, 1980. Based on two unfair labor practice charges filed by Charles E. Clendenin on January 28, 1980, two complaints issued, one on March 18, 1980, against Henry J. Kaiser Company, herein the Company, and the other on March 20, 1980, against Journeymen Pipe Fitters Local No. 392, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, herein the Union, which complaints were consolidated by order of the Regional Director for Region 9 on March 20, 1980.

The consolidated complaints allege that the Company violated Section 8(a)(3) and (1) of the Act by terminating Clendenin on January 28, 1980, and that the Union violated Section 8(b)(1)(A) of the Act by declining to process Clendenin's grievance complaining of his termination. In addition, the complaint against the Company alleges that it assigned overtime to members of the Union on a preferential basis and that, when the attorneys for the Company and the Union were preparing for the instant proceeding, they interviewed prospective employee witnesses without giving the notice required by *Johnnie's Poultry Co. and John Bishop Poultry Co.*, 146 NLRB 770 (1964), enforcement denied 344 F.2d 617 (8th Cir. 1965). Both the Company and the Union denied that they violated the Act in any respect.

Upon due consideration of the entire record herein, including the demeanor of the witnesses and the briefs of the General Counsel, the Company, and the Union, I hereby render the following:

FINDINGS OF FACT

I. JURISDICTION

A. *The Company*

The Company, a Nevada corporation, is engaged in the construction industry as a general and a design contractor and has an office and place of business in Moscow, Ohio, where it is a contractor at the Wm H. Zimmer Nuclear Power Station construction site.[1] During the 12 months preceding the issuance of the complaints herein, a representative period, the Company, in the course and conduct of its business operations, purchased and received products, goods, and materials valued in excess of $50,000 which were shipped to its Moscow, Ohio, construction site directly from points outside the State of Ohio. Accordingly, I find and conclude, as the Company admits, that it is and has been an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. *The Union*

I also find and conclude, as the Union admits, that it is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act. Both it and the Company, as a member of the National Constructors Association, are bound by the provisions of a collective-bargaining agreement covering the terms and conditions of the employment of the Company's employees.

II. THE DISCHARGE OF CLENDENIN

A. *Preliminary Facts*

Clendenin was terminated upon recommendation of his foreman, Tom Watson, on January 28, 1980, for being out of his work area and, the Company contends, for nonproductivity. That morning, Clendenin reported at the fifth floor of the reactor building for the regular 7:30 Monday morning safety meeting, a gathering of employees where a safety memorandum was distributed for reading and discussion by the employees. What transpired between 7:30 a.m. and an hour or so later, when Clendenin was discharged, is subject to dispute because the three principals, Watson, Clendenin, and his working partner, Alfred A. Thompson (Double A),[2] testified to three somewhat differing series of events.

What is not at issue is that after the safety meeting, which lasted approximately 15 minutes, employees were required to go to work; that Thompson, but not Clendenin, began to work after the meeting; that, at or about 8:10 a.m., Watson found Clendenin not at his worksite and directed him to go to work with Thompson; that Clendenin refused, saying that he had to use the toilet facilities; that Watson once again directed Clendenin to report to work; and that Clendenin again refused and left the worksite to go to a facility with flush toilets. As Clendenin was returning, Watson called to him to report to the Company's trailer-office, where Clendenin was terminated by General Foreman Oscar Willingham.

The General Counsel's attack upon Clendenin's discharge is two-pronged. First, the General Counsel claims the discharge was not for just cause because no employee had ever before been discharged for going to the bathroom. Second, the General Counsel claims that, even if there was merit to the discharge of Clendenin, the just cause was merely a pretext for Clendenin's protected and concerted activities of openly criticizing what he thought was the Company's illegitimate practice of assigning overtime work to members of the Union, rather than to "travelers," members of other locals of the same International union (Clendenin is a member of Local 789, located in Tulsa, Oklahoma).

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[1] The power plant is being built for the Cincinnati Gas & Electric Company, herein the C G & E.

[2] Normally, a pipefitter (Clendenin) will work with a welder (Thompson).

B. *Just Cause*

Clendenin testified that, when the safety meeting ended, he ascertained from Thompson that he would be working at the same site that he worked at the previous Friday.[3] He had also ascertained that, on the Saturday before, when he did not work, Watson had "changed hats" from a foreman to an employee and worked with Thompson, a job which Clendenin claimed as his own. In any event, Clendenin was notified by Thompson that he was going to obtain some tools from the toolshed, located outside the reactor building, and would meet Clendenin back at the worksite—a pipe chase located above the fourth floor of the reactor building reached by climbing a 30 foot scaffold from the fourth floor or descending onto the scaffold from a rear stairway on the fifth floor.

Clendenin then went to the toolbox, pulled out some grinders, and went to the worksite. There, he checked the equipment which had been left and found that Thompson had not yet arrived. Knowing that he could not get anything done by himself and needing to go to the bathroom, Clendenin descended from the scaffold to the fourth floor landing, returned to the fifth floor to get his coat, and came back to the fourth floor landing, where he waited to tell Thompson that he was going to the bathroom.

As he waited, along came Watson, whose view of Clendenin's activities up to that time was entirely different. According to Watson, Clendenin paid little attention to the safety meeting, conversing instead with other employees. When the meeting ended, and all of Watson's crew had dispersed, Clendenin continued his discussions, eventually sauntering over to Watson's desk to pick up and read the safety memorandum which the other employees had read 15 minutes before. Watson watched Clendenin until about 8 a.m., never mentioning to him to get to work. Then, Watson left the fifth floor, attended to other business, and returned to the fifth floor to check whether Clendenin had gone to work. Not seeing him there, Watson proceeded to the fourth floor, where he saw Clendenin talking with two other employees. It was then about 8:05 a.m.

In reviewing the testimonies of Watson and Clendenin, the conflict is clear; at least up to 8:05 a.m., Clendenin says that he was performing his normal duties. If he had to use the toilet facilities, I am satisfied that the Company's practices allowed an employee to go to the bathroom (either a portable urinal, located on various floors of the reactor building, or a heated bathroom with flush toilets, located about a quarter mile from the reactor building), at any time, without a supervisor's permission, and only upon notifying his work partner of his whereabouts. On the other hand, if Watson's testimony was accurate, Clendenin was being wholly and inexcusably derelict by failing to perform any services.

Watson and Clendenin agree that, when Watson appeared at the fourth floor, Clendenin (who implied that he was alone) asked whether Watson was going to continue to work with Thompson as he had the prior Saturday. There may have been mention of whether Watson was wearing his foremen's hat or employee's hat. Clendenin also testified that Watson stated that, because he was a union member, he could do whatever he wanted. Watson denied saying this and I credit his denial. Both principals agree that Watson's answer was clear. Watson climbed up the scaffold to get to the pipe chase, saw Thompson working there alone, and directed Clendenin to go to work. Clendenin announced, according to him, that he was going to the bathroom; according to Watson, that he was going to "take a piss," the difference being that the former entailed a quarter-mile walk and the latter only a short distance away on the fourth floor. Watson again directed Clendenin to start working, and Clendenin walked away, proceeding in a direction opposite to the closest urinal, where Watson supposed that Clendenin was going. In fact, Clendenin proceeded to the flush toilets.

That ends the discussion of Clendenin's acts that morning, at least up to the time of his discharge. Watson's story, however, continues. After seeing Thompson working alone in the pipe chase and doing work which should have been done by two men, Watson, concerned about Thompson's safety, instructed him to stop working. Watson then left the pipe chase, went to attend to other duties, and (still thinking that Clendenin had gone to the urinal) returned to the chase some 5 minutes later to see whether Clendenin had returned. Again seeing Thompson alone, Watson again told him to stop working and that if another supervisor wandered by to inform the other supervisor that he was not working on Watson's directions. Watson also determined that he had had enough of Clendenin and went to the Company's trailer-office to recommend to Willingham that Clendenin be fired.

Finding the facts herein might have been made easy if only Thompson had corroborated the testimony of either Clendenin or Watson. Unfortunately, that was not the case. Located in the pipe chase, Thompson was able to see or hear little of what was going on outside the chase, on the scaffold, or below on the fourth floor landing, but what he heard amounted to a factual recitation partially at odds with both principal disputants. First, affirming Watson's testimony that he visited the pipe chase twice, Thompson testified that Watson, in his first visit, asked where Clendenin was. That obviously conflicts with Watson's testimony that he had seen Clendenin engaging in conversation with two other employees and had himself talked with Clendenin on his way up the scaffold. Thus, there would have been no reason for Watson to ask Thompson of Clendenin's whereabouts. Second, Thompson stated that Watson never told him to stop working, contradicting Watson's professed concern for

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[3] Thompson testified that he spoke with Clendenin about this before the meeting started. However, Clendenin knew that Thompson had been asked to work the prior Friday.

Thompson's safety. Third, Thompson testified that, between the first and second visit by Watson, he heard Clendenin yell, "I'll be back, Double A." This contradicted Clendenin, who said that he yelled to Thompson before leaving to get his coat on the fifth floor and before Watson had arrived.[4] Fourth, Thompson told Clendenin at the safety meeting that all the necessary tools were at the worksite, other than those he was going to get from the toolshed. Clendenin's testimony conflicts with Thompson's: he stated that, after the meeting, he went to get the necessary tools from the toolbox—but only Thompson had a key—and went to check what tools were at the site, although Thompson had already told him that all the tools were there. Further, if Clendenin's testimony were truthful, that he arrived at the worksite 5 minutes after the meeting, he surely would have met Thompson, who arrived there at or about the same time and lifted the tools in buckets from the fourth floor to the chase and commenced working. Yet Clendenin testified that he saw the buckets (which should have already been lifted) and still insisted that Thompson was not present. I find that most improbable.[5]

Thompson was not otherwise favorable to Clendenin, depicting him as often engaged in talk, particularly with one other employee, at locations other than the worksite, thus delaying Thompson's completion of jobs. I found Thompson to be sincere and, of the three principal witnesses, the only one who had no reason to favor either party with his testimony. On the other hand, I am persuaded that some of his perceptions were simply inaccurate and, based on the probabilities, specifically discredit his testimony that Watson, at the time of his first visit, asked where Clendenin was, finding it more probable that Watson asked him whether Clendenin had worked up to that time, and discredit his testimony that Clendenin yelled that he would be back, finding that Clendenin's shout probably occurred, if it did at all, at the time of Watson's first visit, as Clendenin left for the toilet.

I am equally persuaded that Thompson would have no reason to misrepresent Clendenin's work habits. That Clendenin was loquacious was evident at the hearing, and even he admitted that he had been cautioned two or three times before his discharge about not doing his work quickly enough, which I attribute to his lack of attention to his work. Willingham had advised him previously that he ought to take more interest in his job; and Watson was always "jiving" him about his work. Finally, I note that on the day of his discharge, Clendenin, who is also an attorney, spoke not one word in his own defense in reply to at least the one charge he admitted knowing about—being out of his work area.

In sum, there is sufficient evidence on its face to support a conclusion that the Company had at least some independent basis for disciplining Clendenin. Thompson was at his job for 15-20 minutes before Watson's first visit; Clendenin was not, despite the ample time he had to join Thompson in the pipe chase. Instead, he searched for tools that he did not need, relied upon an excuse of going to the bathroom (after being at the job for about 40 minutes) to disobey a direction of his supervisor to commence working, and would not have been able to perform his first minute of work until more than an hour after the workday began.

C. *Pretext*

I am persuaded that Clendenin complained, at least earlier in his employment, about the fact that he was not given adequate overtime, and I conclude that he was engaged in protected activity. Clendenin's involvement with the issue of overtime commenced shortly after July 5, 1979, when he was reassigned to the "flush crew," a crew of employees under the supervision of Foreman Adam Kleinholz engaged in testing pipes and joints. Clendenin testified that he discovered that overtime work on the flush crew, which was composed primarily of members of the Union, was regularly assigned to union members (including those who did not work on the flush crews), rather than to travelers. Kleinholz, a member of the Union, maintained at his desk an overtime list which (according to Clendenin) contained the names only of union members who came to Kleinholz during the day to ask for overtime assignments. When Clendenin, a traveler, questioned Kleinholz on several occasions as to when he was going to have his own name placed on the overtime list, Kleinholz replied that Clendenin was only in the "triple A league" and that when he got into the "major league," his name would be put on the overtime list.[6] I agree with the General Counsel that the clear import of what Kleinholz was stating—Kleinholz did not testify—was that Clendenin or any other traveler would have to be a member of the Union before receiving preferential overtime assignments.

The record of overtime given to the flush crew does not fully sustain the General Counsel's position. Admittedly, although the composite exhibit purports to cover the period from July 16 through August 21, 1979, the day after Clendenin had been reassigned to the hanger crew, no time records were produced for 5 days in July and a full 2 weeks in August.[7] The remaining records show that Clendenin worked overtime on 3 of 11 days that overtime was worked, demonstrating that discrimination against him was not complete. The exhibit, however, shows that many union members worked overtime on the flush crew, even though they did not work on that crew during regular hours. Union members worked overtime on 57 occasions, while travelers worked only 14 times, a far greater ratio than the number of times regular hours were worked by union members and travelers (48 versus 31, respectively). A number of union members whom Clendenin heard making requests of Kleinholz for overtime received overtime assignments.

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[4] I reject the General Counsel's contention that Thompson's testimony corroborates Clendenin's assertion that he was leaving for the bathroom. Clendenin testified that he yelled to Thompson only, "Hey, Double A" to check whether Thompson was already in the pipe chase. Further, in light of Clendenin's insistence that he was waiting for Thompson to arrive, it is improbable that he would indicate to someone who was not there that he was leaving. Finally, the substance of Clendenin's message was not necessarily that he was going to the bathroom. It could have meant solely that he was leaving the location to talk with the employees whom Watson saw Clendenin with a few minutes later.

[5] I note that it was possible, as Clendenin recognized, to approach the worksite from the fifth floor and along the scaffold, bypassing the fourth floor. In light of that fact, it is peculiar that Clendenin chose to wait for Thompson on the fourth floor, where he might miss him. Moreover, because of Thompson's testimony of his own whereabouts and his preparation for work, I conclude that Clendenin made little, if any, effort to go to work.

[6] The Company objected to this evidence in its brief on the basis that these conversations are not within the 6-month time limitation prescribed in Sec. 10(b) of the Act. It is well established that, although no findings of unfair labor practices may be based upon acts occurring more than 6 months prior to filing of an unfair labor practice charge, such facts may be used as background to establish motivation as well as to explain the alleged violations occurring within the 6-month period. *Local Lodge No. 1424, International Association of Machinists AFL-CIO; and International Association of Machinists, AFL-CIO* [*Bryan Manufacturing Co.*] v. *N.L.R.B.*, 362 U.S. 411, 416, fn. 6 (1960).

It is true that all or many of the regular crew members may have declined to accept overtime, thus explaining why other employees worked. Some union crew members (for example, Andrews, Young, and Begley) worked even less overtime than did Clendenin. Two travelers, Gering and East, who were not members of the regular crew, worked more overtime than all but three union members, which included Foreman Kleinholz. However, it remains undenied that Clendenin frequently requested overtime from Kleinholz and was not given it, whereas others were. There is clearly a *prima facie* case of discrimination against him because of his status as a traveler; and the Company neither rebutted it nor explained it in any way. I conclude not only that the General Counsel's allegation was proved, *Motor City Electric Company*, 204 NLRB 460 (1973), enfd. as modified 512 F.2d 719 (5th Cir. 1975), but also that a necessary predicate for Clendenin's later actions was sufficiently established.

As stated above, on August 20, 1979, Clendenin was transferred to the hanger crew, which, unlike the flush crew, was composed almost entirely of travelers. His reputation as one who complained of lack of overtime apparently preceded him. Employee Charles Sears testified that on the same day he heard both Watson and Foreman James Robinson protest to Willingham that Clendenin should not be transferred to their own crews because he was a "troublemaker." Despite the denials of this conversation by both Willingham and Watson, I credit Sears, finding that he was genuinely sincere and unbiased and that, in this instance, his recall was precise and his testimony was probable. Although the General Counsel does not allege any separate violation, the circumstances of the transfer to the hanger crew were suspect, coming only a few days after Clendenin had not been given an overtime assignment that C G & E had wanted him and Marvin Ellison, his partner and another traveler, to work. Because of the Company's assignment of that work to union members, Clendenin complained, and his complaints resulted in two union members being taken off that job and Clendenin and his partner being given the overtime work on August 17, 1979. As a result, Clendenin did "make trouble," and Watson's and Robinson's comments were likely the result.

Clendenin worked on the hanger crew from August 20, 1979, until he was terminated. Apparently, the employees on that crew also had their difficulty with the assignment of overtime, but the problems that they encountered and raised were different from the alleged complete denial of overtime on the flush crews. Rather, the employees complained that they did not receive an equitable share of overtime when compared with other crews, such as the flush and pipe crews, which consisted primarily of union members, and that often, when they were asked to work overtime, they would be asked so late in the day that they found it difficult or impossible to accept. There is no question that these two grievances were raised (but not by Clendenin) at one and possibly two meetings conducted or attended by Willingham in late August or early September or November 1979.[8]

On his last day of employment, Clendenin asked Watson whether he had worked overtime with Thompson during the weekend and whether he was going to continue as an employee that Monday. The General Counsel contends that Clendenin's taunting—described by Watson as "smart aleck" and "arrogant"—was the direct motivation for Clendenin's discharge. Thus, the General Counsel contends that had not Clendenin griped about Watson's having worked overtime in Clendenin's place Watson would have permitted Clendenin to use the toilet, would not have ordered him to commence working, and would not have recommended his discharge. Rather, Watson merely seized upon Clendenin's failure to work to conceal his real motive; i.e., to get rid of a "troublemaker."

The theory that the reason for the discharge was merely a pretext is not wholly without support in the record. In addition to the "troublemaker" remarks, which Watson denied, Willingham conceded that at one time he counseled Clendenin about worrying so much about overtime that he would not work during the day. Further, there is some record support for the proposition that Watson should not be believed. I have noted a number of instances where I have not credited Watson, including his failure to request Thompson, whom he found alone on January 28, to stop working as a result of a possible safety hazard. That appeared to be a major reason for Watson's actions that morning and, by discrediting this testimony, his motivation is somewhat suspect.

Further, I am not entirely satisfied with the events of January 25, 1980, and the Company's explanation of why Clendenin was not offered overtime while Watson worked on Saturday in the position occupied by Clendenin the prior day. The testimony of Watson, in particular, was conflicting and inconsistent, and appeared to contradict that of Willingham. Watson shifted from a statement that he did not ask Clendenin to work (because he was not at his worksite), to a statement that he did ask Clendenin, to a statement that he asked him even though he would not have been eligible for overtime because he was absent the prior Wednesday and Thursday. Willingham assumed that all employees had been asked, but wanted Watson to work, although he could not recall why, except that he believed that there might have been insufficient time to notify employees.

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[7] The General Counsel does not contend that an adverse inference should be drawn from the absence of company records.

[8] The General Counsel contends that, at these two meetings, Willingham specifically stated that union members would receive overtime before travelers. I discredit such testimony, finding instead that Willingham merely referred to priority in assignments being given to foremen because a foreman was required to be on the job at all times. I note that there were not only union members who were foremen on the hanger crew, but also travelers. Moreover, the documentary evidence does not prove that preference was given to union members on the hanger crew. Rather, for the period from August 22, 1978, to November 16, 1979, only one union member (not a foreman) worked overtime twice. Thereafter, overtime was worked on 7 days by a substantial majority of travelers.

On the other hand, Clendenin was not wholly believable either. His dislike of the Company caused him to level a series of broadsides, contending that his lack of productivity could not have been a reason for his discharge because the Company was not concerned with it. Employees were encouraged, when there was no work to do, to hide themselves. Relative to seniority, Clendenin insisted that there was plantwide seniority for union members, but only crew seniority for travelers, despite the fact that the record does not really support this contention. When faced with the fact that, even on the flush crew, he was given overtime, Clendenin explained that it was due to his reputation as an attorney that certain engineers recommended him. But the reputation was meaningless in light of Clendenin's explanation that he was given only the "dirty" and "nasty" tasks that union members refused to do. When pressed for details, Clendenin refused to name the engineers for fear that the Union would have them terminated.

Based upon a review of the entire record, I find that the General Counsel has failed to prove by a preponderance of the evidence that Clendenin's discharge was motivated at all by his complaints. Indeed, Clendenin tended to exaggerate the extent of his complaints that he was discriminated against because he was a traveler. The record demonstrates that only one minimal complaint was made by him from the time that he was transferred to the hanger crew until the Monday on which he was discharged.[9] More importantly, there is little to show that Watson's recommendation that Clendenin be discharged was made because Clendenin had complained about Watson's having assumed his overtime. Rather, Watson went to Clendenin's worksite not because of Clendenin's complaint but because he observed that Clendenin was not working. His directive to Clendenin to commence working was merely a followup to the reason he went there in the first place—to ensure that Clendenin was performing work for the wages which the Company was expected to pay.

There is no dispute that by at least 8:30 a.m., according to Clendenin, he had not performed any work. According to other witnesses, the time of Clendenin's discharge was some 10 minutes or more later. In any event, the General Counsel contends that the Company originally discharged Clendenin solely for being out of his work area, arguing that no employee had ever before been dismissed for using the restroom facilities. Although I am persuaded that employees were free to use the facilities, as long as they notified their partners, and that Clendenin did not breach this rule *per se*, Clendenin clearly sought to use the rule to avoid work and, in that sense, since he was successful, the Company properly indicated that he was discharged for nonproductivity.[10]

I have assumed, *arguendo*, that Clendenin's activities were both protected and concerted. I conclude that there is a sufficient basis that his conduct was concerted. There were a number of employees who were disturbed about the distribution of overtime to the hanger crew and who believed that union members were taking advantage of their union membership to the detriment of the travelers. Although the General Counsel conceded that there was nothing inherently illegal about a foreman assumfng a journeyman's functions, as Watson did on January 26, it was Clendenin's suspicion that the taking away of his overtime was part of the same scheme of denial of overtime to travelers because they were not union members. Actually, in the circumstances, that might not be so; rather, Watson's working overtime could be equally due to his being a foreman. In any event, Clendenin's complaint was merely an extension of the same kind of complaint that other travelers had made; and I find that, because his complaint may have tended to redound to the benefit of all the travelers, it constituted protected concerted activity. *ARO, Inc.*, 227 NLRB 243 (1976), enforcement denied 596 F.2d 713 (6th Cir. 1979).[11]

I also find that Clendenin's implied adverse criticism of Watson was protected, since it constituted a complaint concerning working conditions, that is, Watson's assumption of an employee's overtime. But I find little in the manner in which Clendenin expressed his complaint to be protected. The initial questions he put to Watson were clearly within appropriate bounds. But, upon receiving Watson's answer that he had resumed his foreman's hat, and was not working as a journeyman, Clendenin had no right to protest Saturday's actions by refusing to work on Monday. By so holding, I reject Clendenin's claim that, at that moment, he had to use the bathroom and could not go to work. Rather, Clendenin admitted that despite his contention that he had diarrhea, a condition he suffered from the prior Wednesday and Thursday, his need to go to the bathroom was not that "imminent." Indeed, none of his actions indicated any crisis; on finding that Thompson was not at the worksite at Clendenin's first visit, Clendenin, despite having to attend to his bodily needs, returned to the fifth floor to get his jacket and then to the fourth floor to await Thompson's arrival. Considering that he had ample time all morning to take care of himself, that he was well enough to return to work the prior Friday, and the otherwise untrustworthiness of his testimony, I conclude that pique, not physical illness, caused Clendenin's actions. His refusal to work and defiance of Watson's instructions to go to work was unprotected. As a result, I conclude that the Company's termination of Clendenin was not for reasons violative of Section 8(a)(3) and (1) of the Act.

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[9] Clendenin testified that after the meeting in late August or early September he told Willingham that something ought to be done about the overtime situation.

[10] The General Counsel also argues other facts testified to by Clendenin made his termination suspect—that Willingham, when he stated that he was going to terminate Clendenin, looked to Union Steward Walt Hamm, Jr., who nodded his approval; that Willingham filled in on the termination slip that Clendenin was discharged only for being out of his work area, and not for nonproductivity; and that there was no discussion by Watson of the reasons for the recommended discharge, other than his statement to Willingham that Clendenin was out of his work area. I credit none of Clendenin's testimony in these respects, noting that Clendenin's recollection was at this time imprecise, and that Clendenin admitted that events were moving too fast for him to recall.

[11] Clendenin earlier attempted to file a grievance with the union steward about his failure to receive equal overtime opportunities on the flush crew. The steward told him that if he did not like it he should "hit the road."

D. *The Union's Failure To Process the Grievance*

When Clendenin had been told that his employment was terminated, Clendenin went to Union Steward Hamm for a grievance form because he wanted to file a grievance. Hamm asked Clendenin why he needed a grievance form, stating, "if you don't like it, hit the road."[12] Clendenin filed the unfair labor practice charge within a few hours of his conversation with Hamm. The General Counsel claims that Hamm's statement constituted a refusal to process a grievance, in violation of Section 8(b)(1)(A) of the Act. I agree. Clearly, Hamm, as the union steward and admittedly a representative of the Union, summarily rejected a request for representation, without investigation, peremptorily and perfunctorily. That Clendenin asked for a grievance form, rather than stated that he desired to file a grievance, if of no moment; Hamm, as hereinafter shown, knew exactly what Clendenin was asking of him.

The Union contends, however, that when its business manager, Robert Sullivan, was advised of Clendenin's discharge, he immediately investigated the discharge and, only after such investigation, determined that Clendenin's discharge was proper and that no further grievance procedures were warranted.[13] The proof demonstrates, however, that Sullivan was much more concerned with the unfair labor practice charge that Clendenin had filed than with the substance of Clendenin's grievance.

Sullivan was offended that any employee should immediately file an unfair labor practice charge against the Union rather than take up the matter with Sullivan personally. Indeed, the Union's brief takes the position that it was required for Clendenin to consult with Sullivan before filing the charge and that the charge is defective in that no refusal to process Clendenin's grievance was even ripe at the time of its filing. I find no factual or legal support for its position. The latter contention, in particular, is belied by Sullivan's testimony that Hamm immediately advised him on January 28 that Clendenin wanted to file a grievance.

As a result of his receipt of Clendenin's unfair labor practice charge, Sullivan went to the Company's jobsite on Friday, February 1, and spoke with Watson and Willingham about Clendenin's discharge. Seemingly convinced by their representations,[14] Sullivan wrote to Clendenin on February 4, 1980, requesting his position before coming to a final conclusion on the validity of his grievance. Clendenin then conferred with the Union's attorney, Harold G. Korbee, who agreed with Clendenin that he would not personally meet with Sullivan but would submit his position in writing. As a result, Clendenin forwarded a full statement of the facts by letter dated February 7, 1980. By letter dated February 13, 1980, David Jeffers, a union business agent, acknowledged receipt of Clendenin's letter and notified him that Sullivan was then out of town and would not be expected back until February 18, 1980, at which time he would have an opportunity to review Clendenin's letter. On February 27, 1980, Clendenin, not having heard from Sullivan and noting that in Sullivan's February 4 letter directed to the Company the Union had requested that the Company waive any timetable requirements imposed by the agreement's grievance procedure until February 25, 1980, asked Sullivan what had happened to his grievance. Clendenin also stated, as he had previously indicated to Korbee on February 6, 1980, that if there were any further inquiries regarding his discharge, someone should call him so that his grievance could be fairly presented.

On February 29, 1980, Sullivan at last replied, stating, in part, as follows:

> In connection with the investigation of your grievance, and our response to the charges you have filed with the Labor Board, we would appreciate receiving from you as soon as possible a statement of any facts upon which you base your claim that the Union has refused to "process a grievance filed by Charles Clendenin because he had made complaints concerning mistreatment of Union members on traveler's status and/or because he is a member on traveler's status."
>
> None of the officers of the Local Union have any knowledge or record of any such "complaints" that you have filed with the Union.
>
> As you must know, the Union is most interested in effectively representing employees who work under its bargaining agreement. However, the Union feels somewhat handicapped in this matter, since you appear to allege facts about which I have had no notice, record or information upon which to make any judgment.

On March 6, 1980, Clendenin acknowledged receipt of the above-quoted letter and again asked Sullivan whether a grievance had been filed on his behalf. He ended his letter with the following:

> Please tell me what the union steward and yourself decided to do regarding my grievance so I will know when I will be getting back to work at Kaiser, because there is no way a man could be discharged for going to the restroom and have it stick even if he is a Traveler. Please call me and we can set a time to prepare my case for the grievance hearing against Kaiser.

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[12] Hamm did not testify.

[13] The Union, in its brief, contends for the very first time that this allegation should be dismissed because the collective-bargaining agreement provides as follows: "Layoffs and terminations shall be at the sole discretion of the Employer." Had this provision been relied upon by Hamm or Sullivan, the Union's argument might have been difficult to overcome. Since the Union did not rely on it, but was motivated by invidious reasons, I find a violation of the Act.

[14] Sullivan's letter to Clendenin, dated February 4, 1980, stated: "The information that they gave me seems to justify your discharge."

Sullivan's final letter to Clendenin was dated March 28, 1980, after the unfair labor practice complaint had been issued against the Union. Sullivan stated that it had been his experience as a business manager that employees who require or request the assistance of the Union in implementing the grievance procedure provided for in the applicable bargaining agreement generally come to the union hall and inform him or one of the business agents of their problem. Only then does the Union begin its investigation of the dispute and implement the applicable grievance procedure. Sullivan thought that Clendenin's situation was "probably the first one that I ever recall in which an employee filed charges with the NLRB before even coming to the Hall to request our assistance." Sullivan stated that on February 29 he wrote to Clendenin asking him for additional information which Clendenin did not supply. Based upon the investigation and information that the Union had, it was the Union's "opinion that [Clendenin's] discharge was justified and that there is insufficient evidence to warrant carrying the grievance to the second step which would involve bringing in the United Association International Representative."

The foregoing reveals that the Union had little interest in fairly representating Clendenin. Sullivan was upset at Clendenin's having filed an unfair labor practice charge against the Union and his attitude was thereafter tempered by the fact that such a charge had been filed. This is demonstrated by two facts: First, while Clendenin and Korbee had agreed that Clendenin would explain his position solely in writing, Sullivan ultimately held it against Clendenin for refusing to see him personally; second, instead of seeking additional information which may have been relevant to Clendenin's grievance, Sullivan tried to obtain Clendenin's position on his unfair labor practice charge before processing the grievance, and Sullivan's letter of March 28, 1980, demonstrated that he deemed the failure of Clendenin to supply the irrelevant information was determinative.

The result is that the Union gave Clendenin's case merely a minimal effort, perfunctory at best even if Sullivan is to be believed, and no effort at all if Sullivan is not to be credited. Although I have found that the Company did not violate Section 8(a)(3) and (1) of the Act by discharging Clendenin, I do not make that finding for the purpose of my discussion of the Union's liability herein. Rather, merely because the Company took disciplinary action which does not violate the Act does not mean that an arbitrator might not have deemed the discipline unwarranted or too severe. An arbitrator is not bound by the same factual findings that I have made; he may do industrial justice and may effectuate a compromise of a grievance, whereas the Board may not. In this case, the Union did little to help its unit's employee, solely because Clendenin filed an unfair labor practice charge against the Union. I find that the Union violated Section 8(a)(1) and (b)(1)(A) of the Act. *Penn Industries, Inc.*, 233 NLRB 928, 941-942 (1977).

E. *The Assignment of Overtime*

One of the General Counsel's complaints was the systematic denial of overtime assignments to Clendenin, whereas assignments were routinely given to members of the Union. I again note that Kleinholz did not testify. Because Clendenin's testimony in this respect is probable and not inherently inconceivable, I credit his testimony relating to Kleinholz' maintenance of an overtime list containing only the names of Local 392 members. From that fact, Clendenin's testimony about various individual union members asking for overtime work, and a document which shows that those individuals were given overtime work, I conclude that Clendenin was discriminated against during the course of his working on the flush crew in violation of Section 8(a)(3) and (1) of the Act.

When Clendenin was transferred to the hanger crew, the General Counsel admits that distribution of overtime to union members "was less significant." However, the General Counsel contends that Watson, on the Saturday before Clendenin was discharged, bumped into a journeyman's position, with another union member (a foreman of another hanger crew) being appointed as foreman, all to the detriment of Clendenin. On the other hand, it must be noted that overtime on the hanger crew was worked primarily by travelers. Indeed, Clendenin's name appears on the overtime list nine times,[15] and the General Counsel has failed to point out how Clendenin, after August 21, 1979, was treated any differently from other individuals who were members of the Union or were travelers employed on the hanger crew.

I am satisfied with the Company's explanation that denial of overtime to Clendenin and other travelers was not due to their lack of membership in the Union. C G & E assigned overtime. That it did so late in the day was not the fault of the Company, which made assignments only when C G & E authorized it to do so. There is no credible proof in this record to demonstrate that travelers were requested later in the day to work overtime in order to discriminate against them because they were not members of the Union. Nor do I find that the method of distributing overtime to employees was inherently destructive of employees' Section 7 rights. The method, instead, sought to protect the principle of equitable distribution of overtime within the crews and sought to give overtime to members of the crews who were working during regular hours on the projects which required overtime. That was not violative of the Act.

Finally, implicit in the complaints of the emoloyees, if not in the consolidated complaint herein and supporting brief, was that by the nature of the work being done other crews (populated by union members) were receiving overtime and the hanger crew was not. The record lacks any documentary proof of that fact. Although the travelers may have been correct, even to the extent that they were assigned to the hanger crew solely to deprive them of beneficial overtime, the proof is lacking. I dismiss this allegation of the complaint pertaining to the hanger crew.

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[15] In addition, Clendenin refused offers of overtime on several occasions and was absent on days that overtime was worked.

F. *The Interview of Prospective Employee Witnesses*

On Friday, September 5, 1980, employees Earl Crawford and Charles Sears were summoned to the personnel office of the Company where they were interviewed by both Korbee and Bruce E. Allen, counsel of record for the Union and Company, respectively, in the presence of company and union officials. Both employees testified that they were not told that their attendance was voluntary nor that there would be no reprisals taken against them if they declined to participate or cooperate with the interviewers. Both testified that whatever assurances which were given to them were stated only after they both had declined to comply with Korbee's request for their versions of the facts concerning this proceeding and the testimony they were to give at the instant hearing. It was then that Allen stated to them that it was their prerogative not to answer and nothing would happen to them.

I credit the testimony of the two employees, noting that Billy Joe McGuffy, the Company's senior accountant, basically corroborated the employees' testimony, changing his recitation only after being led by the Company's counsel. In any event, Korbee conceded that at no time did he tell the employees prior to the interrogation that their participation in the interview was voluntary and that they did not have to be present before the interrogation began.[16] I, therefore, find a violation by the Company of Section 8(a)(1) and by the Union of Section 8(b)(1)(A) of the Act. In doing so, I reject the Union's claim that a violation of *Johnnie's Poultry Co., supra*, may be found only against an employer. *St. Louis Harbor Service Company*, 150 NLRB 636 (1964). This conclusion is not to be deemed merely a formalistic application of the *Johnnie's Poultry* rule. The coercive effect of the interrogation, without the necessary precautions required by law, was perfectly evident from the record. Even Respondents admit that the employees were scared. That they were later advised that their silence would not be held against them did not relieve the coerciveness of the initial part of the interview. A violation must be found and all of the Company's employees must be so advised by an appropriate notice.

III. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section II, above, occuring in connection with the operations of the Company herein, described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that the Company and the Union have violated the Act, I will recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Because I have found that the Company has discriminated against Clendenin in the assignment of overtime because he was a traveler, I shall recommend that the Company be required to make him whole for any financial loss he may have sustained during the period from July 28, 1979, to August 19, 1979, that being the only period for which discrimination has been found within the applicable 10(b) period. Any backpay due hereunder shall be computed on the basis of the number of overtime opportunities lost during the above period, *Newport News Printing Pressmen's and Assistants' Union, Local No. 288, International Printing Pressmen and Assistants' Union of North America, AFL-CIO (The Daily Press, Inc.)*, 188 NLRB 475 (1971), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[17]

The finding that the Union violated its duty of fair representation would normally require that the Union proceed to arbitrate Clendenin's discharge or, if the Company refused to arbitrate, to make Clendenin whole for his loss of earnings. It is clear, however, that the time limits provided by the collective-bargining agreement's grievance machinery have long since expired. If the Union were ordered to proceed to arbitrate the dispute, the Company would most likely invoke the time limits and the provision which gives it the right to terminate employees for any reason. In these circumstances, because the agreement is clear, it would be inappropriate to grant the usual remedy of a make-whole order. That remedy would grant to Clendenin backpay which he had no right to receive, for he cannot demonstrate in any event that his discharge was contrary to the agreement. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976).

On the basis of the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[18]

A. Respondent Henry J. Kaiser Company, Moscow, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against employees in overtime assignments because they are travelers or are not members of the Union.

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[16] Crawford and Sears were brought to the interview by Union Steward Walter Hurd, who related to them en route words to the effect that as long as they told the truth, their jobs would not be affected. This did not constitute adequate warning that the employees' jobs were secure, because the assurance was linked to the employees' telling the truth. This is not to say that an employer must condone the telling of falsehoods; rather, the statement leaves the judgment to the Company or the Union, or both, of whether the employee is telling the truth, with unspecified discipline a distinct possibility. Further, there is inherent in Hurd's statement the possibility that employees may be coerced into giving misstatements in order to ensure the continuation of their employment—i.e., to tell their employer not what happened, but what the employer desires to hear.

[17] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Coercively interrogating employees in preparation for defense of unfair labor practice proceedings without first obtaining voluntary participation by said employees and without first giving said employees assurances against reprisals if they choose not to participate in said interviews.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights which are guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

(a) Make Charles E. Clendenin whole for any loss of earnings or benefits suffered because of the unlawful denial of overtime work to him, to be computed as set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records (including records of overtime worked) required to determine the amount of backpay due under the terms of this Order.

(c) Post at its premises in Moscow, Ohio, copies of the attached notice marked "Appendix A."[19] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Company's representative, shall be posted by the Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent Company has taken to comply herewith.

B. Respondent Journeymen Pipe Fitters Local No. 392, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing or refusing to fairly represent any employees represented by the Union in the processing and filing of grievances.

(b) Coercively interrogating employees in preparation for defense of unfair labor practice proceedings without first obtaining the voluntary participation by said employees and without first giving said employees assurances against reprisals if they choose not to participate in said interviews.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights which are guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its offices and meeting halls, including the Company's trailer-office where the union steward has a desk, copies of the attached notice marked "Appendix B."[20] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Union's representative, shall be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees of the Company and members are customarily posted. Reasonable steps shall be taken by the Union to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

IT IS FURTHER ORDERED that the complaints be dismissed insofar as they allege violations of the Act other than those found herein.

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[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice reading "Posted by Order of the National Labor Relations Boards" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[20] See fn. 19, *supra*.

Clarklift of St. Louis, Inc. *and* **Bernard B. Nowak.** Case 14-CA-14317

June 17, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 31, 1981, Administrative Law Judge Hubert E. Lott issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

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[1] In the absence of exceptions to the Administrative Law Judge's of finding that Toombs' interrogation of Nowak, concerning the latter's contact with the Union regarding supervisors performing unit work, was *de minimis* and thus did not warrant issuance of a remedial order, we adopt, *pro forma* his dismissal of the allegation that such conduct violated Sec. 8(a)(1) of the Act.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge: This case came to hearing before me in St. Louis, Missouri, on December 9, 1980,[1] upon an unfair labor practice charge filed on October 8, by Bernard B. Nowak, an individual, against Clarklift of St. Louis, Inc., herein called Respondent, and on a complaint issued by the General Counsel on October 29. The issues in the case are whether Respondent, on or about August 15, interrogated the Charging Party concerning his union or concerted activities, and whether Respondent discharged Charging Party Bernard B. Nowak because of his union activities in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.

Upon the entire record,[2] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Missouri corporation, is engaged in the sale, distribution, and repair of material handling equipment at its St. Louis County, Missouri, facility. In the course and conduct of its business operations, Respondent derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $50,000 which were delivered to its place of business in Missouri directly from points located outside of the State of Missouri. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Association of Machinists and Aerospace Workers, District No. 9 and its Local No. 777, herein called IAM and Local 777, respectively, are and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is engaged in the sale and servicing of forklift vehicles as a franchise distributor for Clark Equipment Company. Respondent's present owners purchased the Company in April 1979, renaming the Company Clarklift of St. Louis Inc., from AAA Equipment. Those employees of Respondent who perform service and repair work on vehicles are represented by Lodge 777, IAM. At the time of the purchase of the Company by its present owners Respondent assumed collective-bargaining agreements for its mechanics with the IAM and for its parts department employees with Teamsters Local No. 618. During the negotiation of the Company's acquisition, Teamsters Local No. 618 gained the right to represent the office workers. In October 1979, Respondent executed a collective-bargaining agreement with Teamsters Local No. 618 covering the office employees. Currently both of the Teamsters bargaining units have shop stewards employed by Respondent.

B. *The Interrogation and Discharge of Bernard Nowak*

The General Counsel contends that Bernard Nowak was interrogated and subsequently discharged on August 15, because he vigorously pursued his duties as shop steward for the IAM, who represented the mechanics unit. Respondent corrected or amended its answer to the complaint to reflect that it suspended Nowak on August 15 and discharged him on August 18 because he instructed employees to misrepresent their time on customer work orders, threatened a supervisor with union trouble or problems if he did not receive foremen's wages, and lied to Respondent's vice president and general manager when questioned about these incidents.

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[1] All dates are in 1980 unless otherwise stated.

[2] Errors in the transcript have been noted and corrected.

Bernard Nowak was at the time of his discharge an 8-year employee, and since January 1979 had been the IAM shop steward for the mechanics. Nowak returned to work from sick leave on June 23. On June 26, Samuel Modica, Respondent's service manager since April, assigned Nowak and another employee the task of installing an upright on a forklift. Nowak became upset and refused to perform the work claiming that the Company's 2-ton overhead chain hoist was not strong enough to lift the 5-ton upright and side shifter. Nowak threatened to call OSHA if the Company persisted in its attempt to use the overhead chain hoist. After consulting with John Browning, Respondent's service supervisor over mechanics, Modica abandoned this effort in favor of calling in a wrecker which did the job. No grievance was filed over this incident.

Sometime in late June or July[3] Nowak made an inquiry to Modica concerning the restoration of employee Leonard Richmond to journeymen rate. About a year earlier Richmond had experienced knee problems. The condition of Richmond's bad knee had left him unable to use a ladder to paint forklifts. Officials of the Company and the Union had then met and determined to freeze his pay rate for 1 year (at mechanic trainee 3-year level) to give Richmond time to rehabilitate his knee. A letter of agreement to this effect was signed by the Company and the Union on May 16, 1979. Sometime after the 1-year period had expired, Leonard Richmond reminded Modica that the agreement period was up and that he should be returned or restored to journeymen's wages. Modica said he would check into it. Modica then called Roger Poole the Union's business agent, however, in the meantime Nowak came to Modica and inquired about what the Company was doing about Richmond. Modica told Nowak that he had a call in for Roger Poole and that when Poole returned Modica's call, they would work out some kind of arrangement and let Nowak know about it. Shortly thereafter Poole and Modica discussed the situation and the Company paid Richmond retroactive wages and restored him to the journeymen rate. No grievance was filed over this matter.

On August 13, Nowak, who was not at work due to an injury, received a telephone call from employee Darron Forrest, who said that he had been fired. Nowak went to Respondent's facility and spoke with Modica and Vice President and General Manager Larry Toombs. Nowak had previously spoken with Modica about this and asked him not to do anything until the regular business agent returned from vacation. But, Respondent was adamant that Forrest leave the premises and take his tools with him. Nowak told Forrest not to remove his tools until the matter was straightened out with Respondent. Nowak then assisted Forrest in preparing a grievance and submitted it to Respondent. On Friday, August 15, Nowak reported to work from sick leave. He worked for approximately 10 minutes when Sam Modica asked him to come to his office. John Browning, Sam Modica, and Larry Toombs were present, however, Larry Toombs did all of the talking. According to Nowak, Toombs asked him a series of questions: Had he ever called OSHA? Did he ever tell any employee to hold back time? Did he ever call the hall on any of the Company's salaried men and tell them not to move any equipment or drive forklifts around? Had he ever telephoned one of the supervisors and threatened that if he did not get a raise, he would cause trouble in the shop? Had he ever asked another mechanic to misrepresent hours? To all of these questions, Nowak answered no. After the questioning, Nowak was suspended and received a mailgram on August 19 which stated that he had been discharged as of August 18.

Bernard Nowak testified that after his discharge he filed a grievance. He further testified that he had never been warned or reprimanded before by Respondent and that under the contract the first offense called for a warning letter, second offense a suspension, and the third offense within a year, automatic discharge.[4] Rufus Haney and Darron Forrest, mechanics, testified that they were familiar with the terms "holding back time" or "transferring time." Thus, when a work order comes to the shop from the sales department, it has, under the "shop instructions section," the estimated time that it should take to complete the job. If the job requires more actual worktime than is estimated by the sales department, then, on some occasions, the shop foreman will instruct the mechanic to transfer the excess time to another work order where the job was performed in less time than was estimated by the sales department which would even-out productive time. Haney and Forrest testified that on occasion Shop Foreman John Browning has instructed them to transfer time to other work orders.

C. *Respondent's Defense*

Larry Toombs, Respondent's vice president and general manager, testified that on August 11 he was called into Robert Whittingham's office. President Whittingham had three work orders on his desk, 35831, 35833, and 35835 (Resp. Exhs. 1, 2, and 3). Whittingham told Toombs that there was something wrong because he remembered asking mechanic Michael Troutman to perform work (cut down load back rests) on three forklift trucks and asked him if he could complete the work in 1 day. After Troutman had completed the work in 1 day he remembered congratulating him for doing a good job in the required time. After reviewing the three work orders involved on Troutman's job, he discovered that the number of hours indicated on the work orders showed that Troutman did not complete the work in 1 day but rather in 3 days, taking a total of 20 hours instead of 8 hours. Whittingham asked Toombs to investigate this discrepancy. Toombs in turn asked Service Manager Samuel Modica to investigate the discrepancies on these three work orders. Modica in his investigation questioned Shop Forman John Browning and mechanic Michael Troutman. Troutman told Modica that he had been instructed to transfer hours from a customer work order by Nowak. Modica reported what he had discovered back to Toombs who decided to meet with Troutman on August 12 to get a more complete explanation of what actually happened. At the meeting on August 12 with Toombs, Troutman explained that Whittingham on July 30 or 31 asked him if he could modify three forklift trucks in 1 day because they were promised to a customer on a certain day. Troutman said that he thought he could do the job in 1 day. Thereafter, Troutman completed the work on the three work orders 35831, 35833, and 35835 in 1 day, using the total of 8 hours. After Troutman completed the work on the three work orders he turned them over to Nowak who told him that from now on they were going to use the full time on the tickets (i.e., not the actual time worked but the estimated time for the job, which in this case was 8 hours per work order or 24 hours estimated time). Troutman went on to explain to Toombs that he added 12 hours to the three internal work orders, taking the time from a customer work order, on Nowak's instructions because he did not want to have any trouble with the Union.[5] Troutman further told Toombs that after Respondent stopped inserting estimated time on the work orders which was somewhere around July 31, Nowak told Troutman that they should run the tickets over and see what the Company said about that. He also told Troutman that they should always use maximum time.[6] After hearing Troutman's story about what had transpired with the work orders, Larry Toombs decided to check further with his management to find out whether or not other situations existed that he was unaware of. He talked to Sam Modica who related to him that on or about July 9 Elmer Justus came to him and complained that Nowak had told him to use up the entire estimated time on the job. Modica told Justus to use only the time it took to do the job and that is what he did. Toombs asked Modica why he had not brought this situation to his attention sooner and Modica replied that Justus had told him that he would deny the conversation with Nowak if it ever came up again and that he would not put it in writing.[7]

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[3] The dates for this incident as well as the preceding incident were taken from Respondent's witnesses' testimony since Nowak was unsure of the dates involved and could only fix the time by responding to leading questions.

[4] Although the collective-bargaining agreement covering Nowak was not introduced into evidence, it should be noted that after Nowak's grievance was denied by Respondent, the union membership chose not to pursue it further.

During this same time period but prior to Nowak's discharge Toombs also learned from Modica that during July Nowak had threatened Modica with a picket line and a call to OSHA if he was not allowed to take his invalid wife to the hairdresser every Thursday on company time. At first Modica refused his request, but later on during that day he agreed to let Nowak take his wife to the hairdresser every Thursday in the morning.[8] Toombs also learned during the same period of time that Gary Hull, the used equipment manager, had received several telephone calls at home from Nowak. Hull testified that these telephone calls were received at night from Nowak and one particular call that he remembered occurred in January shortly after Dennis Metz was made working foreman. Nowak told Hull that he was entitled to leadman's pay in the equipment get ready department. Hull told Nowak that there was not enough volume to justify paying Nowak leadman's pay and that since Nowak was a shop steward there might be a conflict of interest. After Hull denied Nowak foreman's pay, Hull stated that Nowak became obnoxious and said that he had worked well with Hull in the past with the Union, but he would use the Union against him in the shop. Hull further stated that although he told John Browning about the phone call shortly after it occurred Browning told him to "sit on it" and he did not repeat the conversation to anyone else because he felt that Nowak was intoxicated at the time he made the call and he felt sorry for him. Hull stated that he related the conversation to Toombs sometime after Nowak was suspended but before he was discharged. Toombs testified that, after receiving all of this information concerning Nowak during the week of August 11, he decided to schedule a meeting with him at the earliest possible time. Nowak was absent from work on August 13 and 14 with an injured hand, however, he reported to work on Friday, August 15. Within 5 or 10 minutes after the shift began that morning, Toombs requested that Nowak report to Modica's office. In Modica's presence Toombs asked Nowak a series of questions: (1) He asked Nowak whether he had ever asked a mechanic at any time to report on a work order more hours than had actually been worked. Nowak denied that he had ever done that. (2) He asked him if he had ever asked any mechanic at any time, or if he had ever told any mechanic at any time that it took 8 hours to cut down a load back rest, when it actually could have taken less. Nowak said he had never done that. (3) He asked Nowak if he had ever told a mechanic at any time that it took 8 hours to cut down the drivers overhead guard, when it actually could have taken less. Nowak said he had never done that. (4) He asked

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[5] Transferring hours from customer work orders to internal work orders does not affect an employee's wage. However, only customer service hours generate revenues. When an employee actually spends his time on customer service work but records his hours as internal time the Company loses customer service revenues. Hours allocated as internal time cost the Company money by increasing overhead expenses. During this period of time, internal work orders which were used to prepare new trucks for delivery were cost-priced at a rate of $19 an hour, while the rate charged on customer service orders was $32 an hour. The effect of transferring 12 hours on a customer service order to an internal make-ready order would be to reduce the charges to the customer by $612 while increasing the cost of preparing truck for delivery by $228.

[6] Nowak denied all of these conversations with Troutman having to do with transferring time and using maximum time. However, Troutman testified to these conversations and Toombs, Modica, and Browning testified that Troutman related these conversations to them.

[7] Elmer Justus testified that some time after the Company removed estimated times from the work orders, Nowak handed him a work order and said, "there were 8 hours to do the job." He further testified that during the same time period Nowak told him that if the Company thinks it took a lot of time to do the jobs now, just wait until later. Justus further testified that the only people who were authorized to distribute hours on work orders were John Browning and Sam Modica. Nowak, according to Justus, was upset and made these statements to him because the Company had removed the allotted times from the work orders. Nowak denies these conversations with Elmer Justus.

[8] Nowak agreed that a conversation between him and Modica took place sometime after Modica assumed the duties of service manager. He further agreed that the conversation dealt with taking his wife to the hairdresser and that although Modica at first refused to allow him to do it, he later agreed to let Nowak take off during the day to perform the service. However, Nowak denied ever threatening Modica with a picket line or a call to OSHA. Modica's testimony supports Toombs' version.

Nowak if he had ever told the mechanics to take home their impact wrenches. Nowak replied that it was the Company's responsibility to furnish the impact wrenches. (5) He asked Nowak if he had ever called a supervisor at his home and threatened that if he did not get leadman's pay he would cause trouble in the shop. Nowak denied ever doing this. (6) He asked Nowak if he had ever called the Union with regard to the salaried supervisors moving machines around in the shop. Nowak stated that he had done this. Finally, Toombs asked Nowak whether or not he had ever threatened the Company with calling OSHA. Nowak said that he had never done that. Nowak stated, however, that he had threatened to call OSHA because he was mad at Sam Modica because Modica would not allow him to take his wife to the hairdresser. After completing the interview with Nowak, Toombs made the decision to suspend him. Toombs further testified that after suspending Nowak he discussed the situation with the mechanics, management personnel, and Whittingham. He stated that some of the things that he heard such as the hairdresser incident were totally unbelievable to him and he questioned the rationality of Nowak. He stated that after learning the things that he had, he could not understand what Nowak was trying to do to Respondent. After another discussion with Whittingham on August 18, it was agreed between the two of them that they would discharge Nowak for directing mechanics to misrepresent hours, for calling the supervisor at home and threatening him, and for denying or being dishonest with him on these points. Toombs indicated that the other things raised in the interview did not enter into his decision to discharge Nowak; i.e., calling OSHA, the impact wrenches, or calling the union hall about supervisors doing unit work. Toombs categorically denied that Nowak's activities as a shop steward had anything to do with his discharge.

Toombs testified that since September 1979 Respondent had discharged four mechanics, one of whom was Harry Poole. Poole was discharged for misrepresenting time turned in for payment. He turned in hours for work that he claimed he did while on the road repairing customers equipment when, in fact, the work was never performed for a customer. Customers complained and their complaints were brought to the attention of Toombs who confronted Poole over the telephone and discharged him on the spot. According to Toombs, two grievances were filed by employees in the parts department unit since September 1979 with the assistance of the Teamsters shop steward. Toombs further stated that Michael Troutman was given a disciplinary letter (Resp. Exh. 6) dated August 14 for misrepresenting hours. The letter reads:

> This letter is to serve as a warning to Michael Troutman for misrepresenting hours on three work orders 35831, 35833, 35835 on 7/31/80. Mike followed the instructions of the shop steward, Bernard Nowak, who had no authority to delegate hours.

Shop Foreman John Browning testified that only he and Sam Modica have the authority to allocate hours. He testified that only about 10 percent of all jobs require the allocation of hours and that Nowak has no role in this procedure. He stated that the allocation of hours generally involves the transfer of cost overruns from the customers service labor ticket to an internal labor ticket. He stated that Respondent does not charge its customers for cost overruns. The customer only pays the price that the salesman has calculated by estimating the amount of time required for the new truck get ready department to prepare the vehicle for customers use.

D. *Analysis and Conclusions*

Where there is a conflict in testimony, between Nowak and Respondent's witnesses, I have credited Respondent's witnesses because for the most part their testimony was corroborated, less evasive, and more on point. Larry Toombs, who played a major role in the interrogation and discharge of Nowak, was a very credible witness. Therefore, I find that Bernard Nowak participated in the activities and made the statements attributed to him by Respondent's witnesses. Furthermore, I find that most, if not all, of Nowak's activities came to the attention of Toombs during the week of August 11. I also find that Toombs suspended and later discharged Nowak not because of his protected shop steward activities but because of his unprotected activities. *International Wire Products Company, a Division of the Carlisle Corporation*, 248 NLRB 1121, 1123 (1980).

The gravamen of this case is that Nowak in my opinion abused his position as union shop steward. He was, therefore, disciplined more harshly than Troutman because as a shop steward he is held to a higher standard of conduct than the average employee. *Midwest Precision Castings Company*, 244 NLRB 597 (1979). Therefore, the terms of the contract dealing with discipline do not necessarily apply in this case. The General Counsel offered, through Nowak's testimony, some evidence that the contract calls for progressive forms of discipline beginning with a written warning for a first offense and ending with discharge for a third offense in the same given year. However, since the contract was not offered into evidence I am not bound by Nowak's testimony and I reject it.

I find that one of the reasons for Nowak's discharge was his conduct which, in effect, can only be described as advocating a slow down among unit employees. This in my opinion was reason enough for Respondent to discharge Nowak notwithstanding his legitimate activities as a shop steward. In this regard, Respondent met its burden of proof in establishing that Nowak would have been discharged had he not engaged in any protected activities. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

An element also lacking in the General Counsel's case is union animus on the part of Respondent. The record indicates that Respondent has a good labor relations history with no record of unfair labor practices. It recognizes two unions and maintains three collective-bargaining agreements covering three separate units of employees. Moreover, many of the supervisors who testified had, themselves, been members of a union for many years prior to promotion into management. It is also noteworthy that the Union never presented any witnesses or participated in this hearing in an effort to demonstrate Respondent's antiunion stance. Coupled with these factors is Nowak's testimony. He concluded his rebuttal testimony by stating that everybody at the Company always treated him as a human being and that he never had any problems with the supervisors who always treated him fairly.[9] After this testimony, I became somewhat perplexed as to why we were holding this hearing. So I asked Nowak the following questions and he responded accordingly:

> JUDGE LOTT: Let me ask you a question. Why do you think the company fired you?
>
> THE WITNESS: Well, on the testimony—
>
> JUDGE LOTT (interrupting): No, no, just—
>
> THE WITNESS (interrupting): Well, I think that they claim that I told certain parties to hold back time.
>
> JUDGE LOTT: Is that why you think they fired you?
>
> THE WITNESS: That is the only reason that I think it was.
>
> JUDGE LOTT: Do you think it had anything to do with your being the shop steward?
>
> THE WITNESS: No, I don't believe they would hold that against me.

While, I did not accord Nowak's answers controlling weight in this decision, they at least helped put this case in its proper perspective with respect to motive. Accordingly, I find that the General Counsel has not established by preponderance of the credible evidence in this record that Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Bernard Nowak.

The two allegations of interrogation have to do with Toombs questioning Nowak about threatening to call OSHA and calling the Union with regard to salaried supervisors moving machines around in the shop. The first allegation has to do with an unprotected activity; namely, threatening to call OSHA when Modica would not allow Nowak to take his wife to the hairdresser. I therefore dismiss this allegation. The second allegation, which was admitted, is without doubt a violation of Section 8(a)(1). However, under the circumstances of this case, not the least of which is Respondent's labor relations history, I find the interrogation to be *de minimus*, and accordingly dismiss this allegation as well.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in any violations of Section 8(a)(1) and (3) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

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[9] These supervisors included Whittingham, Toombs, Modica, and Browning, who were mentioned by name.

B.H.L. Manufacturing, Inc. *and* Industrial Union, Allied Industrial Workers of America, AFL-CIO. Case 25-CA-11155

October 19, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 15, 1981, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding, finding that the Respondent had not violated the Act, and dismissing the complaint in its entirety. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed limited cross-exceptions and a supporting brief, and a motion to correct certain clerical errors in its answering brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the rulings, findings, and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

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[1] In the absence of opposition to Respondent's motion, we hereby grant such motion and make the requested clerical corrections in all copies of its answering brief.

[2] Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1981), for the principle that the General Counsel has the burden of proving a *prima facie* case; that principle was established generations before *Wright Line*.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge: This case was heard before me in Fort Wayne, Indiana, on January 12 and 13, 1981, pursuant to charges filed on July 24, 1979. A complaint issued August 22, 1979, and was subsequently amended on February 12 and 15, 1980. As amended the complaint alleges that 28 employees were refused recall from layoff status on or about May 7, 1979, because of their union activities, all in violation of Section 8(a)(3) and (1) of the Act. There is no allegation or evidence of any other violations of the Act.

259 NLRB No. 3

Upon the entire record,[1] together with my careful observation of the demeanor of the witnesses as they testified, and after consideration of the post-hearing briefs submitted, I hereby make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, an Indiana corporation, has maintained its principal office and place of business at Fort Wayne, Indiana, and has been at all times material engaged at said location in the manufacture, sale, and distribution of toys and related products. During the 12 months preceding issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, purchased, transferred, and delivered to its Fort Wayne facility, goods and materials valued in excess of $50,000 directly from points located outside the State of Indiana. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. SUPERVISORY STRUCTURE

At all times material herein, the following-named persons occupied positions set opposite their respective names and have been, and are now, agents of Respondent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

Norman Meyers	Executive Vice President
Cornell Etoll	Shop Superintendent
Robert Neff II	Foreman
Fred Robinson	Shop Superintendent from on or about January 2, 1979, to the present

IV. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges the following as unlawfully refused recall:

Selena Arrington
Linda Cartwright
Pam Falls
Rose Gase
Kristin Gennari
Diane Hall
Anne Headen
Mildred Jackson
Darlene Jaggers
Maxine Johnson
Olgia Johnson
Karen Keesler
Karen Kieper
Leona Laird
Willie Larry
Debra Lewis
Karen Lunde
Maria Mauricio
Rita Mercer
Karen Miller
Janice Minick
Cynthia Murphy
Joette Nicole
Brenda Parnin
Benita Perez
Olivia Perez
Sheri Robbins
Tina Underwood

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[1] Errors in the transcript are noted and corrected.

By mailgram of November 17, 1978, the Union advised Respondent the following were members of its organizing committee:

Selena Arrington
Pamela Falls
Maxine Johnson
Rose Gase
Kristin Gennari
Diane Hall
Ann Headen
Mildred Jackson
Darlene Jaggers
Olgia Johnson
Karen Kieper
Leona Laird
Willie Larry
Debra Lewis
Karen Lunde
Rita Mercer
Karen Miller
Cynthia Murphy
Brenda Parnin
Olivia Perez
Janet Ramos
Sheri Robbins
Tina Underwood

About 2 weeks before the December 8, 1978, election in Case 25-RC-7033, the Union issued a pamphlet containing all the above names as members of its organizing committee plus Linda Cartwright, Karen Keesler, Maria Mauricio, Janice Minick, Joette Nicole, Michael Payton, and Berita (Benita) Perez.

At the hearing, the General Counsel withdrew the allegation with respect to Diane Hall, and the General Counsel and Respondent stipulated that the following employees were discharged on or about November 27, 1978:

Shelly Johnson
Sheri Gaff
Linda Cartwright
Tina Blair
Jeanette Nicola[2]
Martin Klug
Maria Mauricio
Marjorie Bellinger
Benita Perez
Maxine Johnson
Cynthia Murphy
Connie Gibson
Rose Gase

Of the 30 person organizing committee listed by the Union in its mailgram and pamphlet, only Michael Payton and Janet Ramos were not alleged as discriminatees. The record is silent as to what happened to Payton but his name does not appear on the various lists in evidence, and I conclude he did not work in January 1979 or later. The General Counsel attempted to adduce, but failed to do so, that Ramos had defected from the Union. Of the remaining 28 committeemen, the allegation as to Diane Hall was withdrawn, and 7[3] were terminated in November 1978, more than 6 months prior to the filing of the charge,[4] which leaves 20 committee members as alleged discriminatees:

Selena Arrington
Pamela Falls
Kristin Gennari
Ann Headen
Mildred Jackson
Darlene Jaggers
Willie Larry
Debra Lewis
Karen Lunde
Rita Mercer
Karen Miller
Janice Minick
Olgia Johnson
Karen Keesler
Karen Kieper
Leona Laird
Brenda Parnin
Olivia Perez
Sheri Robbins
Tina Underwood

Of these 20, the General Counsel seeks backpay, and presumably reinstatement, for 18 of them, leaving out Darlene Jaggers and Karen Kieper.

The parties stipulated that 23 employees were laid off on November 27, 1978, of whom 8 were organizing committee members.[5]

After the November layoffs and discharges, a Board election was conducted on December 8, 1978, among Respondent's employees, pursuant to an October 31, 1978, election petition filed by the Union in Case 25-RC-7033. The Union lost 62 to 28, with 3 challenged ballots. Thereafter, on December 15, 1978, Respondent laid off all of its remaining employees.

On or about January 2, 1979, Respondent recalled three of the employees laid off the previous November. They were Committee Members Karen Miller and Kristin Gennari, together with Ann Wormbly who was not on the committee. By January 4, 1979, Respondent had recalled 53 rank-and-file employees, of whom 9[6] were committee members. The plant again shut down on January 10, 1979.

In April 1979, Respondent again commenced operations. By May 5 it had a total of 20 employees. This rose to 45 employees on May 7, and 77 employees on June 26. During this period only 4 of the 23 employees laid off the previous November reappear on the payroll.[7] Moreover, of the 77 employees on June 26, 1979, only 34 were employed by Respondent at the time of the December and January shutdowns. The plant again shut down on or about July 1, 1980, and was not in operation at the time of the hearing.

Of the 20 alleged discriminatees remaining, Respondent presented uncontroverted testimony from Vice President Norman Meyers that Selena Arrington, Karen Kieper, Debra Lewis,[8] and Karen Lunde quit their employment with Respondent and Sheri Robbins either quit or was terminated.[9] The list of possible discriminatees thus diminishes to 15. It shrinks to 14 by virtue of Meyers' credible uncontroverted testimony that Darlene Jaggers was not recalled in May 1979 because of her attitude, attendance, workmanship, and a refusal to sign a 3-day suspension notice given her by Respondent. Karen Miller went in to work on the second shift January 2, 1979, but was sent home along with others after 4 hours because there was a problem with the heating system.

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[2] I conclude that Joetta Nicol and Jeanette Nicola are the same person.

[3] Cartwright, Nicole, Gase, Mauricio, Benita Perez, Maxine Johnson, and Cynthia Murphy.

[4] January 24, 1979, is the statutory limitations date in this case.

[5] Karen Miller, Kristin Gennari, Ann Headen, Pamela Falls, Janice Minik, Mildred Jackson, Karen Lunde, and Darlene Jaggers.

[6] Olivia Perez, Leona Laird, Kristin Gennari, Olgia Johnson, Janet Ramos, Karen Keesler, Tina Underwood, Karen Miller, and Willie Larry.

[7] Ann Wormbly, Helen Brock, Diane Heistand, and Theresa Price.

[8] I note that Debra Lewis' personnel file bore the notation "quit."

[9] I credit Meyers, noting that no adverse inference may be properly drawn from his failure to proffer supporting documentation into evidence because Respondent's personnel files relating to the discriminatees were present at the hearing, made available to the General Counsel, and some were utilized by the General Counsel in his examination of witnesses as the record clearly shows. I must conclude the General Counsel found nothing in the records to contradict Meyers.

She was told to listen to the radio to find out if the heat problem was solved. Her supervisor, Bob Neff, called her on January 4 and asked her if she was returning to work or preferred staying on layoff. She told Neff she would stay on layoff. At the hearing, she asserted her reason for not returning was an inability to work the second shift because she had two children at home. There is no showing she communicated this to Neff or ever again contacted Respondent to advise it that she was available for work until she was recalled in August 1979 pursuant to the commencement of the action before me. In the circumstances I am persuaded that Respondent had no obligation to try to recall her in May 1979, before any charge was filed, or to even believe she was again available for employment.

There is no evidence on the reasons for not recalling Mildred Jackson, Rita Mercer, or Brenda Parnin in May 1979.

With respect to Janice Minick, Meyers credibly testified that she did mediocre work, which gains some support from a timestudy of October 20, 1978, which notes she was too slow for the work she was performing and looked around too much.

According to Meyers, he instructed someone to recall Leona Laird in May 1979, and he believes efforts were made to contact her by phone. This is not overly strong evidence, but it is all the evidence presented on the matter. Meyers did not appear to be dissembling and I am persuaded some effort was made to recall Laird.

Meyers testified that Karen Keesler was not recalled in May because she was not one of the best employees Respondent had. This opinion was neither proved nor disproved by the evidence.

Meyers testified Pamela Falls was not recalled in May because her work performance was inadequate. An October 1978 timestudy shows her work was slow. Falls' recollections were vague and unreliable. She did not impress me as a witness whose memories should be credited in view of their fragmentary, inconsistent, and selective nature.

Meyer asserts Olgia Johnson was not recalled in May because she gave false information to Respondent with regard to the events leading to Cynthia Murphy's termination in November 1978. Johnson was recalled in January 1979. Johnson does not deny giving the false information in regard to Murphy.

Willie Larry conceded her absence record was poor and she had been twice warned about it. She also asserts she was told in February 1979 she would not be called back because her wages had been garnisheed. Meyers testified she was not called back because of her attendance and inability to perform the work.

Ann Headen had never worked on the Etch-A-Sketch line and Meyers testified that experience on that line was a prerequisite for recall in May.

Kristen Gennari was offered second-shift employment, which she declined, when she was laid off in November 1978. Kenneth Folk testified that she told him in January 1979 that she would not be available for recall because she was returning to the east coast. Gennari is a native of Massachusetts and states she returned to Massachusetts over the 1978 Christmas holiday but then returned to Fort Wayne, Indiana, and worked for Respondent the following January. She denies any conversation with Folk about her return to the east or her availability for employment. I credit Gennari that she went to Massachusetts over the Christmas holiday, but I do not credit her assertion that she never talked to Folk about returning east or her availability for employment. Folk impressed me as a certain witness on this point and his testimony on his January conversation with Gennari is believable and credited. That Gennari may not have followed through on her intention to return to Massachusetts permanently does not mean she did not have that intention in January when she talked to Folk.

Tina Underwood credibly testified she was not recalled in May 1979. Meyers states Underwood was a good employee and he was told that someone at Respondent's facility had tried to recall her. Meyers thus has only hearsay information as to whether or not an effort was made to recall her.

Meyers testified Olivia Perez was not recalled because of her attendance and inability to get along with other employees. Perez agrees her attendance was poor. Folk credibly named four employees who had complained about Perez and avers Perez had trouble getting along with other employees.

The reasons given by Respondent for not recalling some few of the alleged discriminatees are not entirely free from question, but this provides no support for the General Counsel's case.

This case is singularly free from *any* evidence of unlawful motivation. All that Respondent did, to express its attitude on the Union so far as the record shows, was to issue a letter from Meyers to all employees on November 28, 1978,[10] which contains nothing of an interfering, restraining, or coercive nature, and certainly no threat of reprisal or force or promise of benefit. The letter clearly falls within the ambit of Section 8(c) of the Act and is not probative evidence supporting the General Counsel's case.

In addition to the total absence of any direct evidence of unlawful motivation, the timing of Respondent's failure to recall some 5 months after the Union had lost the election by a more than two-to-one margin, and 4 months after Respondent had indeed called back known union adherents, suggests no plot to retaliate against those employees for past union activities. Moreover, there is no showing of any continuing union activity after the December 1978 election.

Contrary to the General Counsel, *Great Dane Trailers*[11] is not applicable to the facts before me. The 28 possible discriminatees whom the General Counsel alleged in the complaint and in his opening statement dwindled, by way of stipulations and credible uncontroverted testimony, to a very charitable 14. Of the remaining 14, Respondent had reason to believe Miller and Gennari were not interested in recall, made an effort to recall Laird, and may have tried to recall Underwood. The 28 has now shrunk to 11 at most, and perhaps to 10. Why the General Counsel yet persists in a *Great Dane* theory I do not know, but I find that the General Counsel has not shown any employer conduct "so inherently destructive of employee interests" that proof of motivation is unnecessary. There is no showing that Respondent distinguished between employees to be recalled on the basis of their union activities,[12] and there is no reason in law or logic on the evidence before me to conclude that Respondent's conduct on its face is *prima facie* unlawful, or that employee rights have been adversely affected.

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[10] G.C. Exh. 15.

[11] *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

Leaving *Great Dane* and turning to *Wright Line*,[13] I find and conclude the General Counsel has not made a *prima facie* showing sufficient even to support an inference that protected conduct was a motivating factor in selection for recall. Consequently, Respondent has no burden of justifying those selections. That it has chosen to do so, and in most cases clearly has, serves only to emphasize the weakness of the General Counsel's case. What the General Counsel appears to be urging is that unless Respondent comes forth with totally unassailable reasons for failing to recall each laid- off committee member, *voila!* unlawful motivation is clear. Not so at all. Respondent is under no obligation to justify its conduct unless and until the General Counsel shows by direct or circumstantial evidence that Respondent's failure to recall sprang from a motive to discourage union activity. The General Counsel has not so shown, and nothing brought forth at the hearing can be maneuvered into the vaguest semblance of a *prima facie* case requiring rebuttal by Respondent.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of the Act.
3. The General Counsel has not established by a preponderance of the evidence that Respondent has violated the Act as alleged in the complaint or in any other manner.

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER[14]

The complaint is dismissed in its entirety.

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[12] There was no reason in May 1979 for Respondent to do so. The Union was gone and no longer a matter of concern.

[13] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

American Display Manufacturing Co., Inc. ***and*** **Amalgamated Service and Allied Industries Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO** ***and*** **Thomas Pinto.** Cases 29-CA-7276, 29-CA-7415, 29-CA-7562, 29-RC-4578, and 29-RC-7687

October 20, 1981

DECISION, ORDER, AND DIRECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 28, 1981, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, American Display Manufacturing Co., Inc., Queens, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

DIRECTION

It is hereby directed that Case 29-RC-4578 be remanded to the Regional Director for Region 29, who shall open and count the ballots of Thomas Pinto and Francine Davis and thereupon issue a revised tally of ballots. If the Union obtains a majority of the valid votes counted, a certification of representative shall issue. In the event, however, that a majority of valid votes are not cast for the Union, the election is set aside, the bargaining order heretofore granted shall be in effect, and the petition in Case 29-RC-4578 shall be dimissed.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their union sympathies.

WE WILL NOT threaten to close our factory if our employees select Amalgamated Service and Allied Industries Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, as their collective-bargaining representative.

WE WILL NOT suggest to our employees that they form a committee to bargain directly with us over wages and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize the Union, effective from May 1, 1979, and upon request bargain with it as the exclusive collective-bargaining representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All production and maintenance employees, including shipping and receiving employees, but excluding all salesmen, professional employees, office clerical employees, guards and supervisors as defined in the Act.

AMERICAN DISPLAY MANUFACTURING CO., INC.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases (American Display Manufacturing Co., Inc. (Respondent, the Employer, or the Company), Amalgamated Service and Allied Industries Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO (the Union), 29-CA-7276, 29-CA-7415, 29-CA-7562, and 29-RC-4578, and Thomas Pinto, an individual, 29-CA-7687) were heard by me on various days in July, October, and December, 1980.

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[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Member Fanning would make the bargaining order here prospective only in nature. See his concurring opinions in *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977), and *Hambre Hombre Enterprises, Inc., d/b/a Panchitos*, 228 NLRB 136 (1977).

259 NLRB No. 6

A. *The Representation Proceeding*

The representation proceeding was initiated on May 7, 1979, when the Union filed a petition for an election in Case 29-RC-4578. On May 18, 1979, the parties executed a Stipulation for Certification Upon Consent Election, which was approved by the Regional Director for Region 29. Thereafter, on June 15, 1979, a secret-ballot election was held in a unit of all production and maintenance employees, including shipping and receiving employees, excluding all salesmen, professional employees, office clerical employees, guards and supervisors as defined in the Act.

The tally of ballots served on the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters—40
Void ballots—0
Votes cast for Petitioner—16
Votes cast against the Union—7
Valid votes counted—33
Challenged ballots—8
Total votes counted—4
Challenges are sufficient in number to affect the results of the election.

The challenged voters were Thomas Pinto, Juan Alicea, Francine Davis, Joann Luquis, Janet Perry, Conroy Morgan, Hurelyon McLean, and Arnold Thompson. With respect to the challenges, the Regional Director, on November 30, 1979, issued a report after an investigation, wherein he recommended that the challenge to Pinto's vote be overruled and that the challenge to Alicea's vote be sustained.[1] He further recommended that a hearing be conducted as to the eligibility of Francine Davis, Joann Luquis, Janet Perry, Conroy Morgan, Hurelyon McLean, and Arnold Thompson as these people, with the exception of Davis,[2] were alleged to have been discharged for discriminatory reasons in Cases 29-CA-7276 and 29-CA-7415, which cases will be described below. The Regional Director's recommendations were approved by the Board on January 11, 1980.

After the election, the Union filed timely objections to conduct affecting the results of the election. They read as follows:

> 1. At a mass meeting of employees held in the plant on or about June 1, 1979, the Employer encouraged the formulation of a company union.
>
> 2. Several weeks prior to the election, the Employer offered a life insurance policy to an employee if the employee tried to see things the company['s] way; that the employee did not need a union and that any problem can be settled between the company and the employee. Again on June 14, 1979, and on June 15, 1979, the Employer requested several employees to vote "no" at the election and further promised some of the employees that if the company could get rid of the union, the employees would receive a million dollar insurance coverage, and pension plan coverage.
>
> 3. On June 14, 1979, the Employer called a mass meeting of employees in the plant at which meeting employees opposed to the union were permitted to express their opinions while those for the union, were not permitted to do so.
>
> 4. At a mass meeting of employees held June 1, 1979, in the plant, the Employer said to the assembled employees that in the past 2-1/2 years, the union did not sign up any shops. This statement is false.
>
> 5. At the mass meeting of June 14, 1979, the Employer stated to the assembled employees that the company might have to close down if the union won the election.
>
> 6. During the course of the election on June 15, 1979, a supervisor of the Employer was patrolling the voting line, approximately 15 feet from the voting booth. While so patrolling, he signaled to a group of workers on the voting line who left the voting line and went upstairs with the supervisor.
>
> By these and other acts, the Employer denied the employees the freedom to choose a bargaining representative, in violation of the Act.

On March 20, 1980, the Regional Director issued a Report on Objections. In the report, he directed that a hearing be held on Objections 1, 2, 3, 5, and 6. Additionally, he ordered that a hearing be held on another matter arising during the investigation, to wit; an allegation that on June 15, 1979, the Employer, by Edward Herbst, made a statement to an employee implying that the selection of the Union as bargaining representative would be futile and that the Company would never execute a collective-bargaining agreement with the Union. Also, he directed that a hearing be held on the issue of whether the discharges of Janet Perry, Arnold Thompson, Conroy Morgan, Joann Luguis, Hurelyon McLean, and Julio Nieves were motivated by discriminatory reasons prohibited by Section 8(a)(1) and (3) of the Act, and therefore constituted objectionable conduct.

As to Objection 4, the Regional Director recommended that it be overruled. It was also ordered that the unresolved issues in the representation case be consolidated for hearing with certain unfair labor practice cases described below.[3] On May 19, 1980, the Board, after receiving the Employer's exceptions to the Report on Objections dated March 20, 1980, adopted the Regional Director's report and overruled the Employer's exceptions.

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[1] Pinto was challenged by the Company as being a supervisor or alternatively because he did not share a community of interest with the unit employees. The Regional Director for Region 29 concluded, however, that at the time of the election Pinto was a nonsupervisory employee engaged in making samples and doing production setup work. Accordingly, the Regional Director concluded that Pinto was an eligible voter.

As to Alicea, the Regional Director concluded that he had quit his employment prior to the election, and therefore was not an eligible voter.

[2] Francine Davis' vote was challenged by the Union on the grounds that she was a representative of management and/or because she enjoyed special privileges and did not share a community of interest with the unit employees. In her case, the Regional Director concluded that the investigation raised substantial and material issues of fact, which would best be resolved through a hearing.

[3] The challenged ballot issues were consolidated with the unfair labor practice cases on November 30, 1979. The objection issues were consolidated with the unfair labor practice cases on March 20, 1980.

B. *The Unfair Labor Practice Cases*

A charge in Case 29-CA-7276 was filed by the Union on June 21, 1979, and a charge in Case 29-CA-7415 was filed by the Union on August 15, 1979. Thereafter on August 29, 1979, the Regional Director issued a consolidated complaint and notice of hearing, which alleged the following conduct:

1. That on April 20 and 27, May 3 and 11, 1979, and various other unknown dates during April, May and June 1979, Respondent by Edward Herbst, Mark Harris and Gerald Davis and other unknown agents and supervisors, interrogated employees concerning their membership in, activities on behalf of, and sympathies for the Union.
2. That on April 20 and 27, May 10 and 17, June 1 and 14, 1979, and on various other unknown dates in April, May and June, Respondent by Herbst and Harris, and other unknown agents and supervisors threatened its employees with plant closure and other reprisals if they joined, supported or assisted the Union.
3. That on April 20 and 27, May 1 and 10, June 14 and 15, 1979, and on various other unknown dates in April, May and June, Respondent by Herbst and Harris and by other unknown agents and supervisors offered, promised and granted medical and life insurance benefits to induce its employees to refrain from becoming or remaining members of the Union, and to induce them to abandon their membership and activity for the Union.
4. That on April 20 and 27, May 1 and 10, June 13 and 14, and on various other unknown dates, Respondent by Herbst and Harris, and other unknown agents and supervisors, offered and promised wage increases, vacations, profit sharing, and other benefits and improvements to induce them to refrain from becoming members of, or remaining members of the Union and to refrain from giving any assistance or support to the Union.
5. That on April 20 and 27, 1979, and on various other unknown dates in April and May, Respondent by Herbst, Harris and Davis created the impression that the meeting places, meetings and activities of its employees were kept under surveillance.
6. That on April 27, May 1, 2, and 3, 1979, and on various other unknown dates, Respondent by Davis and by other unknown agents engaged in surveillance of the Union's meeting places, meetings and activities and also the concerted activities of its employees.
7. That on April 20, 1979, Respondent by Herbst asked its employees to ascertain and divulge the Union activities, sympathies, and membership of its employees.
8. That on June 15, 1979, Respondent by Herbst told employees that it would be futile to select the Union as their collective bargaining representative by stating that the Respondent would never execute a collective bargaining agreement with the Union.
9. That on April 20 and 27, May 3, June 1, 14, and 15, 1979, and on various other unknown dates in April, May, and June, Respondent by Herbst and Harris held meetings with employees for the purpose of selecting and remedying its employees' grievances.
10. That on May 1 and June 1, 1979, and on various other unknown dates in April, May, and June, Respondent by Herbst, and Harris urged the creation of an employee organization.
11. That on May 11, 1979, Respondent laid off, in violation of Section 8(a)(1) and (3) of the Act, the following named employees:

Janet Perry
Arnold Thompson
Conroy Morgan
Joann Luquis
Hurelyon McLean
Julio Nieves

On October 30, 1979, the Union filed a charge in Case 29-CA-7562 and on January 8, 1980, Pinto filed a charge in Case 29-CA-7687. On February 21, 1980, a complaint was issued in Case 29-CA-7687, alleging in substance, the discriminatory discharge of Thomas Pinto. On March 20, 1980, a consolidated amended complaint was issued which, in addition to realleging the allegations set forth above, also contended that Respondent, since May 2, 1979, has refused to bargain collectively with the Union. At paragraph 29 of this last pleading, the Regional Director asked for the issuance of a bargaining order in the event that the Union loses the election after counting all the ballots, including those challenged ballots which may be opened.

Finally on April 15, 1980, the Regional Director issued an order further consolidating cases, pursuant to which all of the foregoing matters were consolidated for hearing.

Upon the entire record including my observation of the demeanor of the witnesses, I make the following:[4]

FINDINGS OF FACT

A. *Jurisdiction*

Respondent is a New York corporation with its principal place of business located at 180-10 93d Avenue, Queens, New York, where it is engaged in the manufacture and sale of jewelry displays and related products. During the past year, Respondent purchased goods and materials valued in excess of $50,000 which were delivered to its plant in interstate commerce directly from States other than the State of New York. Respondent admits and I find that it is an employer engaged in commerce withing the meaning of Section 2(2), (6), and (7) of the Act.

B. *The Labor Organization Involved*

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

C. *The Organizational Campaign*

An organizational effort was begun by the Union on or about April 12, 1979, when Business Agent Franklin

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[4] None of the parties filed briefs.

Western approached employees Eleazar Kelly and George Jeffers who signed union authorization cards on that date.[5] At the same time these two employees were given additional cards for distribution amongst the employees, and the evidence herein indicates that they were the two main union advocates of the employees.

From about April 12 on, union business agents arrived at the premises of the Company where they stationed themselves outside a fence facing the main entrance and where they spoke to and solicited employees as they arrived at work and during lunch times. From April 12 to May 2, the Union obtained 33 valid authorization cards executed by employees of the Company, including cards signed by the six alleged discriminatees.[6]

It also is established that at the latest, by the last week of April 1979, the Employer was fully aware that the Union was conducting an organizational campaign, which, as noted above, was conducted in full view immediately outside the Employer's premises.

With respect to the union activities of the alleged discriminatees, there is evidence indicating that Joann Luquis and Janet Perry solicited cards on behalf of the Union. However, the evidence does not establish any particular union activities other than the signing of cards by Nieves, Morgan, or McLean. As to Thomas Pinto, his testimony reveals that although he signed a card on May 1, he kept a "low profile" on this subject at least for the initial part of the campaign and did not surface as a union activist until sometime later in May.

On May 1, 1979, the Union mailed to the Company a demand for recognition but the letter was not accepted and was returned unopened to the Union. Thereafter, on May 7, the Union filed the petition for an election in Case 29-RC-4578.

D. *Events in April 1979*

According to the testimony of Thomas Pinto, sometime in March or April shortly after the Union first appeared, he was called into the office with Ed Herbst, Mark Harris, and Gerald Davis.[7] He testified that at this meeting the Company's management was trying to figure out a way to discourage employees from joining the Union and that Herbst told him, "see what you can do out there and we'll look out for you later." Pinto further stated that Gerald Davis suggested that Eleazor Kelly and an employee named King be discharged as they were considered to be the instigators.[8] To this, Pinto asserted that he responded by saying that discharging these people would be a bad idea because it would upset the employees and make them more eager to have union representation.

Both Davis and Herbst credibly denied the above testimony of Pinto. It is noted that as Pinto was initially uncertain as to when this meeting took place, he was asked about its timing and then stated that it occurred about a month before he signed a union card on May 1. This assertion would thereby place the meeting at a time before the Union commenced organizing Respondent's employees.

Pinto also testified that some weeks after the first conversation described above, he was again called into the office with Herbst and Harris, and asked if he was going to join the Union. According to Pinto, he told them that he was not sure yet, whereupon Herbst said that if he joined the Union he, Pinto, would be the biggest loser because he was receiving regular raises and Christmas bonuses, which he would no longer get if the Union got in. Pinto also asserted that during this conversation Herbst said that he could stop him from joining the Union by making Pinto part of management. This conversation was credibly denied by Herbst.

E. *The Meeting of April 29 or 30, 1979*

A number of the General Counsel's witnesses testified to a series of three meetings held by the Employer in April, May, and June, the last of which was held on June 14.[9] The basic problem I face in trying to determine what took place at these meetings is that with the exception of the General Counsel's witnesses, Pinto and Leonard French (who was only present at the second meeting), his other witnesses speak English as a second language and had substantial difficulty in communicating what was said at these meetings. (It is established that Herbst addressed the employees in English.) Moreover, and perhaps because of the passage of time between the events in question and the time when the witnesses were called to testify, there was a fairly high degree of disparity between what the General Counsel's witnesses could recollect as having been said at these meetings.

It is agreed, however, that the Company did call a meeting to discuss the Union on April 29 or 30, where Herbst did most, and probably all of the talking on behalf of Respondent. Based on the entire record, including my observation of the demeanor of the witnesses, and also because Herbst's version was essentially corroborated by Pinto, I shall credit the former's account which is as follows. Herbst testified that he told the assembled employees that a large portion of Respondent's business was with a company called Riviera, that Riviera's major concern was timely delivery, and that he was concerned that if a union came in, and possibly caused a strike, the Company might not be able to make timely deliveries and thereby lose Riviera as a customer which could cause the possible loss of jobs. Herbst also testified that the only thing an election could do was to force him to bargain with the Union, but that the Union could not force him to give anything he did not want to give and that the Union could only attempt to negotiate.

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[5] The authorization cards state, "I hereby designate and authorize the Amalgamated Service and Allied Industries Joint Board, ACTWU - AFL-CIO-CLC, as my exclusive collective bargaining agent in all matters pertaining to wages, rates of pay and conditions of work."

[6] Hurelyon McLean and Conroy Morgan signed authorization cards on April 26, 1979; Joann Luquis signed a card on April 25, 1979; Julio Nieves signed a card on April 30, 1979; and Janet Perry and Thomas Pinto signed cards on May 1, 1979.

[7] Ed Herbst and Mark Harris are the co-owners of the Company. Gerald Davis was the plant manager.

[8] It does not appear from this record that anyone named King was employed by the Company during any relevant time herein.

[9] It is agreed by the parties that at the meeting on June 14 Herbst read a speech. By so agreeing, however, the General Counsel did not agree that the only things said by Herbst on that date are contained in the written speech.

He stated that he told the employees that some of the promises being made by the Union were completely ridiculous and that there was no way the Company would be able to stay in existence by giving the kinds of raises that the Union had promised. Herbst testified that he said that in the event of a strike he would be forced to have the Company continue to do business by using subcontractors to satisfy its delivery requirements and that he told the employees that anyone was free to come into his office and discuss whatever needed to be discussed. He denied that he suggested to employees that they form an employee committee to meet with him to discuss employment conditions. Finally, he stated that he told the employees that his father had worked for a company called Nautiloid, which Herbst had purchased, that had closed down as a result of a strike and that all the employees of that company had been dismissed.[10]

F. *The Second Meeting*

Like the first meeting described above, there are a variety of accounts as to what took place, some of which are inconsistent. On the whole, it seems to me that the versions given by Thomas Pinto, Ed Herbst, and Leonard French came closest to an accurate description of what took place on that occasion and it is based on their combined testimony that I make my findings.[11]

The first question, apart from what was said, is when did this meeting take place? In this regard both Pinto and Herbst asserted that the meeting was held in early June, and Herbst specifically placed it as having occurred on June 1. Leonard French and Gerald Davis could not give any indication as to when this meeting occurred. On the other hand, Nydia Ortiz, Janet Perry, and Conroy Morgan place the meeting much closer in time to the first meeting. Obviously, if Morgan and Perry were present, this meeting had to have occurred prior to May 11 which is when they were laid off unless, of course, their testimony was not based on their own observations but on what other employees told them. Indeed, given the testimony of Perry and Ortiz it would be within the realm of possibility that this meeting was held before the petition was filed.[12]

Given the above, it seems to me that there is a substantial degree of doubt as to when this meeting was actually held. For if I were to credit Ortiz, Perry, and Morgan, it would appear that it was held before May 11. On the other hand, Herbst's assertion that the meeting was held on June 1 is an assertion contrary to his interest, inasmuch as if it was held prior to May 7 when the petition was filed, nothing he said on this occasion could be used to set aside the election.[13] In actuality, I cannot say with any assurance when this meeting was held, except that it seems more reasonable to conclude that it was held after the petition was filed, because, *inter alia*, if this was not so, it would have been a point raised and argued by Respondent.

As to the substance of the meeting, it appears that Herbst called this meeting, the main thrust of which was to describe the employees' existing benefits. Also, although Herbst testified that the handing out of the insurance forms by a woman from the insurance company took place at an earlier time, May 2, it seems to me that the record as a whole suggests that this probably was done on that occasion and the testimony of Gerald Davis tends to corroborate this conclusion.

In relation to the insurance issue, Herbst testified that he had decided to obtain a medical insurance plan for the employees in October 1978 and began talking with a variety of insurance companies at that time. He states that he finally made an agreement with Colonial Life Insurance Company in April 1979 for the plan which went into effect on May 1. The reason for the delay between October 1978 and the time he made the agreement is explained as being the result of comparison shopping; inasmuch as most of the carriers insisted on family coverage which was more costly than what Herbst intended. The agreement with Colonial on the other hand provides only for employee coverage, and therefore is a good deal less expensive.

In any event, the evidence herein discloses that Herbst did begin to contact insurance companies about medical coverage for his employees well before any union activities commenced and that he did enter into an agreement with Colonial for a plan which became effective on May 1, before the Union filed its petition for an election.

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[10] Pinto's version of this meeting, which was the most detailed of any of the other versions testified to by the General Counsel's witnesses, was that Herbst started talking about how the Union was no good and that all they wanted was to take the employees' dues. According to Pinto, Herbst said that after the Union got it, he would have to pay more money to the workers which would mean that he would have to raise his prices which could adversely affect his competitiveness. He stated that Herbst said that Riviera constituted 40 to 60 percent of his business, that the last shop which had a contract with Riviera had lost the account when they went on strike, and that as a result Respondent had obtained Riviera's business. Pinto stated that Herbst told the employees that he did not want what happened to the other shop to happen to Respondent, that he did not want to lay off anybody, and that he wanted to have more people working for the Company because that would mean more profit for the Company. Pinto also testified that Herbst said that if the Company lost the Riviera account it would hurt the Company greatly and could result in layoffs. He stated that Herbst said that the Union would probably have to go out on strike because he was not going to give what the Union wanted. Finally, Pinto stated that Herbst told the employees that if there was a strike they would lose the Riviera account because the Company could not deliver on time, and that this would result in layoffs.

It is noted that Nydia Ortiz testified that Herbst's comments about Riviera and the consequences of strikes took place at the second meeting. In this respect she asserted that Herbst said that if Riviera contracted with someone else a lot of employees would be without work and that if there was a strike the Company could replace the strikers. In a pretrial affidavit, Ortiz also asserted that, "I recall in one of the meetings that Mr. Herbst said that if the Union came in, it would contract out some of the work. He said he would send out the work during the strike if the Union asked for too much money and could not afford it."

[11] In this respect, I am of the opinion that the testimony of Ortiz, Morgan, and Perry is confused. In my opinion they had difficulty in and recalling what took place and also tended to lump the meetings together, ascribing statements made at the first meeting to this meeting. Accordingly, unless otherwise noted, I do not place much reliance on their testimony.

[12] Ortiz and Perry testified that at this meeting the woman from the insurance company handed out forms, which Herbst stated occurred on May 2, that French was present and offered to represent the employees and that Herbst made statements about Riviera, and closing the plant. The latter remarks, however, I am convinced occurred on April 29 or 30 and were made in the manner described above.

[13] *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961).

It appears that at the meeting under discussion, Herbst made use of a blackboard with one side devoted to a list of the existing benefits, including the aforementioned medical insurance plan, and the other side entitled union benefits was set off by a large question mark. According to Pinto and Herbst, the latter then proceeded to explain the current employee benefits which included annual raises each fall, 2-week paid vacations, eight holidays, profit and pension plans, interest free loans, Christmas bonuses, Thanksgiving turkeys, and an open door policy. This last item seems to have generated some discussion and gives rise to an issue in the case.

According to Pinto, Herbst suggested during this meeting that the employees form a committee which would then negotiate with the Company without paying anybody, presumably union dues. Pinto stated that at this point Leonard French, a salesman, interjected and said, "If you want to give me your money, I'll represent you." Herbst acknowledged that French did make this remark but denied that French was speaking on behalf of the Company. On this point, Herbst stated that he merely mentioned that the Company had an open door policy and that employees could come and talk to him.

According to French, he blurted out that he would represent the employees. He stated that his remarks were spontaneous and not sponsored by the Company. He also stated that he said this as a joke and in this respect, Pinto agreed that after the remark was made French began to laugh. French, however, went on to explain how it came to pass that he made this statement. He testified that at the meeting Eleazor Kelly said that he wanted someone to represent him, whereupon Herbst suggested that each department elect a representative who would then speak to the Company for their respective departments. As French put it; "In other words, if one section felt that they desired a raise, that representative for the section would go in and discuss it."

Because I am of the opinion that French was an honest and disinterested witness,[14] and also on demeanor grounds, I shall credit his testimony. Thus, it is concluded that Herbst, at this meeting, did suggest that the employees elect representatives from each department for the purpose of bargaining directly with him regarding wages and other terms and conditions of employment. In this respect, it is concluded that Respondent violated Section 8(a)(1) of the Act.[15] In all other respects, however, it is my opinion that the General Counsel has failed to prove by a preponderance of the credible evidence that Respondent violated the Act by anything else said at this meeting.[16]

G. *The Layoffs of Joann Luquis, Janet Perry, Conroy Morgan, Hurelyon McLean, Arnold Thompson, and Julio Nieves*

All of the above-named employees were laid off on May 11, 1979. The General Counsel contends that these layoffs were motivated by discriminatory reasons, and thereby violated Section 8(a)(1) and (3) of the Act. Respondent argues that the layoffs were the result of economic reasons, were not discriminatorily motivated, and therefore were not violative of the Act.

In February 1979, a company called K & M Jewelry, Inc., ordered from Respondent a sample of a jewelry display preparatory to a very large order.[17]

According to Jerry Birnbach, a vice president of K & M, the original delivery date envisioned for the production order was to be March 5 for 250 units and March 15 for the remainder. The total order was for about 800 units with a total price of about $60,000. This was a large order compared to the normal order received by the Company which generally was for $5,000 or under. According to Birnbach, because there was a delay in the delivery of the sample unit, the order was not approved by him until early March 1979.

Herbst and Davis testified that as a result of this large order from K & M they decided to hire, on a temporary basis, five additional employees, not necessarily to work on the K & M units, but to fill out the needs of the shop generated by this large order. As a consequence, the Company contacted a number of employment agencies and hired Arnold Thompson on April 2, 1979, Janet Perry and her brother Philip Perry on April 5, 1979, and Conroy Morgan and Hurelyon McLean on April 10, 1979.[18] Thus, each of these employees was hired almost immediately before the Union commenced its organizational campaign.

Sometime after the five above-named employees were hired in April 1979, Joann Luquis notified the Company that she wished to resign for personal reasons. Accordingly, an arrangement was reached with Davis and Herbst that she would leave the Company sometime in the mid-May.[19]

As evidenced by the Company's records, the first 200 or 250 units of the K & M order were delivered by Respondent in or about the third week of April and on or about April 19, K & M directed the Company to hold off delivery of the remaining units. In this respect, Birnbach of K & M testified that because Respondent did not meet the originally planned delivery dates, March 5 and 15, he could not affect timely delivery of these units to his own customers. He stated that he therefore directed Herbst, over the latter's strenuous objections, to hold off production and delivery of the remaining units for 2 or 3 months.

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[14] French was a salesman who left the Company's employ and was not employed by Respondent at the time of the hearing. There was no evidence to suggest that he was in favor of the Union or biased against the Company. As will be discussed, *infra*, the reason French left the Company was because his sales and commissions suffered as a result of Pinto's failure to have samples made on time.

[15] *Aeroglastics Inc.* v. *N.L.R.B.*, 610 F.2d 455 (6th Cir. 1979); *Heat Research Corporation*, 243 NLRB 206 (1979).

[16] In the absence of a brief from the General Counsel and because of the somewhat general allegations of the complaint, it is more difficult to define what he specifically alleges as having occurred at this meeting which was unlawful. However, to the extent that the complaint alleges that Respondent, on this occasion, threatened plant closure and other reprisals, it is recommended that these allegations be dismissed as it is my opinion that they are not supported by credible evidence. As far as the announcement of the insurance plan, as it is concluded that the decision to obtain this benefit was made by the Company prior to the commencement of the union activities and that its implementation was before the filing of the petition, the granting of this benefit, along with its announcement cannot violate the Act. *The Baltimore Catering Company*, 148 NLRB 970 (1964).

[17] In many but not all cases, the Company makes a sample of an item ordered by a customer which must be approved by the customer before production can start. The samplemaker employed by Respondent was Thomas Pinto, who was described by Herbst as being very talented. This sample-making function is clearly the most skilled production operation in the shop and is vitally important to the Company's business.

[18] The other alleged discriminatee, Julio Nieves, was hired on March 29, 1979, and Joann Luquis was hired long before that time.

[19] Luquis did not testify in this proceeding.

According to Davis and Herbst, in light of the action by K & M in delaying delivery of the order, much of which had not yet been fully assembled or packed, it was decided to lay off some employees, basically on a seniority basis. However, as to Luquis, it was decided that she should be among the people to be laid off because she had earlier notified the Company of her intention to quit, and notwithstanding the fact that Davis had shortly before expressed his approval of her desire to extend her employment to the end of May. As explained by Herbst, he decided to let Luquis go at this time rather than a less senior employee because Luquis was going to leave in the near future anyway. With respect to Julio Nieves, it appears that his selection for layoff by Davis was a mistake, inasmuch as he had more seniority than Philip Perry. According to Davis, when he discovered this mistake it was decided to let the decision stand because it was feared that if the Union found out about the mistake, they would make an issue of it. The others who were laid off did, in fact, have the least seniority.

There is no dispute as to the fact that those employees who were told that they were laid off on May 11 were told that the reason for their layoffs was because work was slow.[20] The only seriously disputed factual issue is whether Davis also told them that they would be recalled when work became available. In this respect, Davis denied that he told any of these employees that they would be recalled and stated that, with few exceptions, the Company's policy is not to recall any laid off workers. In support of the General Counsel's position, Conroy Morgan and Nydia Ortiz testified that Davis told the employees when he laid them off that if anything turned up he would call them back. Their testimony on this point, however, was not corroborated by other witnesses called by the General Counsel who asserted that they were present at this transaction. Based on the record herein, I shall credit the testimony of Davis.[21]

While there was some testimony by Pinto challenging the proposition that work was slow, based on his assertion that as of May 11 the Company was contracting out work, the evidence establishes that subcontracting was a normal part of the Company's business practice both before and after the events which are here in dispute. That is, the evidence discloses that the Company has had a practice of subcontracting work when it is economically advantageous, and there is no evidence to indicate that at this time, the Company was deliberately subcontracting work in order to create a shortage of work in its own shop so as to justify the layoffs. Also, Nydia Ortiz testified that about 2 days after the layoffs occurred the Company started hiring new employees. However, Ortiz could not offer the names or even the descriptions of the alleged new employees, and the Company's payroll records disclose that no new employees were hired until after July. As to this latter point, although the Company asserts it did not hire new employees after May 11, it was conceded that just prior to the closing of the shop for the 2-week vacation in July, it utilized the services of a manpower agency which sent over about eight men to help load trucks for 1 day.

Subsequent to the filing of the unfair labor practice charges in Cases 29-CA-7276 and 29-CA-7415, Respondent, no doubt in an effort to limit its potential liability to the people alleged to have been discriminatorily laid off, sent written notifications which unconditionally offered to reemploy McLean, Morgan, Perry, Nieves, and Thompson. In this respect, the parties stipulated that Morgan received an offer on August 25 and returned to work; that Nieves received an offer on August 27, but did not return to work; that Perry received an offer on August 25 and returned to work; that Thompson's offer was sent on August 29, but that he did not return to work; and that McLean received an offer on September 1 and returned to work. Luquis was not offered her job back.

H. *The June 14 Meeting*

It is agreed by the parties that on June 14 Herbst read a speech to the employees and nothing contained in the written speech is alleged to be unlawful by the General Counsel. At most, it is asserted by the Union in its Objection 3 that at this meeting the Employer allowed an employee to make antiunion statements while prohibiting other employees from talking. In this regard, the evidence establishes that Herbst read his speech which was prefaced by the remark that he did not want to get into a discussion with employees at the meeting. It is asserted by Pinto that Francine Davis,[22] "jumped up and started to say something that I can't recall." Similarly, Nydia Ortiz testified that Francine Davis said that the Union was no good and that the Company was giving better benefits. According to both Pinto and Ortiz, employee Kelly at this point tried to say something but that Herbst told him to be quiet whereupon Pinto left the meeting in protest.

Nothing in this transaction strikes me as being objectionable conduct on the part of the Company. At most, the evidence shows that Francine Davis ignored, for a brief moment, Herbst's injunction not to talk, to make a short and essentially innocuous remark. The broad assertion by the Union that antiunion employees were permitted to speak at this meeting is, in my opinion, simply not supported by the evidence.

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[20] Nieves was not actually present on May 11 and was told of his layoff later.

[21] Janet Perry's testimony was that Davis did not say anything about recalling the employees when he notified them that they were being laid off. She asserts, however, that when she spoke with Harris he said something like he would call her back.

Pinto, who testified that he was present at the layoffs on May 11, states that Davis told the employees that work was slow, a contention which Pinto says he challenged. He did not, however, corroborate the assertion that Davis told the employees that they would be recalled.

Nieves, Thompson, and Luquis did not testify in this proceeding.

I also note that Davis was no longer employed by the Company at the time he testified in this proceeding and that I was impressed by his candor.

[22] She is the wife of Plant Manager Gerald Davis.

I. *Miscellaneous 8(a)(1) Allegations*

According to Nydia Ortiz, about 2 weeks after she signed a card for the Union,[23] when she went into the office either Ed Herbst or Mark Harris (both of whom were allegedly present) asked her if she had filled out a card for the Union. She states that when she said that she had not, he asked if she knew anybody else who signed cards and further asked if she knew of anyone who was going to vote for the Union. When she again responded that she did not know, Ortiz stated that she was told to speak to the other employees and tell them how she had gotten a loan for the hospital and that the Company had benefits.[24]

Herbst denied that he interrogated Ortiz or any other employee about union activities. In relation to Ortiz' testimony, evidence of her bias against the Company was elicited by the fact that she was very upset over her discharge in October for fighting with another employee.[25] Respondent also showed that although Ortiz gave two affidavits to the Board's Regional Office in June and July 1979, nothing in either affidavit makes mention of the alleged interrogation. Indeed when pressed as to the apparent inconsistency, Ortiz testified that, on the day of the election, Herbst told her to "make sure you give a good vote," a phrase which conforms to the affidavit wherein she stated that Herbst merely told her to vote no, and that he was counting on her vote. In this respect, Herbst testified that during a period prior to the election, he spoke to almost all of the employees on a direct basis and told them he was counting on their vote. It is therefore evident that Ortiz' assertion that she was interrogated most probably is not correct, but is rather a result of confusion resulting from the circumstances involved and the language barrier that existed. I have no doubt that when Herbst spoke to her and told her that he was counting on her vote, this elicited a response from her and that she interpreted the transaction as meaning that she was being questioned about her feelings for the Union. In fact, I do not believe that she was interrogated and it is concluded that her testimony on this point is the result of a misunderstanding.

It is alleged that Herbst interrogated an employee named Jose Toro, and also promised him life insurance benefits in an attempt to influence his vote. Toro was originally called by the General Counsel without the aid of an interpreter. When it became apparent that his testimony could not be obtained without an interpreter, one was provided. When he resumed his testimony, Toro was initially asked if he ever talked to Herbst about the Union and his response was "no." He was then asked, in a leading manner, if he was ever offered life insurance by the Company, and to this he responded that this was offered by Herbst and Harris about 4 weeks before the election, apparently when he was asked to fill out a card for insurance. Toro went on to testify that this occurred when he walked into the office whereupon, "he told me how can you join the Union if the Union is going to do nothing for you."

It is evident to me that the discussion about insurance merely involved asking Toro to fill out the form required for the medical insurance plan which had previously become effective on May 1. Accordingly, it is concluded that the evidence herein cannot support the contention that Toro was promised a new benefit in order to influence his vote. Also, as in the case of Nydia Ortiz, I have a substantial doubt as to whether Toro was interrogated and it is my opinion that his testimony concerning this allegation was too vague and inconclusive to warrant such a conclusion.

Similarly, the testimony of Patrick Lavista regarding an alleged interrogation by Mark Harris was fraught with an even higher degree of uncertainty than the testimony of Toro and is not, in my opinion, sufficient to prove, by a preponderance of the evidence, the contention proposed by the General Counsel. Since his testimony was relatively short and unchallenged by cross-examination, it is quoted as follows:

> Q. Mr. Lavista, did you ever have any conversation with anyone from management about the Union?
>
> A. With the union people, I talked to them.
>
> Q. With anyone from management of American Display?
>
> A. No. Nobody.
>
> Q. Have any conversation with Mr. Herbst about the Union?
>
> A. What coverage, what they have, you know.
>
> Q. You asked Mr. Herbst?
>
> A. Who is Herbst?
>
> Q. Ed Herbst, the owner of American Display. Do you know who he is?
>
> A. Herbst, no.
>
> Q. How about Mark Harris, do you know who Mark Harris is?
>
> A. Yeah, I know Mark Harris.
>
> Q. Did you ever have any conversation with him about the Union?
>
> A. Never. He came up to me and asked me what I think of . . . did I join the Union, that is no good, you know.
>
> Q. Did it happen before or after you signed your card?[26]
>
> A. After.
>
> Q. Do you recall how much later, after you signed?
>
> A. A week.
>
> Q. Where were you when you had this conversation with Mark Harris?
>
> A. I was cleaning his office.
>
> Q. You were cleaning his office?
>
> A. That's right.
>
> Q. And tell me, how did the conversation start?
>
> A. He asked me, what I think about the Union.
>
> Q. And, what did you respond, what did you say to him?

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[23] She signed a union card on April 26.

[24] It appears that, prior to the union activities, Ortiz had received a loan from the Company to pay for medical expenses.

[25] It is not alleged by the General Counsel that her discharge was unlawful.

[26] He signed a card on April 30, 1979.

> A. I didn't want him to know that I had in mind to join the Union; because he would tell me not to join it.
>
> Q. So, what did you say to him?
>
> A. I said to him—he just told me—he shook my—just don't join you know.

On direct examination, employee Douglas Jamison testified that on the day of the election he had a private conversation with Herbst. He states that Herbst told him that the Union was no good, that he should vote no, that the Company had a million dollar medical plan which the Union could not offer, and that he was just waiting to get the Union out in order to put the plan in effect. Jamison further testified that during this conversation Herbst said that, "[T]he Union could promise us this and promise us that but that's just a lot of crap—junk in other words." When Jamison said that he could not recall any more of this conversation, the General Counsel asked him; "Was there any discussion regarding negotiating a contract with the Union during that meeting?" To this last question Jamison responded that Herbst said that if the Union was elected, "[H]e would have to close the Company down, lay off, close the Company and give the jobs to private contractors because he would have to make a living somehow." When the General Counsel next asked; "Did Herbst ever indicate whether he would or would not sign a contract with the Union," Jamison testified, "he said no way he would sign."

On cross-examination, Jamison testified that paragraph 6 of his pretrial affidavit represents what Herbst told him during the above-noted conversation. This reads: "Herbst says if the Company and the Union cannot agree on a contract and the Union pulls a strike, the Company could contract out the work because they have to do business and they would have to live and no law could tell him otherwise." Also at paragraph 5 of his affidavit, Jamison made the following statements:

> I was in the saw department about 9:30 a.m., June 15, 1979. It was the day the NLRB was to run the election. I was working, performing my normal duties. Ed Herbst stopped me as I was working, and he was campaigning on behalf of the company. He said the Union was no good, they would promise us a lot of junk, and there was no guarantee that they would make a contract with the Company. Herbst did not say it was conditional that the Company and the Union had to agree to the terms; he was saying there would never be any agreement between the Company and the Union. Herbst said the employees were already getting enough benefits because of the Company. He was going to advise the employee to vote no. Herbst said because he didn't want to change the relationship between the Company and the employees but if the Union got in there would be a change in the relationship.

Herbst denied that he ever told any employee that he would close the plant if the Union came in or that he would never agree to a contract with the Union. Based on Jamison's testimony and comparing it with his pretrial affidavit, it is clear to me that I must credit Herbst. It is obvious from his affidavit that at most Jamison was told that despite the Union's promises there was no guarantee that the Company and the Union would make a contract, and that if the Union called a strike the Company would subcontract its work so as to maintain its operations. The statement in Jamison's affidavit to the effect that there would never be a contract between the Company and the Union is clearly not what was said by Herbst, but rather constitutes his interpretation of Herbst's remarks. Similarly, it is evident to me that the statement about the insurance plan, if made, merely represented a description of the plan which had gone into effect on May 1, and therefore was not a promise of a new benefit. In short, nothing related in Jamison's testimony can be concluded to warrant a finding that Respondent violated the Act.

The testimony of Philip Perry, who was discharged in July 1979 for fighting with another employee,[27] is also relied on by the General Counsel to establish certain 8(a)(1) allegations. His testimony, in my opinion, was extremely confused and difficult to piece together. In essence, he testified that sometime between the time he signed a union card[28] and the election, but probably on the day before the election, he had a conversation with Herbst in his office. It appears from his testimony that this came about because after Herbst had previously mentioned that the Company had a policy of giving loans, Perry and another employee, Alphonse Ormsby, decided to, "get some money off of him." Accordingly, Perry testified that he asked Herbst for a $50 loan and a job for his mother while telling Herbst, after being asked, that he would vote against the Union. These requests were not granted by Herbst who testified that these two employees came to him soliciting a bribe.

The testimony of Perry makes it clear to me that he was trying to hustle Herbst by offering to vote against the Union in consideration for being paid. I find him to be entirely unreliable as a witness and his testimony in support of the complaint's allegations is completely rejected.

Roy Mitchell, an employee, testified that he had three personal conversations with Herbst. In his direct testimony, he stated that the first of these conversations occurred about a week after he signed a union card[29] when Herbst drove him home. Mitchell testified that in the car, Herbst asked him, "[W]hat do you think about the Union?" Mitchell stated that Herbst went on to say that the Union was no good, that he, Mitchell, got four raises a year and that if a union came in he would have to get what the Union said. When he was asked if anything else was said, or if voting was discussed during this conversation, Mitchell testified that the above was all that was said. At this point, the General Counsel showed Mitchell his pretrial affidavit to refresh his recollection, whereupon Mitchell testified; "He said to me after the Union I'll lose people. Those lazy guys inside the shop won't want to work." Mitchell went on to explain that Herbst said that "he's going to fire those guys, the lazy guys in the shop." Apparently not satisfied with this answer, the General Counsel had Mitchell again read from his affidavit, after which Mitchell testified; "He said the people, if they vote, those guys, if the people vote for the Union, he's going to get them fired." To end Mitchell's testimony on this first conversation, the General Counsel asked; "Did Herbst ask you who you intended to vote for?" Mitchell's response was, "He asked me once and I told him that I reserved my opinion."

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[27] The General Counsel does not allege Perry's discharge as being unlawful.

[28] Philip Perry signed a union card on April 27.

[29] Mitchell signed a union card on April 29, 1979.

Having concluded his testimony as to the first conversation with Herbst, Mitchell testified that he had a second conversation with Herbst. In this conversation, Mitchell asserts that, "he said to me, who am I going to vote for and that the Union is no good, and that he knows who I'm going to vote for." Mitchell stated that he told Herbst that he reserved his opinion and did not know who he was going to vote for, although he did tell Herbst that he did not like what was going on in the shop with "everybody against one another." Mitchell testified that Herbst asked if he was talking about Pinto and stated that he was "going to get rid of Tom Pinto, cause probably Tom is the ringleader for the Union." Mitchell placed this second conversation about 3 or 4 weeks after he signed a union card.

The third conversation Mitchell said he had with Herbst is essentially irrelevant to this proceeding and need not be discussed. He did, however, state that he had a conversation with Gerald Davis who said that if the Union came in he, Mitchell, would only get one raise a year.

Initially pointed out on cross-examination was that Mitchell was confusing the first conversation with the second, asserting that the first occurred in Herbst's office whereas the second was in the car. Also on cross-examination, Mitchell had this to say about the subject of raises:

> Q. Did he say, if the Union comes in, and we agree to a contract with one raise a year, that's all the raises that he would give to people, including you?
>
> A. He said if the Union came in, he just can give me one raise because he has to go for what the Union says.
>
> Q. He has to go for what the Union and he agrees to. Is that what he said?
>
> A. Right.

It also is noted that Mitchell conceded that his pretrial affidavit made no mention of any conversation with Davis.

In relation to the above, Herbst testified that on one occasion he drove Mitchell home and that during the drive Mitchell said that he was pleased with the raises he received and was not interested in the Union. Herbst stated that he told Mitchell that he was counting on him and to convey his thoughts to the other people in the factory. He denied, however, that he asked Mitchell how he was going to vote. Herbst further stated that during this ride he told Mitchell that he was aware that Pinto was prounion, but denied that he said that he was going to fire Pinto for his union activity.

Mitchell's testimony covered three relatively simple transactions, but his testimony, in large measure, could not be obtained without using his pretrial affidavit to refresh his recollection or through the use of leading questions. Moreover, in certain respects, his affidavit contradicted his testimony, and his testimony on cross-examination was inconsistent with what he said on direct examination. Therefore given the choice between Mitchell's testimony and Herbst's testimony, I am going to credit the latter.

Employeé Conroy Morgan testified that shortly after a meeting held by the Company to discuss the Union, which he places on April 26, and after he signed a union card,[30] he and Hurelyon McLean went to work together and when they reached the gate, spoke to Franklyn Western while Gerald Davis was standing at the front door. He stated that as he and McLean went into the factory past Davis the latter said, "hope you guys didn't change your mind after the meeting last night." Morgan also testified that later that day, at the break, as he and McLean went outside, Davis said, "[W]hat do you guys think about the Union?"

With respect to the above, Davis testified that a few days before Morgan was laid off he overheard Morgan tell McLean that there was no need for a union and that McLean agreed. Davis was not, however, asked by Respondent's counsel to deny and did not deny that he interrogated Morgan and McLean, notwithstanding the fact that he was asked to and did deny other specific allegations. On balance, I shall credit Morgan's testimony regarding the incidents described by him and conclude that when Davis interrogated him and McLean as to what they thought of the Union, Respondent violated Section 8(a)(1) of the Act.[31]

J. *The Voting Line Incident*

In its Objection 6, the Union alleges, in substance, that during the election Supervisor Davis spoke to various people who were on the voting line waiting to vote. In this regard the testimony of Nydia Ortiz and Thomas Pinto was offered to substantiate this allegation.

Pinto testified that Davis came over to the voting line, called employee Al Reynolds upstairs, and spoke to him but that he did not hear what was said. He also stated that he then asked Davis what he was doing at the voting line and that he told Davis that one of the people on line to vote was not eligible because he had quit. As to this transaction, Nydia Ortiz testified that when Davis came out of the office, he went up the stairs and waved to some people to go up to him. She stated that she heard Al Reynolds say he did not want to vote either for the Union or the Company; whereupon, Davis said, "Al get out there and vote, your vote will help us."

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[30] Morgan signed a union card on April 26, 1979.

[31] If, however, the General Counsel is relying on Morgan's testimony to support the allegation of surveillance, this contention is rejected. I do not conclude from the fact that Davis was standing at the entrance of the factory in the morning as employees came to work that this is sufficient to prove that Respondent engaged in surveillance of the employee's meetings and activities with the Union.

Davis testified that at the time of the election he spent most of his time in the main production area away from the election area, but that on one or two occasions he did pass by the voting line on his way to and from the office. He testified that he did not, at any time during the election, converse with any employees at the voting line.

Assuming, *arguendo*, that I accept Ortiz' version of this transaction, I am not inclined to view Davis' statement to Reynolds as the type of last minute electioneering prohibited under the Board cases. At most, the evidence herein establishes that as Davis walked past the voting area, Reynolds made a statement to the effect that he did not want to vote, whereupon Davis called him up the stairs and told him that he should vote because "your vote will help us." It is my opinion that this inconsequential response to Reynold's statement cannot be construed as affecting the laboratory conditions of the election. *Cumberland Nursing & Convalescent Center*, 248 NLRB 322 (1980); *Princeton Refinery, Inc.*, 244 NLRB 1 (1979).

K. *The Discharge of Thomas Pinto*

Pinto was discharged on December 18, 1979. The General Counsel contends that Pinto was a leading advocate for the Union, whose activities motivated Respondent to discharge him. As to this point, the evidence herein does indicate that after the initial organizational period, Pinto was vocal in support of the Union and that his sympathies were known to Respondent. However, the timing of his discharge, about 6 months after the election, is not, in my opinion, particularly favorable to the General Counsel's theory that he was unlawfully terminated.

The parties agree that at the discharge interview Pinto was told that he was being discharged for excessive absenteeism, and it is Respondent's contention that this was, in fact, the reason which motivated its action. More particularly, Respondent asserts that although it may have tolerated a relatively high degree of absenteeism by other employees and even by Pinto in the past, it became apparent that during the months of November and December 1979 Pinto's absences not only were excessive, but were seriously impeding production and the operations of the Company because of his position as the samplemaker. Moreover, Herbst testified that Pinto's pattern of absences during this period of time, when it was known that customers were demanding their samples, was of such a nature as to convince him that Pinto was intentionally sabotaging the Company's operations.

There is, in fact, no dispute that Pinto had an exceedingly poor record of attendance[32] and the evidence establishes that he received warnings about this subject matter prior to his discharge. There is also no dispute that Herbst had tolerated Pinto's absences in the past because, as he put it, Pinto was a very talented sample maker. The question then is why was Pinto's absentee record in this period, November and December, different from all other periods of time?

As noted above, Pinto's job was crucial to Respondent's operations because without his creation of samples the customers could not approve the orders and production could not commence. Therefore, to say that other employees, such as Francine Davis, with equal rates of absenteeism were not discharged and thereby argue disparate treatment, is to miss the point.[33] Except for Respondent's management and supervisory staff, the evidence herein establishes that no other employee was as critical to Respondent's operations as was Pinto and that no other employees' absence would be as sorely missed.

The evidence establishes that during the period from about October through December, a substantial amount of sample making was required and that Gerald Davis was also assigned to do some of this work along with Pinto. Pinto conceded that Herbst and Harris were complaining to him about samples not being finished on time and he further stated that when he was asked to work overtime to complete his work he refused to do so. The testimony of Pinto and French establishes that Pinto was assigned to make the samples for orders obtained by French and that because they were not completed on time French quit the Company's employ because this adversely impacted on his sales and commissions. Thus, according to the General Counsel's own witnesses, Pinto's inability to complete samples, no doubt caused at least in part hy his absences from work and his refusal to work overtime, resulted in the loss of French as an employee of the Company.

As noted previously, Riviera was the largest single customer of Respondent, generating between 40 to 60 percent of the Company's business. Cathy Kostialik, an employee of Riviera was subpenaed as a witness by Respondent. Kostialik testified that an order given to Respondent in October was delayed because of Respondent's inability to furnish the sample on time. As to this sample, she explained that her boss, Baum, got very upset over the delay. She also stated that in the beginning of November another order was placed which required a sample and that the delay on Respondent's part in delivering the sample generated a series of telephone conversations between herself and Herbst. In this respect, Kostialik testified that she kept asking Herbst why the sample was not delivered and that he kept telling her that the delay was caused by the samplemaker. She stated that she expected delivery of this particular sample by the beginning of December but that it was not delivered until December 17. As to yet another order, Kostialik testified that when the sample was not promptly delivered she had a series of phone calls with Herbst who

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[32] The evidence discloses that Pinto's attendance during November and December 1979 was as follows:

Week Ending	Hours Worked Per Week
11/07	39
11/14	32
11/21	31-1/4
11/28	36-1/2
12/05	32
12/12	16-3/4
12/19	28-3/4

[33] In fact, Pinto conceded that some employees who had excessive absences were discharged by Respondent.

again explained that the delay resulted from the samplemaker's inability to complete the project. According to Kostialik, there came a point in November or December when she threatened Herbst with the withdrawal of Riviera's business.

Regarding the decision to discharge Pinto, Herbst testified that although he considered him to be a very talented samplemaker, and although he was aware that Pinto had to go to a medical clinic once a month,[34] the situation with Riviera had gotten so critical that it "was an intolerable situation," and that he could not continue to employ Pinto if he was not available to do his job.

ANALYSIS

A. *The Alleged Unfair Labor Practices*

In the foregoing sections I have already made a number of conclusions which are as follows:

1. That at the second meeting in May, Respondent, by Edward Herbst, violated Section 8(a)(1) of the Act by suggesting the formation of an employee committee which would bargain directly with the Company over wages and other terms and conditions of employment.
2. That Respondent, by Gerald Davis, interrogated its employees concerning their feelings about the Union.
3. That by obtaining a health insurance plan for its employees and announcing its implementation, Respondent did not violate the Act.
4. That apart from the interrogation described above in paragraph 2, Respondent's agents did not interrogate other employees.
5. That Respondent's agents did not promise new benefits to employees Jose Toro and Douglas Jamison.
6. That Respondent's agents did not tell Douglas Jamison that the plant would close down if the Union was elected to represent its employees or that the Company would not bargain with the Union if elected.
7. That Respondent's agents did not offer loans or other benefits to Phillip Perry in order to influence his vote.
8. That Respondent's agents did not, in discussions with employee Roy Mitchell, threaten Mitchell with loss of benefits, threaten to discharge its employees who supported the Union, or interrogate Mitchell about his feelings for the Union.
9. That Respondent's agents did not, in conversations with Thomas Pinto in April, threaten to discharge its employees because of their union activities or threaten Pinto with the loss of benefits.
10. That Respondent's agents did not engage in surveillance or create the impression that they were engaged in the surveillance of its employees' union activities.

With respect to the first meeting held in the shop on or about April 29 or 30, I have credited Herbst's account. Having done so, it nevertheless seems to me that the statements he concededly made raise a substantial issue. Thus, by his own account he told the employees, in essence, that if the Union came in and caused a strike the Company might not be able to make timely deliveries, might therefore lose the Riviera account and thereby result in the possible loss of jobs; that if the Union won the election, it could only force him to bargain with the Union but could not require him to accede the Union's "ridiculous" demands; that there was no way the Company would be able to stay in existence by giving the Union the kinds of raises the Union had promised; and that the former company which dealt with Riviera had closed down as a result of a strike and that all of its employees had been dismissed.

Given the nature of the above remarks, it is not surprising to me that certain employees interpreted them as statements that the Company would close if the Union was elected, despite my belief that such statements, *in haec verba*, were not made and the remarks were couched in the language of economic predictions. In discussing the legal consequences of statements similar to this, the Supreme Court recognized that the line between permissable and coercive statements is not always sharply defined. In *N.L.R.B.* v. *Gissel Packing Co., Inc., et al.*, 395 U.S. 575 (1969), the Court stated:

> Petitioner argues that the line between so-called permitted predictions and proscribed threats is too vague to stand up under traditional first amendment analysis and that the Board's discretion to curtail free speech rights is correspondingly too uncontrolled. It is true that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship, see *N.L.R.B.* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 479 (1941). But an employer, who has control ever that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "brinkmanship" when it becomes all too easy to "overstep and tumble into [over] the brink," *Wausau Steel Corp.* v. *N.L.R.B.*, 337 F.2d 369, 372 (7th Cir. 1967). At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

It is my opinion that the remarks admittedly made by Herbst at this meeting overstepped the line of permissable free speech and crossed into the prohibited area of coercive threats. Notwithstanding his description of the Union's demands as being "ridiculous" and his assertion that the Company could not stay in business if it agreed to the kinds of raises the Union had promised to the employees, there can be no evidence justifying the assertion that the Union's demands were "ridiculous" inasmuch as no demands had been made. In *N.L.R.B.* v. *Gissel Packing Co., supra*, the Court concluded:

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[34] Herbst also testified that Pinto may have been given permission to go to the dentist on 2 or 3 days during the week preceding his discharge, but that he understood that Pinto would come into work after his dental appointments and not stay home as he did. He testified that at the discharge interview when Pinto offered his dental problems as an excuse for his absences, he told Pinto that if he was so sick the Company could not have him on the job.

> Equally valid was the finding by the court and the Board that petitioner's statements and communications were not cast as a prediction of "demonstrable 'economic consequences,'" 397 F.2d, at 160, but rather as a threat of retaliatory action. The Board found that petitioner's speeches, pamphlets, leaflets, and letters conveyed the following message: that the company was in a precarious financial condition; that the "strike-happy" union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shutdown, as the past history of labor relations in the area indicated; and that the employees in such case would have great difficulty finding employment elsewhere. In carrying out its duty to focus on the question: "[W]hat did the speaker intend and the listener understand?" A. Cox, Law and the National Labor Policy 44 (1960), the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities. In this connection, we need go no further than to point out (1) that petitioner had no support for its basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and that it admitted at the hearing that it had no basis for attributing other plant closings in the area to unionism; and (2) that the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts.[35]

Concerning the layoffs on May 11, it is concluded that the General Counsel has not proven by a preponderance of the evidence that these layoffs were motivated by illegal considerations.

Notwithstanding the fact that these layoffs occurred shortly after the petition for the election was filed and at a time when Respondent was aware of the Union's organizational campaign and was taking steps to counter that campaign, it also was established that at the same time the Company had been directed by a customer to defer production and delivery of its largest inhouse order.

It is my opinion that the deferral of this order, which deferral came about contrary to Respondent's wishes, necessitated the layoff of some employees. Given this circumstance, which was beyond the control of the Company, it therefore was not unreasonable for Respondent to lay off a number of employees, as extra employees had originally been hired to deal with the additional work this order created. It also was reasonable for the selection of those employees to be laid off to be done basically on a seniority basis so that the last hired would be the first laid off. This then would explain the reason why Janet Perry, Conroy Morgan, Hurelyon McLean, and Arnold Thompson were selected for layoffs, as they clearly were the least senior employees.

With respect to Joann Luquis, her selection for layoff while not based on seniority factors was also reasonable in my opinion. As noted above, she had previously given notice of her intention of quitting. As such, it clearly made sense for the Company to include her among those to be laid off so that an employee who otherwise would have been let go could be kept employed. The fact that the Company had earlier agreed to her desire to delay her quitting to the end of May is not viewed as particularly relevant, and given the circumstances it was reasonable for Respondent to change its mind and to include her among the individuals to be laid off.

It also is concluded that the selection of Julio Nieves for the May 11 layoff was the result of a mistake and not the result of discriminatory intent. As established by the evidence, he was originally selected for layoff on the assumption that he was one of the people with least seniority. When Davis realized that Nieves had slightly greater seniority than another employee, Philip Perry, he decided to let his mistaken decision stand rather than recall Nieves and lay off Perry. While unfortunate for Nieves and fortunate for Perry, I do not see evidence of discriminatory intent in this transaction.

It is finally concluded, insofar as the layoffs of May 11, that these were intended as permanent rather than temporary layoffs. In this regard, I credit the testimony of Davis to the effect that he did not tell these employees that they would be recalled and that it was normal company policy not to recall laid-off employees. The fact that these individuals were offered reinstatement in August does not change my opinion, because it is clear that these offers were made after unfair labor practice charges had been filed and no doubt were intended to limit Respondent's potential liability.

In Pinto's case, it is concluded that he was discharged for cause and not because of his union or concerted activities. In this respect, it was amply demonstrated that Pinto, during the months of November and December, had a record of excessive absenteeism which created substantial problems for the Company, including the quitting of salesman Leonard French who was not earning enough because Pinto was not making his samples. It also was established that although Pinto's absenteeism had been tolerated in the past because of his talent as a samplemaker, his absences during this period of time resulted in the failure to make timely delivery of samples to Riviera, Respondent's largest customer. This, in turn, generated a series of telephone calls between Respondent and Riviera wherein the latter threatened to withdraw its business unless it could get delivery of the samples on time.

In light of the above and given the fact that during the last week prior to his discharge Pinto was absent for 3 days, Respondent decided that it no longer could tolerate Pinto's absences and discharged him. In my opinion, Pinto's absences were the sole reason for his discharge and I reject the contention that this was a pretext to hide a discriminatory motivation for his termination.

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[35] See also *Buckeye Tempo Gamble-Skogmo, Inc.*, 240 NLRB 723, 725 (1979); *Turner Shoe Company, Inc. and Carmen Athletic Industries, Inc.*, 249 NLRB 144 (1980).

B. *The Challenged Ballots*

Having concluded that the layoffs on May 11 were not discriminatorily motivated, and having also concluded that they were permanent in nature. it is recommended that the challenges to the ballots of Joann Luquis, Janet Perry, Conroy Morgan, and Arnold Thompson be sustained.

Insofar as the challenge to the ballot of Francine Davis is concerned, it is recommended that this challenge be overruled. The evidence herein discloses that she was one of the factory workers and no evidence was presented which would warrant the conclusion that she was a supervisor or that she was otherwise an ineligible voter.

C. *The Objections*

It is my conclusion, noted above, that after the petition was filed and before the election, Respondent, by Herbst, at a meeting of all the employees, urged them to form a committee for the purpose of negotiating directly with Respondent regarding wages and other terms and conditions of employment. In view of my conclusion that such conduct violated Section 8(a)(1) of the Act, I recommend that Objection 1 be sustained. As it is my opinion that these statements made during the pendency of the election are sufficient to upset the laboratory conditions, it is recommended that the election be set aside. *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786 (1962).

IV. THE REMEDY

The General Counsel contends that a bargaining order should be granted herein even if a majority of the bargaining unit employees have not voted for the Union.

The Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc., supra*, distinguished between three categories of cases insofar as the propriety of granting bargaining orders. The first category involves the "exceptional" cases where "outrageous" and "pervasive" unfair labor practices are committed. The second category concerns "less pervasive practices" that have a tendency to undermine majority strength and impede the election process. In this category of cases, the Court concluded that a bargaining order would be appropriate to remedy an employer's unlawful conduct making a fair election unlikely where at some point, the Union had majority support among the employees. The third category of cases concerns those in which minor or less intensive unfair labor practices have been committed, having a "minimal impact" on an election. In this last category, the Court held that a bargaining order is inappropriate to remedy the violations committed even if the Union enjoyed majority support.

Also in cases where an election has been held, a necessary precondition to the granting of a bargaining order is that the election be set aside because of conduct interfering with the conduct of the election. *Irving Air Chute Company, Inc., Marathon Division*, 149 NLRB 627 (1964); *The Great Atlantic & Pacific Tea Company, Inc.*, 230 NLRB 766 (1977). In the instant case this precondition has been met because I have sustained Objection 1.

In the present case, the evidence establishes that by May 7 when the Union filed its petition for an election it had obtained valid authorization cards from 33 of the 47 bargaining unit employees.[36] Moreover, even if I were to conclude that Janet and Philip Perry, McLean, Thompson, and Morgan were not bargaining unit employees because they were, as contended by Respondent, temporary hires, it still would be evident that by May 1 or 7 a majority of the bargaining unit employees had designated the Union as their collective-bargaining representative.[37] Therefore, if it is concluded that the unfair labor practices committed by Respondent put this case into the second category set out by the Supreme Court, the precondition that the Union must have had majority support at some relevant time, has been met.

The final question is whether in the circumstances of this case, the Employer's unfair labor practices are, in the aggregate, sufficient to warrant the granting of a bargaining order. Based on the case precedent, it seems to me that this question must be answered in the affirmative. In *N.L.R.B.* v. *Gissel Packing Co., supra*, it is noted that four cases were consolidated for argument, one of which, *The Sinclair Co.* v. *N.L.R.B.*, 397 F.2d 157 (1st Cir. 1968), involved facts remarkably similar to the facts of the instant case. Thus, in *Sinclair*, the court concluded that a bargaining order was required where the Company, during the pendency of an election, made statements in speeches and pamphlets implying that the selection of the union would result in plant closure.

In the case at bar, I have concluded that at a meeting with virtually all of its employees present, Respondent on or about April 29 or 30 made statements implying that the selection of the Union would lead to strikes and the closing of the plant. I have also concluded that after the petition was filed, Respondent told all the employees that if they formed a committee, the Company would bargain directly with them over wages and other terms and conditions of employment. In effect, the statements made by Herbst on both occasions are tantamount to holding out a carrot while at the same time wielding a stick. It seems to me that such statements to employees are of the type which would impose a substantial impediment to the holding of a fair and free election and that their lingering effects would impact adversely on the holding of a fair rerun election. *N.L.R.B.* v. *International Metal Specialties Inc.*, 433 F.2d 870 (2d Cir. 1970). Accordingly, it is my opinion that a bargaining order is required to remedy the unfair labor practices found herein.[38] Further, as I have concluded that Respondent commenced its illegal campaign on April 29 or 30, 1979, and as the Union obtained majority status no later than May 1, I shall recommend that a bargaining order be retroactive to the latter date.[39]

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[36] By the same token, it is established that as of May 1, when the Union unsuccessfully attempted to demand recognition, the Union had obtained authorization cards from 31 of the 47 unit employees.

[37] Even if I did not count these employees as part of the bargaining unit, the Union, by May 1, would have obtained majority support because it would have obtained cards from 26 of 42 employees.

[38] Although it is concluded that a bargaining order is required, I cannot conclude that Respondent violated Sec. 8(a)(5) of the Act because this record fails to establish that the Union, at any time, made an effective demand for recognition which was received by the Company. In this respect, the filing of a petition for election does not constitute a proper demand for bargaining. *The Great Atlantic & Pacific Tea Company Inc.*, 230 NLRB 766, fn. 1 (1977).

Finally, in view of the fact that the results of the election are at this time still undetermined, I shall recommend that the ballots of Thomas Pinto and Francine Davis be opened and counted and that if the Union should win the election after a revised tally of ballots is issued, then a certification of representative should issue. If, however, the Union should lose the election based on the revised tally of ballots, the election should be set aside and the bargaining order alone should take effect.[40]

Based on the above findings of fact and upon the entire record in this case,[41] I make the following:

CONCLUSIONS OF LAW

1. American Display Manufacturing Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Amalgamated Service and Allied Industries Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by interrogating its employees regarding their sympathies for the Union, violated Section 8(a)(1) of the Act.

4. Respondent, by threatening employees with plant closure if the Union were to be selected as their bargaining representative, violated Section 8(a)(1) of the Act.

5. Respondent, by urging its employees to form a committee for the purpose of bargaining directly with it over wages and other terms and conditions of employment, violated Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. To remedy the unfair labor practices found herein, Respondent shall be ordered to bargain, upon request, with the Union in the appropriate collective-bargaining unit as set forth in the Order.

8. In Case 29-RC-4578, the challenged ballots of Thomas Pinto and Francine Davis shall be opened and counted, whereas the challenges to the ballots of Janet Perry, Hurelyon McLean, Arnold Thompson, Joann Luquis, and Juan Alicea shall be sustained. Therefore a revised tally of ballots shall issue and if the Union obtains a majority of the valid votes counted, a certification of representative shall issue.

9. In Case 29-RC-4578, the facts reveal that Respondent engaged in objectionable conduct as averred in Objection 1 and accordingly, the election should be set aside in the event the Union does not win the election after a revised tally of ballots is issued.

10. Except to the extent heretofore found, the other allegations of the complaint are dismissed and the other objections are overruled.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[42]

The Respondent, American Display Manufacturing Co., Inc., Queens, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union sympathies.

(b) Threatening to close its factory if the employees select the Union as their collective-bargaining agent.

(c) Suggesting to employees that they form a committee to bargain directly with Respondent regarding wages and other terms and conditions of employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize, effective from the date beginning May 1, 1979, and, upon request, bargain collectively with the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All production and maintenance employees, including shipping and receiving employees, but excluding all salesmen, professional employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Post at its place of business in Queens, New York, copies of the attached notice marked "Appendix."[43] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.[44]

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[39] *The Great Atlantic & Pacific Tea Company, Inc., supra.*

[40] *Id.*

[41] Certain errors in the transcript are hereby noted and corrected.

[42] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[43] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[44] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: Notify the Regional Director for

Continued

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not specifically found herein.

IT IS FURTHER ORDERED that the petition in Case 29-RC-4578 be remanded to the Regional Director, that the challenges to the ballots of Janet Perry, Hurelyon McLean, Arnold Thompson, Joann Luquis, and Juan Alicea be sustained, and that the ballots of Thomas Pinto and Francine Davis be opened and counted whereupon a revised tally of ballots shall be issued. In the event, however, that a majority of the valid votes counted is not cast for the Union, the election is set aside, the bargaining order heretofore granted shall be in effect and the petition in Case 29-RC-4578 shall be dismissed.

Region 29, in writing, within 10 days from the date of this order, what steps Respondent has taken to comply herewith.

La Mousse, Inc. *and* **Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO.** Cases 31-CA-9367, 31-CA-9680, and 31-RC-4550

October 20. 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 23, 1981, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and a supporting brief, and the General Counsel also filed a brief in response to Respondent exceptions, and Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, La Mousse, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 2(e):

"(e) Post at its Los Angeles plant copies of the attached notice marked 'Appendix.'[28] Copies of said notice, which shall be in Spanish and English, on forms provided by the Regional Director for Region 31, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material."

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge: This case was heard in Los Angeles, California, on various dates between May 6 and July 2, 1980. The charge in Case 31-CA-9367 was filed on September 6, 1979,[1] and a complaint thereon issued on November 29. On January 15, 1980, the Regional Director for Region 31 issued a "Report on Challenges and Objections, Order consolidating cases, Order Directing Hearing and Notice of Hearing," wherein Cases 31-CA-9367 and 31-RC-4550 were consolidated for hearing. On January 7, 1980, the charge in Case 31-CA-9680 was filed, and on February 29, 1980, an order consolidating all three cases for hearing was issued. The objections to the election allege conduct substantially similar to certain conduct alleged as unfair labor practices in the consolidated complaint. A resolution of the 8(a)(3) allegations will also dispose of the challenged ballots. Respondent denies it engaged in conduct alleged to be unlawful and objectionable.

All parties were given full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Extensive briefs were filed by Respondent and the General Counsel, and have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

La Mousse, Inc., herein called Respondent, is a California corporation engaged in the manufacture and sale of pastries. Its gross revenue exceeds $500,000 per year, and it annually purchases and receives goods and services valued in excess of $50,000 from sellers or suppliers located within the State of California, which sellers or suppliers received such goods in substantially the same form directly from outside the State of California. In accordance with Section 102.20 of the Board's Rules and Regulations, and Respondent's admission, it is found that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In affirming the Administrative Law Judge's conclusion that Respondent did not violate the Act by discharging Supervisor Berta Ujueta, we rely solely on the reason that her termination was only for lawful cause rather than for unlawful discriminatory cause. In addition, we note that the Administrative Law Judge's Conclusion of Law 7 failed to state that Respondent violated Sec. 8(a)(5) of the Act, as well as Sec. 8(a)(1), by its January 1, 1980, unilateral grant of group health insurance benefits.

[3] Member Fanning would make the bargaining order prospective in nature. See his concurring opinions in *Beasley Energy, Inc., d/b/a Peaker Run Coal Company*, 228 NLRB 93 (1977), and *Hambre Hombre Enterprises, Inc., d/b/a Panchito's*, 228 NLRB 136 (1977). The General Counsel has excepted to the Administrative Law Judge's inadvertent failure to include in his recommended Order a requirement that the notices be posted in Spanish as well as in English. We agree with the General Counsel and we shall modify the recommended Order accordingly.

259 NLRB No. 7

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[1] All dates herein are in 1979 unless stated otherwise.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The consolidated complaint alleges in substance:

(1) That following the designation of the Union as Respondent's employees' collective-bargaining representative, Respondent constructively discharged 12 of its undocumented alien employees by making arrangements with the United States Immigration and Naturalization Service, herein called INS, to conduct a raid of Respondent's facility approximately 2 days prior to a Board-conducted representation election and which resulted in the deportation of said employees, because of their union or protected concerted activities, thereby violating Section 8(a)(3) of the Act.

(2) That Respondent has failed to reinstate three of said employees to their former positions of employment in violation of Section 8(a)(3).

(3) That Respondent unlawfully discharged Berta Ujueta in violation of Section 8(a)(3).

(4) That Respondent granted its employees morning and afternoon breaks in order to discourage support for the Union in violation of Section 8(a)(3).

(5) That Respondent subsequently recalled Refugio Betancourt to a position different from his former job and thereafter discharged him, all because of his union or protected concerted activities.

(6) That Nadine Korman, Respondent's president, violated Section 8(a)(1) by telling employees she would never accept the Union and that if they engaged in a strike they would lose their jobs.

(7) That Respondent's agent Fierro unlawfully interrogated an employee about her union interests.

(8) That Respondent's agents, Ramirez and Fierro, interrogated employees about their union activities, solicited their grievances, promised to grant benefits to employees, and threatened unspecified reprisals against an employee, all for the purpose of discouraging their union activities.

(9) That Respondent, through Korman and Ramirez, unlawfully promised Berta Ujueta benefits to discourage her support for the Union, asked her to report on the union sympathies and desires of other employees, and advised her of the futility of selecting the Union by stating Respondent would never have a union.

(10) That in November and December, Respondent violated Section 8(a)(1) by unilaterally changing the length of morning and afternoon breaks, arranging for medical insurance, instituting three rules governing working conditions, and requiring that employees keep a record of certain work produced and began timing its employees engaged in such work.

(11) That in January 1980, Respondent discharged three employees for failing to comply with one of the rules governing working conditions that had been unilaterally instituted.

The General Counsel seeks the usual reinstatement and restitution of backpay remedy, together with a bargaining order. As noted earlier, the objections to the election alleged conduct substantially similar to some of the unfair labor practice allegations. A resolution of the 8(a)(3) allegations will also dispose of the challenged ballot issue.

Contending that Berta Ujueta was a supervisor within the meaning of the Act, played the leading role in organizing the employees, and solicited their signatures on the Union's authorization cards, Respondent denies that the Union at any time represented an uncoerced majority of its employees. While acknowledging that law firm which previously represented it was responsible for the INS raid, Respondent points out that Korman attempted unsuccessfully to countermand arrangements for the raid and notified Respondent's employees not to report for work on the morning of the expected raid, but that the Union encouraged them to report for work. Therefore, Respondent argues, the Union substantially contributed to the discharges of employees resulting from the raid and therefore a bargaining order would allow the Union to benefit from its own misconduct and would not effectuate the policies of the Act. Respondent denies specifically and generally all other allegations in the complaint, and moves to dismiss the complaint on the ground the Union fraudulently induced it into agreeing to an election.[2]

Thus, the principal issues to be resolved are:

1. Whether Berta Ujueta was a supervisor within the meaning of the Act and whether her termination was unlawful.

2. Whether the role Berta Ujueta played in the Union's organizing drive tainted the authorization cards so that the Union never obtained an uncoerced majority.

3. Whether Respondent's conduct warrants setting aside the election and a bargaining order.

4. Whether Betancourt was properly reinstated and whether his subsequent discharge was unlawful.

5. Whether the discharge of Arauz, Badillo, and Aguirre was unlawful.

6. Whether the complaint should be dismissed on the ground that the Union fraudulently induced Respondent into entering into an agreement for an election.

Credibility, as in all cases of this type, is, of course, a material issue. The transcript reveals considerable testimonial conflict. In particular, there was considerable conflict with respect to whether Berta Ujueta, herein called Berta, was really vested with supervisory authority; whether Berta threatened Nadine Korman, which was the motivating factor in her termination; whether both the Spanish and English versions of the notice of election were posted; whether unlawful statements were made by Korman during a speech which was read to employees; and whether Refugio Betancourt was recalled in January to a position substantially equivalent to the job he occupied prior to August 29. In making my credibility findings, I have given consideration to the demeanor of the witnesses while they were on the stand, their ability to recall past events, the various positions occupied by the witnesses and their possible interest in the outcome of the litigation, the inherent probabilities in the accounts which they gave, and the weight of the evidence. The testimony of Berta and others of the General Counsel's witnesses consistently sought to portray Berta as lacking any authority in the kitchen. As will be seen hereafter, Respondent's witnesses, including former employees who have no interest in the proceedings, contradicted their testimony. The General Counsel's picture of Respondent's managerial organization is at variance with sound practice, and in my view the testimony of her witnesses in this regard lacked the ring of truth. If they were to be believed, I would have to find that the 16-plus kitchen employees worked without supervision virtually all of the time. For reasons which will appear hereafter, I am convinced that the General Counsel's witnesses had in some way been apprised of the impact that finding that Berta was a supervisor might have on the proceedings, and tailored their testimony accordingly. I am equally convinced they tailored their testimony regarding the posting of the election notices, which will be more fully explained below. Thus, while I do credit the General Counsel's witnesses in many respects, I do not credit their testimony in those particular areas. To the extent I credit a witness only in part, I do so upon the evidentiary rule that it is not uncommon "to believe some and not all of the witness' testimony." *N.L.R.B.* v. *Universal Camera Corporation*, 179 F.2d 749, 754 (2d Cir. 1950).

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[2] At the conclusion of the General Counsel's case, Respondent moved to dismiss certain complaint allegations. I granted the motion with respect to pars. 18(d) and 20(d). Par. 18(d) alleges that Respondent violated Section 8(a)(1) by promising employees higher wages in order to discourage their support for the Union. The General Counsel acknowledged she had not presented any evidence in support of this allegation. Accordingly, I reaffirm the dismissal of par. 18(d). I have reconsidered the evidence and arguments with respect to par. 20(d) which alleges that Respondent violated Sec. 8(a)(1) by unilaterally requiring its employees to keep records of the number of "leaves" they made, and by timing the employees while they made said "leaves." The evidence shows conclusively that Respondent was engaged in conducting a cost analysis and timestudy for the purpose of developing a price quotation on a special mousse for Continental Airlines. In view of the valid business justification for the study, its limited duration, and the fact that Rosen specifically stated on the record that the Union did not have a "problem" with a timestudy, I reaffirm my prior ruling dismissing par. 20(d).

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Nadine Korman commenced making desserts commercially in the kitchen of her home in 1972. Berta was her first employee. Prior to moving in 1974 to a building on Third Street in Los Angeles, another kitchen employee was hired. The business appears to have prospered on Third Street, more employees were hired, and on March 17, 1979, the operation moved to La Grange Street, where, in addition to Berta, approximately 16 kitchen employees, 2 drivers, and a bookkeeper worked. From sometime in 1975 until December 1977, Korman's mother, Sylvia Lee, also worked at the Third Street location taking orders and selling products at the retail counter which was located in the front of the building. The kitchen, where of course the kitchen employees worked, was located in the rear portion of the building. In or about December 1977, Respondent opened a retail store on Westwood Boulevard in Los Angeles, some distance from the La Grange operation. Lee has worked at that location since its opening. Except for eating lunch sometimes in the kitchen area with the kitchen employees prior to the opening of the Westwood Boulevard retail store, Lee, who speaks fluent Spanish, spent no time in the kitchen production area. Mary Lou Minnillo, no longer employed by Respondent, was the bookkeeper and "sort of office manager" at both the Third Street and La Grange facilities. She occupied a desk in the front office at both locations, where, in addition to doing the bookkeeping, she answered the phone, solicited phone orders from restaurants, typed the orders, and arranged for their delivery. Other than passing through the kitchen to the restroom facilities, Minnillo spent no time in the kitchen. Either she or Korman prepared a list of orders for the following day which was posted on the bulletin board each evening so the kitchen personnel would know what types of desserts were required for the following day. Korman testified that in her absence, which was often and sometimes protracted, Berta had always been in charge of the kitchen and Minnillo in charge of the office. Both Korman and Berta testified that in 1978, while still at the Third Street location, Korman told Berta that she was a supervisor and she was not to wash dishes anymore.

Interest in the Union arose in February or March 1979. Delivery man Mike Garai called the Union and gave Berta's name, address, and phone number to the union representative. Rosen, the Union's secretary-treasurer and business agent, contacted Berta who in turn invited the production employees to a meeting at the union hall on April 13. As Respondent's kitchen employees all speak Spanish, Rosen had another individual present to translate what he had to say into Spanish.[3] Rosen's translator, however, apparently was not too good, and it fell upon Berta, who was fluent in both Spanish and English, to help out in the translations. While there is some dispute as to what Rosen told the employees regarding the purpose of the authorization cards which were passed out, the crucial cards are clear in that they designate, in both English and Spanish, the Union "to act as my exclusive bargaining agent for purposes of collective bargaining." Approximately 2 weeks later, on April 25, Berta handed out a second set of cards to the employees, telling them that they had to sign them because the word "tobacco" had not been included in the Union's name on the first set of cards. While Berta denied that she was present when any of the employees signed the second set of cards, the credited testimony shows that she handed them out in the "closet" or "dressing room" to individual employees and that some signed them in her presence.[4]

On July 3, the Union filed a petition for an election in Case 31-RC-4550. It is undisputed that Korman's first knowledge of organizing efforts was the receipt of a copy of the petition from the Board a couple of days later. After receiving a copy, Korman hired attorneys

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[3] Obviously, Rosen does not speak Spanish.

[4] Of the nine second set of cards in evidence, seven, including one signed by Berta, are dated April 25, one April 26, and one April 27.

Ross Arbiter and Paul Gordon of the Los Angeles firm Gordon, Weinberg & Gordon to represent Respondent in the representation case. A hearing on the R case petition was scheduled for July 30. On that date, the Union and Respondent executed a Stipulation for Certification Upon Consent Election, in the following unit:

> All full and part-time hourly production employees employed by the employer at its location [at] 11150 La Grange Avenue, Los Angeles, California, excluded all delivery employees, office clerical employees, guards, and supervisors including Berta Alicia Ujueta.

The Board agent scheduled to conduct the representation hearing recommended approval of the agreement on July 30, the day it was executed by the parties, and the Regional Director approved it on the same day. On August 7, Rosen, who had executed the agreement on behalf of the Union, wrote to the Regional Director as follows:

> Dear Mr. Goubeaux:
>
> I am questioning the decision made by one of your deputys [sic] Mr. Bryant, regarding the placing of a specific name rather than a position on La Mousse, Inc., case 31-RC-4550.
>
> In my opinion the placing of the name, Berta Alicia Ujueta, constitutes a violation of the NLRB Act, and I am questioning the legality of Mr. Bryants [sic] action in insisting that, that specific name be deleted.
>
> Please inform me if I am correct as to this matter.
>
> Sincerely, James Rosen
> Secretary-Treasurer

A copy of the letter was not sent to Respondent, nor was Respondent aware of the letter until it was produced by the General Counsel during rebuttal herein. The Regional Director's response is not a part of the record.

During August, Korman gave a speech to the kitchen employees, and consultants hired by Respondent's attorneys spoke to various employees. Alleged statements and queries are alleged as violations of Section 8(a)(1) and objectionable election conduct.

About a week prior to the election scheduled for August 31, attorney Arbiter made arrangements with INS to conduct a survey of Respondent's employees for illegal aliens. While Korman appears to have expressed some reservations about followihg this course, nothing was done to impede the forthcoming INS raid. Instead, she called Berta the evening of August 28, told her she had received an anonymous tip that INS would be in the area the following day, and that Berta should call the other employees and tell them not to come to work. While Korman did not know for a fact that a substantial number of the kitchen employees were illegal aliens—and as a consequence they would be deported—she suspected they were. After talking to Korman, Berta went to the union hall and talked to Rosen. Yolanda Martinez and Gloria Lopez were already there. Rosen apparently told them that he did not think INS was going to come, but he thought that someone was coming to check some records and that Korman did not want the employees there so that they could be interviewed. After talking to Rosen, Berta returned home and called those employees she had not yet contacted, telling them both Korman's message and Rosen's reaction.

The following morning, August 29, all but two of the kitchen employees reported for work at 6 a.m., the usual starting time. Maria Zepeda and Lubia Gutierrez were both pregnant and did not report for work that morning. At approximately 7:30 a.m., INS agents arrived and conducted a survey and determined that 10 employees were illegal aliens. All 10 returned voluntarily to their native countries, to Mexico and 1 to Guatemala.[5] At the behest of Respondent's then attorney, all 10 employees taken away by INS agents, and the 2 women that had not reported for work that morning, were terminated. Berta was also terminated under circumstances to be discussed hereafter.

On August 31, Berta and several of the employees that had accepted voluntary deportation on August 29, but that had reentered the country illegally, appeared at Respondent's premises and were permitted to vote in the representation election under challenge. The report on challenges and objections recites that the tally of ballots showed that of approximately 5 eligible voters, 10 cast ballots, of which none were for the petitioning union, 2 were against the Union, and 8 were challenged. Adelina De La Cruz, Raquel Gonzales, and Luis Olivas, all challenged by the Petitioner on the ground they were supervisors, have been determined by the Regional Director to be eligible voters. Ana Veronica Gutierrez, Ana Elsa Reyes Rodriguez, Ofelia Vasquez, Arcelia Rodriguez, and Berta were challenged by the Board agent conducting the election because their names did not appear on the eligibility list prepared by Respondent. All five had been terminated on August 29. My conclusions with respect to their eligibility appears hereafter.

There is no dispute that following Berta's termination, Gloria Lopez was made the kitchen supervisor and that she possessed supervisory authority.

On September 6, the charge in Case 31-CA-9367, and on November 29 the complaint and notice of hearing in that case issued. In December, Respondent offered reinstatement to most of the discharged employees, including Betancourt who was again discharged within a few days. His recall and termination will be discussed later.

Effective January 1, 1980, Respondent, without prior notice to the Union, instituted a health insurance plan for the employees. In December, Respondent changed the length of the morning and afternoon breaks for employees, and on December 29, read to employees, and posted on the bulletin board, Respondent's policies regarding the "disturbing or touching another person's personal property," and the leaving of cooking materials unattended which would subject one to immediate discharge, and the failure to call in within 1 hour of the start of the workday if the employee was going to be late or absent, also subjecting one to immediate discharge. Thereafter, Aida Arauz, Mario Badillo, and Demazo Aguirre were terminated for failure to comply with the call-in policy. The unilateral change in the length of the breaks, the institution of the rules, and the termination of three individuals for violation of the rules, are alleged as violations of Section 8(a)(1). The charge in Case 31-CA-9680 covering those alleged infractions was filed on January 7, 1980, and the consolidated amended complaint covering these and the other alleged discriminatees, issued February 29, 1980.

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[5] Refugio Betancourt, Lilia Garcia, Ana Veronica Gutierrez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Elizabeth Villanueva and Ofelia Vasquez to Mexico, and Yolanda Martinez to Guatemala.

The allegations in the consolidated complaint are not in chronological order. Insofar as is possible, I have attempted to treat the allegations chronologically.

B. *The Question of Berta Ujueta's Supervisory Status*

As noted at the outset, the General Counsel's witnesses consistently sought to portray Berta as lacking any authority, claiming that until Gloria Lopez was made supervisor after Berta's August 29 termination, either no one was in charge of or supervised the kitchen employees, or "all of us" were in charge. It is interesting to note, however, that when several of the General Counsel's witnesses were asked if Berta had testified truthfully at a state unemployment compensation hearing that ". . . I used to train people, new people, and check that the work was done right, and I run the place until she [Korman] got there because they open at 6 in the morning, and she [Korman] gets there usually at 9:00 o'clock or so," they admitted she had.[6]

I am persuaded on the totality of the record that Berta functioned as Respondent's kitchen supervisor within the meaning of the statutory definition of Section 2(11) of the Act. Thus, the record shows that while Berta did indeed work alongside the other kitchen employees, she also possessed authority over them. While it is abundantly clear on the record that from time to time Korman told some of the employees that more kitchen help was needed and asked them if they had friends whom they could bring in, the record is equally clear that Berta effectively recommended the hiring of Gloria Lopez, Eva Sanchez, Maria Skelson, Sissy Ujueta (her sister-in-law), Raquel Huerta, and that numerous other friends and relatives brought in by other employees were put to work right away while Berta "run the place" prior to Korman's arrival. Berta was also instrumental in the hiring of her husband, Luis Ujueta. Berta, the most senior of all the employees, was paid $5.50 per hour prior to her discharge, a dollar more than the next two highest paid employees, Ana Elsa Rodriguez and Ofelia Vasquez. The rest of the kitchen employees earned varying amounts from the minimum of $2.90 to $4.50 per hour. While Korman testified she also rewarded Berta with substantial cash Christmas bonuses, $800 in 1978, $500 in 1977, and lesser quantities from 1973 through 1976, bonuses to other employees varied from $10 to $20 for new employees to $200 for Luis Ujueta, Berta's husband. Korman also rewarded Berta with gifts of jewelry costing approximately $300, or triple the cost of gifts given to any of the other employees. She also rewarded Berta with a variety of other gifts. The record shows that Korman relied on Berta's evaluations of employees in either granting or denying raises, and that she terminated employees upon receiving negative reports on employees from Berta. In neither situation did Korman make an independent investigation, instead relying solely on Berta's evaluations. According to Korman, she told Berta as early as 1974 that she was in charge of the kitchen, and in 1978, that she was a supervisor and should not be washing dishes. Berta acknowledged she had been told on two occasions not to wash dishes, and in 1978 that Korman told her she was a supervisor.[7] The record shows that Korman was away on numerous occasions varying from a few days to a month. While the General Counsel's witnesses claim that no one was left in charge of the kitchen on these occasions, the weight of the evidenoe and sound business practice convinces me otherwise. There is no evidence that Minnillo, the bookkeeper, possessed any authority over employees, and Berta testified that Minnillo had no experience in the kitchen. Thus, Berta's subsequent testimony that she took problems brought to her by the kitchen employees to Minnillo is not credited. There is ample testimony that, despite some of the testimony of the General Counsel's witnesses to the contrary, Berta assigned work, oversaw the making of the desserts, inspected the work and required employees to redo defective work, told them what time to come in,[8] and told them when they could have their lunch breaks; that they called her when they were going to be late or miss work; and that she was in charge of the inventory. For a period of time she also either kept or checked the timecards, and on one occasion reported to Korman the fact that an employee had falsified a timecard. Korman terminated an independent cleaning crew at Berta's request. Berta proposed that Korman pay her $120 per week for the cleaning, and that she would in turn pay the kitchen employees for doing it. Accordingly, Korman paid her $120 per week and Berta made up the cleaning lists, rotated employees on the lists, and on occasion asked Korman to type them. Lilia Garcia, one of the General Counsel's witnesses, acknowledged that if something bad happened in the kitchen, they told Berta, and that Berta made decisions such as to throw products away. When Korman was gone and problems arose, they asked Berta, who made the decisions. There was also testimony by Mirеam Gutierrez, which was unrefuted and which I credit, that on an occasion when Berta was on a maternity leave, the kitchen employees called her at home when problems arose. Gutierrez, who voluntarily left Respondent's employ in June 1978, testified credibly that Berta was in charge of the kitchen, directed everyone and told them what to do.[9] Berta was the one to whom they took their problems and who would direct them to redo their work if it was done wrong. In Berta's absence, Ofelia Vasquez or Lilia Garcia would tell them to redo their defective work. Eva Sanchez, an employee and neighbor of Berta's, testified she asked Berta for a job, and was put to work by Berta before Korman arrived. When she wanted to leave early, she notified Berta who responded right away whether or not she could leave. Before she started to work, Berta told Sanchez that she, Berta, was in charge of the kitchen. Sanchez testified that Berta was in charge whether or not Korman was present, and that Korman never told her what to do in the kitchen. It is clear that all employees in the kitchen respected Berta and considered her as their link to management, and that management considered her the boss of the kitchen. In sum, contrary to the General Counsel, I conclude, based on all the evidence, that Berta was a supervisor exercising independent judgment, as defined in section 2(11) of the Act. Accordingly, her inclusion in the bargaining unit would be contrary to Federal Labor policy.

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[6] Raquel Gonzales, no longer employed by Respondent, identified Berta as her supervisor, testified everyone knew she was a supervisor and that it was not until "the last days in which they were with the Union" that the employees said she was not a supervisor.

[7] Acknowledging that in July 1979 she was training Eva De La Cruz to be a supervisor, she denied she herself was a supervisor.

[8] The usual reporting time was 6 a.m. However, there were occasions when employees came in at 3, 4, and 5 a.m. Korman's usual reporting time was 9 a.m.

C. *The Authorization Cards*

Eleven employees signed authorization cards on April 13, Refugio Betancourt, Lilia Garcia, Ana Veronica Gutierrez, Gloria Lopez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Ofelia Vasquez, Elizabeth Villanueva, and Maria Zepeda.[10] The parties stipulated that, in addition to the foregoing, Lubia Gutierrez, Eva Rodriguez, and Eva Sanchez were employed during the period June 28 to July 11, which encompasses the date the representation petition was filed by the Union. Thus, if the April 13 cards were valid, the Union had authorization cards for 11 of 14 unit employees. As noted earlier, Berta was instrumental in establishing initial contact with the Union, in arranging employee meetings with the union representatives, and acted in the role of an interpreter at the April 13 meeting. She also solicited the signatures to a second set of cards from most of the same employees between April 25 and 27. Respondent contends that since Berta was a supervisor, her role in the organizing drive tainted the authorization cards so that the Union never obtained an uncoerced majority in the bargaining unit. The General Counsel contends that even if Berta is a supervisor, her participation in obtaining the cards is insufficient to invalidate them.[11]

The evidence indicates that Berta's union activity in early April when the first set of authorization cards was signed, was limited to informing the kitchen employees of the first union meeting, to expressing her opinion that the Union would be good for the employees, to translating Rosen's remarks from English to Spanish, and to responding to employees' questions regarding the Union and the authorization cards. Her involvement with the late April cards was to pass out the cards to employees and to tell them that the new cards were needed because the name of the Union was not complete on the first set. In this regard, it is noted that the second set of cards was passed out secretly, indicating to employees in any event that Respondent did not favor the union, which it indeed did not. The record is void of any evidence which could have misled the employees into believing that Respondent favored the Union, or that they were induced to designate the Union through fear of supervisory retaliation. The courts and Board have long recognized that mild supervisory involvement in organizational activity is not sufficient to undermine the validity of a union's card majority. Rather, there must be a showing of supervisory participation calculated to exert substantial pressure directly on those who sign. As the Fifth Circuit stated in *N.L.R.B.* v. *WKRG-TV, Inc.*, 470 F.2d 1302, 1315, 1316 (1973):

> It is actual pressure and coercion we are seeking to avoid by our rule disallowing cards tainted by supervisory influence. A mechanical rule that requires a finding of supervisory solicitation in situations . . . where there is no hint of intimidation, is too broad.
>
> Before the Board invalidates a card because of prounion supervisory solicitation, there must be some showing that the signing employee was subject to a reasonable apprehension that his failure to sign could have adverse consequences. . . .
>
> There must be a more substantial exhibition of pressure than a passing remark or statement of prounion conviction. So long as nothing in the words, deeds, or atmosphere of the alleged "solicitation" contains the seeds of potential reprisal, punishment, or intimidation, the involvement of the supervisors does not rise to the levels of supervisory "solicitation" . . . .

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[9] Mike Garai, a driver who had been terminated by Respondent in April and who testified on behalf of the General Counsel, testified that Berta was in charge of the kitchen.

[10] The April 13 cards of Ana Elsa Reyes Rodriguez, Refugio Betancourt, and Gloria Lopez contain their printed names rather than their signatures. Each of the three employees testified that they read the cards before filling them out and that each printed his name thereon. I conclude, therefore, that they are valid designations. In any event, all three signed valid cards again on April 25. Elizabeth Villanueva testified that she read the authorization card containing her name, and asked fellow employee Rosenda Ramirez to fill it out for her. As Ramirez was authorized to sign Villanueva's name, her card is valid. Villanueva too, signed a second valid card on April 25.

[11] The unit alleged to be appropriate at par. 7 of the complaint and the unit described in the Stipulation for Certification Upon Consent Election differ in substance only in that, in the latter, Berta was specifically excluded as a supervisor by name. Respondent contends that the complaint should be dismissed on the ground that the Union fraudulently induced it to agree to an election. Rosen agreed, in the Stipulation for Certification Upon Consent Election, that Berta was to be excluded as a supervisor, intending if the Union won the election, to bargain on her behalf. While the Regional Director approved the election agreement, it is well established that neither the General Counsel nor the Board is bound by positions or stipulations taken by parties in a representation case. See, e.g., *Southern Paint & Waterproofing Co., Inc.*, 230 NLRB 429, 436 (1977). The Board recognizes the fact that parties are sometimes willing to forego the presence of a given employee in the unit or his vote in a tally in order to hold a speedy election. Such action does not, however, preclude relitigation of the issue in a subsequent 8(a)(1) or (3) unfair labor practice proceeding. *Southern Paint, supra; Farms Fans, Inc.*, 174 NLRB 723 (1969); *Stanley Air Tools*, 171 NLRB 388 (1968). Accordingly, no merit is found in Respondent's position.

Thus, the courts have rejected employer challenges to cards based on minor supervisory participation in union activities such as supervisor's signing cards, attending union meetings, transporting employees to meetings and answering questions about the union. *N.L.R.B.* v. *Jerome T. Kane, d/b/a Kane Bag Supply Co.*, 435 F.2d 1203, 1207 (4th Cir. 1970); *Clay City Beverages, Inc.*, 176 NLRB 680, 682 (1969), enfd. 434 F.2d 1315 (6th Cir. 1970); *N.L.R.B.* v. *Ozark Motor Lines*, 403 F.2d 356, 358–359 (8th Cir. 1968); *International Union, UAW* v. *N.L.R.B.*, 363 F.2d 702, 707 (D.C. Cir. 1966), cert. denied 385 U.S. 973. Compare: *N.L.R.B.* v. *Hecks, Inc.*, 386 F.2d 317, 322–323 (4th Cir. 1967), and *Turner's Express, Incorporated* v. *N.L.R.B.*, 456 F.2d 289, 292–293 (4th Cir. 1972). On the basis of the foregoing facts and authorities, contrary to the position of Respondent, I find that the authorization cards are not invalid and that the Union represented a majority of Respondent's employees, 11 out of 14, from and after April 13, and on June 28 as alleged in the complaint.

D. *Alleged Acts of Interference, Coercion, and Restraint*

Paragraph 16 of the consolidated complaint alleges that in the latter part of July, Korman advised employees of the futility of selecting the Union by telling them she would never accept the Union and that if they engaged in a strike they would lose their jobs. The basis for this allegation is a speech that Korman read to employees in English which was translated into Spanish by Lucien Cadji, a friend. Korman, whom I credit, testified that the speech had been dictated by her attorney, and that she made no statements not contained therein. The speech, Respondent's Exhibit 1, reads:

> A. The Union submitted a Petition to a government agency called the N.L.R.B. In that Petition 30% of the employees here said they wanted to have an *election—not* a Union. Therefore, I have cooperated and there is going to be an election where everyone in the kitchen except Berta can vote. The voting will take place on Friday, August 31st at 11:00 a.m. at our shop.
>
> B. What you will be voting for is whether or not you want to be represented by the Union. Even if you signed cards, you do not have to vote in favor of the Union. A "yes" vote means you want the Union to represent you. A "no" vote means that you do not need someone else to represent you.
>
> C. "Representing" means the Union will negotiate on your behalf regarding your working conditions, but *it does not necessarily mean there will be any changes. The only changes will be those I want to make* regardless of the Union and what it wants.
>
> D. I do not think it is good for all of us to have the Union here. I am not for the Union because it will divide us. The Union will only take your money (in monthly dues, initiation fees, and fines) and there are *no guarantees* that the Union will get you anything.
>
> E. I have always kept an open door to all of you. I have always tried to help you resolve problems and I have given you as much as I could. The Union would be an outsider—a third party—who would only interfere with the working relationship we all have. The Union does not care about how comfortable you girls and men are here. What the Union does care about is getting its money. I work with you on an everyday basis, and the Union won't always be around when you need them.
>
> F. The law does not allow me to make any promises to you about the future. The law does not allow me to tell you my plans for the future. I cannot make any promises.
>
> However, the Union can make all the promises it wants—this is because the Union *cannot* make good any of its promises and, unfortunately, the law expects all of you to understand and realize this. I am not allowed to promise you anything, but my past experience with you have always shown concern for you and your families' well-being.
>
> If you still believe in the promises that the Union has made, ask the Union to guarantee those promises in writing. The Union won't be able to do this because it knows that their promises can't be kept.
>
> G. Before you girls and men make up your minds as to whether or not you want the Union, you should understand the problems. Let me list a few for you.
>
> 1. Initiation fees to join the Union.
> 2. Monthly dues.
> 3. Fines for not attending meetings.
> 4. A strike.
>
> H. A *Strike* means you will not be working for the Company. Under some circumstances, the Company may be able to permanently *replace you*, which means you will not have a job here anymore. Under other circumstances, the Company will take you back, but you won't be paid for all the time you are on strike. The Union can tell you to go on strike. That will seriously disrupt your family life. The Company will continue to operate and the Company will have workers replace you if you go out on strike.
>
> I. These are a few of the things I thought you should think about and know. I will be sending you letters for the next few weeks further explaining my thoughts and beliefs.
>
> J. Please discuss the Union and your vote with your family. Your family should also understand the consequences and responsibilities of voting for the Union.
>
> K. I strongly believe that you do not need the Union and that your future is here with me. You do not need to pay someone else to talk to me.
>
> L. Vote No—Vote against the Union—Keep us together.
>
> M. If you have any questions, I will be glad to answer them. However, I will answer them in a letter so that my answers are not misunderstood.

> N. Please understand—I cannot go to your homes like the Union can, but I will keep you advised by meetings and letters.
> Please vote for me.
> Vote against the Union.
> Vote No.

Korman testified that she told Cadji, who speaks seven languages, to translate exactly as written "because that is the law," and that she was not allowed to say anything else. In light of testimony by several of General Counsel's witnesses that additional statements were made, the question is raised whether Cadji made statements not contained in the written text. Cadji was not a witness. Minnillo, who is not bilingual, testified that both Korman and Cadji read from the paper each had. Lilia Garcia, acknowledging on cross-examination that Korman read from the paper, testified on direct examination as follows:

> Well, Nadine spoke and the other person interpreted in Spanish. It was said there about the election, it was going to be the 31 of August, of the union, that the votes were going to be taken the 31st of August at 11:00 o'clock in the morning. That she did not want the union. As a favor she was asking us to vote no for the union, because said union was not good, that it made a lot of promises but did not accomplish them, and until that day we were working well as a family, that if the union would come in it would not be the same, because the union was going to intervene in our persons, and she as a favor was asking us to vote no for the union, because under no motive was she going to accept the union.

Ofelia Vasquez' version was that Korman "said that she was never going to accept the Union, even though we went on strike, that years and years could go by and she was not going to accept it." Further, "Nadine's friend [Cadji] asked if there was someone who had been in a union, and Eva De La Cruz answered and said she had been.[12] She said that unions were not good. They are only good for taking money."

Asked to recite everything that was said at the meeting, Arcelia Rodriguez testified:

> Well, I do not remember what she said, but I do have in mind that Nadine told her friend to tell us that she was not going to accept the Union . . . .[13] She also said that maybe we would not go to strike, but she would not pay us the time that we would lose there, and various things, but I do not remember what.

Berta, fluent in both Spanish and English, was present at the meeting, and testified that:

> Nadine was speaking in English, and this man was translating to Spanish. Nadine said that she wanted for us not to vote for the Union because she didn't want anybody to be—to come in between us. She says we are like a family and she wanted to keep being that way, and she also said that she wouldn't—she couldn't offer us anything, but if we didn't call the Union she could do something for us, but it wasn't a promise, and that is all I remember right now.

After reading over a copy of the speech, Respondent's Exhibit 1, Berta acknowledged that it sounded like what had been said. Thus, Berta failed to corroborate the other witnesses for the General Counsel, and corroborates Korman. In light of Berta's testimony, an adverse inference based on the Respondent's failure to call Cadji as a witness is not warranted. As I credit the testimony of Korman and Berta over that of Lilia Garcia, Ofelia Vasquez, and Arcelia Rodriguez, I conclude that the General Counsel has failed to prove paragraph 16 by a preponderance of the evidence and recommend its dismissal.

Paragraph 17 of the complaint alleges that on or about August 25, Fierro interrogated an employee about her union activities, desires, and sympathies. Berta testified she overheard Fierro, who was speaking to Gloria Lopez and Eva De La Cruz, ask Lopez, "How come we wanted the Union there." Lopez, who appeared as a witness for both the General Counsel and Respondent, neither confirmed nor denied the conversation, and neither De La Cruz nor Fierro testified.

Paragraphs 18(a), (b), and (c) allege that in mid-August Daniel Ramirez and Carmen Fierro, Respondent's agents, unlawfully interrogated employees, solicited their grievances, and promised to grant them benefits in order to discourage support for the Union. While Respondent denied the agency of Fierro and Ramirez, Korman acknowledged that her attorneys at that time had hired the labor consulting firm of Borowski and Brushett, and that she had made Respondent's premises and employees available to Fierro and Ramirez, who were employed by that firm. As they were acting on Respondent's behalf in the union organizing campaign, I find they were Respondent's agents within the meaning of Section 2(13) of the Act. As neither Fierro nor Ramirez testified, the record stands unrefuted that one or the other asked various employees why they wanted the Union, if they had any problems at work; "what it was that we were asking for to ask for the union"; encouraged them to speak directly with Korman in order to obtain the things they wanted, and inferred they (Ramirez and Fierro) would seek raises for employees; asked if it was true they wanted the union, and why they were not happy.[14] The General Counsel has proven paragraphs 17, 18(a), (b) and (c).

Paragraphs 18(e), (f), and (g) appear to be based on a conversation between Berta and Ramirez, and allege unlawful interrogation, a promise to grant benefits in order to discourage union support, and a threat of unspecified reprisals if she engaged in activities in support of a union. Berta testified, without contradiction, that Ramirez spoke to her alone; "he said because I was a supervisor," a fact she denied, and asked her if she knew anything about the Union, which she also denied; that he asked why she was unhappy, and after learning why, told her that one of the things about which she complained was going to be fixed. She testified he stated further that if the employees were caught in a union meeting, "that we would be in trouble." Such statements made to an employee would be unlawful. However, as I have found that Berta is a supervisor within the meaning of Section 2(11) of the Act, she cannot be considered a statutory employee legally protected with respect to her exercise of rights which Section 7 of the Act guarantees. Accordingly, I recommend dismissal of paragraphs 18(e), (f), and (g).

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[12] Cadji's purported question was not alleged in the consolidated complaint as a violation of the Act, and this is the only witness who testified Cadji asked any questions. Lacking corroboration, I do not credit the testimony in this regard.

[13] Korman neither speaks Spanish, nor does the witness speak or understand English. Accordingly, I do not credit her statement that "Nadine told her friend to tell us that she was not going to accept the Union."

[14] Based on the unrefuted testimony of Berta, Lilia Garcia, Yolanda Martinez, Ofelia Vasquez, and Ana Veronica Gutierrez.

Paragraphs 19(a), (b), and (c) are based upon a conversation between Berta, Ramirez, and Korman, and allege a promise to grant benefits to discourage support for the Union, a request that Berta report on other employees' union sympathies and desires, and advising Berta of the futility of selecting the Union by saying that Respondent would never have a union.

According to Berta, during a conversation with Ramirez and Korman that lasted about 45 minutes, Korman made the following statements:

> She said, I don't want the union to come in here, and she says, you can help me because you are a supervisor. . . . So she says, what do you want? She says, I give you one week vacation in October, and I will renew your wages in January, and you will have two weeks vacation anytime you want next year . . . Before I left she says that she didn't want the union in there, and she was going to fight even if it took her 20 years, to fight it . . . She says to ask the girls to vote no for the union, and I said I will try, but they probably wouldn't listen to me . . . And she says, try it anyway, and I left, and about 5 minutes later she called me into the kitchen and told me to talk to the girls and give her an answer by 3 o'clook that afternoon.

Korman testified that she told Berta, "I need your help. There is a campaign to organize the union. You are my supervisor. I want your help"; that Berta responded, "What is a union?"; that she went on to state, "Berta, what is it you want? Do you want more vacation? Do you want more bonus? . . . What is it you want, because I want your help and you're not helping me. . . . Do you want 4 weeks in Guatemala?" She testified: "Because Berta was stipulated my supervisor [in the Stipulation for Certification Upon Consent Election] and because I was told I could talk to her as administrative, I said Berta, I don't want a union." She denied she asked Berta to ask the employees to vote against the Union, contending she was "asking for help" without specifying the nature. Korman impressed me as the more reliable witness and I therefore credit her version over that of Berta. It is specifically found that Korman did not ask Berta to report on other employees' union sympathies and desires as alleged in paragraph 19(b), and I do not credit Berta's testimony that Korman said she would fight the Union if it took 20 years. While Korman's testimony may be susceptible to a finding that she was promising a benefit to Berta in order to enlist her aid in resisting the Union, such conduct would not be unlawful here since it has been found that Berta is a surpervisor within the meaning of Section 2(11) of the Act. I therefore recommend dismissal of paragraphs 19(a), (b), and (c).

Paragraph 13 alleges that, on or about August 25, Respondent granted its employeee a morning and afternoon break in order to discourage support for the Union. It is undisputed that prior to the advent of the Union, Respondent's employees were not authorized to take morning and afternoon breaks.[15] A few days before the election, Korman told Berta to instruct the kitchen employees to take a 10-minute break each morning and afternoon.[16] In the absence of evidence demonstrating that the announcement of the granting of the breaks was governed by factors other than the pending of the election, the Board will regard interference with employee freedom of choice as the motivating factor. See, e.g., *The Baltimore Catering Company*, 148 NLRB 970, 973 (1964). Respondent has failed to show the announcement was governed by factors other than the pending election. Accordingly, I find that the timing of the announcement was calculated to discourage support for the Union in violation of Section 8(a)(1) and interfered with the election.

E. *The Immigration Raid*

Respondent admits that its former attorney, Arbiter, made arrangements for INS to conduct a survey of Respondent's employees, and that the raid occurred on August 29, 2 days before the scheduled representation election.[17] The evidence establishes that while Korman did not know, she suspected that most of her employees were illegal aliens and would therefore be deported by INS. As noted earlier, Korman apparently had second thoughts about the pending INS survey and, on August 28, told Berta that she had received an anonymous call that INS would be in the area the following day, and that Berta should call the other employees and tell them not to come to work. Berta, Gloria Lopez, and Yolanda Martinez all went to the union hall that evening, and Rosen expressed the opinion that the INS would not conduct a survey, but that representatives of another government agency were coming to check records. Thereafter, Berta called the employees she had not already contacted, and told them of Korman's message and Rosen's reaction to it. On the following morning, August 29, all but two of the kitchen employees reported for work, the INS conducted a raid, or survey, about 7:30

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[15] There is evidence, however, that they took an unauthorized break in the mornings but that Korman was not aware of the fact.

[16] The instruction had apparently originated with Respondent's then-attorney.

[17] It is clear that Arbiter was acting as Respondent's agent and that the idea of requesting an INS raid originated with him.

a.m., and the 10 illegal aliens in the group were voluntarily deported.

Respondent contends that the INS raid, resulting in the deportation of the 10 illegal aliens, should not be the basis of a bargaining order since Korman had expressly directed the employees not to report for work on the day of the raid; that the complicity of the Union and the employees insured the success of the raid; consequently, to impose a bargaining order in these circumstances would enable the Union and the employees to benefit by their own wrongdoing. Even if Respondent's role in the INS raid is found to have violated Section 8(a)(3), it is argued, the policies and purposes of the Act have been effectuated by the reinstatement of the employees in December, and further relief in the form of backpay should be denied.

I find no merit in Respondent's argument. Minnillo testified, without contradiction, that Arbiter told her to terminate the 10 illegal aliens picked up and deported by INS, and also Lubia Gutierrez and Maria Zepeda, neither of whom had reported for work the morning of the raid. Thus, those illegal aliens who reported for work were doomed, at Arbiter's direction, to be terminated for having reported for work, and those employees who heeded Korman's instruction not to report for work were ordered by Arbiter to be dealt with in the same manner. It is clear from the record that the termination of all 12 employees was motivated by their collective engagement in union and/or protected concerted activities, which resulted in the filing of the representation petition, and Respondent's desire to affect the results of the Board election scheduled for August 31. In light of Minnillo's testimony, I reject Respondent's contention that Lubia Gutierrez and Maria Zepeda were terminated for not reporting for work. I find they were terminated because Respondent believed all the Mexican nationals had engaged in organizing the Union and were responsible for the filing of the petition. Accordingly, I find that Respondent violated Section 8(a)(3) of the Act by constructively discharging and by discharging Lilia Garcia, Ana Veronica Gutierrez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Ofelia Vasquez, Elizabeth Villanueva, Eva Rodriguez, Refugio Betancourt, Lubia Gutierrez, and Maria Zepeda because of their engagement in union and/or protected concerted activity as alleged in paragraphs 10 and 11 of the consolidated complaint, and in order to interfere with and affect the results of the August 31 Board election.

F. *Berta's Termination*

Paragraph 12 of the consolidated complaint alleges Berta was unlawfully discharged on August 29, the day of the INS raid. The General Counsel contends that Berta was terminated because Korman suspected she supported the Union. Respondent claims she was terminated because of threats she made against Korman on the day of the raid.

The record shows that when the INS agents raided Respondent's premises on August 29, Berta was taken outside the premises along with the other employees, but was released after she produced evidence that satisfied the INS agents that her status did not call for deportation. There is a bit of confusion on the part of both Korman and Berta regarding the sequence of events following Berta's return to the kitchen. I conclude on the basis of the testimony of Gloria Lopez, Minnillo, Raquel Gonzalez, and Eva Sanchez, all of whom were present and testified to events and statements made after Berta returned to the kitchen, in addition to the testimony of Korman and Berta, that events occurred substantially as set forth hereafter. After the others had been taken outside by the INS agents and it was apparent they were going to be taken away by the INS, they gave Berta and Gloria Lopez the keys to their cars.[18] Berta and Gloria returned to the plant where the two proceeded to call the relatives of those in INS custody, Berta using the phone in the office and Gloria the public phone in the kitchen. After completing the calls, Berta and Gloria, apparently with Korman's permission, left the plant and were observed by Minnillo getting into a Mercedes-Benz with Rosen. While Minnillo did not know who Rosen was, she speculated he was connected with the Union and at some point told Korman. Gloria and Berta told Rosen what happened. Rosen drove to a location several blocks away where he used a telephone. The two women apparently became tired of waiting for Rosen and proceeded to walk back to the plant where several of the employees who had not been taken away by INS were working. According to Gloria Lopez, when they entered the plant to go to work, Berta became irritated, got "very mad" and yelled insulting remarks to Korman and the others in English and Spanish. Korman's testimony was as follows:

> Berta yelled "I will get you. I will follow you. We will never let you forget this." And she did it in a screaming, yelling manner with a raised hand. She used both the terms 'I' and 'we'. I didn't know if she was referring to her husband Louis Ujueta or to gangs or to what, and I didn't ask. She was screaming so loud, at the top of her lungs. . . . She yelled at me for a period of 4 minutes, and then turned around and yelled at the employees, and then yelled at one employee in particular, in a very heated debate, screaming.

Respondent contends the above conduct led to her discharge which was for cause.

Raquel Gonzalez, who understands but speaks little English, is no longer employed by Respondent. She testified that Berta told Korman, "I hate you" and "you are going to regret this that you did." Later, Berta loudly stated in Spanish to the employees that, "whoever it was [that called INS] is going to regret it. . . . Curse the person who did it." Berta admitted she was angry and raised her voice and had angry words with Korman in front of the other employees. While she testified that Gloria Lopez, Eva Sanchez, Korman, Raquel Gonzalez, Eva De La Cruz, and Louis Olivas were present during the conversation, her version lacks corroboration and is not credited. Her initial version was that after returning to the kitchen she said, "Does everybody feel go[od] about it, and Nadine said to me, don't threaten me, just leave. And I left, and I went to make some phone calls and Gloria Lopez left with me." That version was followed by "I told her that she knew about it—if she—that she had called Immigration, and that if she didn't, that she knew about it, and she did that because of the Union and all, but that it wouldn't help her because we would be back to vote on Friday. . . ." Korman's response, according to Berta, was "not to threaten her, and just to leave."[19] Even if some significance is attached to the fact that Berta was observed getting into Rosen's car shortly prior to her discharge, Gloria Lopez was observed getting into the car too. Berta's role as the principal union protagonist was not known to Respondent at this time. Why, then, was Berta terminated and Gloria Lopez not? The answer lies in Berta's conduct upon her return to the plant—the threats she made towards Korman.

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[18] During the raid, Gloria had become emotionally upset, cried and threw a pastry bag to the floor. Korman tried to console her.

Upon the foregoing evidence, I find that Berta's termination was not in violation of Section 8(a)(3) or (1) for the reasons that she was a supervisor within the meaning of Section 2(11), and that her termination was for cause. Accordingly, I recommend dismissal of paragraph 12 of the consolidated complaint.

G. *Betancourt's Reinstatement and Subsequent Discharge*

Paragraph 14(a) alleges that, on or about December 21, Betancourt was recalled to a position different from his former position of employment, and paragraph 14(b) alleges he was discharged on or about January 2, 1980, and Respondent has since failed and refused to reinstate him to his former position of employment. The General Counsel contends that prior to August 29, Betancourt spent half of each day making (measuring and whipping) creams and the rest of each day doing a variety of other tasks. She contends that when he returned in December, he was not assigned to do the creammaking since another employee made creams, and instead spent all of his time on a variety of other tasks. When, on his last day, he was assigned to creammaking, he worked only half a day before he was fired, allegedly for making more cream than was needed. The General Counsel contends that Betancourt was initially given jobs which required him to use different skills and was not adequately informed of the changes in Respondent's rules about excess cream when he was finally assigned to creammaking. Therefore, his reinstatement was not proper, and Respondent's liability to him did not terminate when he returned to work in December. Respondent contends that when Betancourt returned to work in December, he performed substantially the same duties he had performed before; that he was slow and not a good employee, a fact known to everyone but Korman, who first observed his work after the December reinstatement; that Respondent's motive in terminating him again was not bad, but that he was in fact terminated for slowness and incompetence.

There is no contention that Betancourt was reinstated at a lower rate of pay or that he had no training or experience in doing the tasks he performed upon reinstatement at the end of December. To the contrary, it appears he resumed doing much the same as he had done before. In fact, there seems to have been no specific job which was performed by any particular employee in the kitchen. All of the employees appear to have been capable of performing, and did perform, all of the kitchen tasks, including creammaking. While some testimony indicates that Betancourt's "principal job" prior to the August 29 termination was creammaking, the record makes it clear he also did other jobs in the kitchen, including grinding cookies, breaking and separating eggs, melting chocolate, washing and drying molds, pots, and dishes, helping bring in merchandise, helping clean up the kitchen, throwing out the trash, and otherwise helping the kitchen employees. The record is also clear that Betancourt did not make the cream all of the time. Berta testified that "it was my week to go in early to whip the cream" the week of August 29. Gloria Lopez, whom I credit, testified that Betancourt was not too good a worker, that he would get behind in the work, and that the other employees would have to help him measure and beat the creams because he was so slow. Miream Gutierrez, no longer employed by Respondent, testified that she had overheard Berta tell some of the other kitchen employees that Betancourt was "very slow" and "very dumb." Korman testified that the first she realized Betancourt was such a slow worker was when he returned in December, and she asked Gloria Lopez to put him on the cream machine.[20] Lopez declined to do so because he was too slow.[21] Korman testified that she later asked Eva Sanchez, Lopez' assistant, to put him on the cream machine and that Sanchez also responded that he was too slow. She testified that on the basis of her December observation, she found Betancourt to be one of the slowest working employees she had ever seen, regardless of age or sex, and that during the 3 days she observed him, she asked him a number of times if he felt alright. She testified she made suggestions for speeding up his dishwashing and drying and how to perform other tasks more efficiently, and on December 28 commenced making notes about his work. On December 28, the grinding machine broke while he was operating it. On December 29, she "spoke to him repeatedly about his slowness." On December 31, she informed him that his work was unsatisfactory, that he was too slow "on dishes, on both washing and drying, too slow on crumbs and putting on labels. I said that in one week I would speak to him again and, if no significant improvement, I would have to fire him." On January 2, she made another note regarding several work deficiencies, and terminated him because his work was "totally incompetent." Betancourt acknowledged that on January 2 he had been assigned to do the creams and that he had made an extra batch for decorating and an extra batch for filling. He informed Sanchez, who was in charge of the kitchen in Lopez' absence, and was later called to the office by Korman and terminated. It is apparent from the record that making creams requires no special skill, that everyone in the kitchen did it, including Berta, who testified she did it the final week in August. It is also clear from the record that Betancourt was a personal friend of the Ujuetas, lived in the same building, and that they were instrumental in his employment. It is also apparent that Betancourt was a slow and inefficient employee and that it was undoubtedly through his friendship with the Ujuetas and the fact Berta was the supervisor in the kitchen, that he was able to retain his job as long as he did. In sum, I find no merit to the contention of the General Counsel that he was not reemployed or recalled to his former position of employment, which was as a helper in the kitchen, or that he was unlawfully discharged on January 2, 1980. I conclude on the basis of the foregoing evidence, that he was terminated on the latter date because he was not a satisfactory employee, and that but for his friendship with the Ujuetas, he would have been terminated earlier. Accordingly, I recommend dismissal of paragraph 14.

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[19] While Berta and Louis Ujueta denied her statements, Eva Sanchez testified to other threats against Respondent's premises and Korman's car, made that evening.

[20] The evidence convinces me that Korman spent very little time in the kitchen prior to August 29.

[21] Lopez was the kitchen supervisor the first day Betancourt returned in December; however, she was away after that because of sickness, during which time Eva Sanchez was in charge of the kitchen workers.

H. *Alleged Unilateral Changes and Discharges of Arauz, Badillo, and Aguirre*

Paragraph 20 of the consolidated complaint alleges several unilateral changes made by Respondent:

(a) Alleges that in November, Respondent changed the length of the morning and afternoon breaks from 10 to 15 minutes each.

(b) Alleges that in the latter part of December, Respondent arranged for Blue Cross medical insurance effective January 1, 1980.

(c) Alleges the institution of the following workrules: (1) Any employee burning chocolate would be fired; (2) failure to notify Respondent 1 hour before starting time that an employee would be absent would result in termination; and (3) employees were not to leave money in the dressing room.

The General Counsel seeks a bargaining order and argues that if one is warranted, the above changes were unilateral and in violation of Respondent's bargaining obligation. It is also contended that the discharges of Arauz, Aguirre, and Badillo were unlawful since the terminations were for violating the unilaterally established rule calling for discharge for failure to notify Respondent of an absence 1 hour before starting time. Contending there were additional reasons for the terminations of Arauz and Badillo, Respondent admits that failing to call in or report for work played a role in the termination of all three employees. Respondent points out that none of the three had any contact or relationship to activity surrounding the union organizing campaign, nor did they testify at the hearing. It is argued that the record is replete with testimony concerning employees calling Berta if they were going to be late or unable to work, thus there was a practice of calling in, and it is common sense that an employee inform an employer if he is going to be late or not work at all. It is argued that "employees are not free to choose the hours or days they will work and cavalierly disregard their responsibilities and obligations not only to the employer, but to fellow employees who, without notice, are obligated to assume the work which otherwise is left undone. . . ." Respondent argues that as long as the motivation is not unlawful, the discharges cannot be unlawful and, in any event, reinstatement is not appropriate and does not effectuate the policies of the Act.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Court upheld the Board's bargaining order remedy where the only unfair labor practice shown was the threat of plant closure. Here, the Respondent retaliated against the protected concerted activity of its employees by discharging 12 employees out of a unit of 17 employees, 10 of whom had signed valid authorization cards.[22] Thus, it is seen that 59 percent of the employees in the unit were unlawfully discharged. In *Ludwig Fish & Produce, Inc.*, 220 NLRB 1086, 1087 (1975), the Board noted:

> The pervasive effect of such egregious violations cannot be gainsaid. For whether the unit is large or small the discriminatory discharge of 40 percent of the bargaining unit employees demonstrates most convincingly that the Respondent has resorted to its ultimate weapon in thwarting the employees' exercise of protected statutory rights.

The nature and pervasiveness of Respondent's unfair labor practices, as described above, have made the holding of a fair election impossible, and therefore, since the Union represented a majority of Respondent's employees on and after April 13, a bargaining order is necessary to remedy Respondent's unfair labor practices. As Respondent embarked on a clear course of unlawful conduct on or about August 22, when it requested that INS conduct a raid, I conclude that a bargaining order effective that date will reestablish the conditions as they existed before Respondent embarked on an unlawful course and placed the Union in a disadvantaged position. *Gissel Packing Co., Inc., supra; Beasley Energy, Inc., d/b/a Peaker Run Coal Company*, 228 NLRB 93 (1977); *Ludwig Fish and Produce, Inc., supra; Trading Port, Inc.*, 219 NLRB 298 (1975).

With respect to the change in the length of the morning and afternoon breaks from 10 to 15 minutes each, Respondent admits that the Union was not notified, and Korman testified that the reason for making the change was because the employees were completing their work on time. Not every unilateral change in work rules constitutes a breach of the bargaining obligation. In *Peerless Food Products, Inc.*, 236 NLRB 161 (1978), the Board stated: "The change unilaterally imposed must, initially, amount to 'a material, substantial, and a significant' one." I conclude and find that the change here was not material, substantial, or significant, and therefore recommend dismissal of paragraph 20(a).

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[22] The unit employees on August 29, the date of the mass discharges, were Betancourt, Lilia Garcia, Ana Veronica Gutierrez, Gloria Lopez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Ofelia Vasquez, Elizabeth Villanueva, Maria Zepeda, all of whom had signed valid authorization cards, Lubia Gutierrez, Eva Rodriguez, Eva Sanchez, Louis Olivas, Adeline De La Cruz, Raquel Gonzalez, the last three having been found by the Regional Director to have been eligible voters on August 31.

The record shows that in 1978, Korman offered all employees a group health insurance plan which the kitchen employees turned down because it did not include maternity benefits. In October, Korman reconsidered the idea and on January 1, 1980, a Blue Cross group plan was put into effect. Admittedly, there was no prior notice to the Union. The implementation of hospitalization or health insurance benefits, clearly mandatory subjects of bargaining, cannot lawfully be granted without first giving the Union an opportunity to bargain. I conclude, therefore, that Respondent violated its statutory duty to bargain with the Union over the implementation of the plan as alleged in paragraph 20(b).

On December 29, Korman had read to employees and posted on the bulletin board the following notices directed to all employees:

> To: All Employees
> From: La Mousse
>
> On Decemer 28, 1979, three pots of chocolate were left unattended on the stove. The chocolate and all three pots was burned and had to be thrown out. Also on December 28, 1979, two large industrial brooms were broken beyond repair. Therefore, this is to notify all employees that any employee found leaving cooking materials unattended, including material in the Hobart mixers, will be subject to immediate discharge.
>
> If, for any reason, an employee is unable to come to work, he or she is to call in within one hour from the start of the work day. If, for any reason, an employee is going to be late work, he or she is to call in within one hour from the start of the work day. Failure to comply will subject the employee to immediate discharge.
>
> On December 29, 1979, this letter was read both in English and in Spanish to all employees present. Further, this notice was posted in English and in Spanish in our bulletin room on December 29, 1979. Those employees not present on December 29, 1979, will be read this letter in English and in Spanish upon their return.
>
> To: All Employees
> From: La Mousse
>
> At 6:00 A.M. on December 29, 1979, an employee reported to me the loss of money from her purse, which was located in the dressing room on Debember 28, 1979.
>
> This letter is to notify all employees that at no time are they to leave anything of value in their purses or in the dressing room. All money, jewelry, credit cards, and any other valuable property are to be kept on their person at all times.
>
> Any employee found disturbing or touching another person's personal property will be immediately discharged.
>
> On December 29, 1979, this letter was read both in English and in Spanish to all employees present. Further, this notice was posted in English and in Spanish in our bulletin room on December 29, 1979. Those employees not present on December 29, 1979, will be read this letter in English and in Spanish upon their return.

The General Counsel contends that since the written rules are stricter than the prior practice, their institution without consulting with the Union constitutes an unlawful unilateral change. Respondent contends that the rules merely reduce to writing the Employer's past practice.

While there was no written rule prior to the issuance of the December 29 memo to the effect that anyone found leaving cooking materials unattended would be subject to discharge, Lilia Garcia testified that there was a verbal rule "to take care of the chocolate, make sure it did not burn." The record further shows that burnt chocolate was reported to Berta, and that it had to be thrown away. There is no evidence that anyone has ever been discharged for burning chocolate or leaving cooking materials unattended. Korman testified that the reason for the posting of the rule was that on December 28 three pots of chocolate had been left unattended and as a consequence burned at one time, which had never happened before, and two large industrial brooms had been broken beyond repair. No brooms had ever been broken before.

With respect to the memo advising employees they were subject to discharge for failure to call in within an hour from the start of the workday if the employee was going to be absent or late, it is abundantly clear, and Berta so testified, that employees were aware they were to call in, and that "they always did." Korman testified "they always would call in within an hour, or a half hour. They just did. Or so Berta told me. Berta received the phone calls." The record shows that employees had in fact been terminated for failure to call in.

The purpose for the December 29 notice which the complaint characterizes as a rule that "employees were not to leave money in the dressing room," is spelled out in the first paragraph; i.e., money had been stolen from an employee's purse which had been left in the dressing room. Korman testified that there had in fact been two thefts, one on December 28 and one on December 29, Eva Sanchez had lost $170 cash and Esperanza Tirado had lost $40 cash. The record shows prior theft of money, and that in one instance the suspected employee quit her employment right away. The General Counsel's distinction between the prior practice and the notice in the memo is, "the written rule stated that anyone touching or disturbing another's property would be terminated whereas prior practice was that anyone found stealing would be immediately terminated."

I conclude and find that Respondent has demonstrated justifying circumstances for issuing the December 29 notices. There is no indication that they were discriminatorily motivated as retaliation against the employees for any protected activities, nor that they in any way undercut the Union's representative status. Absent discrimination, an employer is free to choose more efficient and dependable methods for enforcing its workplace rules. *Bureau of National Affairs, Inc.*, 235 NLRB 8 (1978). Moreover, the publication of the rules does not represent a "material, substantial, and significant change" constituting a breach of the bargaining obligation. *Peerless Food Products, Inc., supra.*

Having found that the publication of the December 29 memorandum informing employees that they were subject to discharge for failure to call in within an hour from the start of the workday if they were going to be late or absent, did not constitute an unlawful unilateral change, it follows that the discharges of Arauz, Aguirre, and Badillo for that reason did not violate Section 8(a)(1) of he Act as contended by the General Counsel. The circumstances surrounding their terminations, however, are discussed herein.

Badillo, who also used the name Mario Garcia, Aguirre, nor Arauz testified. Thus, Korman's testimony regarding their discharges is not refuted. The record shows that Badillo was a slow worker, a fact discussed with him on several occasions. On December 28, he received his "third and final warning before termination," because he was so slow. On December 29 Badillo called in that he would not be in that day because of car trouble on the freeway but that he would be in Monday, December 31. He failed to either show up or call on December 31.[23] After missing approximately 5 days of work, Badillo appeared one morning at 11 o'clock Korman testified she thought he had quit. She asked the reason he had not appeared and he informed her that he had been "in jail and something about a car crash." She terminated him for failure to call in. On April 1, 1980, the California Employment Development Department issued a decision finding:

> You were discharged for absence from work. You were unable to report to work because you were incarcerated; however, you did not notify your employer of your situation, although you could have done so. Therefore, it must be held that you[r] discharge was for actions detrimental to the employer's interest.

Korman characterized Aguirre as an "excellent worker." The record shows that on December 28 Aguirre overslept and failed to call in or show up until 2:30 p.m. when he came in to pick up his check. On December 29, he again overslept and did not come in until 10 a.m. Korman accepted as an excuse for failing to call in the fact that Gloria Lopez had given Aguirre the wrong telephone number to call. On Monday, December 31, Aguirre again failed to call or show up for work. After he failed to call in or report for work on January 2, Korman terminated him.

Korman testified that Arauz was a slow worker and a slow learner. Notes placed in her employee file show that on October 18, her slow performance was discussed with her; that on December 3, she had shown improvement, but "she seems to be a slow learner"; that she was absent on December 19; that on December 27, she did not have a hair net;[24] that on December 26 she received three personal telephone calls, and on December 27 one personal call, all received, according to Korman, during working hours which meant a loss of time for two individuals, Gloria Lopez, who went to answer the phone, and the time Arauz spent in talking. Near the end of December, Arauz asked for a day off, which was granted. The following day she neither called in nor showed up for work. The next day, when she came in to work she reported as the reason for not calling in the previous day that she had run out of gas the day before. She was asked and acknowledged that she knew about the requirement that employees call in when they were going to be late or absent from work. She was then terminated.

Contrary to the General Counsel, I find all three employees were terminated for cause and recommend dismissal of paragraph 21.

V. THE CHALLENGES

Having found that Berta Ujueta was a supervisor within the meaning of Section 2(11) of the Act, I recommend that the challenge to her ballot be sustained. Having found that Ofelia Vasquez, Ana Veronica Gutierrez, Ana Elsa Rodriguez, and Arcelia Rodriguez were unlawfully discharged on August 29, I recommend the challenges to their ballots be overruled.

VI. PETITIONER'S OBJECTIONS

Objection 3 alleges that prior to the election, Respondent granted benefits to the employees in order to impinge upon their freedom of choice and to encourage them to vote against the Union. Having found that Respondent's instruction on or about August 25 to the kitchen employees to take a 10-minute break each morning and afternoon was calculated to discourage support for the Union and interfered with the election, I recommend that Objection 3 be sustained.

Objection 4 alleges that Respondent interrogated employees and conducted surveillance of its employees to determine the extent of their support for the Union. Having found that in mid-August Fierro and Ramirez unlawfully interrogated employees about their union sympathies and desires, I recommend that Objection 4 be sustained.[25]

Objection 5 alleges the unlawful discharge of Berta and 11 employees in order to discourage membership in the Union and to interfere with concerted, protected activities. In light of my findings regarding the unlawful discharge of the 12 employees as alleged in paragraphs 11(a) and (b), I recommend that Objection 5 be sustained.

Objection 6 alleges that Respondent failed to post the official board notices in Spanish and English in conspicuous locations and for the time period required. The General Counsel's witnesses who testified on this subject, claimed that only the English version of the Board's notice of election was posted. Korman testified that both English and Spanish versions of the notice were posted in three locations, and that they remained posted until after the election. The Board agent who conducted the election did not contend there was any irregularity with respect to the posting. Minnillo, who is no longer employed by Respondent, testified that two sets of notices (Spanish and English) were posted by Korman in the kitchen and by the timeclock, both locations visible from her desk. Gloria Lopez and Eva Sanchez testified they only read the center portion of the notice, which was in Spanish. Raquel Gonzalez thought a Spanish notice was posted, but was not sure if there was an English version. Respondent's witnesses testified that only the notice in English was posted, but that the center portion was in Spanish. It is clear from an examination of both the English and Spanish notices, that the center portion of both is identical, the left side in English, the right side in Spanish, both setting forth the unit, inclusions and exclusions, and the time and place of the election. Below each, in both Spanish and English, is a sample copy of the ballot. As noted earlier, I am convinced that the General Counsel's witnesses tailored their testimony regarding the notices to insure a new election. The fact remains, however, that five of those who had been deported to Mexico on August 29, made it back to vote at the August 31 election, which convinces me they were not unaware of the legend on the election notices. In light of my credibility findings, I recommend that Objection 6 be overruled.

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[23] The Christmas-New Year Holidays are Respondent's busiest time of the year.

[24] Apparently employees working with food products are required by law to wear hairnets.

[25] No showing has been made, however, that Respondent engaged in surveillance as alleged.

On the basis of the foregoing facts, I find that the election should be set aside, and I so recommend. I conclude further, as more fully described above, that Respondent's unfair labor practices are pervasive so as to prevent the holding of a free election and that, consequently, a bargaining order based on a card count is warranted. Thus, I recommend to the Board that the petition in Case 31-RC-4550 be dismissed and that all prior proceedings held thereunder be vacated in view of the remedy requiring recognition and bargaining based on a card majority.

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By requesting the Immigration and Naturalization Service to conduct a raid to investigate which of Respondent's employees were undocumented aliens, because of their support for the Union, Respondent caused the arrest and deportation of Refugio Betancourt, Lilia Garcia, Ana Veronica Gutierrez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Eva Rodriguez, Ofelia Vasquez, and Elizabeth Villanueva, thereby constructively discharging them in violation of Section 8(a)(3) and (1) of the Act.

4. By discharging Maria Zepeda and Lubia Gutierrez because Respondent believed they had engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By granting employees a morning and afternoon break in order to discourage support for the Union, Respondent violated Section 8(a)(1) of the Act.

6. By interrogating employees regarding their union activities, desires and sympathies; by soliciting their grievances, and by promising to grant them benefits in order to discourage their suppport for the Union, Respondent violated Section 8(a)(1) of the Act.

7. By unilaterally granting employees medical insurance coverage at a time when the Union represented a majority of Respondent's employees in an appropriate collective-bargaining unit, Respondent violated Section 8(a)(1) of the Act.

8. All full and regular part-time employees employed by Respondent at its location at 11150 La Grange Avenue, Los Angeles, California; excluding all delivery employees, office clerical employees, guards and supervisors as defined in the Act, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

9. On or about April 13, 1979, and at all times thereafter, the Union represented a majority of the employees in the above-appropriate unit, and has been the exclusive representative of all said employees for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

10. Respondent's unfair labor practices were so pervasive that they are disruptive of the election process, precluding a fair election and warranting an order to bargain.

11. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

12. Respondent has not committed any other unfair labor practices alleged in the consolidated complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. To the extent that Respondent has not already done so, I shall recommend that Respondent be required to offer Lilia Garcia, Ana Veronica Gutierrez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Eva Rodriguez, Ofelia Vasquez, Elizabeth Villanueva, Maria Zepeda, and Lubia Gutierrez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them, together with Refugio Betancourt, whole for any loss of earnings they may have suffered by reason of Respondent's discrimination against them, by payment of a sum of money equal to that which they normally would have earned as wages from the date of their discharge on August 29, 1979, to the date of said offer of reinstatement, less their respective net earnings during such period, with backpay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289

(1950), with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[26]

It having been found that the nature and pervasiveness of Respondent's unfair labor practices have made the holding of a fair election impossible, I shall recommend that Respondent cease and desist from engaging in such unlawful conduct and bargain with the employees designated collective-bargaining representative, Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO.

Because of the character of the unfair labor practices found herein, I shall recommend that Respondent cease and desist from in any manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

It is also recommended that Respondent make available to the Board, upon request, all payroll and other records to facilitate checking the amount of backpay due.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[27]

The Respondent, La Mousse, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or causing the constructive discharge of employees by requesting the Immigration and Naturalization Service to investigate which employees are undocumented aliens, because of their support for Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, or any other Union.

(b) Dicharging employees because we believe they engaged in union or protected concerted activities.

(c) Granting employees benefits in order to discourage support for the Union.

(d) Interrogating employees regarding their union activities, desires, and sympathies.

(e) Soliciting grievances from employees, or promising to grant them benefits in order to discourage their support for the Union.

(f) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of all the employees in the above-described unit.

(g) Unilaterally granting benefits to employees at a time when the Union represents a majority of Respondent's employees in an appropriate collective-bargaining unit.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, recognize and bargain with Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, as the exclusive collective-bargaining representative of all the employees in the aforesaid appropriate unit and, if an agreement is reached, embody such agreement in a written, signed agreement.

(b) To the extent that Respondent has not already done so, Respondent shall offer Lilia Garcia, Ana Veronica Gutierrez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Eva Rodriguez, Ofelia Vasquez, Elizabeth Villanueva, Maria Zepeda, and Lubia Gutierrez, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(c) Make whole each of the employees as set forth above, together with Refugio Betancourt, for any loss of pay each may have suffered by reason of Respondent's unlawful discrimination, for the period commencing August 29, 1979, to the date of reinstatement or offer of reinstatement, in the manner set forth in the section entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Los Angeles plant, copies of the attached notice marked "Appendix."[28] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein, specifically paragraphs 12, 14(a) and (b), 16, 18(d), (e), (f), and (g), 19(a), (b), and (c), 20(a), (c), and (d), and 21.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

We will not discharge or cause the constructive discharge of employees by requesting the Immigration and Naturalization Service to investigate which of our employees are undocumented aliens, because of their support for Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, or any other union.

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[26] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[27] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[28] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discharge employees because we believe they have engaged in union or protected concerted activities.

WE WILL NOT grant benefits to employees in order to discourage their support for the Union.

WE WILL NOT interrogate employees regarding their union activities, desires, or sympathies.

WE WILL NOT solicit grievances from employees or promise to grant them benefits in order to discourage their support for the Union.

WE WILL NOT unilaterally grant benefits to employees at a time when the Union represents a majority of our employees in an appropriate collective-bargaining unit, without first bargaining thereon with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively with Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, as the exclusive collective-bargaining representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an agreement is reached, embody such agreement in a written signed agreement. The bargaining unit is:

> All full and regular part-time production employees employed by us at our location at 11150 La Grange Avenue, Los Angeles, California, excluding all delivery employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer each of the employees named below, to the extent that we have not already done so, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges previously enjoyed, and make whole each of said employees, together with Refugio Betancourt, for any loss of pay each may have suffered by reason of our discrimination against each of them, for the period commencing August 29, 1979, to the date of reinstatement or offer of reinstatement, with interest.

Lilia Garcia
Ana Veronica Gutierrez
Lubia Gutierrez
Yolanda Martinez
Rosenda Ramirez
Ana Elsa Reyes Rodriguez
Arcelia Rodriguez
Eva Rodriguez
Ofelia Vasquez
Elizabeth Villanueva
Maria Zepeda

All our employees are free to become or remain, members of Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, or any other labor organization.

LA MOUSSE, INC.

Glesby Wholesale, Inc. ***and*** **Teamsters Local 85, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner.** Case 20-RC-15224

October 21, 1981

DECISION AND ORDER REMANDING

By Members Fanning, Jenkins, and Zimmerman

On March 26, 1981, the Acting Regional Director for Region 20 issued a Report on Objections wherein he found that the Employer had failed to comply with the requirement in Section 102.69 of the Board's Rules and Regulations that it immediately serve on the other party a copy of its objections and that it make a statement of such service. The Acting Regional Director further found that the Employer had offered no valid and compelling reason for its failure to comply with the requirement for immediate service and, accordingly, he recommended that the Employer's objections be dismissed and that an appropriate certification be issued. Thereafter, the Employer timely filed with the Board exceptions to the Acting Regional Director's report wherein it contends, *inter alia,* that the Acting Regional Director erred in failing to find that the Employer made "an honest attempt to substantially comply" with the requirements of the Board's Rules and Regulations and, therefore, he erred in failing to consider the merits of its objections. For the reasons stated below, we find merit in the Employer's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In its brief in support of its exceptions, the Employer concedes that it failed to attach a "Proof of Service" form to the objections it filed, but it asserts that such failure was due to "clerical inadvertence." In this regard, the Employer contends that, at the time its objections were prepared and signed, a proof of service form was also prepared, signed, and attached to said objections, and that, at the time its objections were filed with Region 20, it maintained a good-faith belief that such proof of service form continued to be attached to its objections and that a copy of its objections was immediately served on the Petitioner in accordance with California law. In support of the latter contention, the Employer refers to the transmittal letter accompanying its objections which states, *inter alia,* "A copy of these Objections has today been served on the Petitioner as is more fully set forth in the attached Proof of Service." As further evidence of its good faith herein, the Employer correctly asserts that, upon learning of its failure to comply with the service requirements of Section 102.69, it immediately sought to rectify its error by serving, the next day, a copy of its objections on the Petitioner and a new proof of service with Region 20.

In agreement with the Employer, we conclude that the foregoing facts establish that the Employer has made "an honest attempt to substantially comply" with the Board's rules on service of objections. See, generally, *Alfred Nickles Bakery, Inc.*, 209 NLRB 1058, 1059 (1974). In this regard, we conclude that both the transmittal letter which accompanied the objections as well as the speed with which the Employer sought to perfect service upon being notified of its deficiencies indicate that its failure to comply with the service requirements of Section 102.69 was due to clerical inadvertence rather than a disregard of the Board's requirements. Cf. *The Nestle Company,*240 NLRB 1310, 1311 (1979); see also *High Standard, Inc.*, 252 NLRB 403, 405 (1980); and *Alleghany Warehouse Company, Inc., and Star Warehouse Corporation*, 256 NLRB No. 9 (1981). Accordingly, we will remand this matter to the Regional Director for investigation of the Employer's objections and any further action deemed appropriate.

ORDER

It is hereby ordered that this proceeding be, and it hereby is, remanded to the Regional Director for Region 20 for investigation of the Employer's objections and any further action deemed appropriate.

Member Jenkins, dissenting:

I cannot agree with my colleagues' conclusion that the facts herein establish that the Employer has made "an honest attempt to substantially comply" with the requirements of Section 102.69 of the Board's Rules and Regulations. To the contrary, the Employer admittedly was aware of the requirements of Section 102.69, yet was not sufficiently concerned with the same to prevent such "clerical inadvertence" as occurred herein. In my opinion, this lack of concern clearly demonstrates a disregard of our requirements rather than an "honest attempt" to substantially comply therewith.

Since the Employer has established neither an "honest attempt to substantially comply" with our requirements nor a "valid and compelling reason" for its noncompliance, I would dismiss the objections and issue the appropriate certification. See, e.g., *Platt Brothers*, 250 NLRB 325 (1980). This my colleagues refuse to do; accordingly, I dissent.

Lexington Cartage Company, Inc. ***and*** **Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 9-CA-15172**

October 22, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 19, 1981, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lexington Cartage Company, Inc., Lexington, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to recognize and bargain in good faith with Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of our employees in the following appropriate bargaining unit:

> All truck drivers employed by us at our Lexington, Kentucky, facility, excluding all mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL recognize and, upon request, bargain in good faith with the above-named labor organization as the exclusive representative of all employees in the above-described unit.

LEXINGTON CARTAGE COMPANY, INC.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: This case was heard in Lexington, Kentucky, on January 12, 1981, pursuant to an unfair labor practice charge filed by Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, on April 7, 1980, and a complaint and notice of hearing issued by the Regional Director for Region 9 of the National Labor Relations Board on May 23, 1980. The complaint alleges that Lexington Cartage Company, Inc., herein called Respondent, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein called the Act, by refusing to bargain in good faith with the Union, by not responding to telephone calls from the Union, by not responding to bargaining proposals, by canceling a negotiation meeting, and by withdrawing recognition from the Union.

On May 15, 1980, Respondent filed a petition with the Regional Director, which requested the Board to refrain from processing this matter on the grounds that the Union does not represent a majority of employees, and that a remedial order would deprive Respondent and its employees of their constitutional rights. On June 10, Respondent filed its answer to the complaint denying the commission of unfair labor practices, and therein also alluded to the aforesaid petition dated May 15, 1980, and further recited that it had instituted action in the United States District Court for the Eastern District of Kentucky seeking a declaratory order that it not be required to bargain with the Union and that the Union be enjoined from enforcing its bargaining demands.

On July 15, 1980, the said Regional Director referred Respondent's May 15 petition to the Chief Administrative Law Judge for ruling as a motion to dismiss pursuant to Section 102.25 of the Board's Rules and Regulations, Series 8, as amended. On the same date counsel for the General Counsel filed a motion in opposition to the motion to dismiss with supporting memorandum. The General Counsel argued therein that the complaint herein is premised upon an admitted refusal to recognize and bargain with the Union during the 1-year period wherein the Union was certified by the Board as collective-bargaining agent, and that, in the absence of any unusual circumstances, there can be no justification for said

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refusal, citing *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954). Respondent's petition was treated by the Associate Chief Administrative Law Judge as a motion to dismiss which he denied on November 24, 1980.

It appears that all parties have intervened in the district court action where the matter is now pending. Respondent's petition to defer action was not thereafter renewed before me. Subsequent to the hearing in this matter, Respondent and the General Counsel filed briefs. Nowhere in argument or brief does Respondent set forth a cogent argument supported by case citation as to why the Board should or can cede to the district court its exclusive statutory jurisdiction over the alleged unfair labor practice. At no time did Respondent or employees file with the Board a petition to revoke certification. As stated by the Supreme Court in the above-cited *Brooks* case:

> If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit. Although the Board may, if the facts warrant, revoke a certification or agree not to pursue a charge of an unfair labor practice, *these are matters for the Board; they do not justify employer self-help or judicial interference*. . . . [348 U.S. at 103, emphasis supplied.]

Accordingly, I conclude that the processing of this case ought not be deferred.

Upon the entire record and the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a Kentucky corporation with an office and place of business in Lexington, Kentucky, has been engaged in the intrastate transporting of freight in and around Lexington. During the 12-month period preceding the complaint, Respondent, in the course and conduct of its business operations, purchased and received goods and materials valued in excess of $50,000, which were shipped to its Lexington, Kentucky, facility directly from points outside the Commonwealth of Kentucky.

It is admitted and I find that at all times material Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF THE LABOR ORGANIZATION

It is admitted and I find that the Union is and has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

On October 30, 1979, in Case 9-RC-12989, the Board issued a Decision and Certification of Representative wherein it certified the Union as the exclusive bergaining representative of all employees in the following appropriate unit:

> All truck drivers employed by the Employer at its Lexington, Kentucky facility, excluding all mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act.

On November 27, 1979, Union Business Agent Rex Edwards communicated by letter with Respondent wherein he requested a meeting on January 6, 1980, for the purpose of negotiating a collective-bargaining agreement. The first negotiation meeting occurred on January 18, 1980, between union representatives including Edwards and representatives of the parties including General Manager Frank Dean, Sr., and Attorney Robert Houlihan. Edwards submitted a proposed collective-bargaining agreement to Respondent's representatives who agreed to study them.

The next negotiating meeting occurred, on February 25, in Attorney Houlihan's office. At that meeting and at meetings held on March 6, 13, and 28, Respondent submitted to the Union no counterproposals orally or in writing. Rather, at each meeting commencing with the meeting of February 25, Houlihan stated that it was the position of Respondent that the Union did not represent a majority of the unit employees and therefore it was not obliged to bargain with the Union. Edwards testified that he responded that he would file unfair labor practice charges to compel bargaining. He conceded that he also threatened that the Union would engage in strike activity to compel negotiations. Arguments then were engaged in between Edwards and Houlihan as to whether the Union was required by its International constitution and Local bylaws first to conduct a strike vote before engaging in strike activities. No meetings were held after March 28.

Edwards testified that he had made numerous efforts to contact Respondent to arrange for meeting dates but that he was frustrated by the failure of Respondent to answer his messages, and by the unavailability of Attorney Houlihan. Edwards testified that on one occasion he appeared at Houlihan's office for an arranged meeting only to be informed that Houlihan was called away for other business. Edwards' testimony in this regard was confused, uncertain, cryptic, conclusionary, and not related to specific dates or events. He conceded on cross-examination that there were occasions when he was also unavailable for meetings. Edwards' testimony is too vague and uncertain to support any conclusions with respect to Respondent's failure to respond to telephone calls and with respect to the cancellation of one meeting.

General Manager Dean testified that a "short time" after the Union was certified on October 30, 1979, he was presented with a petition which bore the purported signatures of all the 14 unit employees then employed, and which stated, *inter alia*: "We the undersigned Petition Local 651 Teamsters Union to Drop their Effort to Organize the Drivers of Lexington Cartage Company." He also testified that he first became aware of such petition "sometime prior to" October 26, 1979, but he did not explain the circumstances nor did he fix a date.

Dean further testified that on October 18, 1979, he had observed and removed from the plant bulletin board a cartoon which had been extracted from Hustler magazine and which depicted two male persons, one of whom, a political candidate, was engaged in an act of lewd obeisance to the other, a potential voter. Handwritten on the cartoon was an identification of the two persons as General Manager Dean and employee truckdriver Roosevelt Coates (identified at the hearing as the distributor of the employee petition).

Dean concluded, after an investigation of handwriting samples later verified by a handwriting expert, that the handwritten portion was that of Thomas Mason. Dean assumed that, because he had seen Mason in possession of that particular issue of Hustler containing the cartoon shortly before the posting occurred, Mason was responsible for the actual posting. Dean testified without elaboration that during the preelection campaign Mason was "visible as the in-plant union organizer." Also Mason appeared at the National Labor Relations Board Regional Office in the company of the union agent for the scheduled representation case hearing which however was aborted because of a voluntary election agreement. Additionally, Mason served as the observer for the Union at the Board-conducted election.

Mason was discharged on October 26, 1979, without further investigation. The Union was notified by letter of his discharge. No unfair labor practice charge was filed concerning his discharge. Respondent attempted to elicit testimony from Dean as to his opinion of the impact of Mason's discharge on the employees' mental attitude regarding continued union representation. Objection to that inquiry was sustained, *inter alia*, on grounds that Dean was not competent to testify as to the employees' state of mind.

On or about March 9, 1980, according to Dean, a second petition was shown to him, dated March 9, containing the apparent signatures of all unit employees which was addressed "To the Teamsters" and which stated:

> We the Drivers of Lexington Cartage Co. Hear You Are Still Trying To Negotiate for us. We Do Not Want You To Do This. We Do Not Want Your Union. We Want You To Leave Us Alone.

Like the first petition, Dean testified that the second petition was presented to him by a group of three or four employees.

Truckdriver Roosevelt Coates testified that he prepared, with his wife's clerical help, both of the employee petitions described above. He testified that he solicited each employee to sign the petitions. With respect to the first petition he testified that he encountered some employee resistance, but that *after* Mason was discharged he "didn't have a bit of trouble" obtaining signatures. Coates identified Mason as the "one who tried to organize," and stated that Mason's discharge "cut the head off" the organizing drive. Coates testified that he delivered both petitions to the Union. He further testified that shortly after the second petition the employees all "voted" at the union hall to renounce further union representation, and that no strike vote was ever conducted by the Union. Coates did not disclose precisely when a majority of employees signed the petition, nor did he disclose the circumstances.

For reasons set forth below, I granted a motion to strike, as irrelevant, Dean's testimony as to the receipt of the employees' petitions and Mason's discharge. Coates' testimony was received as an offer of proof, as I ruled at the hearing, that the substance of his testimony was also irrelevant.

B. *Analysis*

Respondent argues that, despite the fact that its admitted refusal to recognize and bargain with the Union occurred during the certification year, it was justified in so doing because of unusual circumstances. These circumstances consist of Respondent's belief that the employees renounced the Union because of the opprobrius conduct of the leading employee union adherent who it also expected was "slated" to become a shop steward.[1] Respondent contends that the employees' reputed desires should be honored and that a bargaining order based on a presumption of majority status would be contrary to the employees' rights under the Act and an abridgement of their first amendment right of freedom of association.[2]

Although Respondent contends that the Union is responsible for the conduct of Mason, a contention I find untenable, Respondent does not argue that the circumstances herein give rise to such a degree of union misconduct as to obviate the possibility of a viable relationship at the bargaining table.[3] Indeed, there was no evidence offered to demonstrate that the Union adopted or approved of Mason's conduct, or that it even requested that he be reinstated. Rather, Respondent sought to adduce evidence of Mason's purported conduct solely to establish employee motivation for its alleged disavowal of the Union.[4]

The issues raised herein by Respondent have long been resolved. The Board has explicitly stated:

> It is well settled that a Union's continued majority is conclusively presumed to exist for 1 year from the date of the certification and such an employee

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[1] No evidence was sought to be adduced that Mason was "slated" to be a shop steward. He was discharged prior to any bargaining and was not a member of the Union's bargaining team.

[2] At the hearing Respondent explicitly disclaimed that its refusal to bargain was in any way premised upon the threat of the Union to engage in strike activity.

[3] Where a union has engaged in a campaign of extensive and egregious violence directed against an employer the Board has refused to require a bargaining order. *Union Nacional de Trabajadores and its agent Arturo Grant (The Carborundum Company of Puerto Rico and Carboundum Caribbean, Inc.)*, 219 NLRB 862 (1975); *Allou Distributors, Inc.*, 201 NLRB 47 (1973); *Herbert Bernstein, Alan Bernstein, Laura Bernstein, a copartnership d/b/a Laura Modes Company*, 144 NLRB 1592 (1963).

[4] It can be argued that Respondent's proffered evidence in this regard does not demonstrate that the employees' disapproval of Mason's alleged conduct motivated their change of loyalty, but rather that it was the fact that the chief union adherent was discharged which caused them to cooperate with Coates' antiunion efforts. Respondent's proffered evidence does not establish that the employee petition was executed by most employees after the cartoon posting but before Mason's discharge.

petition does not constitute "unusual circumstances" within *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954).[5]

In no case has the Board or the courts evaluated the motivation of employees' subsequent change of mind as an unusual circumstance. Indeed, the goal of industrial stability sought to be achieved by the Board as affirmed by the Supreme Court would be frustrated if a Board certification based on a secret-ballot Board-conducted election could be speedily nullified by the informal mechanism of an employee-conducted petition. This is so particularly in the instant case where the motivations of the employees are speculative, and where the subsequent petition and renunications occurred after Respondent refused to recognize its bargaining obligations and thereby frustrated effective bargaining by the Union.[6]

Accordingly, I reaffirm my ruling made during the course of the hearing that the evidence proffered by Respondent as to the Union's loss of employee support during the certification is irrelevant and inadmissible.[7] I conclude that Respondent has failed to adduce relevant, competent, and probative evidence to establish the existence of extraordinary circumstances to justify the withdrawal of recognition from the Union. I find that Respondent breached its bargaining obligations under the Act and failed to bargain collectively and in good faith with the Union, and violated Section 8(a)(5) and (1) of the Act on and after February 25, 1980, by failing to respond to the Union's bargaining proposals, and by withdrawing recognition from the Union as the exclusive bargaining agent of employees in the appropriate bargaining unit.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above occurring in connection with its operations described above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

I recommend that Respondent be ordered to cease and desist from its unfair labor practices and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, on and after February 25, 1980, by failing and refusing to respond to the Union's bargaining proposals and by withdrawing recognition of the Union as the exclusive bargaining representative of the employees in the appropriate unit, I recommend that Respondent be ordered to bargain in good faith with and recognize the Union as the exclusive representative of its employees in that unit.

In cases where an employer has refused to bargain during the certification year, the Board has normally, in the remedial order, construed the certification year as commencing on the date the the employer commences good-faith bargaining. *Eckerd Drugs of Georgia, Inc.*, 248 NLRB 151 (1980); *Regal 8 Inn, supra*. In certain circumstances the Board will merely extend the certification year less the amount of time when the parties engaged in substantial good-faith bargaining. *Deister Concentrator Company, Inc.*, 253 NLRB 358, fn. 2 (1980). When the nature of the employer's bad-faith bargaining requires a full year of bargaining in order to effectuate the policies of the Act, the Board has ordered a full year of bargaining during which no representation or decertification elections can be held despite the fact that the employer's bad-faith bargaining occurred in the last few months of the certification year. *Glomac Plastics, Inc.*, 234 NLRB 1309, fn. 4 (1978). Where an employer has withdrawn recognition from a union during the certification year, and where the union after a substantial period of bargaining sought to induce employees to engage in acts of vandalism against the employer in order to support its bargaining position and thereafter the employees renounced the union, the Board held that it would not entertain the processing of a decertification petition until after the employer commenced good-faith bargaining for a reasonable period of time, but the Board did not extend the certification year for an absolute 12-month period. *Lee Office Equipment, supra.*

In this case, the Union did not engage in misconduct during a period of bargaining. Furthermore, bargaining herein did not effectively commence, because Respondent withdrew recognition based on an employees' petition that had been initiated prior to the certification. Clearly, Respondent was aware of the petition prior to any bargaining demand, and was therefore not of a mind to engage in any bargaining from the outset of the certification year. Under these circumstances, I recommend that the full certification year commence on the date that Respondent commences to bargain in good faith, and that during such time no question concerning the Union's majority status can be raised.

CONCLUSIONS OF LAW

1. The Respondent, Lexington Cartage Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

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[5] *Affordable Inns, Inc., d/b/a Regal 8 Inn*, 222 NLRB 1258 (1976). The Board therein cited *Cocker Saw Company, Inc.*, 186 NLRB 893 (1970), enfd. 446 F.2d 870 (2d Cir. 1971); and *Williams Energy Company*, 218 NLRB 180 (1975). See also *Kenneth B. McLean, d/b/a Ken's Building Supplies*, 142 NLRB 235 (1963), 333 F.2d 84 (6th Cir. 1964); *Lee Office Equipment*, 226 NLRB 826 (1976), enfd. 572 F.2d 704 (9th Cir. 1978), and cases cited therein.

[6] This is not to say that an employer or employees are not without recourse to the Board processes at the appropriate time. After the expiration of the certification year employees and the employer may file new representation petitions. Under certain circumstances the Board will entertain petitions for revocation of certification during the certification year; e.g., defunction of the Union or radical change in the bargaining unit.

[7] See *N.L.R.B.* v. *American Steel Buck Corporation*, 227 F.2d 927 (2d Cir. 1955), enfg. 110 NLRB 2156 (1954).

3. All truckdrivers employed by Respondent at its Lexington, Kentucky facility, excluding all mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since October 30, 1979, the Union has been and is the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. On and after February 25, 1980, by failing to respond to the Union's bargaining proposals and by withdrawing recognition of the Union as the exclusive collective-bargaining representative of the employees of Respondent in the aforesaid unit, Respondent has failed and refused, and is failing and refusing, to bargain collectively in good faith with the Union as the representative of its employees, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Lexington Cartage Company, Inc., Lexington, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain in good faith with Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following bargaining unit:

> All truck drivers employed by the Respondent at its Lexington, Kentucky facility, excluding all mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain in good faith with the above-named labor organization as the exclusive representative of all employees in the above-described unit.

(b) Post at its Lexington, Kentucky, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations in the complaint as to which no violations have been found are hereby dismissed.

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[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Browning-Ferris Industries, Chemical Services, Inc. ***and*** **Excavating, Grading, Asphalt, Private Scavengers and Automobile Salesroom Garage Attendants Union, Local No. 731, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 13-CA-19709, 13-CA-19884, and 13-RC-15408

October 23, 1981

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 30, 1981, Administrative Law Judge Hubert E. Lott issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and both Respondent and the General Counsel filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

Respondent excepts to the Administrative Law Judge's finding that employees Andrus and Ciukaj engaged in protected concerted activity when they refused to cross the picket line at International Harvester; Respondent argues that their refusal to cross the picket line was motivated by fear, not by their union sympathies. However, the Administrative Law Judge found, and we agree, that Andrus and Ciukaj refused to cross the picket line out of sympathy for the striking employees. Moreover, such conduct is protected regardless of motivation. See *G & P Trucking Company, Inc.*, 216 NLRB 620, 624 (1975); *Overnite Transportation Company*, 212 NLRB 515, 516 at fn. 6, 522 (1974); *Congoleum Industries, Inc.*, 197 NLRB 534, 547 and fn. 64 (1972). Respondent also argues that Andrus and Ciukaj were obliged to apply unconditionally for reinstatement in order to trigger Respondent's backpay obligation. This argument is without merit because, as Administrative Law Judge found, these employees were unlawfully discharged. See *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979).

In adopting the Administrative Law Judge's finding that Respondent did not violate Section 8(a)(1) of the Act by Supervisor Bevin's statement to employee Pavlowski that, "if the union was here, there might not be any work," we note that Pavlowski initiated the conversation with a joking statement about the Union. Thus, Bevin's statement was a spontaneous response rather than a calculated attempt at intimidation, and was apparently not taken seriously by Pavlowski. Moreover, this statement was an isolated incident; it occurred about 2 months after the discharge of Andrus and Ciukaj and 1 month before the election. In this regard, other than the two discharges, which were unrelated to the employees' support for the Union herein, Respondent did not violate the Act during the period in question.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order[3] the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Browning-Ferris Industries, Chemical Services, Inc., Lemont, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Offer Robert Andrus and Florian Ciukaj immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privilegespreviously enojoyed, and make them whole, with interest, for any loss of earnings they may have suffered as a

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[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge inadvertently included a broad cease-and-desist provision in his recommended Order. We will modify his recommended Order to conform it to the narrow language contained in his notice, which we find appropriate in the circumstances of this case. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). Additionally, we will modify the affirmative provisions of the recommended Order to include the appropriate reinstatement language which was omitted, apparently through inadvertence, by the Administrative Law Judge.

[3] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

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result of their unlawful discharge in the manner set forth in the section of this Decision entitled 'The Remedy.'"

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Excavating, Grading, Asphalt, Private Scavengers and Automobile Salesroom Garage Attendants Union, Local No. 731, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that said labor organization is not the exclusive representative of all the employees, in the unit described below within the meaning of Section 9(a) of the National Labor Relations Act, as amended:

> All full-time and part-time drivers, yard employees, mechanics and service crew employees employed at the Employer's facility presently located at Main and Park Road, Lemont, Illinois, but excluding all office clerical employees, salespersons, supervisors, including service supervisors and service engineers, guards and professional employees as defined in the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interfere with the right of employees to engage in protected concerted activities by discharging them for refusing to cross a lawful picket line established at the premises of another employer.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Robert Andrus and Florian Ciuka immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole, with interest, for any loss of earnings they may have suffered as a result of their unlawful discharge.

All our employees are free to engage in concerted activities for their mutual aid and protection within the meaning of Section 7 of the Act or to refrain from engaging in such activities.

BROWNING-FERRIS INDUSTRIES,
CHEMICAL SERVICES, INC.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge: These consolidated cases were heard at Chicago, Illinois, on November 24 and 25, 1980.[1] The charge in Case 13-CA-19709 which was filed on March 24, and the charge in Case 13-CA-19884 filed on May 5 were filed by Excavating, Grading, Asphalt, Private Scavengers and Automobile Salesroom, Garage Attendants Union, Local No. 731, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union. A complaint issued on May 29, consolidating Cases 13-CA-19709 and 13-CA-19884. A report on objections order further consolidating cases issued July 9. In that report the Regional Director's order recommended that a hearing be held with respect to Objections 2, 5, and 6 because they raised issues which were the same as those involved in the unfair labor practice cases filed by the Union. The Regional Director further recommended overruling Objections 1, 3, 4, 7, and 8. Objection 7 alleges the discriminatory discharge of seven employees, including Robert Andrus and Florian Ciukaj. That portion of Objection 7 relating to the discharge of five employees was overruled by the Regional Director because the charge in Case 13-CA-19926 alleging the discriminatory discharge of these five employees was dismissed by the Regional Director on July 1. The Regional Director further recommended overruling the balance of Objection 7 seven with respect to the discriminatory discharge of Andrus and Ciukaj because he found that the discharges occurred at the premises of another employer on February 19, which was outside the critical preelection period. Limited exceptions were filed with the Board over the Regional Director's ruling with respect to that portion of Objection 7 dealing with Andrus and Ciukaj. The Board in its Decision and Direction dated September 12, adopted the Regional Director's finding and recommendations; however, it remanded that portion of Objection 7 dealing with the discharge of Andrus and Ciukaj for hearing to determine the actual discharge date of these two employees, since the discharge of these employees could have occurred after the filing of the petition and therefore affected the results of the election. Therefore the Board directed that a hearing be held with respect to Objections 2, 5, 6, and that portion of Objection 7 relating to the discharge of employees Andrus and Ciukaj and that these objections be consolidated with the issues in Cases 13-CA-19709 and 13-CA-19884. An amended consolidated complaint in Cases 13-CA-19709, 13-CA-19884, and 13-RC-15408 issued on July 29. The current complaint alleges that Browning-Ferris Industries, Chemical Services, Inc., herein called Respondent, has violated and is violating Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act. Respondent's answer to the complaint, duly filed, denies the commission of any unfair labor practices.

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[1] All dates herein refer to 1980 unless otherwise indicated.

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for Respondent and counsel for the Union.

Upon the entire record and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Company, a Nevada corporation, is engaged in the business of chemical cleaning and liquid waste handling at its plant in Lemont, Illinois, where it annually purchases and receives at its Lemont facility goods and materials valued in excess of $50,000 directly from points located outside the State of Illinois. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Issues*

The principal issues raised by the pleadings and the various amendments made thereto at the hearing are whether Respondent violated Section 8(a)(1) of the Act by various instances of interrogation, surveillance, wage increases, threats, and by replacing employees because they refused to cross another employer's picket line; and whether, as a result thereof, certain election objections should be sustained and a new election directed.

B. *Background*

Respondent is engaged in various forms of cleaning, dredging, and hauling of chemical waste. It cleans the bottoms of waste ponds, utilizes a hydroblaster which performs high pressure water cleaning at large refineries and industrial sites, and performs chemical cleaning using a mixture of acid and water which is circulated through customer equipment. Respondent's drivers haul away the spent chemicals and liquid waste. Respondent performs these various functions at customer locations or plants which are located throughout many States. Usually each job requires several laborers and a supervisor.

The parties entered into several stipulations which are as follows:

As of February 14, Browning-Ferris Industries at its Lemont, Illinois, facility, employed the following six employees classified as truckdrivers and ranked according to seniority: Florian Ciukaj, Robert Andrus, John Grande, Ernie Breuckman, Mike Ward, and Ron Pavlowski.

On February 14, International Harvester, West Pullman Plant, sent a purchase order to Browning-Ferris Industries, Lemont, Illinois, to do the following work: To provide labor and materials, to transport 22,000 gallons of soluble oil waste and 4,500 gallons of hydrochloric acid waste to the C.I.D. Landfill, Calumet City, Illinois.

On February 15, the following personnel completed the work at International Harvester's West Pullman Plant described in the above purchase order; Harold Dugan, salesman Bill Anthony, Randy Dann, and Tom Doolan. Each of the above arrived in a separate truck at International Harvester's West Pullman Plant at 9:30 a.m., and left at 12:15 p.m. Each of the above drove a semitractor-trailer, to wit: 7170, Bill Anthony; 7233, Harold Dugan; 7257, Tom Doolan; and 7279, Randy Dann. As of February 15, 1980, the above semitractor-trailers were normally assigned as follows; 7170 to Ernie Breuckman, 7233 to Robert Andrus, 7257 to Jim Chandler, and 7279 to Florian Ciukaj.

On February 22, International Harvester's West Pullman Plant sent Browning-Ferris Industries, Lemont, Illinois, a purchase order for the following work. To provide labor and materials to transport 10,000 gallons of soluble oil waste to C.I.D. Landfill, Calumet City, Illinois. This work was actually completed by Browning-Ferris Industries, Lemont, Illinois, on February 21, by drivers Ernie Breuckman and Ron Pavlowski who drove separate trucks. Both left Browning-Ferris Industries at 10 a.m., arrived at International Harvester's West Pullman Plant at noon, and departed at approximately 2:30 p.m. from International Harvester.

On March 17, International Harvester's West Pullman Plant, sent to Browning-Ferris Industries an invoice to provide labor and materials to transport 10,000 gallons of soluble oil waste to the C.I.D. Landfill, Calumet City, Illinois. This work was completed by Browning-Ferris Industries on March 18, by drivers Mike Ward and Tim Doogan. Both arrived at International Harvester, West Pullman Plant, at 11:30 a.m. and departed at 1 p.m., Doogan drove truck 7120. Ward drove truck 7233. Browning-Ferris Industries, Lemont, Illinois, performed no work for International Harvester from March 18, until July 30.

International Harvester was billed on August 15 for Browning-Ferris Industries work, described as quench oil sludge and transportation disposal, performed on August 1 and 5.

International Harvester was billed on August 29 for Browning-Ferris Industries work described as clean tank and dispose of waste performed on July 31 and August 1, 4, and 5. This work is similar to work which has been performed by Browning-Ferris Industries for International Harvester in the past.

David Doogan first performed work as a driver for Browning-Ferris Industries, Lemont, Illinois, on February 25. Tim Doogan first performed work as a driver for Browning-Ferris Industries, Lemont, Illinois, on February 26. David Doogan and Tim Doogan were terminated as drivers sometime in late April.

Ricardo DeHoyos was hired as a driver by Browning-Ferris Industries on June 17 and was terminated on June 20. Fred Balas was hired as a driver by Browning-Ferris Industries on June 12 and was terminated on October 8. Walter Miller was hired as a driver by Browning-Ferris Industries on May 6 and is still employed as a driver.

Browning-Ferris Industries has maintained an average of six drivers (excluding James Chandler) who have actually and regularly performed work from February 19 through November 24.

There is no written job description for the position of driver supervisor. There is no written job description for James Chandler from November 1, 1978, to the present. There is a written job description for the following hourly job classifications: Shop foremen, service supervisor, service technician, equipment technician, and mechanic.

In addition to the above stipulations it should be noted that Respondent's drivers spend approximately 90 percent of their time hauling liquid waste in semitractor-trailers from customer storage tanks to disposal sites. Individual drivers do not service regular customers or have assigned routes. They learn where they are to be dispatched each day by checking the drivers' schedule in the dispatchers office the evening before. If the schedule is not completed, the driver will telephone for his assignment or the dispatcher will telephone the driver. The drivers also receive radio messages during the workday from the dispatcher and make runs which have not been posted on the schedule. Drivers rarely switch assignments and only then with the approval of the dispatcher. Drivers normally do not decline assignments once they have been scheduled, however, Respondent often asks drivers whether they want a particular assignment before scheduling them for it and usually accommodates their wishes.

At all times material herein there was a lawful economic strike at the International Harvester facility, West Pullman Works, Chicago, Illinois.

C. *Replacement of Robert Andrus and Florian Ciukaj*

In February International Harvester placed an order with Respondent for the removal of liquid waste which would require four trucks on February 15. Four of the six drivers working for Respondent, including Andrus and Ciukaj, refused to cross the picket line at International Harvester. Andrus told Respondent that he did not think that it would be a very good idea to cross the picket line, while Ciukaj told Respondent that he did not want to get his head busted and he did not want to hurt the strike effort. District Manager Harold Dugan, salesman Bill Anthony, Service Supervisor Tom Doolan, and Shop Foremen Randy Dann, all management personnel, later drove the required trucks across the picket line and completed the February 15 job for the customer.

On February 19, Respondent received another work request to remove liquid waste from the International Harvester Plant on February 21. This job required all six of Respondent's trucks. Since only six drivers are employed to drive liquid waste hauling jobs, all drivers would be needed to complete the order. As a result of the previous refusals of employees to cross the picket line at International Harvester on February 15, management held a meeting on February 19 and interviewed each driver for the purpose of determining who would cross the International Harvester picket line to complete the work order scheduled for February 21. At each of these meetings Service Manager Ken Bevin, Randy Dann, and Harold Dugan were present. At that time Respondent's drivers were Ernie Breuckman, Ron Pavlowski, Jim Chandler, Bob Andrus, Florian Ciukaj, and Mike Ward. At these meetings Ciukaj merely stated that he would not cross the picket line while Andrus told Dugan that he was in sympathy with the strikers' economic action. When Andrus and Ciukaj told Dugan that they would not cross the picket line, they were both told that they would be replaced with someone who would do the work. Andrus and Ciukaj were the only drivers who refused to cross the picket line and neither driver worked for Respondent after February 19. On February 20, International Harvester called Respondent and reduced their order to only two trucks to be used on February 21. Pavlowski and Breuckman completed the International Harvester order on February 21. Dugan testified that replacements for Ciukaj and Andrus were hired either on February 21 or 22. The work schedule for February 21 indicates that there were five jobs or trucks scheduled: Breuckman and Pavlowski were assigned to International Harvester, while Ward, Chandler, and Supervisor Simpson were dispatched to other local customers. Neither Andrus nor Ciukaj ever made an unconditional offer to return to work. On February 23 Ciukaj came to the plant for his paycheck and asked Dugan if he had been fired. Dugan informed him that he had been permanently replaced. Dugan further stated that, Respondent had already hired two, drivers to replace Andrus and Ciukaj but that if they made an unconditional offer to return to work Respondent would take them back when an opening occurred. The following week Dugan met with the other drivers to explain what had happen to Andrus and Ciukaj. He told the drivers that they had been permanently replaced and further stated that, while he did respect their feelings for not crossing the picket line, Respondent could not operate a business by not servicing their customers and they had no choice but to permanently replace the people who would not service the customers and do the work for Respondent. There was evidence that the drivers are not scheduled to work every day and when that occurs they simply stay home and call in the next day and check with the dispatcher to see if they are scheduled to work the following day. Andrus and Ciukaj were not scheduled to work on February 15, 16, and 18, however, Ciukaj worked on February 19. Ciukaj began his employment with Respondent in July 1974 while Andrus started work with Respondent in November of that same year. Dugan testified that neither Andrus nor Ciukaj ever made an unconditional offer to return to work. He further stated that there were no other jobs available for these two drivers on February 21.

D. *James Chandler*

1. Supervisory status

Chandler has been employed at Respondent's Lemont facility since 1972. Chandler testified that prior to November 1978 he was a trucking coordinator dispatcher. In that capacity he received a salary and his job duties consisted of dispatching trucks, hiring and firing drivers, and supervising the entire trucking operation. He wore a uniform that consisted of blue trousers and a white shirt with the words "Browning-Ferris, Jim, Supervisor" printed on it.[2] As a truck coordinator Chandler testified that he drove trucks frequently and that prior to November 1978 he met with Dugan and explained that he was not making enough money as a coordinator and wished to return to driving. Dugan said that he could be a lead driver. He was given a new truck and a 45-cent-an-hour wage increase which was that much more than what the most senior drivers were earning. Since November 1978 Chandler stated that he has continued to wear the white shirt with the word supervisor on it, but that over a period of time the supervisor label wore off some of the shirts and was not restored until February or March. As a lead driver his job duties consisted of driving a vacuum truck and operating a vacuum pump which pumps liquid waste from the customers tank into his truck. He also stated that he fills out certain EPA, metropolitan sanitary district forms, and trucking manifests. He spends approximately 95 percent of his time driving the truck and 5 percent of his time overseeing service crews that are assigned to him. After the truck is loaded with waste liquid he then drives the contents to a disposal site and disposes of the waste. Chandler further testified that in his present job as lead driver he has no authority to hire, fire, schedule employees work, discipline, or transfer employees. Sometime in 1979 Chandler recommended to higher management that Ernie Breuckman not be allowed to drive a tractor-trailer because he was not qualified. Thereafter Breuckman drove nothing but a straight truck. Chandler, 2 months later, after driving with Breuckman, recommended that Breuckman be allowed to drive a tractor-trailer and thereafter Breuckman did drive the larger truck.[3] In January Chandler stated that he recommended a raise for Leo Durkin which Durkin received. As a lead driver Chandler testified that the customers at the jobsite looks to him to see that the job gets done and it is part of his responsibility to set up the job correctly and show the service employees how to do their job. In the past he has talked to management about employees not performing their job safely in accordance with his direction and has reported employees to Ken Bevin who have not performed their jobs correctly and that Bevin's responded that Chandler was the boss on the job. Chandler admitted supervising a Monsanto job in September or October with another supervisor Tom Simpson, in Iowa. The job lasted for 8 or 9 days and Chandler was the sole person in charge of one shift. Chandler testified that as a truck operator he completed many service receipt and log forms at the end of each day.[4] These service receipt and log forms basically describe which equipment was used on a particular job and the dates and the hours of use. They also show the number of employees and supervisors that worked on the job and the dates and hours that they worked. The form also indicates any chemicals used and any other special equipment that was needed to complete the job. Respondent prepares the customers bill based upon the information contained in these service receipt and log forms. The customers receive a copy of this form from the driver or a supervisor and the balance of the copies are returned to Respondent for billing purposes. Chandler stated that the drivers' time is not shown on these forms because that time is included with the cost of his truck. However, Chandler indicated that if he did work on a job other than driving work his labor would be indicated. On several such service receipt and log forms which Chandler completed and signed dating from August to November 1979, Chandler listed one supervisor and either one or two service employees or equipment technicians. Chandler could not recall who the supervisor was on any of these jobs if it was not himself. On several other forms which Chandler had completed during the period of January and February (some 18 different jobs) Chandler listed himself as a service technician.[5] On another service receipt and log form dated March 18, signed by Chandler, he listed himself as a supervisor for that entire day. On all of these forms Chandler lists at least one and in most cases two employees working with him on the job for that particular day.

Harold Dugan testified that James Chandler was hired as a trucking coordinator on June 5, 1977. His job duties as trucking coordinator included scheduling trucks for work, hiring and firing truckdrivers, and assigning drivers to haul liquid waste loads according to orders from various customers. Dugan testified that in October 1978 Chandler requested that he be allowed to assume the duties of a truckdriver in addition to his supervisory functions. Chandler wanted to change his job status because he could make more money as a driver and hourly employee than he could remaining as a coordinator. Chandler stated to Dugan that since there were times when he had to drive a truck as a coordinator, he wanted to be paid for it. According to Dugan, they agreed that Chandler would be classified as a driver-supervisor, continuing many of his supervisory functions as well as performing regular driver duties. Chandler's employee history record (Resp. Exh. 14) notes "11-1-78, per Jim Chandler's request, duties were changed from coordinator to driver supervisor (HD)." An employee transaction report (Resp. Exh. 18) dated November 1, 1978, reflects the change in status: "Explanation of other-change from coordinator to driver supervisor per employees request." Dugan further testified that Chandler assumed the duties of driver-supervisor on November 1, 1978. Since becoming a driver-supervisor on that date, Chandler supervised employees approximately 25 percent of his worktime and drove trucks for the remaining approximate 75 percent of the time. After becoming a driver-supervisor, Chandler continued his duties as a trucking coordinator through February 1979. After February 1979, his supervisory duties consisted of directing service crew employees at customer's jobsites.

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[2] Other employees wore uniforms consisting of blue trousers and blue shirts. All supervisors wore white shirts and blue trousers.

[3] Apparently other experienced drivers such as Andrus and Ciukaj also made similar recommendations to higher management although the record is not clear as to whether or not these recommendations were ever followed.

[4] Other drivers also complete these forms and signed their names.

[5] On Resp. Exh. 15, which is a job description form, a service technician classification lists certain duties: Hourly employee skilled in all product lines normally assigned to. Has service and support responsibility as assigned by service manager and/or branch manager. Duties include job execution, supervision and discipline of crews, and equipment care. Uniform is blue pants, white shirt, and white hat.

As a supervisor of service crew employees Chandler acted as a liaison between the customers and Respondent and had the authority to discipline employees for poor performance at the jobsite. As Respondent's representative at the customers' place of business, he was the customers direct contact with Respondent. Chandler directed service crew employees and gave them work assignments. He would assign jobs to employees according to their abilities, would instruct them in the proper use of company equipment, and would observe employees using the equipment. As a supervisor on service crew jobs, Chandler also was responsible for completing the company service receipt logs which listed the equipment, labor, and chemicals used on each job. The service receipt logs completed by Chandler and other employees list Chandler as a supervisor or service technician on the service crew jobs. Service technician is another designation used for service crew supervisor.

Dugan testified further that like every company service supervisor, Chandler had the authority to terminate employees. In the summer of 1979, after leaving his coordinator job, Chandler evaluated Ernie Breuckman's driving skills and recommended that Breuckman not be allowed to drive tractor-trailer rigs until he had more experience handling smaller trucks. Management followed this recommendation based on Chandler's evaluation. Several months later Chandler made a second evaluation of Breuckman and recommended that he be allowed to drive the tractor-trailer. Respondent followed this recommendation as they had done on the previous occasion and Breuckman began driving trailer rigs. Chandler also has effectively recommended that an employee be given a raise. In January 1980, Chandler discussed Leo Durkin's work abilities with Ken Bevin and suggested that Durkin be given a raise. Bevin acted on Chandler's recommendation and a payroll change was made giving Durkin the raise. Dugan testified that Chandler is paid on an hourly basis as are all service crew supervisors. Although there were times when all drivers and supervisors were receiving the same rate of pay, those pay rates were instituted in order to change the payroll raises to anniversary date system. In January 1980 Dugan informed the drivers and supervisors that they would get a raise that would be effective in April. On April 1, all drivers and supervisors received a raise from $7.50 per hour to $8 per hour. To reestablish some differentiation between drivers and supervisors, all supervisors (including Chandler) were given a 25-cent-per-hour raise to be effective on April 21.

2. Threats and interrogation

The facts surrounding these allegations are basically undisputed. On April 22, a group meeting of company supervisors was called by Dugan to discuss Respondent's strategy regarding the Union's organization drive. Chandler was on a route assignment at the time but was called on the radio by Dann and told to attend the meeting. No company personnel were present except supervisors. At the end of the meeting Dugan handed out a questionnaire which contained a list of employees names and a yes, no, and maybe after each name. Each supervisor was instructed to mark next to the employee name how the supervisor felt about each employees' support or sympathy for the Union. Apparently Chandler completed the questionnaire but refused to sign it on the signature line which stated "supervisor." Chandler told Dugan that he refused to sign the questionnaire because he was not a supervisor. On April 23 James Chandler received a letter from Harold Dugan (G.C. Exh. 5) which reads as follows:

> Dear Jim
>
> Lemont district policy states that as a supervisor you have specific responsibilities to fulfill, both at the branch managers request and in the capacity of providing support functions. One of the supportive functions is filling out employee questionnaire forms as requested.
>
> Such a request was made on April 22, 1980; and you failed to fully comply with it. Nor did you fully cooperate as requested.
>
> In addition to your failure to cooperate on April 22, 1980, you have refused to wear your supervisors shirt insignia, even though Lemont district policy mandates that this be done.
>
> As a supervisor, you owe your loyalty to this company and can not, by law, actively support or campaign on behalf of any labor organization. If you continue to refuse to cooperate, or otherwise refuse to, or fail to fulfill your duties and responsibilities as a supervisor, you will be terminated.
>
> Lemont district policy is specific, and leaves no doubt whatever concerning supervisory responsibilities and duties.
>
> I hope I can count on your full support, cooperation and assistance in the future. If, you for any reason, are uncertain as what your responsibilities are, I would be happy to further explain them to you.
>
> Harold Dugan

3. Wage increase

This allegation concerns itself with the 25-cent-per-hour raise received by Chandler and all supervisors effective April 21. Dugan testified that this raise was given in order to establish a differential between supervisors and drivers who up until that time were earning the same hourly rate.[6]

E. *Ron Pavlowski*[7]

Ron Pavlowski has been a truckdriver for Respondent since January 21. He testified that during the week of April 13 to 20 or the week of April 20 to 27 he was working at Clark Oil. He stated that on one occasion he was putting some hydrochloric acid into the circulating unit and just jokingly said to Ken Bevin, "If we were union I wouldn't even have to load this acid." Ken Bevin's comment was, "If you were union you wouldn't have any work." Pavlowski further testified that during that same week he was putting liquid waste in Respondent's holding pond and Randy Dann, who was still at the yard, came back to him and said, "Is Jim Chandler talking about anything regarding the Union? Pavlowski answered, "No." Then Dann said, "Well, how do you think the vote is going to go?" Pavlowski responded, "Roughly, I think it's going to be about 18 to 7." Dann said, "For?" And Pavlowski said, "No, I think against."

Pavlowski further testified that on May 20 after the election was over and the ballots had been counted (approximately 9 p.m.), he went to Johnny's 83 Bar and Grill where Respondent's supervisors were having a victory celebration. Pavlowski stated that he walked into Johnny's and noticed that all the supervisors were sitting at one table. Everybody was drinking, laughing, and joking. He sat down with Ken Bevin, John Grande, and Kevin Wales. Pavlowski started the conversation by stating that he could not believe the vote came out 14 to 3. Bevin said challenges would have made it 14 to 7 or 8. Bevin further stated that the four votes which had been challenged were Bob Andrus, Ciukaj, Jim Chandler, and he believed George Bouer and, according to Pavlowski, he also said that the two Doogans had called up to ask if they could vote and were told not to waste their time. Bevin then stated to Pavlowski, "We know that Mike Burns and Wayne Kirkpatrick voted yes and Randy Dann thinks that you voted for the Union. You are a very hard individual to figure out. We probably will never know how you voted." Pavlowski said, "Well you're right." Bevin then said, "Jim Chandler's ass is grass and Wayne Kirkpatrick doesn't know it yet but he is gone."

Radcliff Dann, shop foremen for 3 years, testified that he recalls a conversation with Pavlowski in April wherein he asked Pavlowski what the outcome of the vote would be and Pavlowski replied 14 to 7. Dann testified that that was the end of the conversation and that nothing else was said and that he does not recall mentioning Chandler's name.

Kenneth Bevin, service manager, testified that after the election was over at approximately 7 p.m., on May 20, he went to Johnny's 83 Bar and Grill. Several supervisors were sitting at a table drinking when Pavlowski came in at approximately 9 p.m., and sat down and ordered a beer. Pavlowski asked Bevin what the outcome of the election was and Bevin told him 14 to 3 at which time Pavlowski did some figuring and stated something to the effect that it should be 14 to 7, whereupon, Bevin said that some votes were contested and not counted. Pavlowski said that that made sense then. Bevin stated that they did not discuss anything else and that Chandler's name was not mentioned. Bevin further testified that nothing was said about how any particular employee voted or that he knew how certain employees voted. Bevin further stated that he did not say that those employees who voted for the Union would be fired or words to that effect. He also testified that there was no conversation regarding Kirkpatrick. Bevin further testified that he remembers a conversation with Pavlowski taking place in April at the Clark Oil Refinery in Blue Island wherein Pavlowski jokingly said, while he was loading acid into a truck, "If the union was here or if we had a union I wouldn't have to load the truck." Bevin responded in a joking manner, "If the union was here there might not be any work."

F. *Analysis and Conclusions*

1. Interrogation by Ken Bevin on February 19

There is no evidence in the record to support this allegation. Therefore, I hereby dismiss it.

2. Replacement of Andrus and Ciukaj

The Board recognizes two competing rights in cases where employees are replaced for refusing to cross the picket line of another employer. The right of employees to respect a picket line established at the premises of another employer and the right of employers to run their business despite the employees' protected right. Thus, the Board recognizes the right of an employer to replace employees who refuse to cross a picket line and are thereby engaging in protected conduct. However, the employer, when it takes this action, must show that it acted "only to preserve the efficient operation of his business." *Overnight Transportation Company*, 209 NLRB 691, 692 (1974). Similarly, the employer is required to show, "an overriding employer interest" *Overnight Transportation Company*, 154 NLRB 1271, 1274 (1965). The Board further stated in this decision, "clearly, what is required is the balancing of two opposing rights, and it is only when the employer's business need to replace the employees is such as clearly to outweigh the employees' right to engage in protected activity that an invasion of the statutory right is justified."

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[6] At the conclusion of the General Counsel's case in chief, the General Counsel amended the complaint to include the 25-cent-per-hour wage increase to Chandler as a violation of Sec. 8(a)(1) of the Act; i.e., the granting of the benefit. I denied the motion because this allegation was never contained in any charge, complaint, or objection that issued prior to hearing. Further, it appeared clear to me at the time that this information was known or should have been known by the General Counsel several months prior to hearing because it involved a matter which was well known to one of the General Counsel's chief witnesses. However, at this time I am granting the motion to amend the complaint and will deal with the wage increase on its merits.

[7] All the testimony of Ron Pavlowski was given in support of amendments to the complaint which were made by the General Counsel at the hearing. The General Counsel stated that the information provided by Pavlowski first came to her attention on November 18. The same is true with respect to the allegations involving Randy Dann. I granted the motion but stated that coming forth with evidence at this late date may effect the credibility of her witness.

Applying these principles to the present case, I can not find a compelling business reason for Respondent's action. Respondent offered virtually no evidence that replacements were necessary to preserve the efficient operation of the business. To the contrary, the evidence indicated that Respondent's drivers are not assigned regular routes and while it is not customary for drivers to refuse assignments after they are scheduled, Respondent in the past made every effort to accommodate their wishes prior to preparing the schedule. Moreover, I find based on the record that no special skills are required of these drivers. Keeping this evidence in mind, it is further found that both Andrus and Ciukaj were informed by Dugan on February 19 that they were being replaced because Respondent had need of all six drivers on February 21. However, on February 20, which was prior to the time the schedule for February 21 was actually prepared, and prior to the hiring of any replacements; Respondent was informed by International Harvester that a mistake had been made and it really only needed two trucks and two drivers.[8] With this information Respondent proceeded to hire replacements even though they were not needed. Further, Respondent could not demonstrate that replacements were ever needed. The evidence is clear that International Harvester was the only customer whose employees were engaged in a strike. The evidence is also clear that from February 21 to the end of the strike at International Harvester, Respondent received one order for two drivers (March 18) from this customer. Keeping in mind that from February 20 to the end of the International Harvester strike, Respondent had four or five drivers who were willing to cross the International Harvester picket line; there appears to be no justification for the replacement of these two drivers. On the critical day of February 21, Respondent's schedule indicates that Andrus and Ciukaj could have been assigned to three other jobs or merely sent home for the day if no work was available. There would have been nothing unusual in either course of action and Respondent offered no evidence to show that by so doing, it would have adversely affected its business operation. Instead, Respondent chose to replace its two most senior drivers, which it clearly did not have to do. Respondent took the position that Ciukaj and Andrus were advised that their rights as employees were retained, but they made no unconditional offer to return to work. Therefore Respondent was under no obligation to reinstate them. Under the circumstances of this case, I reject this argument and note instead that when driver job openings occurred, Respondent never notified either driver of this fact. This suggests that Respondent did not want to employ either driver so long as they intended to respect picket lines. Dugan explained Respondent's position when he told the other drivers the following week, "[Y]es, we told the drivers that Bobby and Pie (Ciukaj) had been permanently replaced. We did respect their feelings for not going across the line but we could not operate a business by not servicing our customers and we had no choice but to permanently replace the people who wouldn't service the customers and do the work for us." Dugan's explanation to the other drivers uses the word "customers" twice and never refers to International Harvester or any legitimate business necessity for replacing Andrus and Ciukaj. What this statement means to me and, I am sure, to the drivers is that Respondent did not want to employ any drivers who would honor a picket line because the mere act of honoring a picket line interfered with its business operations affecting all of its customers.

Dugan's statement also refutes Respondent's argument that Andrus and Ciukaj refused to cross the picket line because of their fear of physical harm. Dugan and other supervisors went to the International Harvester plant on February 15 and knew there was no danger involved in crossing the picket line. Therefore, the clear import of Dugan's words is that he respected their decision to support the strikers at International Harvester. Based upon this statement and the testimony of Andrus and Ciukaj, I find that both drivers refused to cross the picket line out of sympathy for the strikers.

Accordingly, I find that Respondent discharged Andrus and Ciukaj on February 19 in violation of Section 8(a)(1) of the Act for their refusal to cross a picket line at the plant of another company.

3. James Chandler

The only issue to be resolved herein is whether or not Chandler was a supervisor on April 22. If he was not, the allegations must be sustained since the facts supporting them are admitted.

Respondent's documentary evidence supports Dugan's version of the meeting held between him and Chandler sometime prior to November 1, 1978. Therefore, I find that Chandler agreed to become a driver-supervisor and further agreed to supervise service employees at the customers jobsite. He was hourly paid and earned the same hourly wage as other service crew supervisors. He wore the same uniform with the designation "supervisor" on the shirt as did other supervisory personnel. Thus, holding himself out to the other employees as a supervisor. The service receipt and log forms completed by Chandler are persuasive evidence that Chandler was a supervisor during the critical period in this case. On these forms covering a period from March to October, Chandler listed himself by name as a supervisor and charged his time as a supervisor in addition to the time of one or two equipment technicians. On other forms completed by Chandler covering the period from August to November 1979 and January through February (1980), Chandler charged customers for a supervisor's time as well as the time for one or two service employees. Thus, the inference to be drawn is that Chandler was the only person at these customer jobsites to direct the work of Respondent's service employees who were also listed on the forms. Since there was no evidence to the contrary, a finding that Chandler was not a supervisor during 1979 and 1980 would mean that Respondent's service employee's worked away from Respondent's facility at a customer site without any supervision. Therefore, I find that Chandler was the only person in many instances that was available at customer jobsites to direct the work of service crew employees. I further find that Chandler assigned work to service crew employees and directed their work. He effectively recommended wage increases and job promotions. I also find that he was in many cases Respondent's representative at the customer's place of business and in that capacity was responsible for satisfactory completion of the work.

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[8] Respondent's witnesses could not testify as to actually when the schedule for February 21 was prepared. However, other record evidence indicates that the schedule for the next day is prepared the night before. I find that Respondent hired Tim Doogan and David Doogan to replace Andrus and Ciukaj on February 21 and 22, and neither replacement drove for Respondent until February 25 and 26.

Accordingly, I find that James Chandler on the critical date at issue herein was a supervisor within the meaning of Section 2(11) of the Act. Based upon this finding, I hereby dismiss allegations V(b) and (c) of the complaint and the amended allegation with respect to the granting of the wage increase to Chandler on or about April 21.

4. Ron Pavlowski

After observing the witnesses demeanor with the respect to all the testimony given in support of these allegations and the denials by Respondent's witnesses, I credit Respondent's witnesses over the uncorroborated testimony of Pavlowski. According to Pavlowski the alleged statements were made to him in April and May, however, he did not come forward or make any attempt to offer this evidence for over 6 months. In addition to the reasons already cited, it is noteworthy that Pavlowski could recall very little of the conversation in Johnny's 83 Bar on May 20 except the bare allegations.

Dann testified that sometime in April he asked Pavlowski what he thought the outcome of the election would be. In the context of this case I do not find this to be interrogation and a violation of Section 8(a)(1).

Bevin admits stating to Pavlowski that, "If the Union was here there might not be any work." I view this statement as an expression of Bevin's opinion but not a threat. In support of my finding, I note that Pavlowski was asked whether or not Bevin ever threatened to discharge him and Pavlowski answered no.

Accordingly, based upon the above findings, I conclude that the General Counsel has not carried the burden of proof by a preponderance of the evidence with respect to these allegations and hereby dismiss all the amended allegations; namely, paragraphs V(d), (e), (f), (g), and the amended allegation involving Randy Dann.

G. *The Objections*[9]

The petition was filed on February 25. A Stipulation for Certification Upon Consent Election Agreement was approved on April 1. Thereafter a secret-ballot election was held on May 20. The polls closed at 7 p.m. on May 20 and the election results were as follows: Approximate number of eligible voters 19, void ballots 0, for petitioner 3, against petitioner 14, challenged ballots 4. The election was conducted in the following unit of employees:

> All full-time and regular part-time drivers, yard employees, mechanics and service crew employees employed at the employer's facility presently located at Main and Park Road, Lemont, Illinois, but excluding all office clerical employees, sales persons, supervisors, including service supervisors and service engineers, guards and professional employees as defined in the Act.

Thereafter, timely objections to the election were filed by the Union. All the objections were overruled by the Regional Director with Board approval with the exception of the following:

Objection 2 that the Employer interrogated its employees concerning their Union and/or protected, concerted activities.

Objection 5 that the Employer improperly threatened employees.

Objection 6 that the Employer engaged in surveillance of the employees union activities.

That portion of Objection 7 relating to the discharge of Andrus and Ciukaj.

The allegations contained in Objections 2, 5, and 6 were the same as the allegations in the unfair labor practice hearing which I considered and dismissed. The issue relating to the discharge of Andrus and Ciukaj was resolved by my finding that they were terminated on February 19, which was prior to the filing of the petition. Accordingly, I overrule all of the Union's objections in their entirety and recommend that the Board certify the result of the election.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Robert Andrus and Florian Ciukaj on February 19, for engaging in protected concerted activities, the Respondent has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except as found above, Respondent has not engaged in other unfair labor practices as alleged.

6. Following the filing of the representation petition on February 25, Respondent has not engaged in conduct which would warrant setting aside the election held on May 20 and the direction of a second election.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I recommend that it be required to cease and desist therefrom and from any other unlawful conduct, and that it post an appropriate notice, attached hereto as "Appendix." It is further recommended Respondent make whole employees Robert Andrus and Florian Ciukaj for any loss of pay as a result of the discrimination against them and reinstate them to their former positions without loss of seniority or other benefits to the extent that Respondent has not already done so. Said backpay is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 139 NLRB 716 (1962).

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[9] On January 14, 1981, the Union Petitioner filed what amounts to a motion to have the amended allegations included in the objections to the election although this conduct was not specifically alleged in the objections. It appears to me that granting such a motion would be tantamount to permitting the filing of untimely objections. This is especially true in this case where the motion was made after the region's investigation was completed, the Regional Director's report on objections issued and the Board ruled on petitioners' objections. I am therefore dismissing the motion *Albuquerque Publishing Company*, 219 NLRB 631 (1975).

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Browning-Ferris Industries, Chemical Services, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with the rights of employees to engage in protected concerted activity by discharging them in violation of Section 8(a)(1) of the Act.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make employees Robert Andrus and Florian Ciukaj whole in the manner set forth in the section entitled "The Remedy."

(b) Post at its Lemont, Illinois, facility copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Local Union No. 46 Metallic Lathers and Reinforcing Iron Workers (Cement League)[1] ***and*** **Michael J. Cahill**

Wood, Wire and Metal Lathers' International and United Brotherhood of Carpenters and Joiners of America ***and*** **Michael J. Cahill.** Cases 2-CB-7620 and 2-CB-7767

October 28, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 13, 1980, Administrative Law Judge Irwin Kaplan issued the attached Decision in this proceeding. Thereafter, Respondent Local Union No. 46 Metallic Lathers and Reinforcing Iron Workers, herein called Local 46, Respondent Wood, Wire and Metal Lathers' International, herein called the International Lathers, and Respondent United Brotherhood of Carpenters and Joiners of America, herein called the Carpenters, filed exceptions and supporting briefs. The General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[2] and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge, as modified below.

We agree with the Administrative Law Judge's conclusion that Respondent Local 46 and Respondent International Lathers violated Section 8(b)(1)(B) by barring Local 46 members Cahill, Murtha, and McDermott from serving as foremen for 1 year.

Union discipline of a member who serves as an employer representative within the meaning of Section 8(b)(1)(B) violates that section only when it "may adversely affect the supervisor's conduct in performing the duties of, and acting in the capacity as, grievance adjuster or collective bargainer on behalf of the employer."[4] There can be no doubt that the discipline imposed in this case had such adverse effect, since it totally barred Cahill, Murtha, and McDermott from serving as foremen and performing representative functions on behalf of their employers.[5] The employers were therefore "restrained and coerced" within the literal meaning of Section 8(b)(1)(B).

Nevertheless, Respondent Local 46 contends that the discipline was lawful since it was motivated by Cahill's, Murtha's, and McDermott's conduct as union members and was neither directed at, nor related to, their conduct as foremen. We disagree. While Respondents had a legitimate interest in disciplining Cahill, Murtha, and McDermott as union members for their disruptive behavior at a meeting, their obligation was to do so in a manner consistent with all the provisions of the Act. And, as the Administrative Law Judge noted, a fine or other penalty which would not have adversely affected any employer's choice of its representatives could have been imposed lawfully. By their discipline, Respondents dictated to the actual and potential employers of Cahill, Murtha, and McDermott who their foremen could not be, an unwarranted and unlawful intrusion on an employer concern specifically protected by Section 8(b)(1)(B).[6] In this regard, it is immaterial whether Local 46 exerted pressure directly on any of the employers to remove Cahill, Murtha, or McDermott. Restraint or coercion under Section 8(b)(1)(B) does not require economic pressure directed at an employer but can be accomplished by internal union discipline which reasonably tends to deprive an employer of the right to select its representative.[7]

We also agree with the findings that the Carpenters, as the successor to the International Lathers, should be responsible for remedying the unfair labor practices of that organization. In so finding, the Administrative Law Judge applied the Board's

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[1] The name of Respondent was amended at the hearing.

[2] The Carpenters has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[3] The Carpenters and Local 46 have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641, et al.*, 417 U.S. 790, 804–805 (1974); see also *American Broadcasting Companies* v. *Writers Guild of America, West, Inc., et al.*, 437 U.S. 411 (1978).

[5] The record, particularly the collective-bargaining agreement, the Local 46 constitution, and the testimony of Local 46 Business Agent Ryan, supports the Administrative Law Judge's conclusion that the position of foreman contained the authority to adjust grievances and therefore rendered Cahill, Murtha, and McDermott, as supervisors, employer representatives within the meaning of Sec. 8(b)(1)(B).

[6] The Senate Report explained Sec. 8(b)(1)(B), in part, as follows:

> . . . this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances. [S. Rept. 105, 80th Cong., 1st sess. 21; 1 Leg. Hist. 427 (NLRB, 1947).]

[7] See *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB 2173 (1968); *Florida Power & Light, supra*; and *American Broadcasting, supra.*

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Perma Vinyl doctrine,[8] which states that a bona fide successor employer which has knowledge of pending unfair labor practices at the time of its purchase of the predecessor's business should be responsible for remedying those unfair labor practices.

In a union affiliation context, the victims of unfair labor practices are as without a meaningful remedy as are unfair labor practice victims when title to an employing business changes hands. Here, the International Lathers is no longer a viable organization capable of remedying its violations of the Act. And the Carpenters, which has taken the International Lathers place, is not just the best, but the only organization capable of doing so.[9] Finally, the employing industry has not changed "insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices."[10] Thus, like the Administrative Law Judge, we see no policy reasons not to apply the *Perma Vinyl* doctrine in the context of a union affiliation.

We disagree, however, with the Administrative Law Judge's recommended Order against the Lathing Subdivision of the Carpenters. The Administrative Law Judge found that, pursuant to the affiliation between the International Lathers and the Carpenters, the International Lathers continued primarily intact as the Lathing Subdivision of the Carpenters, without commingling of funds. He therefore reasoned that, as a matter of equity, the Lathing Subdivision should be primarily liable for remedying the International Lathers unfair labor practices, while the Carpenters, which engaged in no wrongdoing, should be secondarily liable. Contrary to the Administrative Law Judge, the issue of whether the Lathing Subdivision, as distinct from the Carpenters as a whole, was the successsor to the International Lathers was neither alleged nor litigated.[11] Since there is no basis for distinguishing between the Carpenters and its Lathing Subdivision as the successor, we shall delete the Order against the subdivision and order only that the Carpenters be liable for remedying the unfair labor practices of the International Lathers.[12] As a matter of equity, we shall also order that the Carpenters liability be secondary to, rather than joint and several with, that of Local 46. The Carpenters itself engaged in no wrongdoing and Local 46, the primary wrongdoer, never affiliated with the Carpenters.[13]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders:

A. Respondent Local Union No. 46 Metallic Lathers and Reinforcing Iron Workers, New York, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing employer members of the Cement League, The Building Contractors Association, Inc., and Dic Concrete Corporation, John T. Brady and Co., Inc., J.P.D. Construction Co., Inc., or any other employer, in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances by threatening to suspend, suspending, or trying otherwise to cause the removal of such representatives from performing supervisory, executive, or managerial functions for said employers.

(b) Publicizing reports, findings, and recommendations of union officials to members which tend to coerce and restrain them in the exercise of their rights guaranteed in Section 7 of the Act.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make Michael Cahill, William Murtha, and Lawrence McDermott whole for any loss of earnings and benefits suffered by reason of the unfair labor pratices committed against them in the manner described in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(b) Notify, in writing, Michael Cahill, William Murtha, and Lawrence McDermott and their former employers, Dic Concrete Corporation, John T. Brady and Co., Inc., and J.P.D. Construction Co., Inc., that it has no objection to these named individuals serving as foremen.

(c) Post at its offices and meeting halls copies of the attached notice marked "Appendix A."[14]

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[8] *Perma Vinyl Corporation, Dade Plastics Co.*, 164 NLRB 968 (1967), enfd. *sub nom. United States Pipe & Foundry Co.* v. *N.L.R.B.*, 398 F.2d 544 (5th Cir. 1968). See also *Golden State Bottling Co.* v. *N.L.R.B.*, 414 U.S. 168 (1973).

[9] In terms of its obligation to remedy unfair labor practices committed herein, Local 46 exists as a joint wrongdoer with, not a replacement for, the International Lathers.

[10] *Perma Vinyl, supra* at 969.

[11] While the General Counsel, in his brief to the Administrative Law Judge, argued that the International Lathers continued largely intact as the Lathing Subdivision, he did not allege or argue that the Carpenters liability should be based on anything other than its status as a successor.

[12] Since the Carpenters is a bona fide successor and engaged in no wrongdoing, we shall not order it to cease and desist from engaging in unfair labor practices. Further, since Local 46 was not part of the affiliation between the International Lathers and the Carpenters, there is no reason to order that the Carpenters notify employers that it does not object to the employment of Cahill, Murtha, and McDermott as foremen.

[13] See, e.g., *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134 (Illinois Bell Telephone Company)*, 192 NLRB 85 (1971), and *Exxon Company, U.S.A.*, 253 NLRB 213 (1980).

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

Continued

Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Deliver to the Regional Director for Region 2 signed copies of said notice in sufficient number for posting by Dic Concrete Corporation, John T. Brady and Co., Inc., and J.P.D. Construction Co., Inc., said employers willing, at all locations where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent Local Union No. 46 has taken to comply herewith.

B. Respondent United Brotherhood of Carpenters and Joiners of America, Washington, D.C., its officers, agents, and representatives, shall take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make Michael Cahill, William Murtha, and Lawrence McDermott whole for any loss of earnings and benefits suffered by reason of the unfair labor practices committed by its predecessor Wood, Wire and Metal Lathers' International Union, provided that the action required in this subparagraph shall be required of Respondent Carpenters only to the extent that Respondent Local 46 shall fail to do so.

(b) Post at its officers copies of the attached notice marked "Appendix B."[15] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by its authorized representative, shall be posted by said Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Deliver to the Regional Director for Region 2 signed copies of said notice in sufficient number for posting by Dic Concrete Corporation, John T. Brady and Co., Inc., and J.P.D. Construction Co., Inc., said employers willing, at all locations where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent Carpenters has taken to comply herewith.

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Pursuant to a decision of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

WE WILL NOT restrain or coerce employer-members of the Cement League, The Building Contractors Association, Inc., and Dic Concrete Corporation, John T. Brady and Co., Inc., J.P.D. Construction Co., Inc., or any other employer, in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances by threatening to suspend, suspending, or trying otherwise to cause the removal of such representatives from performing supervisory, executive, or managerial functions for said employers.

WE WILL NOT publicize reports, findings, and recommendations of union officials to our members which tend to coerce and restrain them in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Michael Cahill, William Murtha, and Lawrence McDermott whole for any loss of earnings and benefits suffered by reason of the unfair labor practices committed against them, with interest.

WE WILL notify, in writing, Michael Cahill, William Murtha, and Lawrence McDermott and their former employers, Dic Concrete Corporation, John T. Brady and Co., Inc., and J.P.D. Construction Co., Inc., that we have no objection to these individuals serving as foremen.

LOCAL UNION NO. 46 METALLIC
LATHERS AND REINFORCING IRON
WORKERS

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[15] See fn. 14, *supra*.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Pursuant to a decision of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

> WE WILL make Michael Cahill, William Murtha, and Lawrence McDermott whole for any loss of earnings and benefits suffered by reason of the unfair labor practices committed against them, with interest, to the extent that Local Union No. 46 Metallic Lathers and Reinforcing Iron Workers fails to do so.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge: This case was heard by me in New York, New York, on September 13 and October 29, 30, and 31, 1979. The charge in Case 2-CB-7620 was filed by Michael Cahill, an individual, on January 17, 1979, alleging in essence that Local Union No. 46 Metallic Lathers and Reinforcing Iron Workers (herein Local 46) deprived Michael Cahill, William Murtha, and Lawrence McDermott of their status as foremen for Dic Concrete Corporation (herein Dic), John T. Brady and Co., Inc. (herein Brady), and J.P.D. Construction Co., Inc. (herein J.P.D.), respectively, for a period of 1 year because of their conduct at a union meeting in violation of Section 8(b)(1)(A) and (B) of the National Labor Relations Act, as amended (herein the Act). On April 3, 1979, Michael Cahill filed a new charge in Case 2-CB-7767 against Wood, Wire and Metal Lathers' International (herein the International) and United Brotherhood of Carpenters and Joiners of America[1] (herein the Carpenters) alleging in essence that on or about October 20, 1978, the International and the Carpenters also violated Section 8(b)(1)(A) and (B) of the Act by ratifying in part the penalties imposed by Local 46 which resulted in the removal of Cahill, Murtha, and McDermott as foremen for their respective employers.

The charges in Cases 2-CB-7620 and 2-CB-7767 gave rise to the issuance of complaints and notices of hearing on March 30 (amended May 30) and May 30, 1979, respectively. The aforenoted cases were then consolidated by Order on May 30, 1979, and amended at the hearing to include, *inter alia*, the Carpenters as a successor and additional Respondent for the purposes of liability insofar as the alleged unfair labor practices were committed by the International. (G.C. Exh. 1(p).)

The answers (amended at the hearing) filed by the International and Local 46 admit, *inter alia*, jurisdiction and the status of the labor organizations but deny the commission of any of the alleged unfair labor practices. Also, in dispute is the status of foremen within the meaning of Section 8(b)(1)(B) of the Act.

With respect to the Carpenters, liability is denied principally on the basis that said Carpenters denies any knowledge of alleged unfair labor practices committed by the International before the affiliation which took place on or about August 7, 1979. Further, the Carpenters contends that it was not timely and properly named as a respondent. The Carpenters does not contest jurisdiction. (G.C. Exh. 1(n), p. 2.)

Issues

The principal issues are:

1. Whether Michael Cahill, William Murtha, and Lawrence McDermott as foremen were representatives of their respective employers for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.
2. Whether Local 46, by its executive board and membership, restrained and coerced employers in the selection of their employer representatives for the purposes of collective bargaining or the adjustment of grievances in violation of Section 8(b)(1)(B) of the Act.
3. Whether the International violated Section 8(b)(1)(B) of the Act by endorsing the suspensions imposed by Local 46 on Michael Cahill, William Murtha, and Lawrence McDermott.
4. Whether the acts of Local 46 and the International in suspending Michael Cahill, William Murtha, and Lawrence McDermott as foremen, in the circumstances of this case, also tend to restrain and coerce employees in the exercise of their rights guaranteed by Section 7 of the Act, thereby violating additionally Section 8(b)(1)(A).
5. Whether Local 46 independently violated Section 8(b)(1)(A) of the Act on or about October 20 by its recording secretary's reading to the union membership the report, recommendation, and decision of International representatives with regard to the suspensions of Michael Cahill, William Murtha, and Lawrence McDermott.
6. Whether the Carpenters are liable as a successor to the International for the alleged unfair labor practices committed by said International prior to affiliation.[2]

Upon the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the post-trial briefs, I find as follows:

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[1] The consolidated complaint was amended at the hearing to join United Brotherhood of Carpenters and Joiners of America as an additional Respondent.

[2] Other issues as well as the Carpenters contention that it was not timely or properly named as a respondent and was otherwise denied due process will also be treated *infra*.

FINDINGS OF FACT

I. JURISDICTION

The Cement League (herein the League) is an association of employers who are engaged in general contracting and concrete contracting in the building and construction industry. The Building Contractors Association, Inc. (herein the Association), is an association of employers who are engaged in general contracting in the building and construction industry. The League and the Association exist, *inter alia* , for the purpose of representing their employer-members in collective bargaining and of administering collective-bargaining agreements on behalf of their employer-members with various labor organizations, including Local 46.

Dic Concrete Corporation, a New York corporation, is a concrete subcontractor involved in constructing residential, commercial, industrial, and office facilities and maintains its principal office in Hicksville, New York. Annually, Dic derives gross revenue in excess of $500,000 in connection with its operations described above. Further, it annually purchases goods and supplies in excess of $50,000 to be used for its New York operations directly from points outside the State of New York. At all times material herein Dic has been a constituent member of the League.

John T. Brady and Co., Inc., a New York corporation, has maintained its principal office in New Rochell, New York, and various other places of business in the State of New York. Brady is, and has been at all times material herein, engaged as a general contractor in the building and construction industry, constructing commercial, industrial, and office facilities. At all times material herein, Brady has been a constituent member of the Association.

J.P.D. Construction Co., Inc., has maintained its principal office in New York, New York, and various other places of business in the State of New York. J.P.D. is, and has been at all times material herein, engaged as a renovation contractor in ceiling and drywall construction in the building and construction industry, renovating commercial, industrial, and office facilities.

Local 46 and the International admit, the Carpenters does not dispute, the record reveals, and I find that the League, the Association, Dic, Brady, and J.P.D. are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Local 46 admits, the record reveals, and I find that it is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.[3]

The International admits, the record reveals, and I find that it is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.[4]

The Carpenters admits, the record reveals, and I find that the Carpenters is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

At all times material herein Local 46 has maintained a collective-bargaining relationship with Brady and Dic, members of multiemployer associations (the Association and the League) and with J.P.D. covering all employees employed as lathers. Local 46's most recent contracts with these companies by their terms were effective from July 1, 1978, to June 30, 1981 (G.C. Exhs. 4 and 5). At a union meeting on June 30, 1978,[5] 1 month before the most recent contracts became effective, a fight broke out over contract ratification involving from 50 to 100 members, including Michael Cahill, William Murtha, and Lawrence McDermott.

Business Manager James Maher and four business agents of Local 46, including John Ryan, submitted a statement regarding the June 30 incident to Fred LeMoine, recording secretary, to read at the July 11 local union meeting. The statement put the membership on notice that the union officials intended to file internal union charges against Cahill, Murtha, and McDermott for assertedly engaging in, *inter alia*, physical and verbal abuse of the local union officers at the earlier meeting of June 30 in violation of sections 96 and 102 of the International Union's constitution and section 6 of Local 46's constitution. (See G.C. Exh. 6.) Shortly thereafter, Cahill, Murtha, and McDermott received formal notice of the aforenoted charges and notice that a hearing would be conducted before the executive board on August 18 on these charges. (G.C. Exhs. 7(a), (b), and (c).)

On August 18, Cahill, Murtha, and McDermott appeared before the Local 46 executive board and gave their account of the June 30 meeting. Later that day they learned that they were found guilty of the charges and as a penalty they could not serve as a foreman or shop steward for 2 years.[6] Formal notice of the executive board's action was received a short time later. The formal notices contained, *inter alia*, information relative to appeal procedures and notification that the executive board's recommended action in terms of penalties "will be presented to the General Membership for acceptance, modification or rejection at the next regular meeting," which was scheduled for September 12 at the Local 46 union hall. (G.C. Exhs. 9(a), (b), and (c).)

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[3] By the time of the hearing, Local 46 had severed its relationship with Wood, Wire and Metal Lathers' International and had affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers (herein the Iron Workers). The Iron Workers were not named as a party and did not appear.

[4] The International and the Carpenters admit and I find that on or about August 7, 1979, the International affiliated with the Carpenters. Further, the record reveals and I find that the International became the Lathing Subdivision of the Carpenters.

[5] All dates hereinafter refer to 1978 unless otherwise noted.

[6] At the time of the executive board hearing, Cahill, Murtha, and McDermott were foremen for Dic, Brady, and J.P.D., respectively. The relevant collective-bargaining agreements expressly include "foremen" in the unit description. (See G.C. Exh. 4, p. 1, art. II, par. 1.) As previously noted, however, the General Counsel contends that foremen are agents, supervisors, and representatives of employers for the purpose of adjustment of grievances within the meaning of Sec. 8(b)(1)(B). The status of these disputed individuals as foremen *vis-a-vis* Sec. 8(b)(1)(B) will be treated more fully in a separate section below.

Cahill, Murtha, and McDermott retained an attorney and contemplated seeking recourse in the Federal courts in the event the membership accepted the executive board's recommendations. According to Murtha, on September 8, while he was still a foreman for Brady at the Ossining Sewage Disposal jobsite, he had a long conversation with Business Agent Ryan wherein the latter told him, *inter alia*, that he would have "big problems" and faced ostracism by the union membership for retaining an attorney and going outside the Union for help.[7] Ryan testified that he told Murtha that he did not want to discuss the matter and denied telling Murtha that if he pursued his case in court he would be ostracized by the union membership. On September 11, Cahill visited with Business Manager Maher to dissuade him from encouraging the union membership to accept the recommendations of the executive board but was unable to do so. McDermott testified that he told (J.P.D.) Superintendent Jimmy Lynch on September 12 that commencing the next day there was a possibility that he would be precluded from serving as foreman because the union membership was going to vote that night on the executive board's recommendations. According to McDermott, Lynch told him that, if he could no longer serve as foreman, his services were not needed.

At the union membership meeting of September 12, Business Manager Maher and other local union officials spoke in favor of the executive board's recommendations and asked that they be adopted. Cahill, Murtha, and McDermott were all in attendance at this meeting and asked the membership to amend the findings of the executive board, but this was not done and the union membership voted to accept the recommendations. The next day, September 13, Cahill, Murtha, and McDermott were no longer foremen for their respective employers.

On the morning of September 13, Cahill appeared for work at Dic's Manhattan jobsite and met with Superintendent Thomas Lynom. According to Cahill, while he and Lynom were discussing the membership vote of the previous evening, Shop Steward Ray Hill came over and advised that he had just come from the union hall and Business Agent Ryan had told him that Cahill could not be the foreman. Cahill testified that Lynom told Hill that he knew of "the findings" and he was going to relieve him (Cahill) as foreman as of then. Ryan denied that he ever had a conversation with Ray Hill with regard to Cahill's serving as foreman.[8]

According to Murtha and (Brady) Superintendent Leahy, the latter told Murtha on September 13 that he could no longer be foreman because the membership upheld the action of the executive board.[9] Leahy testified, however, that he also knew that the constitution provided a further appeal to the International and he called the local union hall for clarification in terms of whether Murtha had to be relieved as foreman immediately or whether he could continue to serve in that capacity pending an appeal. According to Leahy, Business Manager Maher told him that consistent with union practice once the membership upholds the executive board a person is no longer a foreman and he, Leahy, had to relieve Murtha from that position as of that day. Maher's version of the conversation was somewhat different. According to Maher, Leahy asked him whether there would be any further communications from the executive board regarding Murtha's status and in response thereto he stated, "Buddy [Leahy is also known as Buddy], you were at the meeting last night and you heard the body uphold the determination of the Executive Board." Maher testified that Leahy in turn asked, "That's it," and he responded, "That's it," and that was the end of the conversation.

Leahy asserted that he immediately transmitted the substance of what Maher told him to Murtha and that he, Leahy, therefore had to appoint a new foreman. However, Leahy asked Murtha, his longtime friend, whether he would be willing to stay on the job as a journeyman and Murtha accepted the offer.[10]

McDermott testified that he called Lynch on September 13 and advised Lynch that the membership had found him (McDermott) "guilty" and he therefore could not serve as foreman that morning, to which Lynch responded that "[McDermott's] services were no longer needed."

On September 13, the same day that Cahill, McDermott, and Murtha were removed as foremen, they filed a suit in the Southern District of New York to enjoin Local 46 from "directly or indirectly, threatening or attempting to suspend or to prevent the employment of the [Charging Parties] as foremen." (G.C. Exh. 12, p. 4.) They also requested, *inter alia*, punitive damages in the sum of $500,000. (*Id.*) Further, that same day, Cahill, Murtha, and McDermott, pursuant to section 47 of the Local's constitution (G.C. Exh. 2, pp. 36–38), by telegram appealed the action taken by Local 46 to General President Charles Brodeur of the International.

By letter dated September 22, General President Brodeur responded to the aforenoted appeal and notified Cahill, McDermott, and Murtha that he had designated International Representative John L. Diver to conduct a hearing on said appeal on September 27. (G.C. Exh. 13.) He also acknowledged therein that he had been informed of the pending injunction and damage suit that they had brought against Local 46. (*Id.*)

The hearing on the appeal was conducted as scheduled on September 27 and in attendance were the Local 46 union officials who brought the initial charges, members of Local 46's executive board, and Cahill, McDermott, and Murtha. By letter dated October 16, International Representative Diver submitted his report and recommendations to General President Brodeur upholding the action and penalties imposed by Local 46 but recommending that the 2-year suspension of Cahill, McDermott, and Murtha as foremen be reduced to a 1-year suspension. (G.C. Exh. 14, pp. 7 and 8.)

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[7] The General Counsel contends that Ryan's statements to Murtha on September 8 constituted a separate violation of Sec. 8(b)(1)(B).

[8] Neither Superintendent Lynom nor Shop Steward Hill testified. The General Counsel represented that Lynom was subpenaed but failed to appear. In any event no request was made for time to enforce the subpena. None of the parties explained the failure to call Hill as a witness.

[9] The record reveals that Leahy has long been a member of Local 46 and attended the union meeting on September 12.

[10] The record discloses that foremen receive, *inter alia*, $5 a day more than journeymen and $100 a week in expenses whether expenses are actually incurred or not.

By letter dated October 20, General President Brodeur notified Cahill, McDermott, and Murtha that he had adopted International Representative Diver's report and recommendations in their entirety and advised them that his decision was subject to a further appeal to the executive council of the International within 30 days. (G.C. Exh. 15.) An appeal was taken to the executive council but was rejected. (Resp. Carpenters Exh. 6, p. 38.)

At a local union meeting in October, Local 46 Recording Secretary LeMoine read to the membership both the report and recommendations of International Representative Diver and General President Brodeur's letter dated October 20 adopting the report and recommendations.[11]

B. *Discussion and Conclusions*

1. Whether Cahill, Murtha, and McDermott, as foremen, were employer representatives within the meaning of Section 8(b)(1)(B)[12]

Cahill, Murtha, and McDermott testified that as foremen they had, *inter alia*, the authority to assign work, to resolve grievances, and to hire, layoff, and discharge employees. Murtha's immediate superior (Brady) Superintendent Leahy, the only one of the superintendents to testify, substantially corroborated Murtha's testimony and confirmed that Murtha's responsibilities at the Ossining Sewage Disposal jobsite included the hiring and firing of employees.[13] Further, for almost one half of the approximately 5- to 6-week period in which Murtha was employed as foreman on the Ossining job, he alone directed the work of lathers; Leahy was on vacation for approximately 2-1/2 weeks.

With regard to processing grievances, only Cahill testified that he had been involved in their adjustment, although Murtha and McDermott asserted that they had the authority to do so. Murtha's testimony was corroborated by Superintendent Leahy. Cahill credibly testified and without contradiction that he and Shop Steward Raymond Hill[14] had been involved in adjusting at least five grievances which for the most part related to safety matters on the job. According to Cahill, if he and the shop steward were unable to resolve a grievance, the business agent would then be contacted to intervene. Business Agent Ryan confirmed that this was the acceptable procedure.[15]

The record also discloses that foremen receive, *inter alia*, $5 a day more than journeymen, $100 a week in expenses, and pay for holidays and days lost due to inclement weather which are not provided journeymen under the contract. (G.C. Exh. 4, p. 3.)

On the other hand, the record reveals some factors which tend to militate against a finding that the disputed individuals were statutory supervisors. Thus, it is noted that under the collective-bargaining agreement foremen are expressly included in the unit description.[16] (*Id.* at 1.) Further, much of the testimony adduced from the disputed individuals (particularly McDermott) was conclusionary. However, on the basis of the entire record, I am persuaded and I find that the disputed individuals possessed the degree of independent power necessary to satisfy the requirements of supervisory status within the meaning of Section 2(11) of the Act.[17]

I am also convinced on the state of this record that the disputed individuals, as foremen, were employer representatives for the purpose of adjusting grievances. While Business Agent Ryan characterized the grievances that these foremen handled as "minor ones," he conceded that they included job assignments. In any event it is not the gravity of grievances that is significant but rather the fact that foremen are involved in their adjustment which serves as the basis for their qualification as employer representatives within the meaning of Section 8(b)(1)(B). As observed by Administrative Law Judge Leff:

> The employer's bargaining obligation under the Act is as much applicable to minor employee grievances as to major ones. So, too, is management's need for representation in their consideration and adjustment.[18]

Ryan also explained that a foreman unlike other unit employees is hired by the contractor. Thus, on the jobsite, Ryan considered the foreman as a representative of the contractor. In these circumstances and on the basis of the entire record, I find that Cahill, Murtha, and McDermott, as foremen, were employer "representatives for the purpose of adjusting grievances" within the scope of Section 8(b)(1)(B) of the Act.

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[11] The General Counsel contends that the reading of this material to the membership by itself constitutes a separate violation of Sec. 8(b)(1)(A).

[12] Sec. 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances."

[13] While the record discloses that Local 46 maintains an exclusive hiring hall, it is also noted that by contract the employer retains the "absolute and unconditional right to reject any workman referred by the Union . . . [and] shall have the absolute right to lay off any employee . . . either because of lack of work or the Employer's determination that the employee does not have the ability to perform the required tasks." (See G.C. Exh. 5, p. 5, art. VIII.)

[14] As noted previously, no explanation was advanced for the failure to call Hill as a witness. The complaint alleges, the record reveals, and I find that at all times material herein Hill, as shop steward, was an agent of Local 46, acting on its behalf. See *Miscellaneous Drivers and Helpers Local 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Bianco Manufacturing Co., a Division of Falcon Products, Inc.)*, 236 NLRB 1048, 1049, fn. 5. (1978).

[15] This procedure is also spelled out in the constitution and bylaws of Local 46, which in pertinent part reads as follows:

RULES GOVERNING SHOP STEWARDS

Section 59

> Rule 4. Where the Steward and Foreman cannot agree, the Steward is not to stop the work but shall immediately get in touch with the Business Agent." (See G.C. Exh. 2, p. 44.)

[16] This factor standing alone does not negate a finding of supervisory status within the meaning of Sec. 2(11) of the Act. See, e.g., *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641, et al.*, 417 U.S. 790 (1974); *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB 2173, fn. 2 (1968).

[17] The constitution and bylaws of Local 46 tend to confirm this conclusion by stating in relevant part that "the hire and discharge of all lathers shall be the responsibility of the foremen." (G.C. Exh. 2, p. 24, sec. 20.)

[18] *Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO (The Washington Post Company)*, 207 NLRB 841, 847 (1973), affd. 220 NLRB 1177 (1975).

2. The role of Local 46 in causing the removal of Cahill, Murtha, and McDermott as foremen

The record clearly establishes that Cahill, Murtha, and McDermott last worked as foremen on September 12 because of the acts and conduct engaged in by Local 46. This was manifest in the first instance by internal union measures in the form of charges against the above-named foremen, a hearing on said charges before Local 46's executive board, and finally, on September 12, membership ratification of the executive board's recommendations which included suspending these foremen for a 2-year period.

On September 13, Local 46 officials engaged in a more direct approach to ensure that the suspensions of Cahill, Murtha, and McDermott were implemented. Thus, Cahill credibly testified that, on the morning of September 13 while he was in the presence of (Dic) Superintendent Lynom, Shop Steward Hill encountered them with instructions from Business Agent Ryan that Cahill could not be the foreman. Lynom, a longtime union member, acknowledged to Hill that he knew of the Union's action and then relieved Cahill as foreman.[19] The credited testimony also discloses that on the same morning Business Manager Maher told (Brady) Superintendent Leahy that he had to relieve Murtha as foreman.[20] As noted previously, Leahy asked Murtha, his longtime friend, whether he would be willing to stay on the job as a journeyman and Murtha accepted the offer.

With regard to McDermott, there is no evidence tending to show that any union official spoke to his immediate superior (J.P.D.) Superintendent Lynch. McDermott notified Lynch on September 13 that the union membership upheld the guilty finding against him and he therefore could not serve as foreman. McDermott was then terminated.

On the basis of the foregoing and on the entire record, noting particularly the vulnerability of the foremen and superintendents as union members in terms of penalties, benefits, and adverse publicity, the conclusion is inescapable, and I find, that the removal of Cahill, Murtha, and McDermott as foremen on or about September 13 was predicated solely on union pressure, both direct and indirect.[21]

3. The International's role

The record discloses that on September 13 the suspended foremen appealed the action taken by Local 46 to General President Brodeur of the International. It is undisputed that the International was not involved in any disciplinary measures against these suspended foremen prior thereto.

Brodeur designated International Representative Diver to conduct a hearing on the appeal on September 27. The hearing was conducted before Hearing Officer Diver as scheduled with Local 46 officials and the suspended foremen presenting their respective arguments. By letter dated October 16, Diver submitted his report and recommendations to Brodeur. Diver recommended "that the finding of guilt by the Executive Board and the membership of Local 46 . . . be upheld" (G.C. Exh. 14, p. 4) but modified the term of suspension from 2 years to 1 year (*Id.* at p. 8). By letter dated October 20, Brodeur notified the suspended foremen that he had adopted Hearing Officer Diver's report and recommendations in their entirety. Cahill, Murtha, and McDermott's final appeal to the executive council of the International was also rejected.

As noted above, the International ratified the disciplinary measures of Local 46 which included suspending the foremen. I find that, by the International's giving its imprimatur to the appropriateness of "suspensions" as a disciplinary measure (albeit a reduced term), the acts and conduct of Local 46 *vis-a-vis* the suspensions are also chargeable to said International.[22]

4. Whether Local 46 and the International restrained and coerced employers within the intent of Section 8(b)(1)(B)

Having determined that the suspended foremen are employer representatives within the meaning of Section 8(b)(1)(B) and having further determined that Local 46 and the International are responsible for eliminating them as foremen for their respective employers, it must now be determined in the circumstances of this case whether Local 46 and the International thereby violated Section 8(b)(1)(B).

It is well settled that a union may not with impunity under Section 8(b)(1)(B) discipline its supervisor-members who are employer representatives for the purpose of collective bargaining or the adjustment of grievances for reasons related to, or growing out of, their supervisory responsibilities.[23] The matter at bar, however, is not a garden variety 8(b)(1)(B) case. It is not contended nor does the record reveal that the disciplinary measures taken against the suspended foremen were related to their activities as employer representatives. Rather, the record discloses that Local 46 invoked discipline solely because the foremen were aggressive combatants in a physical fight in an attack on union officials over contract ratification. Cahill apologized to the membership for this conduct at a subsequent union meeting. The foremen attended the union contract ratification meeting as union members, not employer representatives, and they were perceived only as union members by Local 46.[24]

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[19] As noted previously, neither Lynom nor Hill testified. However, as I have heretofore found that at all times material herein Hill, as shop steward, was an agent of Local 46 acting on its behalf, I further find it appropriate to draw an adverse inference against Local 46 by its failure to call him as a witness. Further, I was unimpressed with Ryan's overall demeanor and reject his denial that he had a conversation with Hill concerning the removal of Cahill as foreman.

[20] Union Business Agent Ryan testified that superintendents are union members and as such receive certain unspecified fringe benefits. Superintendent Leahy, a longtime union member, testified as follows:

> The union had suspended him [Murtha] from being a foreman. I was the superintendent of the job and a union member. I took an oath by my Constitution and By-Laws to be a union member and to protect the union. The union said Mr. Murtha was no longer to be able to be a foreman, so I relieved Mr. Murtha from being a foreman.

[21] See *American Broadcasting Companies* v. *Writers Guild of America, West, Inc., et al.,* 437 U.S. 411 (1978); *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.), supra.*

[22] See, e.g., *International Union of Bricklayers and Allied Craftsmen (Sam W. Cleskey Construction Company, Inc.),* 241 NLRB 898 (1979).

[23] See *American Broadcasting Companies* v. *Writers Guild of America, West, Inc., supra; ITO Corporation of Rhode Island, Inc.,* 246 NLRB 810 (1979); *Local Union No. 841, International Union of Operating Engineers, AFL-CIO (M. L. Arnold Steel Company),* 203 NLRB 429 (1973).

It is now well settled that Section 8(b)(1)(B) does not *per se* proscribe union discipline on supervisor-members.[25] In *Florida Light*, the Supreme Court upheld the union's right to fine its supervisor-members for performing unit work during a lawful strike. The Court observed as follows:

> Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the selection of its representatives for the purpose of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a *union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisors conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.*[26] [Emphasis supplied.]

In a post-*Florida Light* case, where it was alleged that the union fined a supervisor-member in violation of Section 8(b)(1)(B), the Board stated:

> We recognize that a union's discipline of a supervisor-member falls outside the proscription of Section 8(b)(1)(B) where the offense occasioning the discipline involves a matter purely of internal union administration, unrelated either directly or indirectly to any dispute between the union and the employer. . . . *This rule results in the finding of no violation where, for instance, a supervisor-member is disciplined* for failing to pay his union dues or *for disturbing a union meeting.*[27] [Emphasis supplied.]

As noted previously, the suspended foremen were disciplined solely because of the disruptive tactics they engaged in at a union meeting not as employer representatives but as union members. If the disciplinary measures in the circumstances of this case were confined to a fine or some other similar penalty then clearly such conduct would not be proscribed by Section 8(b)(1)(B).

In the case at hand, however, no fine was imposed but rather the action taken was directed at employment status; to wit, suspending Cahill, Murtha, and McDermott as foremen. As a result of the membership vote upholding the executive board's "guilty" findings and recommended penalties which included "suspensions," McDermott obediently removed himself as foreman. He then advised his superior, Superintendent Lynch, of Local 46's action and was terminated. With regard to Cahill and Murtha, the membership's action on September 12 was followed by more direct pressure on employers to remove these individuals as foremen.[28] Thus, union officials told Superintendents Lynom and Leahy (also union members) on September 13 to relieve Cahill and Murtha, respectively.

The Board found in *Northwest Publications*[29] that union pressure on supervisory personnel violated Section 8(b)(1)(B), notwithstanding the fact that the union was not directly urging the replacement of the foremen. The Board reasoned:

> That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the Charging Party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically, the employer would have to replace its foremen or face *de facto* nonrepresentation by them.[30]

This case does *not* turn on the legitimacy of the reasons for the invocation of discipline on the foremen-members as contended by counsel for Local 46 and the International but rather whether such discipline may adversely affect their performance as employer representatives within the meaning of Section 8(b)(1)(B).[31] The consummate act in depriving an employer of a selected representative is to effectively remove that representative from the employer's control. Given the internal or institutional union pressures noted previously, the disciplinary action taken herein was tantamount to eliminating the suspended foremen as employer representatives.

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[24] Cf. *ITO Corporation of Rhode Island, Inc., supra; Miscellaneous Drivers and Helpers Local 610, et al. (Bianco Manufacturing Co., a Division of Falcon Products, Inc.), supra.*

[25] *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641, et al., supra.* See also *Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO (The Washington Post Company)*, 242 NLRB 1079 (1979).

[26] *Id.* at 804–805. Cf. *American Broadcasting Companies* v. *Writers Guild of American, West, Inc., supra*, where the Court held that the union violated Sec. 8(b)(1)(B) for fining its supervisor-members who performed supervisory work during a lawful strike.

[27] *United Brotherhood of Carpenters & Joiners of America, Local Union No. 141, AFL-CIO (Max M. Kaplan Properties)*, 217 NLRB 202 (1975).

[28] As noted previously, the General Counsel contends that Local 46 independently violated Sec. 8(b)(1)(B) by Business Agent Ryan's threatening Murtha on or about September 8 with "big problems" and that he would be "ostracized by the membership" if he went outside the Union to fight the impending suspension. Ryan admitted that Murtha told him that he was contemplating recourse in court in the event the membership upheld the suspension but denied threatening Murtha. According to Ryan, he told Murtha that he did not want to discuss the matter. I find it highly unlikely that Ryan would have passed up this opportunity to make some comment in response to Murtha's contemplated legal action or at least to offer a plausible reason as to why he refrained from doing so. In these circumstances and as I have previously noted that I was unimpressed with Ryan's demeanor, I credit Murtha's account and find that Ryan threatened him as alleged.

[29] *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.), supra.*

[30] *Id.* at 2173. Under the Board's reading of the Supreme Court's decisions in *Florida Light* and *American Broadcasting Company*, the *Northwest Publications* doctrine remains viable. See *Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO (The Washington Post Company), supra.*

[31] See *American Broadcasting Companies* v. *Writers Guild of America, West, Inc., supra.*

In sum, I find that, by suspending Cahill, Murtha, and McDermott and by taking steps to ensure compliance therewith, Local 46 and the International effectively deprived employers of their selected representatives within the meaning of Section 8(b)(1)(B). Accordingly, I find that Local 46 and the International violated Section 8(b)(1)(B) as alleged.

5. Whether Local 46 and the International violated Section 8(b)(1)(A) as alleged

As previously noted, the discipline administered to Cahill, Murtha, and McDermott by Local 46 and the International was based on their involvement in a physical fight with union officials at a union ratification meeting and not because of their opposition to the union leadership and/or contract ratification. It is not contended nor does the record reveal that these individuals were engaged in protected concerted activities.

The problem, however, is that this case involves much more than mere internal union discipline; it involves the employment status of the three individuals and other potential supervisor-members. Thus, the record discloses that journeymen lathers consistent with the operation of Local 46's exclusive hiring hall may be employed as rank-and-file employees on one job and as foremen on another. This fluctuation from supervisory to nonsupervisory position has also been experienced by Cahill, Murtha, and McDermott. Cahill and Murtha both reverted to journeymen status for the same employers the day they were removed as foremen. Further, the record discloses that foremen are expressly included in the bargaining unit description and receive certain benefits under the collective-bargaining agreement. While the Board in such circumstances has declined to find 8(b)(2) violations because the individuals involved were statutory supervisors, on the other hand, where, as in the instant case, such conduct coercively impacts on all unit employees by causing them to fear similar union control over employment status and related benefits, such conduct restrains and coerces them within the meaning of Section 8(b)(1)(A).[32]

As noted above, Cahill, Murtha, and McDermott fluctuated from supervisory to nonsupervisory jobs. I find in agreement with the General Counsel that the same 8(b)(1)(B) conduct described previously also constitutes violations of Section 8(b)(1)(A) *vis-a-vis* Cahill, Murtha, and McDermott insofar as such conduct tends to restrain and coerce them under the exclusive hiring hall procedures in their nonsupervisory capacities.[33]

Still further, the General Counsel contends that Local 46 independently violated Section 8(b)(1)(A) by its recording secretary's reading of the hearing officer's report to the membership at a union meeting on October 19, which, *inter alia*, upheld the "guilty" findings against Cahill, Murtha, and McDermott and recommended that they be "suspended" as foremen for 1 year. In *IATSE, Local 659*,[34] cited by the General Counsel, the Board found the disputed individuals to be employees and not supervisors within the meaning of the Act but observed, in pertinent part, as follows:

> Moreover, even if Coleman and Lapenicks were supervisors, we would still find the action directed against them by Respondent to be unlawful because of its impact on employees. The record shows that "Daily Variety," a publication distributed principally to employees in the motion picture industry in Los Angeles County, contained articles relating to Respondent's refusal to permit the hiring of Colman and Lapenicks . . . . *In addition, the charges in this case were read to members at regular meetings. It can reaeonably be concluded that the discrimination thus directed by Respondent Union created an impact on other employees, the natural consequence of which was to restrain and coerce them with respect to their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act.*[35] [Emphasis supplied.]

Significantly, in *IATSE, Local 659*, the respondent union's discrimination was not predicated on opposition to union leadership or other forms of protected concerted activities but rather was based on the manner in which the respondent union maintained and applied its seniority roster. In this regard, the respondent union refused to give the disputed individuals experience credits for jobs worked for companies not under contract with respondent union and thereby restricted their employment opportunities based strickly on union considerations.

Similarly, in the case at bar, Local 46 and the International restricted the employment opportunities of Cahill, Murtha, and McDermott by denying them the opportunities of working as foremen for 1 year. Thus, here, too, as in *IATSE, Local 659*, employment opportunities were predicated on union considerations. Further, Local 46, by publicizing this action to the membership at the meeting of October 19, perpetuated the impact it had previously created on employees when Cahill, Murtha, and McDermott were first suspended and removed as foremen. In these circumstances, the natural consequence of Local 46's action was to restrain and coerce its members with respect to their Section 7 rights in violation of Section 8(b)(1)(A) as alleged. Accordingly, I find that Local 46 independently violated Section 8(b)(1)(A) by reading the hearing officer's report to the membership on or about October 24.

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[32] See, e.g., *ITO Corporation of Rhode Island, Inc., supra; Local Union No. 725 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Powers Regulator Company)*, 225 NLRB 138, 145 (1976).

[33] See, e.g., *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry Local Union No. 137 (Hames Construction and Equipment Co., Inc.)*, 207 NLRB 359 (1973); *Local Union No. 725 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Powers Regulator Company), supra.*

[34] *International Photographers of the Motion Picture Industries, Local 659 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (MPO-TV of California Inc., Y-A Productions, Inc.)*, 197 NLRB 1187 (1972).

[35] *Id.* at 1191.

6. The Carpenters liability

a. *Due process*

Counsel for the Carpenters contends that it was denied due process by a failure of the General Counsel to provide adequate notice of the allegations and an opportunity to defend against them. In this regard, he asserts that the Carpenters was not served with a copy of the charge or a complaint naming said Carpenters as a respondent.

Counsel for the General Counsel represented that less than 2 weeks before the hearing opened he learned for the first time from counsel for the International that the International had merged with the Carpenters or was in the process of doing so. By letter dated September 7, 1979 (6 days before the hearing), counsel for the General Counsel served all parties, including the Carpenters, with a notice of intention to amend the complaint in Case 2-CB-7767 to name the Carpenters as a "successor" to the International and as an additional respondent for purposes of liability only. A copy of the complaint was enclosed for the Carpenters. The Carpenters appeared "specially" at the hearing by counsel for the International who objected to the amendments citing Section 102.20 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, which provides for the filing of an answer within 10 days. He represented that the Carpenters had only received the complaint 2 days before the scheduled hearing date and moved for a continuance to October 30. The amendments were received over objection with leave, however, for the Carpenters to file an answer within 10 days. Further and in order to provide the Carpenters with a reasonable opportunity to prepare for hearing, I granted the continuance of approximately 7 weeks. The Carpenters filed a timely answer (G.C. Exh. 1(n)) and appeared with counsel when the hearing reconvened on October 29, fully participating therein.

With regard to the failure to provide service of the charge and complaint naming the Carpenters as a respondent, it is undisputed that a copy of the complaint naming the International as Respondent and also naming Charles Brodeur as general president and an agent thereof was served on the Carpenters before the hearing opened. This complaint was amended early in the hearing and before any testimony was adduced to name Brodeur also as agent of the Carpenters in his capacity as assistant to the general president of the Carpenters. The charge giving rise to this complaint named Brodeur as the union representative to contact (G.C. Exh. 1(c)) and service thereof was admitted in the International's answer (G.C. Exh. 1(m)). In view of the foregoing and noting that the Carpenters fully participated at the hearing, I find that it had timely actual notice.[36] It is also noted that counsel for the Carpenters did not request additional time to meet the issues of the consolidated complaint and all amendments thereto, although he was told that a reasonable request might be entertained. In these circumstances, and on the basis of the entire record, I reject the Carpenters contention that it was denied due process or that it was otherwise prejudiced with respect to litigating the allegations in the complaint.[37] Accordingly, its motion to dismiss the complaint insofar as it relates to the Carpenters is hereby denied.

b. *Liability*

The record discloses, as described more fully below, that contemporaneous with affiliation, the International became a subdivision of the Carpenters and the latter organization became the "successor" entity. The General Counsel asserted that the Carpenters had knowledge of the alleged unfair labor practices committed by the International at the time of affiliation. He contends therefore that under the principles and rationale enunciated by the Board in *Perma Vinyl*[38] and the Supreme Court's decision in *Golden State*[39] (citing with approval the Board's *Perma Vinyl* doctrine) the Carpenters is jointly and severally liable with the International for the latter's unfair labor practices.

Under the Board's *Perma Vinyl* doctrine a "successor" employer who was a bona fide purchaser but with knowledge of the predecessor offending employer's unfair labor practices at the time of the transaction is held responsible for remedying its predecessor's unlawful conduct.[40]

Counsel for the Carpenters contends principally that it is unprecedented and unwarranted to extend the *Perma Vinyl* doctrine to an International Union (the Carpenters), where, as here, it assertedly did not have actual knowledge of the unfair labor practices prior to affiliation and, in any event, Local 46 still exists as a viable entity capable of providing a full remedy.

Insofar as the threshold question of whether the Carpenters had "knowledge," I find on the basis of the totality of the record that it is fair and reasonable to infer such knowledge, noting particularly that Brodeur, who became assistant to the general president of the Carpenters and an agent thereof at the time of affiliation, was also largely responsible for committing the unfair labor practices as general president and agent of the International. This is better understood by noting the events and circumstances which gave rise to the affiliation and Brodeur's agency status on behalf of the Carpenters.

For a number of years the International explored the possibility of affiliating with the Iron Workers and the Carpenters and engaged in separate negotiations with both organizations toward that end. The record discloses that there was substantial movement toward affiliation between the International and the Carpenters in September and October 1978 with an agreement in principle having been reached at a third session in January 1979. The International was represented at these sessions by General President Brodeur, Secretary-Treasurer Michael Brennen, and Vice President Harry Sullivan, whereas the Carpenters were represented by General President William Sidell, First General Vice President William Konyha, and Second General Vice President Campbell. Campbell testified that, in addition to the agreement in principle on affiliation and in connection therewith, a proposal was made for Brodeur to head up the lathers' division for the Carpenters.

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[36] For reasons discussed more fully below, I find that, at all times material herein, Brodeur was an agent of the Carpenters. Cf. *American Steamship Company, a Subsidiary of General American Transportation Corporation*, 222 NLRB 1226, 1230-31 (1976).

[37] See, e.g., *Starkville, Inc.; Hillsdale Manufacturing Corporation; et al.*, 219 NLRB 595, 596 (1975).

[38] *Perma Vinyl Corporation, Dade Plastic Co.*, 164 NLRB 968 (1967), enfd. *sub nom United States Pipe and Foundry Co.* v. *N.L.R.B.*, 398 F.2d 544 (5th Cir. 1968).

[39] *Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento* v. *N.L.R.B.*, 414 U.S. 168 (1973).

[40] See *Perma Vinyl Corporation, supra* at 969.

On April 3, 1979, Cahill filed the charges in Case 2-CB-7767[41] against the International (service admitted) naming Brodeur as the union representative to contact. Brodeur testified that he "turn[ed] this situation over to his attorney for consideration" and conceded that he "thought" that the International was named in the charge. Further, he testified that his attorney, Markowitz (who also represents Local 46) was involved in the final drafting of the affiliation agreement. On April 13, 1979, representatives of the International and the Carpenters signed this affiliation agreement, which, *inter alia*, provided:

> 4. A Lathing Subdivision will be created within the Carpenters which will consist of all former Lathers Local Unions. The General President of the Lathers [Brodeur] will assume the title of Assistant to the General President of Carpenters, and shall supervise the activities of the Lathing Subdivision.
>
> The three International Representatives of Lathers shall be integrated into the International staff of Carpenters, and their primary duties and assignments shall be in the service of the Lathing Subdivision of Carpenters.[42] [G.C. Exh. 17., p. 1.]

Campbell, second general vice president for the Carpenters, testified that Brodeur acknowledged in April, at the time the above-noted affiliation agreement was finalized, that he would be working for the Carpenters. According to Brodeur, however, he never advised the Carpenters about the charges against the International because he was preoccupied with matters relating to affiliation and because he believed that the charges were really the responsibility of Local 46. As Brodeur also testified that he was under the impression the International was named as "a party" in the complaint,[43] I find his explanation incredible and not worthy of belief.[44] In this regard it is also noted that Brodeur conceded that he "probably" discussed the charges with his attorney after they had been forwarded. While Campbell denied any knowledge of the charges against the International, it is noted that neither General President Sidell nor any other Carpenter official testified. Campbell also testified that General Counsel McGowen of the Carpenters and Markowitz worked together on finalizing the "legal language" in the affiliation agreement on April 12 or 13. Thus, counsel for the respective Unions were in contact approximately 10 days after the charges against the International were filed, which further tends to support an inference that the Carpenters learned of the charges before affiliation was achieved, particularly in the absence of record testimony by these individuals denying such knowledge. Brodeur, for example, testified that he spoke with General President Sidell on a number of occasions after the last formal negotiating session on affiliation in January 1979, but before affiliation was finally achieved on August 7, 1979, and maintained that the charges against the International were never discussed.[45] As noted above, Sidell did not testify.

It is well settled that the burden is on the "successor" to establish that when it took over the operations of its predecessor it was without knowledge of the offending predecessor's unfair labor practices.[46]

As General President Sidell and other key Carpenter officials failed to testify and as I have previously rejected Brodeur's denial that he had informed the Carpenters, I am unpersuaded that the Carpenters established that it lacked knowledge of the charges at the time of affiliation. Moreover, the record discloses, as noted above, that Brodeur knew in April after the charges were filed against the International that he would be supervising the lathers as a subdivision of the Carpenters pending ratification by the International membership. He also knew *before* August 7, when affiliation was finally achieved and he assumed the title of assistant to the general president of the Carpenters, that the International was a "party" to the complaint and that he, too, was personally named therein. In these circumstances, I find it fair and reasonable at all times material herein to impute the knowledge of Brodeur of the charges against the International to the Carpenters. In any event, for the reasons noted previously and on the basis of the entire record, I find in agreement with the General Counsel that the weight of the credible evidence supports the inference that Brodeur informed the Carpenters of the charges before August 7 when affiliation was completed.[47]

Having determined that the Carpenters became a "successor" with knowledge of pending litigation against the International when the latter affiliated and became a subdivision, I further find that it is responsible for remedying the unfair labor practices of the International.[48] How-

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[41] The earlier charges against Local 46 were filed in Case 2-CB-7620 on February 17, 1979.

[42] International Representative Diver, the hearing officer who recommended that Brodeur suspend the foremen, was one of the three International representatives employed by the Carpenters.

[43] The complaint in Case 2-CB-7767 was issued on May 30, 1979.

[44] I was also unimpressed with Brodeur's demeanor and his overall credibility.

[45] I place no significance on Brodeur's testimony that Sidell on one such occasion requested a copy of the International's financial statement (without giving a reason for the request) because Brodeur also asserted that the International did not maintain formal records reflecting pending litigation. Moreover, Brodeur admitted that no one from the Carpenters ever asked him whether the International was involved in the pending litigation.

[46] See *Am-Del-Co., Inc. and Compton Service Company, Jointly, and Merchants Home Delivery Service, Inc.*, 234 NLRB 1040, 1041 (1978).

[47] See *Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento* v. *N.L.R.B., supra.*

[48] I can discern no legally sufficient basis for declining to apply the *Perma Vinyl* doctrine against "successor" unions, particularly *where*, as in

Continued

ever, as the *Perma Vinyl* doctrine is predicated on principles in equity,[49] as the Carpenters has not engaged in any wrongdoing, and as it appears that the International has largely remained intact as a subdivision of the Carpenters without the commingling of funds, I shall recommend that the Lathers' subdivision of the Carpenters and Local 46 be jointly and severally liable and the Carpenters secondarily liable to remedy the unfair labor practices found herein.

CONCLUSIONS OF LAW

1. The League, the Association, Dic, Brady, and J.P.D. are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

3. On or about August 7, 1979, the International affiliated with the Carpenters and became a subdivision thereof,[50] with the Carpenters emerging as the "successor" entity.

4. Michael Cahill, William Murtha, and Lawrence McDermott, at all times material herein, have been employer representatives within the meaning of Section 8(b)(1)(B) of the Act.

5. Local 46[51] has violated Section 8(b)(1)(B) of the Act by invoking its constitution to cause the suspension of Cahill, Murtha, and McDermott as foremen for their respective employers, by independently coercing McDermott to accept the impending suspension, and by demanding that employers remove these individuals as foremen during the period of their suspension. By such conduct and by additionally publicizing to its membership the report and recommendations of the International's hearing officer, which included suspending Cahill, Murtha, and McDermott as foremen for 1 year, Local 46 has also restrained and coerced employees and potential supervisors with respect to their Section 7 rights under the Act in violation of Section 8(b)(1)(A) of the Act.

6. The International has violated Section 8(b)(1)(B) of the Act by adopting the hearing officer's recommendation that Cahill, Murtha, and McDermott be suspended as foremen for 1 year, thereby further enforcing the unlawful action taken by Local 46. By such conduct, the International has also restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

7. The Carpenters is secondarily responsible for remedying the unfair labor practices committed by the International.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth in section III, above, occurring in connection with the operations of the Employers named and described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondents Local 46 and the International have engaged in certain unfair labor practices within the meaning of Section 8(b)(1)(A) and (B) of the Act, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Local 46 and the International were responsible for unlawfully seeking and obtaining the removal of Cahill, Murtha, and McDermott as foremen for their respective employers by, *inter alia*, suspending them as foremen in violation of Section 8(b)(1)(A) and (B) of the Act, I shall recommend that they cease and desist therefrom and that they be ordered to notify the suspended foremen and their former employers, Dic, Brady, and J.P.D., in writing, that they have no objection to their serving as foremen. As the 1-year suspension for Cahill, Murtha, and McDermott has long past, and noting that they were employed at jobsites in the construction industry with the strong likelihood that the work that they were assigned to supervise has long been completed, I shall not recommend that they be ordered reinstated to their former positions. However, I shall recommend that Local 46 and the International be jointly and severally liable to make Cahill, Murtha, and McDermott whole for any loss of earnings and benefits they may have suffered by reason of their suspensions and removal as foremen.[52] With regard to the Carpenters, I have found for reasons previously stated that it is liable as a "successor" to the International; but, noting, *inter alia*, that the International has largely remained intact as a subdivision of the Carpenters with its own funds, I shall recommend that the Carpenters only be held secondarily liable for the unfair labor practices committed by the International for the purpose of making Cahill, Murtha, and McDermott whole for the backpay due in the manner set forth hereinabove.

I shall also recommend for reasons stated in *Hickmott Foods, Inc*, 242 NLRB 1357 (1979), that Local 46 and the International be ordered to cease and desist in any like or related manner from restraining or coercing employees in the excercise of the rights guarenteed them in Section 7 of the Act.

[Recommended Order omitted from publication.]

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the instant case, the Carpenters admittedly never asked International officials whether it was involved in pending litigation.

[49] See *Perma Vinyl Corporation, supra* at 969.

[50] The record discloses that the International became known as the Lathing Subdivision of the United Brotherhood of Carpenters and Joiners of America (G.C. Exh. 19).

[51] As noted previously, Local 46 (fn. 3) severed its relationship with the International and affiliated with the International Association of Bridge, Structual and Ornamental Iron Workers. It is now Local Union No. 46 Metallic Lathers and Reinforcing Iron Workers (Resp. Exh. 12).

[52] Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Haynes-Trane Service Agency, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 208. Case 27-CA-6503

October 28, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On December 17, 1980, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

Statement of the Case

James M. Kennedy, Administrative Law Judge: This case was heard before me in Denver, Colorado, on August 12-14, 1980, pursuant to a complaint issued by the Regional Director for Region 27 for the National Labor Relations Board on February 19, 1980, and which is based on a charge filed by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 208 (herein called the Union), on January 8, 1980. The complaint alleges that Haynes-Trane Service Agency, Inc. (herein called Respondent), has engaged in certain violations of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act, as amended (herein called the Act).

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[1] At fn. 10 of his Decision, the Administrative Law Judge stated that, according to its president, Fred Haynes, Respondent never sent employee Charles W. Ledford a warning letter regarding alleged threats to management because Ledford's suspension had been deemed warning enough. The record shows that Ledford was suspended solely because he refused to report to a temporary job assignment in Denver. Haynes' testimony that Ledford's suspension was considered warning enough was in the context that no useful purpose would have been served by disciplining Ledford for a second act of alleged misconduct at a time when he was being subjected to more severe discipline for an earlier act. Haynes did not suggest that Ledford's alleged threats motivated his suspension in any way.

[2] The General Counsel has excepted, *inter alia*, to the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(4) and (1) of the Act by discharging employee Ledford. In support of this exception, the General Counsel points to certain testimony the Administrative Law Judge did not discuss which appears to establish some link between a threat Ledford made to file charges with the Board and his dismissal.

Service Manager Jan Aldrich testified on cross-examination that a letter was drafted, but never sent, which would have warned Ledford that continued threats to management personnel would result in his discharge. The letter reads as follows:

> Dear Mr. Ledford:
>
> On——occasions in the recent weeks you have made various threats to other management personnel in this company, apparently in connection with the charges you have filed with the NLRB. On October 23, in a phone conversation with Bill Watkins regarding your failure to accept a temporary assignment to Denver, you threatened that "Someone's head is going to be broken."
>
> The company cannot ignore or tolerate such threats. This letter should be considered by you as a serious reprimand of your conduct, and because you are already on a week's suspension without pay, no further action will be taken. However, any recurrence of threats, abusive, or insubordinate conduct will result in your immediate discharge.

Aldrich further testified that included among the threats contemplated by the letter were threats of civil action and bodily harm and a threat Ledford had made concerning the filing of charges with the Board. The General Counsel argues that, because one of the four reasons for discharge listed on Ledford's memorandum of dismissal was "Insubordination in the form of both passive and active threats to management, and a challenge by yourself for management to discharge you," Respondent must have terminated Ledford for attempting to exercise his rights under the Act as it stated it would do in its earlier letters.

Aldrich's testimony does in fact raise the possibility that, in drafting Ledford's dismissal memo, Respondent may have taken into account Ledford's threat to file NLRB charges as well as other unprotected threats. However, careful examination of the circumstances surrounding Ledford's dismissal establishes that Ledford's threat to file NLRB charges did not play a motivating role in his discharge.

On the morning of October 22, 1979, Ledford refused to report to a temporary job assignment in Denver. Later that day, he was notified by wire that he would be suspended for 1 week if he did not report to the Denver job the following day. On October 23, Ledford again refused to report. As a result, he was suspended from October 24 through October 31. Ledford returned to work on November 1, and was again ordered to report to a Denver job. Respondent accepted his excuse that he could not go to Denver that day for personal reasons. However, when Ledford again declined to go to Denver the next day, he was discharged. This sequence of events persuades us that Ledford's termination was precipitated by his repeated refusal to accept temporary work assignments in Denver. Thus, under the test adopted in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. *N.L.R.B.* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), we are compelled to conclude that the General Counsel has not made "a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor'" in Respondent's decision to discharge Ledford.

Because the General Counsel has failed to make a *prima facie* case, in which event the issues treated in *Wright Line* do not arise, Member Jenkins does not consider *Wright Line* pertinent.

Member Zimmerman agrees that Respondent did not violate Sec. 8(a)(4) and (1) of the Act. He finds that, through the testimony of Service Manager Jan Aldrich, the General Counsel made a *prima facie* showing that protected conduct was a motivating factor in Respondent's decision to discharge employee Ledford. The mention of the filing of NLRB charges in a proposed letter of discipline 1 week prior to the discharge, coupled with the repetition of the same language regarding "threats" in the actual dismissal letter, supports the inference that protected conduct was a motivating factor for the discharge. However, he further finds that Respondent established that it would have discharged Ledford for repeated refusals to accept temporary work assignments even in the absence of his protected conduct.

259 NLRB No. 12

Issues

The principal issue is whether Respondent discriminatorily ordered its employee Charles W. "Bill" Ledford to transfer from its Colorado Springs office to its Denver headquarters as a reprisal for its employees' having chosen representation by the Union. When Ledford refused to transfer, he was suspended; he refused a second time and was thereafter discharged. Thus, a sequential issue is whether or not those acts were likewise unlawful. In an alternative theory the General Counsel has alleged that Respondent took its action against Ledford because he participated in a representation case hearing. Finally, as a third alternative, there is the allegation that the decision to transfer Ledford was a unilateral change in working conditions and designed to undermine the Union's majority status.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of all parties.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent admits it is a Colorado corporation engaged in the sale, installation, and service of heating and air conditioning equipment having its headquarters in Englewood, Colorado, and a subsidiary office in Colorado Springs. It further admits that during the past year, in the course and conduct of its business, it has purchased and received goods and materials valued in excess of $100,000 from suppliers outside Colorado. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Participants*

Respondent is a heating and air-conditioning sales and service business which holds an exclusive Trane Company franchise for the State of Colorado and parts of Wyoming and Nebraska. As noted its headquarters are in Englewood (a suburb on the south side of Denver)[1] and it has a subsidiary office in Colorado Springs. In addition it has another subsidiary office in Cheyenne, Wyoming. The business is divided into two sections, the sale of new Trane Company equipment and the service of heating and air-conditioning equipment manufactured not only by Trane but by others. This case involves the service end of Respondent's business.

Respondent's entire operation is run by its president, Fred Haynes. His assistants with respect to the service agency are Controller William Watkins and Service Manager Jan Aldrich. Under Aldrich are field supervisors and so-called "service engineers," i.e., those individuals actually engaged in installation and/or repair of equipment.

The Colorado Springs office was also divided into the two divisions but was much smaller. During the period in question it had two or three sales persons, including a sales manager, two service engineers, including the alleged discriminatee, Bill Ledford, and two office workers who provided clerical support to both sides of the business. Until August 1979,[2] Ledford was in charge of the Colorado Springs service operation. For some period prior to the transactions to be described herein, he reported directly to Aldrich. However, the Denver operation also had an intermediate field supervisor who had direct supervision of the service engineers and who reported directly to Aldrich. Ledford did not report to him until August. At that time the field supervisor was Greg Koenig.[3]

B. *The Union Organizing Drive and the Election*

On April 25 Respondent issued a new policies and procedures statement with respect to the employer-employee relationship. On April 27 a group of employees, including Ledford, met with Fred Haynes to discuss the new policies. Dissatisfied with the changes and with management's responses the employees met at a nearby restaurant and discussed the possibility of seeking union representation. Ledford's participation in both meetings was not remarkable as compared to any other employee's. He later signed a union authorization card, but so did most of the other employees. A petition was filed by the Union and on June 12 a hearing was conducted in Denver with respect to it. One of the issues was the question of whether or not Ledford, as the head of the Colorado Springs service operation, was a supervisor within the meaning of Section 2(11) of the Act and whether he was properly includable in the voting unit. Through counsel Respondent sought a continuance of that hearing because it conflicted with a previously scheduled trade show in which Respondent was a participant, but the hearing officer denied the motion. Respondent thereupon did not participate further in the hearing.

Ledford, aware that his status was an issue, had left work that day to attend the hearing. He testified with respect to his duties at Colorado Springs and subsequently the Regional Director issued a Decision and Direction of Election which, among other things, found him not to be a supervisor. A mail election was arranged and the ballots sent to all eligible voters on July 27. On August 10 the returned ballots were opened and counted. The election result showed that the Union had obtained a majority and the Regional Director 10 days later certified the Union as the exclusive bargaining representative of the service engineers unit, covering the Denver, Colorado Springs, and Cheyenne offices.

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[1] The parties refer to the Englewood headquarters as the "Denver" office. That terminology will be followed herein.

[2] Unless otherwise indicated all dates are in 1979.

[3] The Cheyenne operation, which is not really pertinent here, was run by one individual who handled both service and sales.

C. *Ledford's Employment at Colorado Springs*

Ledford was originally hired by Respondent in 1979 and worked in the Denver office as a service engineer until 1976 when he was transferred to Colorado Springs. From 1976 to 1978 he was the only service engineer in Colorado Springs and was supervised by the manager of that operation, Dick Logue. In mid-1978 Respondent hired Mike Edde who was trained momentarily in Denver and then assigned to Colorado Springs. Shortly thereafter Logue resigned and Ledford became the service manager.[4] He held that position until August 27, 1979, when the senior clerical in Colorado Springs, Lois Gysin, became service coordinator and Ledford began reporting directly to Greg Koenig.

Also on that day Jan Aldrich, the service manager, informed Ledford that he was to relocate in Denver by December 1, 3 months hence. The only reason Aldrich gave Ledford for the decision was "economic considerations." Ledford contends that Aldrich said nothing further, but there is reason to believe that Aldrich either told Ledford, or that it was a company policy well known to Ledford because of his 1976 transfer, that Respondent would assume most, if not all, the costs of his relocation. Ledford testified that the decision came as a "total suprise."

That evening Ledford decided to ask Respondent's officials to reconsider their decision. His family had become well situated[5] in Colorado Springs and he had no desire to leave that city. He says he first called President Haynes at his home and told him he did not wish to move back to Denver. He told Haynes that he felt the decision was "a union reprisal"; they also discussed other matters including his assertion that he and the Colorado Springs office had been "more or less kept in the dark as to what the profit pictures were." Haynes told Ledford that the decision stood and that it was an economic consideration. Ledford later called Aldrich and had a similar discussion with him, also to no avail. Ledford testified that in both conversations he asserted he had made an agreement with the Company in 1976 when he had moved to Colorado Springs that if he liked that city he could stay. He says another agreement was reached in 1978 when Edde was assigned to that office. The second agreement was to the effect that in the event it became necessary to rotate an individual back to Denver it would be Edde, not him. Ledford says both Haynes and Aldrich professed lack of knowledge of such agreements. Their testimony, as well as Watkins', is similar; they knew of no such agreements.[6] On this record there is no evidence, other than Ledford's testimony, that either agreement existed.

On cross-examination Ledford explained the basis of his accusation to Haynes that the transfer was "a union reprisal." He said that the events which led him to that conclusion involved "times when we were ostracized by the Company." On further examination he said the Company's treatment of him was "an ignoring [sic] . . . very little was said to us."

On August 14, 4 days after the ballots were counted, Aldrich went to Colorado Springs. He met with Ledford at a local pancake house and a conversation covering a number of topics occurred. According to Ledford, Aldrich principally "discussed the union." Ledford says Aldrich told him "the guys had brought he [sic] and Fred [Haynes] to their knees with the Union, with voting in the Union." Ledford recalled Aldrich also said, "[Haynes] wouldn't have to sign an agreement. He just had to negotiate." In the same conversation, according to Ledford, Aldrich also told him that "the union vote is behind us, and that seemed to take up a lot of everyone's time . . . and let's continue with the work now."

Aldrich agrees that on August 14 he met with Ledford in Colorado Springs. He had gone there to review some job files and had picked up six files to examine. He recalled the pancake house conversation somewhat differently and places different emphasis on it. He remembers that when he spoke to employees, including Ledford, during that period it was common for them to quickly bring up the Union as a topic. He said he and other supervisors had been instructed to avoid conversations of that nature but it was hard to do so because of the employees' persistence. He remembers the conversation in question as occurring in the following manner.

> The way I recall, Mr. Ledford alluded to the fact that now we are union, we are going to do this, this, and this. I said, as I understand it, let me explain the position: we are not union, we are committed to sit down and bargain in good faith to establish a contract; we may end up establishing the existing contract, we may forge a new contract; I don't know, but we're not union. We are committed to sit down and bargain in good faith.

With respect to Ledford's testimony that he had said something to the effect that the Union had brought Haynes and him "to their knees," Aldrich said, "I may have used that expression. I can't honestly say that I said it, but I may have."

Between August 27 and mid-October Ledford's employment continued in the normal fashion with one exception. At some point Ledford decided he would not transfer to Denver though he may have hoped Respondent would change its corporate mind about requiring him to do so. On September 27 he signed a trade name affidavit, actually filing it on October 2 with the County Clerk, establishing a trade name for a new heating and air-conditioning business, Service Engineering, of which he was to be the proprietor. In addition there is his testimony that he had obtained a $90 receipt dated September 28 from the telephone company as a deposit on a business telephone. Also, he made an arrangement with the telephone company to buy a large Yellow Pages advertisement for Service Engineering. The dates of these activities are not quite clear but appear to have been in late September. On October 18 he established a business bank account for Service Engineering.

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[4] Another individual, Stacy Heib, became the sales manager at that time.

[5] Ledford's phrase was "dug in."

[6] Ledford at first testified Aldrich told him the question of such an agreement would be "settled in the courts." Almost immediately he backed off saying that such a remark may have occurred in another conversation with Controller Watkins much later.

Ledford said that on October 18 he had heard from Lois Gysin, who was scheduling the Colorado Springs employees, that he was to work on a Denver area job beginning Monday, October 22. He also said Koenig told him officially of that assignment on October 19. (Gysin also said she first told Ledford of the assignment on October 19 and described that conversation in some detail.) Koenig says it was either on October 18 or 19 that he told Ledford he was scheduled for a Denver job involving 2 days' work. Koenig testified Ledford responded saying he would not go to the job and that he had received advice that a temporary job in Denver was the same as a transfer and, if he acquiesced, it would be used against him in some fashion. Koenig also reported that Ledford told him the transfer was not part of "the deal" and if anyone were to go to a Denver job it should be Edde. Koenig replied he was unaware of any "deal"; Koenig later testified such arrangements did not exist for anyone else.

On October 22 Ledford refused to go to the Denver jobsite. It should be noted here that Ledford had possession of a company truck and regularly used it to commute from his home to work as well as driving it to various worksites. He was expected to drive the truck to the Denver job. He claims Koenig had said he would not be entitled to travel pay while enroute between Colorado Springs and the Denver site. Koenig was not asked that particular question, but Haynes said it is company policy to pay employees their standard hourly rate while engaged in lengthy commutes. The April 25 policies and procedures memo permitted an employee a half hour commute time. Ledford deemed that to be insufficient. But that provision seems aimed at the Denver-based employees for Denver-area jobs. It appears unlikely to have had applioation to Ledford who was in the process of being transferred and who was being staged into Denver. Oddly, Ledford never asked Aldrich who could have clarified the matter of travel pay. Haynes testified Ledford would have been on full pay for travel time to Denver during the transfer period. In any event, allowing for the policy's half hour travel time, the amount of money involved herein is probably in the neighborhood of half an hour's pay each direction as Colorado Springs is only approximately 70 miles from Denver. Ultimately Ledford conceded that the question of travel pay was not the reason he refused to report to the Denver site; it was his refusal to work in Denver at all.

Ledford's refusal to go to the Denver job on October 22 was promptly reported to Denver by Gysin. Shortly thereafter Controller Watkins called her back to tell her he had not decided what action to take. Later that day Aldrich sent Ledford a wire (originally telephoned to him, but later put in writing by Western Union) which read as follows:

> This wire will serve notice that because of your failure to report to your assigned job today, you have put the Company's account relationship in jeopardy. You are hereby instructed to report to your assigned job tomorrow. Failure to comply with this directive will result in one week's suspension without pay commencing 10-23-79 and ending 10-31-79.

On October 23 Ledford again refused to go to the Denver site. When Gysin reported his refusal to Denver she was told he was to be suspended; that did not occur immediately as there was some confusion over the exact suspension period. On that day Ledford assigned himself to go with Edde to a Colorado Springs job. His suspension actually began the following day.

On Thursday, November 1, Ledford was to return to work. Again he had been assigned to work a Denver area job. That morning he called Gysin to tell her he would not be leaving his home for some time as the wing window of his truck had been broken. He was afraid someone had broken into it the previous evening, Halloween night, and he needed to determine if any equipment was missing. He told Gysin he was waiting for the police.[7] She reported the situation to Denver and although Watkins thought his reason for not reporting to the Denver site was "flimsy" he tolerated the situation. Edde went to Ledford's home to help him. Ledford did no work that day, although later he and other employees had a discussion at the office with Watkins who had come down on another matter.

On the next day, November 2, Ledford picked up the truck at the Ford dealership where it was being repaired. He testified that, when he attempted to drive it, the motor did not run correctly.[8] He told Gysin that the vehicle was inoperable and he wanted to leave it at the garage for repairs. Either she or someone from Denver told him to get to Denver any way he could, including using Edde's truck, but he refused. She testified that he tried to get her to overrule the Denver assignment, but she would not do so because there was nothing more pressing to do in Colorado Springs. She reported his refusal to Denver and was told that someone would be right down to take care of the matter.

Later that morning Watkins appeared at the Colorado Springs office and discharged Ledford by memo signed by Aldrich. The memo recites four reasons for his discharge. The first and fourth reasons are connected. The first recites that on two occasions he failed to report for temporary job assignments and the fourth says that he had placed a customer's account in jeopardy by working on jobs which are not assigned to him. The second reason given was "questionable reporting of time worked on job assignments" and the third was "insubordination" taking the form of both "passive and active threats to management and a challenge by yourself for management to discharge you."

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[7] A police report was never filed. Ledford says that when he told the police nothing was missing they refused to investigate his complaint.

[8] The dealership later reported the truck needed new spark plug wires, but Watkins declined the repair and drove the truck to Denver. The spark plug wires were never replaced, at least within the period pertinent here.

Items one and four encompass his October and November refusals to report to Denver assignments. These have been explicated above. Item two involved two things. The first was a time report for June 12, the day of the National Labor Relations Board's hearing in which Ledford had claimed to have worked a full 8-hour day. However he had been off the entire morning at the Board hearing and had not mentioned his absence to attend the Board hearing on his timecard. This resulted in Aldrich's questioning the timecard. Aldrich "officially" accepted Ledford's explanation that the time had been worked after the hearing had ended. In fact Aldrich continued to doubt Ledford but, not wishing to make an issue of it, let it drop.

The second, and more important, matter covered by item two involved an observation made by Gysin during Ledford's week on suspension. One of Gysin's duties was to perform the paperwork on each work order to collect data and material for proper billings to the customers. Although not particularly perceived by either her or Ledford at Colorado Springs, some of that same data was used by Denver, particularly the controller's office, to determine manpower efficiency. One of the calculations done for that purpose was to compare the number of billable hours per month with the number of hours actually billed. That was done for each job and Colorado Springs had been under some scrutiny since January because of a perceived managerial inefficiency in the service department. According to both Haynes and Watkins it was these figures, together with unfavorable profit projections, which led Haynes to decide to transfer Ledford to Denver in the first place. On August 14 Watkins had taken six files to examine for the purpose of identifying problem areas with respect to profit efficiency. During that time he had explained to Ledford, perhaps in nondetail form, what his concern was. In late October Gysin had occasion to go through similar files and had noticed that enclosures appeared to be stapled to the folders contrary to office practice and that some of the hours charged to the job were not consistent with the hours being submitted by the service engineer, principally Ledford. She thought the files had been doctored in some fashion and thought she detected Ledford's hand (albeit in printed form) where it normally would not be seen. Although uncertain of the situation, she nevertheless reported her observation to Watkins who, on November 1, came to Colorado Springs to conduct an investigation of the matter. After questioning everyone, including Ledford, as to whose handwriting it was, and after determining that recalculation of those hours made Ledford's efficiency appear better than it had been before, Watkins concluded that the individual who was likely to have doctored the forms was Ledford.

I note that the proof which Watkins had against Ledford is hardly conclusive. Nonetheless both he and Aldrich testified that this matter induced them to cite it as one of the reasons for discharging him. It should be observed that an unfair labor practice charge, Case 27-CA-6351, had been filed on September 12 alleging that Respondent's decision to transfer Ledford to Denver was unlawful. The record does not show when that charge was withdrawn, but it is conceivable that if Ledford were aware of the manner in which Respondent went about calculating employee efficiency, and was also aware that such material would be advanced by Respondent as a defense to an unfair labor practice charge, Ledford would understand the matter sufficiently well to realize that changing the underlying data would undermine that defense. Frankly, on this record neither fact has been sufficiently well proven for me to make any findings thereon. Nonetheless Gysin's testimony was not sufficiently shaken by the General Counsel or the Charging Party for me to discredit it; by the same token neither did Respondent clearly prove that Ledford doctored the documents, although he may have had both the motive and opportunity to do so.

The third reason listed in the discharge memo, "insubordination," involved Ledford's refusal to accept assignments as noted above and also included "threats" which are not truly denied by Ledford. These involve statements which he made to Koenig and Watkins to the effect that "heads will be broken." Ledford denies using that exact phraseology but admits he commonly uses the phrase "heads will roll" and concedes he may have used that statement to both those individuals. Respondent also points to a few occasions in which Ledford claimed he was compiling "dirt files" to be used against the Company in the event it carried out its demand that he move to Denver. Ledford denies making such threats but does say he was attempting to keep track of what happened to him in order to support the National Labor Relations Board's charges which had been filed. Finally, Watkins quotes Ledford, on November 1, as having "dared" Respondent to fire him, the challenge which is included in item three. Ledford denies having made that statement.

IV. ANALYSIS AND CONCLUSIONS

In the foregoing section explicating the facts leading up to Ledford's discharge on November 2, I have described those facts which may properly be construed as part of the General Counsel's case-in-chief, together with appropriate dovetailing facts proven by Respondent which should be juxtaposed against it. I have not described with detail the procedure which Respondent says it followed with respect to reaching its decision of August 27 to require Ledford to transfer to Denver. I have not done so because it is not a part of the General Counsel's burden of proof nor is it particularly necessary to discuss the procedure in detail as a response to the General Counsel's proof.

Of course in every case before the Board it is the General Counsel's burden to prove the alleged violation. Here, it is somewhat difficult to follow the General Counsel's alternative theories. First, the General Counsel alleges that Respondent's decision to transfer Ledford as either straightforward reprisal for the election results, for Ledford's own union sympathies, or because he participated in the representation case hearing. The difficulty with these theories is that the principal element of union animus is only ephemeral, if not missing altogether. With respect to the General Counsel's claim that the decision to transfer Ledford violated Respondent's bargaining obligation to the Union, the theory is likewise unclear. Normally a unilateral change case can be made without a showing of animus. Here, however, the General Counsel has alleged that Respondent's purpose was to "undermine" the Union's majority status. These varying approaches to the facts, rather than strengthening the General Counsel's hand, demonstrate its weaknesses instead.

First, there is no particular showing by the General Counsel that Ledford's union activity was any greater than that of any other employee or that Respondent thought so or otherwise had reason to single out Ledford. Indeed, the initial contacts between the employees and management with respect to challenging the April 25 change in policy was made by a Denver employee, Steve Arneson. Haynes knew that. Ledford, though he may have spoken out at that meeting, has not been shown to be any more vocal or vociferous than anyone else. In any event the group's dissatisfaction with Haynes' response did not manifest itself to Haynes' perception as being aimed in a union direction. That direction did not materialize until after the meeting was over. Haynes has not been shown to have known who the union leaders were. Moreover, the General Counsel has not shown Ledford to have been such a leader.

Later, Ledford signed an authorization card, but so did others. And it is true that he participated in the Board hearing testifying to his status as an employee. In that sense Respondent may have deemed him to be in favor of union representation. However, Ledford himself appears to have neutralized that effect when both before and after the election he told Gysin, and others, first that he had not yet made up his mind, and, second, that he had voted against union representation. Thus even though he participated in the representation hearing, Respondent's management, who had been informed by Gysin that Ledford did not favor union representation, could not be sure of his stance. Thus, Respondent's state of knowledge regarding his union feelings and desires was not clear; Ledford sent them deliberately confusing signals. In that circumstance it does not seem likely that Respondent would have picked on Ledford as opposed to anybody else.

Respondent's alleged union animus, according to the General Counsel, can be seen from several angles. First the General Counsel points to the August 14 conversation between Ledford and Aldrich in which Aldrich, 4 days after the ballots were counted, allegedly told Ledford that the Union had brought Haynes and himself "to their knees." Ledford further testified that during that conversation Aldrich remarked that Respondent would not sign a contract with the Union. However, in the same conversation Ledford described Aldrich as having said Respondent would negotiate with the Union.

Ledford quoted Aldrich as saying Haynes "wouldn't have to sign an agreement. He just had to negotiate." In some respects the meaning of these remarks is unclear.[9] Certainly the National Labor Relations Act does not require Respondent to sign any proposal until an agreement is actually reached. Allowing for lay imprecision on Aldrich's part, such a statement contains no animus. If taken as an announced refusal to sign a negotiated agreement, such animus does not necessarily include an intention to discriminate against employees on a hire/tenure basis.

The second sentence—"he just had to negotiate"—likewise does not clearly evidence animus of a hire/tenure nature. Indeed, it can be understood as a recognition of the legal obligation to bargain with the Union, though conveying the likelihood of a hard bargaining stance. Even the statement that the Union had brought company officials "to their knees" is vague as animus evidence.

Aldrich himself says that he told Ledford Respondent was obligated to bargain in good faith and that the outcome of the negotiations could be any number of variables. In a sense, therefore, Ledford's statement that Respondent just had to bargain can be seen as a corroboration of Aldrich's denial. Frankly, if any animus has been shown here, it is more closely related to bargaining positions to be taken shortly, not reprisals against employees.

Other areas of alleged animus can be found, according to the General Counsel, in campaign literature and, apparently, by the fact that Respondent did not participate in the representation case hearing. With respect to the literature, the General Counsel's Exhibit 15, there is no animus whatsoever. Regarding Respondent's failure to participate in the representation case hearing, that failure is adequately explained by the fact that it conflicted with a trade show in which Respondent no doubt had invested a great deal of money. It did seek a continuance, but to no avail. To derive animus from that circumstance would be inappropriate. Also cited as evidence of animus is Ledford's claim that he and Edde were "ignored" after the election. However, the evidence does not show that, and even if it did, it would not amount to animus.[10]

Also mitigating against a conclusion that Respondent had union animus manifesting itself in ordering Ledford's transfer is the manner of the transfer itself. First, Aldrich gave Ledford more than 90 days in which to make the transfer. Respondent had transferred him to Colorado Springs in the first place and considered itself to have the power to transfer him back. In both instances its policy was to cover relocation costs. It was not a transfer designed to force Ledford to quit as it would have been had union animus been the motivating force. It was designed to make it palatable. Second, when Ledford refused the October 22 assignment, it did not act precipitously. It warned him. But Ledford's failure to heed the warning did not even result in his discharge, only a week's suspension. Respondent then tolerated his apparent balk of November 1, though it was suspicious of Ledford's veracity. Respondent clearly did not wish to lose Ledford as an employee. That being the case it is hard to see what Ledford's union sympathies or the majority's selection of the Union had to do with the transfer. The Union had won and had been certified. And, although bargaining had not yet commenced, Ledford's transfer could have had little, if any, impact on it. As Respondent could gain nothing by way of its future relationship with the Union by transferring Ledford, I fail to see any animus here.

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[9] Aldrich may have been alluding to the Union's area agreement covering other employers as the expected proposal. Haynes had earlier referred to it in compaign literature dated May 18.

[10] Also in the category of nonconclusive evidence is an unsent letter to Ledford, drafted by counsel for Aldrich's signature, Resp. Exh. 6. That letter was to have served as a warning to Ledford regarding some threats he allegedly had made in October and during the suspension process on October 23. The letter does connect the threats to Ledford's Board charge, but the threats are not clearly described. In any event, the letter was never sent, because, according to Haynes, Ledford had already been suspended, and that was deemed warning enough.

The third element in any discharge case is that of timing. Timing, here, is double-edged. It is true that the decision to transfer Ledford was made only a week after the certification became final and 17 days after the election results were known. But that decision also closely followed a favorable periodic evaluation given Ledford on August 6. Because the evaluation and the retroactive raise that went with it coincided with the last campaign speech before the ballots were mailed and because Aldrich did not wish to be accused of improperly influencing Ledford's vote, he gave it to Ledford in a sealed envelope, offering to have it held by a third person pending the election.

General Counsel does not allege this to have been improper. Furthermore this evaluation is consistent with evaluations given Ledford previously and clearly marked him, if he had not already been so marked, as one of Respondent's best and most qualified service engineers.

That fact ultimately was the reason that Respondent selected him over Edde as the individual to be transferred to Denver. Clearly Denver is a larger market for air-conditioning and heating equipment than Colorado Springs and clearly there would be greater need for an individual of Ledford's skills as opposed to those of Edde's, whose experience was only slightly more than a year in the field. Thus, while it may be argued that the timing of the decision is close to the election results, the manner of selection tends to show that the election had nothing whatsoever to do with the decision. Eespondent was most careful, and took great pains, to avoid being accused of misconduct with respect to Ledford's evaluation. Second, the market situation in Denver required someone of greater skill.[11]

I am, therefore, unable to find that the General Counsel has made out a *prima facie* case that Respondent discriminated against Ledford either because he was a union activist or because it sought to take a reprisal against the union-represented employees generally. Certainly there is no evidence to show that Ledford's participation in the representation case hearing had anything to do with the decision.[12]

With respect to the 8(a)(5) allegation, once again the proof nears nonexistence. The General Counsel relies on Ledford's testimony that he had an agreement with Respondent to the effect that Edde, not he, would be transferred to Denver should economic circumstances require it. First of all, there is no reason to credit Ledford's testimony to that effect.[13] But, assuming that his testimony is credited, the agreement was a private one between him and Respondent. It was not a term and condition of employment for employees generally. He had negotiated it long before the union organizing drive and it related to him specially, to no one else. Thus, assuming Respondent reneged on that agreement, that act affected only him, not the terms and conditions of the other employees in the bargaining unit. It was not, therefore, a change in working conditions as contemplated by Section 8(a)(5) and 8(d). See *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., and Pat O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701 at 704 (1974), and *Brown & Connelly, Inc.*, 237 NLRB 271 at 280 (1978). Cf. *Orfont Orthodontic Laboratories, Inc.*, 156 NLRB 49 at 64-66.

And, as with the 8(a)(3) and (4) allegations, *supra*, the General Counsel's claim that the unilateral change was designed to undermine the Union's majority status depends on a showing of union animus. Here, as there, the evidence is nonexistent. There is no proof whatsoever that Respondent intended to undermine the Union's majority status or that Ledford's transfer would have that forseeable effect. Furthermore, the transfer contemplated Ledford's continued employment in the bargaining unit. Thus, the "undermining the Union" theory also fails for lack of proof.

Accordingly, I have concluded that Respondent did not violate Section 8(a)(1), (3), (4), or (5) of the Act here and I shall recommend dismissal of the entire complaint.

Upon the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent, Haynes-Trane Service Agency, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 208, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in any violations of Section 8(a)(1), (3), (4), or (5) of the Act.

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[11] In this respect it should be noted that Respondent has been attempting to recruit experienced service engineers to work in its Denver office for some time. It had also recently experienced a loss of three such employees and had only been able to locate one new individual.

[12] Had Respondent truly wished to take a reprisal against Ledford for testifying in the representation case hearing, it could have done so as he had provided them with ready reason, his failure to note his whereabouts on his June 12 timesheet. That failure did trigger an inquiry by Aldrich, but he let it drop.

[13] With respect to Ledford's credibility generally, I found him to be glib and capable of explaining all questions in an innocent-appearing manner. His testimony must be carefully examined. For example, his denial that he "dared" Respondent to fire him on November 1 cannot be credited. He was already prepared to begin his new business. He had committed time and money to that effort. Once he had made up his mind that he was not going to Denver and had prepared for the worst, his "dare" becomes quite likely. His frustration level was then quite high and his dare, in light of his newly seen independence, is more than a mere possibility. Thus, where credibility matters, I cannot credit Ledford over others. Certainly the General Counsel has provided no reason to discredit Respondent's witnesses when compared to Ledford.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[14]

The complaint is dismissed in its entirety.

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[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections hereto shall be deemed waived for all purposes.

Yellow Transportation Company, a Division of Yellow Cab Cooperative, Inc. *and* Raul Rodriguez. Case 20-CA-16274

October 29, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on May 27, 1981, by Raul Rodriguez, an individual, and duly served on Yellow Transportation Company, A Division of Yellow Cab Cooperative, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 20, issued a complaint on June 10, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 3, 1981, following a Board election in Case 20-RC-15153, Independent Cab Drivers Association was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about April 20, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On June 18, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising an affirmative defense.

On June 21, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 31, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer Respondent denied the allegations in the complaint that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that the unit is appropriate. Respondent denied these allegations on the grounds that the complaint merely stated legal conclusions and failed to state sufficient facts as to require an answer.[2] Respondent also denied that the Union was the exclusive representative of the unit employees. It further denied that it violated Section 8(a)(5) and (1) of the Act. Respondent admitted that during the calendar year ending December 31, 1980, it derived gross revenues in excess of $500,000, and during the same period it purchased and received at its San Francisco location products, goods, and materials valued in excess of $5,000 directly from points outside the State of California or from other enterprises located within the State each of which other enterprises had received the said products, goods, and materials directly from points outside the State. Respondent also admitted that the Union was certified as the exclusive representative for collective bargaining for the unit of employees described in paragraph 5 of the complaint. Respondent further admitted that on April 15, 1981, the Union requested it to bargain collectively with the Union as the exclusive representative of unit employees with respect to their rates of pay, wages, hours of employment, and other terms and conditions of employment, and that since April 20, 1981, Respondent has failed and refused to recognize and to bargain with the Union.

As an affirmative defense Respondent alleges that the Board's certification in Case 20-RC-15153 was invalid, unlawful, and improper for the reasons set forth in its objections to the election conducted in the underlying representation proceeding. Also in its answer and response to the Board's Notice To Show Cause Respondent asserts that because of the invalid certification it has never been obligated to bargain collectively and that the sole reason for its refusal to bargain is to obtain judicial review of the Board's certification.

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[1] Official notice is taken of the record in the representation proceeding, Case 20-RC-15153, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] In Case 20-RC-15153 Respondent stipulated that it is an employer engaged in commerce, that the Union is a labor organization, and that the unit, as described in the complaint, is appropriate.

259 NLRB No. 13

Review of the record herein, including the record in Case 20-RC-15153, reveals that on September 9, 1980, Respondent and the Union entered into a Stipulation for Certification Upon Consent Election. As noted supra, Respondent stipulated that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, that the Union is a labor organization, and that the unit, as described in paragraph 5 of the complaint, is appropriate.

Subsequently, on October 24, 1980, the employees in the unit voted in an election for the purpose of selecting a collective-bargaining representative. The tally of ballots showed 43 votes cast for, 34 cast against, the Union, and 77 challenged ballots, a sufficient number to affect the results of the election. On October 31, 1980, Respondent filed timely objections to conduct affecting the results of the election, alleging in substance that the Union engaged in deceptive campaign practices and interfered with the employees' free choice in the election. On December 29, 1980, the Acting Regional Director issued a "Report on Objections and Challenged Ballots" to the Board recommending that the Employer's objections be overruled in their entirety, and that 72 challenges be sustained. On April 3, 1981, the Board found no merit in Respondent's exceptions to the Acting Regional Director's recommendations, and certified the Union as the exclusive bargaining representative of all the employees in the unit. By mailgram dated April 15, 1981, the Union requested Respondent to bargain. On April 20, 1981, and at all times thereafter, Respondent admittedly has refused, and continues to refuse, to recognize and to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding which alleges a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. As noted supra, Respondent in its answer to the complaint denied that it is engaged in commerce within the meaning of the Act, that the Union is a labor organization, and that the unit is appropriate. In light of Respondent's stipulation in the underlying representation proceeding that it is an employer engaged in commerce within the meaning of the Act, that the Union is a labor organization, and that the unit described in paragraph 5 of the complaint is appropriate, it is apparent that Respondent is attempting to litigate issues which were or could have been raised in the underlying representation proceeding. This it may not do.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we find that Respondent, since on or about April 20, 1981, has violated Section 8(a)(5) and (1) of the Act by its refusal to bargain with the Union. We therefore grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Yellow Transportation Company, A Division of Yellow Cab Cooperative, Inc., stipulated that it is a California corporation engaged in the taxicab business in San Francisco, California. During the past fiscal year, Respondent has received gross revenues in excess of $100,000. During the same period, Respondent purchased items which originated outside the State of California valued in excess of $10,000.

We find, on the basis of the foregoing, and upon the entire record in this proceeding, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Independent Cab Drivers Association is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

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[3] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

> All cab driver employees employed by Respondent at its San Francisco, California location; excluding all other employees, lessees, guards and supervisors as defined in the Act.

2. The certification

On October 24, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 20, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 3, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 15, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 20, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 20, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Yellow Transportation Company, A Division of Yellow Cab Cooperative Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Independent Cab Drivers Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All cab driver employees employed by Respondent at its San Francisco, California, location, excluding all other employees, lessees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 3, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 20, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has en-

gaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Yellow Transportation Company, A Division of Yellow Cab Cooperative, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Independent Cab Drivers Association as the exclusive bargaining representative of its employees in the following appropriate unit:

> All cab driver employees employed by Respondent at its San Francisco, California location; excluding all other employees, lessees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its San Francisco, California, location copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Independent Cab Drivers Association as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All cab driver employees employed by the Employer at its San Francisco, California location; excluding all other employees, lessees, guards and supervisors as defined in the Act.

YELLOW TRANSPORTATION COMPANY, A DIVISION OF YELLOW CAB COOPERATIVE, INC.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Best Products Co., Inc. *and* United Food and Commercial Workers Union, Local No. 197, affiliated with United Food and Commercial Workers International Union, AFL-CIO. Cases 32-CA-2910 and 32-RC-1104

October 29, 1981

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 15, 1981, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Best Products Co., Inc., Stockton, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election conducted herein on September 11, 1980, in Case 32-RC-1104 be, and it hereby is, set aside, and that said case be, and it hereby is, remanded to the Regional Director for Region 32 for the purpose of conducting a new election at such time as he deems appropriate.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

DECISION AND REPORT ON POST-ELECTION OBJECTIONS

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This consolidated matter was heard before me in Stockton, California, on January 29, 1981.

The charge in Case 32-CA-2910 was filed on July 28, 1980, by United Food and Commercial Workers Union, Local No. 197, affiliated with United Food and Commercial Workers International Union, AFL-CIO (herein the Union). The complaint which issued on September 12 was amended during the hearing and alleges that Best Products Co., Inc. (herein Respondent), committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended.

An election in Case 32-RC-1104 was held on September 11, 1980, among the full-time and regular part-time employees in Respondent's Stockton store. It derived from a petition filed by the Union on June 30, 1980, and a Stipulation for Certification Upon Consent Election approved on July 22. The initial tally was 32 for and 33 against representation, with 2 challenged ballots.

The Union filed objections to conduct allegedly affecting the outcome of the election on September 16. On October 29, the Regional Director issued his Report and Recommendations on Challenged Ballots and Objections recommending that one of the challenged ballots be opened and counted and concluding that the status of the other challenged voter and the objections issues could best be resolved after a hearing.

On November 19, the Board issued its Order adopting the Regional Director's recommendation and conclusions. The one challenged ballot, accordingly, was opened and counted on December 12, resulting in a revised tally of 32 for and 34 against representation, with 1 challenged ballot—that of Virginia Klopstock, Respondent's sales training coordinator.

By order dated January 6, 1981, the Regional Director consolidated the objections and complaint matters herein for hearing and decision, stating that it would "not be necessary to litigate" Klopstock's eligibility, her ballot no longer being determinative.

I. JURISDICTION

Respondent is a Virginia corporation engaged in the operation of a chain of discount department stores, including one in Stockton. The Stockton store realizes annual gross revenues in excess of $500,000, and annually takes delivery from outside the State of California of goods valued in excess of $50,000.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within Section 2(5) of the Act.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Although the Administrative Law Judge relied, in part, on *Essex International, Inc.*, 211 NLRB 749 (1974), which has since been overruled by *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB No. 47 (1981), in finding that Respondent violated Sec. 8(a)(1) of the Act by prohibiting employees from gathering outside the store on their own time, it is clear that Respondent violated the Act under either standard.

259 NLRB No. 16

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *David Meanor*

1. Allegations

The complaint alleges that David Meanor, the manager of the housewares department and an admitted supervisor, violated Section 8(a)(1) on or about July 16, 1980, by threatening an employee with the loss of her position and with the loss of various benefits, including seniority rights and privileges, should the Union be voted in; and by telling the employee that Respondent would not sign a bargaining agreement, meaning that the employees "would inevitably have to go on strike," if the Union were voted in.

2. Evidence

These allegations concern a conversation in mid-July between Meanor and Virginia Klopstock.[1]

Klopstock's version. Klopstock testified that she was walking through the housewares department when Meanor, noting her unsmiling countenance, asked what was wrong. She denied that anything was wrong, but Meanor persisted, asking, "Is it the union thing?" Klopstock conceded that she was troubled by the union situation. Meanor suggested that they "go upstairs and talk about it." Klopstock assented, and they went upstairs to the tag room.

In the tag room, Meanor asked if Klopstock had "any questions." She replied, "You tell me why shouldn't I want the Union." Meanor answered that, "personally," he did not think the Union would benefit the employees as much as they thought it would, elaborating that there would be "a lot of hidden things" that the employees probably did not know about. He particularized that, while they might get a pay raise, they would lose benefits elsewhere "to make up for it"; that they would "lose all [their] seniority" and would "start from scratch" as concerns seniority; that, "if you want a day off . . . you won't be able to get it off if the schedule is already posted," whereas, "the way it is now . . . [you] just go up to your manager and ask him and they can arrange it with no problem"; and that they would not "be able to sit here and talk like this anymore, because there's a third party that you'll have to go through, and that'll be the union representative."

Klopstock asked how all this would happen. Meanor said that it would be "step by step"; that winning the election "doesn't guarantee you anything." He continued that, if Respondent should "say no" to the Union's bargaining demands, the Union then would "order" the employees "to go on strike," and they would have no choice but to comply. Meanor added:

> You have to go on strike, and while they're on strike, the Company will not close. They will rehire people to fill your position, send you a letter telling you that your position's been filled and that they do not have to hire you back.

Klopstock asked, "Well, then, what's the point of all this?" Meanor remarked, "Yeah, what's the point?" To Klopstock's asking how he knew these things, Meanor said his brother had been in a union. Meanor concluded the exchange by telling Klopstock "just to keep it between us."

Meanor's version. Meanor, although conceding that he did not remember "this particular conversation . . . really well," testified at length about it. While professing concern that Klopstock looked "upset or tense," Meanor averred that the conversation was initiated by Klopstock saying that she had "some things to talk about" and asking if he "would talk with her." He assented, after which, in the tag room, she raised the recent discharge of three employees. She voiced concern that management could "arbitrarily" discharge people, opining that union representation would give greater job security. Meanor responded that a union would not have made "any difference whatsoever" in the cases she had cited.

Klopstock then remarked that she did not understand "the union situation," that she felt she was being judged "a union person unfairly," and that she was "being picked on" as a result. Meanor assured her that she was not being picked on, and invited her to "come talk to" him whenever she had "any problems."

Meanor described "the negotiation process," explaining that, once the Union "was voted in . . . everything from that point was negotiable, that benefits could be changed"; that, "depending on the contract, [you] could get more, [you] could get less." The main point I was trying to get across to her." Meanor testified, [was] that nothing was definite." Asked by Respondent's counsel if he said in this context that the employees "would start from scratch on all their benefits," Meanor implied that he did, answering, "And they have." He denied saying, however, that any negotiated raise might be at the expense of other benefits.

After describing the bargaining process, Meanor asserted that, regardless, he did not "see how the Company could pay or do more for the Stockton employees . . . , without doing it for the entire Company." "Fairness," he went on, was "what it was all about . . . and that wouldn't happen if we paid the Stockton employees more than Sacramento."

Meanor denied speculating whether Respondent would agree to the Union's demands—"I had no way of knowing"; and denied saying that the employees "would have to go on strike" should agreement not be forthcoming. He admittedly told Klopstock, though, that "if for some reason" there were not an agreement, "that's when you hear of strikes," and that the Union would do "whatever they had to if it came to an impasse." He continued that in the event of a strike Respondent would have "the right to . . . hire replacements," and that those striking "could be permanently replaced."

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[1] Respondent challenged Klopstock's ballot on the ground that, as sales training coordinator, she is a confidential employee. Respondent's counsel stated on the present record, when Respondent rested, that "we have never abandoned our position that Mrs. Klopstock is a confidential employee." As earlier noted, that issue has been excluded from those to be litigated herein in the context of the representation case. Nor need it be resolved in the context of Respondent's alleged unfair labor practices. Assuming without deciding that Klopstock is a confidential employee, she nevertheless is entitled to the protections of the Act under prevailing Board law. *Intermountain Rural Electric Association*, 253 NLRB 1133 (1981), and cases cited. Respondent expressly disavowed any contention that Klopstock is a statutory supervisor.

Meanor denied speaking of the "hidden problems" that go with union representation, only to concede that he told Klopstock of his own "not very good" experiences with a union. He noted, in this regard, that it was "very easy" to arrange a day off as things were, but that with a union in the picture "you worked the schedule." He added that with a union management and the employees would not be able to discuss things "like we [are] doing now."

3. Conclusions

To the substantial degree that their stories diverge, Klopstock is credited. Her recital was richly detailed, internally consistent, and altogether believable. Meanor, apart from admitting that he did not recall the exchange "really well," betrayed a discrediting penchant to be evasive and unresponsive.

Meanor, by juxtaposing the ideas that there would be a strike if Respondent said "no" to the Union's demands; that considerations of "fairness" made it impossible for him to "see how the Company could pay or do more for the Stockton employees . . . without doing it for the entire Company"; that, should there be a strike, the strikers' positions would be filled and Respondent would not "have to hire [them] back"; and, in summary, that there was no "point" to it all, that a strike would be likely if not inevitable were the Union voted in, that those striking would lose their jobs, and that the organizational undertaking in general was a futility. It is concluded that Meanor, by so doing, violated Section 8(a)(1).[2]

It also is concluded that Meanor violated Section 8(a)(1) by saying that, among the "hidden things" about representation, the employees would "start from scratch" as concerns seniority, work schedules would be rigidly binding, and the employees no longer would be able to talk directly with management. The evil of these remarks is their implication that unionization alone would have the stated effects.[3]

It is concluded, finally, that Meanor's comment was not unlawful that the employees would lose benefits elsewhere "to make up for" any wage increases that representation might bring. Meanor plainly was referring to the workings of the bargaining process, and, as the Board has stated:

> An employer is free to indicate to his employees what the possible result of bargaining may be, and to call their attention to the possibility or even probability that certain existing benefits may be traded away for others.[4]

B. *Terry Sauer (1)*

1. Allegation

The complaint alleges that Terry Sauer, a manager trainee in the toy department,[5] violated Section 8(a)(1) on about July 18, 1980, by prohibiting employees from meeting and speaking with one another during nonwork times and in nonwork areas, to discourage their support of the Union.

2. Evidence

Kevin Sullivan, a sales counselor in the housewares department, testified that he and two coworkers, Gary Petitt and Don Winget, had gathered outside the toy department exit after work on July 18, "trying to decide what [they] were going to do" with their evening. This was their usual after-work practice. A sidewalk about 10 feet wide led from the exit, and they were seated on a planter along the edge of the walk. Sullivan continued that, after they had been there "about 15 minutes," Sauer came out and announced that he would "have to break [them] up," explaining: "I'm sorry, but I was told that any more than three employees in any one place at a time were to be considered a conspiracy."

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[2] *Richard Tischer, Martin Boder and Donald Connelly, Sr., a limited partnership d/b/a Devon Gables Nursing Home; Richard Tischer, Martin Bader and Donald Connelly, Sr., a limited partnership d/b/a Devon Gables Lodge & Apartments*, 237 NLRB 775, 776 (1978); *Four Winds Industries, Inc.*, 211 NLRB 542 (1974); *Tommy's Spanish Foods, Inc.*, 187 NLRB 235 (1970).

[3] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969); *Sportspal, Inc.*, 214 NLRB 917 (1974); *Stumpf Motor Company, Inc.*, 208 NLRB 431 (1974).

[4] *Stumpf Motor Company, supra*, 208 NLRB 432.

[5] The parties are in disagreement over Sauer's status. The General Counsel contends that Sauer was a supervisor; or, even if not, an agent of Respondent. Respondent argues that he was neither. The ranking person in each of the store's departments is a departmental manager. Beneath the manager in some departments are an assistant manager, who is concededly a supervisor, and a manager trainee. The toy department, at most if not all relevant times, did not have an assistant manager, meaning that it wae run by the manager—a Mrs. Allen—and by Sauer, as manager trainee. The department had about seven employees beneath those two.

The store is open from 10 a.m. to 9 p.m. weekdays, from 10 a.m. to 6 p.m. on Saturdays, and from noon to 5 p.m. on Sundays. Allen and Sauer alternated weekends running the toy department; and worked separate but overlapping shifts during the week, one opening the department in the morning and staying into the afternoon, the other reporting in the afternoon and closing the department at night. In Allen's absence, which also included a week or more when her daughter was ill, Sauer was in command of the department, accountable only to Michael Ebbensteiner. the overall showroom manager, whom Sauer labeled as his "boss."

Aside from the regularly recurring instances in which Sauer was the ranking person present in the department, it is uncontroverted that he attended weekly meetings of assistant managers and manager trainees (the managers attended weekly meetings at other times so that the departments would never be without leadership); shared an office with Allen; did not punch a timeclock, unlike the general run of employees; authorized the acceptance of customer checks and employee use of the departments' telephone; had the authority to give warnings, to permit employees to report late or leave early, and to grant days off; prepared department work schedules; assigned employees from task to task; sometimes evaluated job performance; participated with Allen in the interview of prospective employees; and made notations on timecards, enabling payment for extra hours.

Virginia Klopstock, one of whose duties is to teach new hires "how they are to respond to their managers," testified that Sauer in addition had authority to request that employees work extra hours and overtime; and Gary Petitt, a toy department employee, testified that Sauer in fact made such requests of him "on different occasions." Sauer's denial that he had such authority was unconvincing. As is elsewhere noted, he was not an impressive witness.

Finally, Klopstock credibly testified that she instructed the new hires whom she trained, that managers, assistant managers, and manager trainees were all managers in their departments, all to be accorded the "same respect."

It is concluded from this aggregate of circumstances that Sauer indeed was a supervisor and agent, and that his conduct therefore is binding on Respondent. *Osco Drug, Inc., a wholly owned subsidiary of Jewel Food Companies, Inc.*, 237 NLRB 231, 233-234 (1978).

With that, Sullivan went on, he and his companions "just laughed a little bit, got up, and left." He testified that they continued this practice to gather at the same place after work, hearing nothing further from Sauer.

Petitt, a sales counselor in the toy department, corroborated Sullivan in all significant respects. Sauer denied ever speaking to employees in this manner outside the building, offering that he once "had to ask" Sullivan, who was soliciting for the Union in the store while off duty, "to let the employees that were on duty do their work, and . . . to talk to them during their breaks or off-duty hours." Sauer denied ever using the word "conspiracy"—"I wouldn't use the word 'conspiracy.'"

3. Conclusions

Sullivan and Petitt are credited, as against Sauer's denial, that this incident occurred and was as they recalled. Both were persuasively cogent and forthright in their presentations; whereas, Sauer not only was unresponsive and evasive on frequent occasion but unconvincing in overall demeanor.

Given the surrounding context of a union campaign and the assorted other unfair labor practices found herein, it is concluded that Sauer's dispersal of the three employees on the stated ground that they were "considered a conspiracy" was meant to interfere with and restrain them in their exercise of organizational rights, violating Section 8(a)(1). It is further concluded that, regardless of motive, Sauer's prohibition against the employees' gathering outside the store on their own time, there being no showing of a valid business justification, was in the nature of an unlawfully broad ban on solicitation.[6]

C. *Annette Menius*

1. Allegations

The complaint alleges that Annette Menius, the assistant manager of the housewares department and an admitted supervisor, violated Section 8(a)(1) on or about July 24, 1980, by interrogating an employee concerning his union sentiments, by imparting to the employee "the impression that Respondent had engaged in surveillance of" some of the employees' union activities, and by telling the employee that Respondent "would force a 'stalemate' in bargaining with the Union and that employees would inevitably have to go on strike."

2. Evidence

These allegations concern a conversation on or about July 24 between Menius and Kevin Sullivan, previously identified as a sales counselor in the housewares department.

Sullivan's version. Sullivan testified that after he and Menius had finished discussing another matter, Menius asked, "What do you think about the union campaign?" Sullivan replied that he not only was "in favor of it" but was "working on the campaign."

Menius then showed Sullivan a list of those in the department, with an "X" or "O" designation behind each of about 14 names. After explaining that the designations signified who was prounion and who was procompany, and that the list was being prepared for John Case, regional personnel manager, and Michael Ebbensteiner, showroom manager. Menius asked Sullivan if the designations were accurate. He demurred that he preferred not to answer.

At this point, according to Sullivan, he told Menius that "there was the possibility" that he would file an unfair labor practice charge against her for instituting a conversation with him about the Union. She said that she had done "nothing illegal," then stated:

> If the Union was voted in and it came to negotiations . . . the Company would stalemate such negotiations and force the employees out on strike . . . .

Menius added that the strikers "would then be replaced"; and that Respondent, because of its wealth, "could outlast [the employees] on any strike."

Sullivan countered that Respondent "could not force us legally out on strike"—rather, that that would be the employees' "own personal choice"; and related his understanding of the distinction between economic and unfair labor practice strikers as concerns susceptibility to permanent replacement.

Menius also said, per Sullivan, that Respondent would try to schedule as many as possible of the procompany employees to work the day of the election, leaving off schedule as many as possible of the prounion people.

Menius' version. Menius testified that she and Sullivan "just sort of drifted into the talk about the Union," and that she said:

> [I]f it got to the negotiation table, there could be possibility, I guess, that if the Company and the labor union could not come to an agreement on various terms or what-not, they—it would be kind of like a dead-end thing and there could be the possibility of a strike.

Menius testified elsewhere that Sullivan "raised the subject" of a possible strike, remarking that any strike "would have to be voted on by the employees"; and, at another point, that she could not "really say for sure" whether he or she first broached the subject.

In any case, according to Menius, Sullivan exclaimed, after she had expressed herself as above set forth, that she had "committed a ULP," whereupon he departed and the exchange ended.

Menius denied asking Sullivan about his union sentiments, explaining that his feelings were apparent from the prounion T-shirt he was wearing; or that she said anything about rigging work schedules on election day; or that she mentioned Respondent's having the economic resources to withstand any strike.

Menius denied, finally, that she showed Sullivan a list of employees' names on which their union sympathies were denoted. On examination by counsel for the General Counsel, however, she grudgingly admitted that Case and Ebbensteiner had directed the several department managers to "figure out who might be for the Union, and who might be against it"; that she had kept a list indicating whom she thought was of which persuasion; and that she went over the information on that list with Meanor, who was her immediate superior, and with Case and Ebbensteiner.

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[6] Cf. *K.W. Norris Printing Co.*, 232 NLRB 985 (1977); *Essex International, Inc.*, 211 NLRB 749 (1974).

3. Conclusions

To the considerable extent that their versions conflict, Sullivan is credited. His demeanor and the substance of his testimony suggested both competence and conscientiousness under oath, whereas Menius was often evasive and generally unconvincing.

It is concluded that Menius interrogated Sullivan in violation of Section 8(a)(1) by inquiring of his thoughts "about the union campaign" and by asking him if the designations on her list were accurate;[7] that she imparted the impression of surveillance, further violating Section 8(a)(1), by showing and explaining the list to him;[8] and that she committed yet another violation of that section by remarking that Respondent "would stalemate" bargaining, thereby forcing a strike and causing the strikers to be replaced, which conveyed the notion that representation would be both pointless and destructive of job security.[9]

D. *Terry Sauer (2)*

1. Allegation

The complaint alleges that Sauer, previously identified as a manager trainee in the toy department, violated Section 8(a)(1) on July 25, August 2, and two other dates in July or August 1980 by interrogating employees concerning their and their coworkers' union sentiments.

2. Evidence

Gary Petitt, previously identified as a sales counselor in the toy department, testified of "a couple of" conversations with Sauer concerning the Union. The first, took place in the department manager's office towards the end of July. In it, Sauer asked Pettit how the Union "was going"; Pettit replied that it was "still going strong;" and Sauer then asked Petitt's opinion on why the Union "came in."

The second conversation, as recalled by Petitt, occurred in the same office around the "beginning of August." Petitt testified that Sauer, remarking that he had not heard too much about it of late, asked if the Union was dying down. Petitt assertedly answered that the cause had lost a number of people, but that its proponents were trying to get them back.

Mary Avila, also a sales counselor in the toy department, testified that she had "several" conversations with Sauer about the Union, "starting around July." Avila related that in one such conversation, at the customer service desk on July 25, Sauer asked if she wanted to go into the office with him and talk about the Union. To her negative answer, Sauer reportedly said that he was supposed to talk to all the employees and get their opinion of the Union.

Avila responded, so she said, that Sauer already knew her opinion, prompting Sauer to state that he was not going to use "the propaganda" he had been told to use. Avila persisted that she did not "want to discuss it," and Sauer allegedly said: "Let me say just one more thing. . . . [I]f you do not vote, it'll be a vote for the Union."

Sauer, while not addressing these particular pieces of testimony, denied generally that he ever questioned anyone about the Union—"No, sir, we were instructed not to."

3. Conclusions

Petitt and Avila are credited that Sauer made the remarks attributed to him. Sauer, as previously mentioned, was unconvincing both in testimonial content and demeanor. Petitt and Avila, in contrast, came across as sincere and capable witnesses.

It is concluded that Sauer violated Section 8(a)(1) by asking Petitt how the Union "was going," why it "came in," and if it "was dying down.[10] It also is concluded that Sauer in effect interrogated Avila about her union sympathies by the combination of his asking her if she wished to talk to him about the Union and telling her that he was supposed to obtain the employees' "opinion of the Union"; and that he thereby further violated Section 8(a)(1).

E. *Terry Sauer (3)*

The complaint alleges that Sauer violated Section 8(a)(1) on about August 2, 1980, by threatening an employee "with the inevitability of a strike and loss of employment" should the Union be voted in.

2. Evidence

Kevin Sullivan, previously identified as a sales counselor in the housewares department, testified that on August 2 while on vacation he went to the store to see when Gary Petitt would be getting off. Sullivan was wearing a prounion T-shirt. According to Sullivan, Sauer came up to him and remarked, "Don't you like working for the Company?" Sullivan assertedly replied that he did, whereupon Sauer stated that. "if the Union was voted in," Respondent "would force" the employees "out on strike" and they "wouldn't be coming back."

Sauer further stated, as Sullivan recalled, that he would "really miss" working with him and his coworkers, because they were a "great group"; and that "even if the Union lost the election" the employees "could still possibly lose" their jobs, for Respondent "would not forgive and forget."

Petitt was present during this exchange, according to Sullivan. Petitt corroborated Sullivan in this regard, and with respect to the salient substantive features of Sullivan's recital.

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[7] E.g., *PPG Industries, Inc., Lexington Plants Fiber Glass Division*, 251 NLRB 146 (1980); *Didde-Glaser, Inc.*, 233 NLRB 765 (1977).

[8] *Tipton Electric Company, and Professional Furniture Company*, 242 NLRB 202 (1979).

[9] See fn. 2, *supra*.

[10] See fn. 7, *supra*.

Sauer denied participation in any incident of this character—"No, sir, we were instructed not to mention anything of that nature."

3. Conclusions

For reasons earlier stated, Sullivan and Petitt are credited that Sauer bespoke himself as they described. It is concluded that Sauer, by indicating that a strike necessarily would follow from Respondent's bargaining posture, with attendant job loss to the strikers, conveyed the idea that representation would be at once a futility and a peril; and that he consequently violated Section 8(a)(1).[11]

F. *Michael Ebbensteiner*

1. Allegation

The complaint alleges that Ebbensteiner, previously identified as the showroom manager, an admitted supervisor, violated Section 8(a)(1) on and after June 24, 1980, by engaging in surveillance of the employees' union activities.

2. Evidence

The Stockton store has a single small lunchroom. It has food and drink vending machines, a refrigerator, a microwave oven, a few tables and chairs, a stereophonic radio, and sometimes a television set; and is for the use of both management and rank-and-file personnel. Some make purchases there and leave; others spend their breaks and/or lunch periods there. The weight of evidence indicates that it receives considerably more use from rank-and-file personnel than from management.

Ebbensteiner's office is down the hall from the lunchroom. Virginia Klopstock testified that, when the lunchroom door is open, lunchroom conversations can be clearly heard in Ebbensteiner's office.

Before the union campaign the lunchroom door was propped open most, if not all, of the time. With the campaign's onset, employees gathering in the lunchroom routinely closed the door so that their discussions of issues relating to the campaign would not carry outside. Just as routinely, the door would be reopened from the outside. Klopstock, who had a desk a few feet from the door, testified that the door was closed and opened in this manner "sometimes 10 times a day"; that it "got to be a game"; and that those recurrently opening the door were Ebbensteiner and his secretary, Joyce Davis.

Klopstock further testified that she once told Ebbensteiner that the employees were "upset about" the continued reopening of the door, and that he responded that he liked the door open "to hear the music." Before the campaign, according to Klopstock, Ebbensteiner sometimes turned off the radio in the lunchroom, presumably because it disturbed him.

Kevin Sullivan testified that when Joyce Davis once opened the door during the campaign she commented that she had been told that the door "must remain open." Sullivan also testified that he once complained to John Case, the regional personnel manager, about the "problems with the door"; and that, while Case said he would "check on it," nothing changed.

Gary Petitt corroborated Klopstock that the door "generally" stayed open before the campaign; and that, though it was frequently closed by the employees during the campaign, "it would always get opened again." Petitt, however, could not identify those opening it—"I've never seen anybody come out and open it.

Neither Ebbensteiner nor Davis testified.

3. Conclusions

It is inferable from the recitals just set forth, particularly Klopstock's, and absent testimony to the contrary, that Ebbensteiner was behind the recurrent opening of the door. And, while it might be speculated that his purpose was to ensure that the room's intended use not be subverted by a certain employee faction, neither he nor anyone else offered testimony giving substance to such speculation.

The further inference necessarily follows that Ebbensteiner's purpose was to eavesdrop, and to impart the impression that he was eavesdropping, on the employees' discussions of the Union. It is concluded, therefore, that Ebbensteiner violated Section 8(a)(1).

CONCLUSIONS OF LAW

As previously concluded, Respondent violated Section 8(a)(1) by:

1. Imparting to its employees the impression that should the Union be voted in a strike was likely if not inevitable; that those striking would lose their jobs; and that the organizational undertaking in general was a futility.
2. Stating or implying to an employee that unionization would result in the employees' "starting from scratch" as concerns seniority, in work schedules becoming rigidly binding, and in the employees' no longer being able to talk directly with management.
3. Forbidding three employees from gathering outside the store on their own time, thereby issuing what amounted to an overly broad no-solicitation rule.
4. Interrogating employees about their opinions concerning the Union, and about their and their coworkers' union sympathies.
5. Imparting to its employees the impression that their union activities were under surveillance, and in fact engaging in surveillance of such activities.

THE OBJECTIONS

The several instances of misconduct above found occurred during the "critical period" after the June 30, 1980, filing of the election petition. It is concluded that this misconduct is sufficient to overturn the election.

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[11] See fn. 2, *supra*.

ORDER[12]

The Respondent, Best Products Co., Inc., Stockton, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Imparting to its employees the impression that, should the Union be voted in, a strike is likely if not inevitable; that those striking will lose their jobs; and that the organizational undertaking in general is a futility.

(b) Stating or implying to its employees that unionization will result in their "starting from scratch" as concerns seniority, in their work schedules becoming rigidly binding, and in their no longer being able to talk directly with management.

(c) Forbidding employees from gathering outside the store on their own time, thereby issuing an overly broad no-solicitation rule.

(d) Interrogating employees about their opinions concerning the Union, and about their and their coworkers' union sympathies.

(e) Imparting to employees the impression that their union activities are under surveillance, and in fact engaging in surveillance of such activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in their exercise of rights under the Act.

2. Take this affirmative action:

(a) Post at its store in Stockton, California, copies of the notice which is attached and marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the election of September 16, 1980, be set aside and a new election directed.

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[12] All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Eastern Market Beef Processing Corporation, Alfred and Scott Street Divisions *and* United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC and Industrial, Technical, and Professional Employees, a Division of National Maritime Union, AFL-CIO, Party in Interest. Cases 7-CA-16527, 7-CA-16680, and 7-CA-17014

October 29, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 15, 1981, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in support of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Eastern Market Beef Processing Corporation, Alfred and Scott Street Divisions, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was heard by me pursuant to due notice on July 16, 17, 18, 22, and 23, 1980, in Detroit, Michigan.

The charge in Case 7-CA-16527 was filed on June 27, 1979; the original charge in Case 7-CA-16680 on August 7, 1979; the amended charge in Case 7-CA-16680 on August 22, 1979; and[1] the charge in Case 7-CA-17014 on November 2, 1979. The order consolidating cases and the consolidated complaint in this matter was issued on June 20, 1980.

The issues concern whether certain conduct of Respondent commencing in May 1979 constituted conduct violative of Section 8(a)(1), (2), (3), and (5) of the Act. In major effect some of the issues concern whether Respondent's opening of a new plant, unilateral setting of wages and terms of employment, transfer of work, and decision to close its old plant and to terminate employees constituted conduct of refusal to bargain in violation of Section 8(a)(5) and (1) of the Act, and constituted conduct of discrimination in employment in violation of Section 8(a)(3) and (1) of the Act. Further, some of the issues concern whether Respondent unlawfully assisted a union, the NMU, by granting agents access rights to its plant, by recognition of NMU as bargaining agent, by execution of a collective-bargaining contract, and by threats. Such issues concern whether Respondent has violated Section 8(a)(2) by acts of assistance to NMU, and has violated Section 8(a)(5) of the Act by the same conduct by refusing to bargain with the Charging Party, Local 26.[2]

There are also issues raised concerning the General Counsel's reinstatement of charges filed in Case 7-CA-16527 and concerning the receipt in evidence of pretrial statements of a deceased individual.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel and Respondent and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Eastern Market Beef Processing Corporation, Alfred and Scott Street Divisions, Respondent, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan. At all times material herein until June 16, 1979, Respondent maintained its principal office and place of business at 1545 Alfred in the city of Detroit, State of Michigan.

Commencing on or around June 16, 1979, Respondent also maintained a plant in the State of Michigan at 1825 Scott Street, Detroit, and maintained and operated both said Alfred Street and said Scott Street plants until around November 26, 1979. At such time Respondent ceased operations at Alfred Street but continued operations at Scott Street. At all times during the operations at both plants, Respondent engaged in the processing,

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[1] The amended charge in Case 7-CA-16680 was also served on Industrial, Technical, and Professional Employees, a Division of National Maritime Union, AFL-CIO, Party in Interest, herein NMU, on September 27, 1979.

[2] The reference to Local 26 herein is to United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC.

packing, sale, and distribution of meat and related products. Both plants are the only facilities involved in this proceeding.

During the fiscal year ending April 30, 1979, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, manufactured, sold, and distributed at its Michigan plants products valued in excess of $500,000, of which products valued in excess of $50,000 were shipped from said plants directly to points located outside the State of Michigan.

As conceded by Respondent and based on the foregoing, it is concluded and found that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED[3]

United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Industrial, Technical, and Professional Employees, a Division of National Maritime Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Case 7-CA-16527—The 10(b) Issue*[4]

The Union filed the charge in Case 7-CA-16527 on June 27, 1979, averring that Respondent had engaged in conduct violative of Section 8(a)(5) and (1) of the Act. Included in such charge were the usual general allegations. Further, such charge specifically averred that:

> Since in and about May, 1979, the above-named Employer has refused and continues to refuse to bargain in good faith with the Charging Party as the collective bargaining representative of an appropriate unit of its employees, by repudiating a collective bargaining agreement between the Charging Party and the Employer, entered into on December 15, 1977 and effective November 22, 1976 to and including November 22, 1979.

The Regional Director for Region 7 issued a letter on August 2, 1979, in which the parties were advised that the Regional Director was refusing to issue a complaint in Case 7-CA-16527. The Regional Director referred the parties to an enclosed form as to the procedure and deadline for filing an appeal to his "dismissal action." Thereafter, the Charging Party on August 21, 1979, appealed the Regional Director's refusal to issue a complaint in Case 7-CA-16527. On October 9, 1979, the General Counsel denied the Charging Party's appeal.

In the meantime, the Charging Party filed on August 7, 1979, a charge in Case 7-CA-16680, averring that Respondent had violated Section 8(a)(1) and (3) of the Act. Included in such charge were the usual general allegations. Further, such charge specifically alleged the discriminatory discharges of J. C. Bonner and Elmer Jordon. On August 21, 1979, the Charging Party filed an amended charge in Case 7-CA-16680, averring that Respondent had violated Section 8(a)(1) and (2) of the Act. Included in such charges were the usual general allegations and certain specific allegations. On September 28, 1979, the General Counsel issued a complaint in Case 7-CA-16680. However, the complaint was to a more limited effect than sought by the Charging Party. Accordingly, on September 29, 1979, the General Counsel issued a letter setting forth that he was refusing to proceed with allegations to the effect that Respondent had unlawfully assisted the National Maritime Union in obtaining its majority support. Thereafter, the Charging Party, on October 10, 1979, appealed the Regional Director's refusal to issue complaint in such regard.

On November 1, 1979, the Charging Party filed a charge in Case 7-CA-17014 alleging conduct violative of Section 8(a)(1) and (5) of the Act. Included in such charge were the usual general allegations. Further, such charge had specific averments including the following:

> Since in or about June, 1979, the above-named Employer has refused and continues to refuse to bargain in good faith with the Charging Party as the collective bargaining representative of an appropriate unit of its employees, including its employees at its Scott Street facility, Detroit, Michigan, by repudiating a collective bargaining agreement between the Charging Party and the Employer, entered into on December 15, 1977 and effective November 22, 1976 to and including November 22, 1979.

On November 28, 1979, the Regional Director for Region 7 apparently issued a letter advising the parties of his refusal to issue complaint in Case 7-CA-17014. Thereafter, on December 10, 1979, the Charging Party appealed such decision.

It appears that at some point of time before May 27, 1980, the General Counsel sustained the Charging Party's appeals in Cases 7-CA-16680 and 7-CA-17014.[5] On May 27, 1980, the General Counsel issued a letter referring to his sustaining of appeals in the two cases. Further, the General Counsel averred that it had decided, *sua sponte*, to revoke his prior denial in Case 7-CA-16527 and sustain the appeal therein. The General Counsel averred that such decision was in view of the evidence adduced in the investigation of Cases 7-CA-16680 and 17014, and of the conduct as alleged in Case 7-CA-16527.

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[3] The facts are based on stipulations or admissions in the pleadings.

[4] Sec. 10(b) of the Act provides in part:

> *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

[5] Counsel for the General Counsel avers in his brief that the General Counsel on May 16, 1980, sustained the Charging Party's appeal in both Cases 7-CA-16680 and 7-CA-17014. Said brief refers to Resp. Exh. 29 as the basis for such referred to evidence. I do not find a document setting forth such date of May 16, 1980. Perhaps, by inadvertence, the same has been left out of the original formal exhibit file. Excepting for the date of such action, a comparison of the complaints as issued and the other evidence as a whole would reveal no real issue on such contention.

Thereafter, a consolidated complaint alleging violations of Section 8(a)(1), (2), (3), and (5) of the Act was issued on June 20, 1980.

Respondent contends that only Case 7-CA-16527 is barred by Section 10(b) of the Act. In many respects, this issue may be said to be an exercise in academics. Thus, the charge in Case 7-CA-16527 concerned itself with conduct violative of Section 8(a)(5) and (1) of the Act. The charge in Case 7-CA-17014 concerned itself with conduct violative of Section 8(a)(1), (3), and (5) of the Act. The averred 8(a)(5) conduct set forth in the charge in Case 7-CA-16527 is essentially similar to some of the allegations as averred in Case 7-CA-17014. In the charge in Case 7-CA-16527, the commencement date of the averred refusal to bargain was set forth as "Since in and about May, 1979 . . . ." In the charge in Case 7-CA-17014, the commencement date of the averred refusal to bargain was set forth as "Since in or about June, 1979 . . . ."

The complaint allegations in the amended complaint avers the earliest conduct alleged to be violative of Section 8(a)(5) and (1) of the Act, as occurring, "Since on or about the last week of May."

Considering all of the foregoing, I am persuaded that all of the conduct alleged in the amended complaint is properly based upon the charge in Case 7-CA-17014. Thus, such charge was filed on November 1, 1979, and would support complaint allegations of conduct on or after May 1, 1979. It is clear that the alleged conduct of late May 1979 relating to the refusal-to-bargain issues is timely within the view of Section 10(b) of the Act. Thus, it would not appear necessary that the General Counsel use the charge in Case 7-CA-16527 as a basis for his complaint. However, the alleged conduct averred in Case 7-CA-16680 and 7-CA-17014 is closely related to the conduct alleged in Case 7-CA-16527 and, thus, it is clear that Respondent has been on notice of the issues under investigation in this case at all times since June 27, 1979. Therefore, the overall facts relating to the ultimate termination of employees in November 1979 warrant the reinstatement of the charge in Case 7-CA-16527.[6]

B. *Statements of Jordon—Affidavit and Oral*

The General Counsel's complaint alleges that Respondent discriminatorily discharged Elmer Jordon on or about August 6, 1979. On the second day of the hearing, July 17, 1980, the General Counsel (A. Bradley Howell) offered an affidavit of Elmer Jordon into the record as evidence. Howell stated, as counsel, that Jordon was deceased, that he (Howell) had personally taken the affidavit, and that Jordon had signed the same in his presence.

Further, statements of Howell were to the effect that Jordon had died around July 2, 1980; that Howell learned of Jordon's death on or around July 7, 1980; that Howell had advised one of Respondent's attorneys, Hyman, of Jordon's death, and that a copy of Jordon's affidavit had been mailed to Respondent's counsel on July 9, 1980.

Jordon's affidavit bears the date of oath as May 29, 1979. Respondent did not dispute Howell's statement of facts. However, Respondent disputed whether Jordon's affidavit as furnished counsel complied with Rule 804 of the Federal Rules of Civil Procedure. Thus, Respondent contended that the affidavit had not been expeditiously furnished nor was it complete. It is not disputed that a number of names had been deleted from the affidavit furnished Respondent prior to the hearing.

The affidavit of Jordon, dated May 29, 1979, was tentatively received into the record, and the parties were advised to brief the question of such admissibility. At such time said affidavit, unedited and with all names therein, was made available to Respondent's counsel, who was advised that he would be given time at that time or that he could have time at the end of the General Counsel's case in connection with preparation for the issues raised by the substance of the affidavit. At such time, Respondent's counsel elected to take such time at the end of the General Counsel's case. It appears that Respondent did not find it necessary to take time with respect to such issues at the end of the General Counsel's case.

The General Counsel in his brief alludes to Respondent's argument concerning Rule 804, appears to argue that Respondent's counsel was not prejudiced by failure to furnish a complete affidavit prior to the hearing, and argues that Board case law reveals that affidavits of deceased persons, even those with interests in the proceeding, are admissible.

Respondent argues that the affidavit is not admissible, that the requirements of Rule 804 for admissibility have not been made, that an affidavit of a deceased person having interest in the proceeding lacks inherent trustworthiness, that the affidavit was not timely furnished to Respondent, and that the affidavit as furnished to Respondent was not complete.

The Board has always been guided as to the receipt of evidence by Section 10(b) of the Act which provides in effect that its proceedings shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district court. In this regard the Board has found affidavits of deceased persons having an interest in the proceeding to be admissible as evidence.[7] The Board, however, has determined that statements of deceased persons should be considered with the utmost care and caution and closest scrutiny. The weight to be given such statements depends on consideration of the richness and fullness of detail and whether such details are corroborated or disputed and the resultant logical consistency of such statements with all other facts presented on the issues involved.

The Federal Rules of Evidence contain the following rules relevant to the issues presented concerning the receipt of Jordon's affidavit into evidence:

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[6] *California Pacific Signs, Inc.*, 233 NLRB 450, 451 (1977).

[7] See *Prestige Bedding Company, Inc.*, 212 NLRB 690, 701, fn. 13 (1974); *Canterbury Gardens and Manchester Gardens, Inc.*, 238 NLRB 864, 868 (1978).

> Rule 102. Purpose and Construction
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> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.
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> * * * * *
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> Rule 804. Hearsay Exceptions: Declarant Unavailable
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> (a) *Definition of unavailability.*—"Unavailability as a witness" includes situations in which the declarant—
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> * * * * *
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or . . . .
>
> (b) *Hearsay exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> * * * * *
>
> (5) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Considering all of the foregoing, I am persuaded that the Board should adhere to the principles of Federal Rule 804 insofar as practicable and as consistent with its past decisions relating to the receipt of evidence.

Thus, I am persuaded that receipt or consideration of a statement, as to which the proposing party has not complied with the requirement of furnishing a copy of said statement to the adverse party sufficiently in advance of the hearing, is dependent on discretion requiring consideration of all of the circumstances. In the instant case, it appears that the General Counsel furnished the affidavit, with certain names deleted, to his opponent within a reasonable time considering the timing of the events. There is no indication that Respondent, on receipt of the "affidavit," found it necessary to ask that the hearing as scheduled be postponed. I am persuaded that the better policy for the General Counsel would have been to furnish the affidavit without deletion of names, well before the time of the hearing, that, if the affidavit were needed as evidence, such need outweighed any internal policy relating to confidentiality. I note that it is standard practice, at the hearing and upon request after a witness has testified, to furnish unedited affidavits of said witnesses to counsel. The trier of fact in his discretion might refuse to receive such proposed affidavit if to do so under all the circumstances would be unfair to respondent or an abuse of the hearing process. In the instant case, however, Respondent's counsel was advised that time would be given him to prepare concerning the affidavit. Thus, the timing of the furnishing of the affidavit to Respondent and the presentation of an edited affidavit at such time do not constitute an impairment to the receipt of the affidavit in evidence.

As to the question of whether an affidavit by a deceased person who has an interest in the proceeding has guarantees of trustworthiness, Board case law reveals that the affidavit is admissible but subject to careful and cautious consideration and to close scrutiny with the weight to be given subject to consideration of all of the circumstances and facts. Accordingly, I reaffirm the ruling wherein the affidavit of Jordon was received into the record.

The General Counsel further attempted to present testimony of Calloway as to statements made by Jordon to Calloway concerning the events surrounding his discharge. Such testimony was objected to and rejected. It is clear that the General Counsel did not advise Respondent prior to the hearing that he intended to introduce evidence through Calloway of statements by Jordon. Normally, such evidence would be inadmissible because of its hearsay characteristics. In the instant case, the principles of Federal Rule 804 has not been followed or practically applied. I reaffirm the ruling rejecting such testimony.

C. *Supervisory Status*[8]

At all times material herein, except as limited by indication, the following named persons occupied the positions set forth opposite their respective names, and have been and are now supervisors of Respondent at its Scott Street plant, within the meaning of Section 2(11) of the Act, and its agents: Marcus Rohtbart—owner; James Richardson—plant manager; Benjamin Govaere—supervisor; Lawrence Selig—supervisor until July 1, 1979, thereafter Michael Mislevy—supervisor; Matthew Guilfoyle[9]—boning room supervisor.

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[8] The facts are based on the pleadings and admissions therein, and on stipulations. The General Counsel further contends and Respondent denies that Lawrence Selig's supervisory status commenced in the beginning of June 1979. It suffices to say that the evidence is not sufficient to establish that fact. Under the facts of this case as later found out, this appears to have little significance.

[9] The motion to amend the complaint to include Guilfoyle as a supervisor as indicated on the record sets forth the name "Matt Gilford." Witness Matthew Guilfoyle testified in this proceeding. The names sound similar. Under the circumstances I am persuaded that the correct name of the supervisor referred to is Matthew Guilfoyle.

D. *Background*

From in or about 1972 and through November 22, 1979, Amalgamated Meat Cutters and Butcher Workmen of North America, Local 26, AFL-CIO, or United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, and Eastern Market Beef Processing Corporation had a collective-bargaining relationship and had collective-bargaining agreements, the last of which was effective from November 22, 1976, until November 22, 1979.

The last collective-bargaining agreement and perhaps earlier ones were agreements negotiated when Eastern Market Beef Processing Corporation bargained as part of the Detroit Meat Packers Association. Said agreement spelled out the covered appropriate bargaining unit as follows:

> All employees who are engaged in janitorial, receiving, boning, breaking, cutting, grinding, slicing, curing, preparing, processing, sealing, wrapping, bagging, prefabricating, of all meat products, sausage, poultry, fish and sea food products, whether such products are fresh, frozen, chilled, cooked, cured, smoked or barbecued, including those employees operating equipment used in wrapping, cubing, tenderizing of such meat products and who perform those duties in all areas where such products are prepared. All services as indicated above performed in the plant shall be performed by employees covered by this agreement.

The General Counsel alleges, and Respondent denies, in effect that the above-described appropriate bargaining unit of employees employed by Respondent at its facility located at 1545 Alfred Street, Detroit, Michigan, but excluding office clerical employees, guards and supervisors as defined in the Act, constitutes an appropriate bargaining unit within the meaning of the Act.

Respondent's counsel indicated an understanding that cleanup janitorial employees were not in the unit. Apparently in support of such contention, Respondent presented into evidence memorandum agreements relating to janitorial service employees and "night cleanup" employees. I would note, however, the 1976-79 contract was executed on December 15, 1977, and appears to have absorbed earlier agreements as indicated in such memorandum.

I note that the facts reveal that Respondent, prior to March 1979, had two plants, one on Alfred Street and the other on Adelaide Street. The plant on Adelaide Street apparently closed around March 1979 and its employees were transferred to the Alfred Street plant. Further, the union steward for the Adelaide plant became the union steward at the Alfred Street plant when the old steward left. Thus, it appears that Respondent's 1976-79 collective-bargaining agreement covered employees at both the Alfred and Adelaide Street plant until March 1979 and thereafter covered the employees at the Alfred Street plant. Further, it appears that, whether or not janitorial employees of Respondent were covered or in the bargaining unit prior to 1975 and 1976, such employees were included in the bargaining unit during the time of the before-referred-to 1976-79 collective-bargaining agreement. The sum of all of the facts establishes, and I conclude and find, that the bargaining unit as set forth above with respect to Respondent's employees at the Alfred Street plant and/or the Scott Street plant constitutes an appropriate collective-bargaining unit.

E. *Bargaining and the New Plant—Scott Street Plant*

In January 1979, Rohtbart, president of Respondent, discussed with his attorney the fact that Respondent was doing some subcontracting of work. It appears that at such time Rohtbart was contemplating and exploring the possibility of subcontracting agreements and was also involved in the planning of acquisition of new plant facilities and "changes" in operations, including changes in methods of payment for labor services. Respondent's attorney informed Rohtbart that he needed to notify the Union about his subcontracting of work.

Rohtbart, after exploring the idea of subcontracting, apparently decided not to enter into any extensive agreement with anyone for the subcontracting of work. Excepting for the foregoing reference to subcontracting, later events do not involve the question of *true subcontracting*. It appears from all of the evidence, and I draw such inference, that Respondent considered that it had the same obligation of notifying and bargaining with the Union about the relocation of its Alfred Street plant to Scott Street and about changes in operations and wage plans. In such regard, terminology of "subcontracting" appears to have been used with reference to said relocation and changes in operations or as a result of confusion otherwise.

Thus, in January 1979, Respondent was in the midst of arrangements to acquire a plant at Scott Street and of plans for the relocation of its Alfred Street plant.[10] Armstrong, business agent for Local 26, informed Seely, business representative for Local 26, that Respondent Plant Manager Richardson desired a meeting to discuss contracts and the procedure for moving the Alfred Street plant to the Scott Street facility.

Following the foregoing, Seely had a meeting with Richardson in the latter part of January 1979. What occurred is revealed by the following credited excerpts from Seely's testimony:

> Q. (By Mr. Howell) Where did the meeting take place?
>
> A. In the union office.
>
> Q. Who was present at this meeting?
>
> A. Mr. Jack—Maynard Jack Armstrong, Jim Richardson, and myself.
>
> Q. What time of day did that occur?
>
> A. In the morning.
>
> Q. What was said and by whom at this meeting?
>
> A. Mr. Richardson explained to me that the company had acquired the Scott Street facility and was intending to move very shortly into the Scott Street facility. That the Alfred Street facility would be closed, that the company was desirous of entering

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[10] This finding is based on a consideration of all of the facts and logical inferences therefrom.

into a new collective bargaining agreement, which would be patterned after the Western—and I am putting that in quotes—"The Western Type Beef Packers" and that also the company was desirous of having a contract also comparable to the Western Beef Packers. Mr. Richardson further showed me a list of grades or classifications with pay rates describing the work content of the new radical type operation. He described it as a new on-the-rail beef boning operation.

* * * * *

All right. I said, "Do you want rates comparable to the Western Beef Packers also? He said, "Yes." I said, "You have your beef boners on an incentive plan at the Alfred Street facility. What happens to the incentive plan? He said, "There will be no incentive plan at the new operation." And I said, "Jim, you've got to be kidding. You're talking about cutting people's wages."

Later, on or about February 9, 1979, Richardson continued Respondent's approach to Local 26 concerning its desired changes by sending a letter to Maynard Armstrong which set forth reference to further discussion of proposed changes as follows:[11]

> Re: Current Status of Eastern Market Beef
> Dear Mr. Armstrong:
>
> As I am sure you are quite well aware, the small independent beef packers in the State of Michigan, and especially the City of Detroit, have experienced many problems of a financial nature in the last year. Several independent meat packers in the City of Detroit have been forced to close their facilities because they were unable to cope with the economic reality of meat packing in today's economy. Management has been actively engaged in studying the methods and procedures regarding the operation of a plant facility that are currently being used by independent meat packers in the western portion of the United States. It is our opinion that we can no longer continue to operate Eastern Market Beef as it is currently known to the union. There have been many innovations in the past couple of years that enable a packer to run its operations in a more effective, efficient, and competitive nature. As I am quite sure you know, the competition has become fierce in this industry.
>
> The union and the employer must work together to effectuate the changes that must be made in the current operations of Eastern Market Beef to enable it to remain a viable entity. We have no intention to displace any union employees. Our only goal is a reorganization that would enable us to be competitive in the marketplace. We intend to make some changes in areas that are not specifically covered under the current collective bargaining agreement. For this reason, we think it is proper at this time to invite you to contact us so we may arrange a mutually agreeable time to meet and discuss the future of Eastern Market Beef. Please bear in mind that these changes are essential to prevent Eastern Market Beef from going the same way as the following: Rem Packing Company, Prime Meat, Ray's Beef, Standard Beef, and Snow Beef.
>
> We are looking for your response in the very near future.

At some point of time in February 1979, Plant Manager Richardson and Local 26's chief steward, Peter C. Kitka III, engaged in a discussion concerning a grievance. During the time of such discussion, Kitka questioned Richardson as to whether Respondent had purchased the "Wolverine" plant on Scott Street. Richardson told Kitka that Respondent had purchased the Wolverine plant, that the operations at such plant would involve a different type of procedure for "boning," that there would be no need for artisan boning, and that this was the way "they do it out west and that is our competition. That's the way it is."

Later, around March 4, 1979, Respondent held meetings with chosen employee groups. At one of such meetings at least, Richardson showed the Alfred Street employees blueprints of the "Scott Street Plant," told the employees that they would be working there, and spoke concerning the proposed Scott Street plant as is revealed by the following excerpts from Kitka's credited testimony:

Q. What was said and by whom in that meeting?

A. Well, Jim was up there and he had the blueprints of the Scott Street plant.

Q. Did you examine those blueprints?

A. Oh, yes.

Q. What did they show?

A. Well, it had the whole floor plan of the whole Scott Street plant, showing the meat as it would come in. How they would bring it in off the trucks and how they would send it along the rails to different spots in the plant to be boned out and processed.

* * * * *

He started the meeting by saying, "You'll be working there. We will not have any need for any artisan boning or any skilled jobs." He also said that he did not care what kind of seniority we had, plant or departmental seniority. He said that that would be a different procedure altogether. Our competition is out west and that's what we're against. And he also said that March 15 was a deadline for signing the mortgage for the loan for plant and in 60 days after that we would move in. He also wanted the expiration date of our contract to be moved up to July 1. When he was asked about wages, he would say that we would have to negotiate that with the union.

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[11] In the meantime, Local 26 had apparently taken no steps to comply with Respondent's request for discussions. It should be noted that, where there is a collective-bargaining agreement, changes therein cannot be made unilaterally even if there occurs bargaining to an impasse.

> One of the other employees asked him about new machinery in the plant, and he said that during the upcoming months they would be taking a line out of Plant 2 and a line out of Plant 1 and moving them over there, both the roll-omatic machines and other machines that would be used.
>
> He also said, if I can recall, that to remain solvent we would need, you know, a loan. He wanted our contract moved up. I've already said that, sorry. Right now, that is all I can recall.

At some point of time in March 1979, Respondent convened around 30 employees for a meeting in President Rohtbart's office. At such meeting were Plant Manager Richardson and President Rohtbart. During such meeting, a movie was shown the employees. What occurred is revealed by the following credited excerpts from David Dziepak:

> Q. What was the movie about that he showed?
>
> A. Mr. Richardson and Mr. Rohtbart explained that the movie was taken on a trip out West. And the movie depicted meat cutting operations in a plant out West. And the description of the movie was showing how beef was cut out West on the rail, and Mr. Richardson and Mr. Rohtbart explained that the way this meat was cut out West was a more efficient way of cutting it than the way we were cutting it at the Alfred Street plant.
>
> Q. Okay. Was anything else said at this meeting?
>
> A. Mr. Richardson and Mr. Rohtbart, I am not sure which one, said the general explanation, but they said this was a more efficient—boning on the rail, which is the way they bone it out West, was a more efficient way of boning it than the way we did at Scott Street, on the table.
>
> Q. Scott Street or Alfred Street.
>
> A. Alfred Street. At Alfred Street we were boning the meat on the table. And Mr. Richardson explained that they were planning on going to the more efficient way of boning meat, which would be on the rail.

At some point of time in March 1979, Local 26 received a petition from employees at the Alfred Street plant. Said petition requested Local 26 to enter into immediate negotiations with Eastern Market Beef for the purpose of negotiating a new contract. Seely, for Local 26, convened a union meeting to discuss the referred-to petition. What occurred is revealed by the following credited excerpts from Seely's testimony:

> Q. What occurred at this meeting?
>
> A. I presented the petition that had been given to the union and opened the floor immediately to questions as to what had precipitated their drawing up and signing a petition, reminding them that they had a contract in effect and they were being well taken care of and that their contract would continue until November 1979.

Following the above-referred-to union meeting, Seely had a telephone conversation with Plant Manager Richardson. What occurred is revealed by the following credited excerpts from Seely's testimony:

> Q. Who called who?
>
> A. Mr. Richardson called me.
>
> Q. What did he say and what did you say?
>
> A. He demanded to know who and why the union could act contrary to a petition that had been signed by the majority of the employees of Eastern Market Beef, and which the employees had demanded that Local 26 enter into contract negotiations. I responded that the petition had no weight because a local union had a contract with the company that ran to November of 1979.
>
> Q. Was anything else said during this conversation?
>
> A. I am trying to remember.
>
> Q. Was anything said regarding the multiemployer group?
>
> A. Yes that was the other part. This was also explained at the membership meeting, that there were some legal and or technical—
>
> Q. Who is doing the explaining?
>
> A. I am.
>
> Q. What did you say?
>
> A. That there were some legal or technical questions that barred Local 26 from terminating the contract with Eastern Market Beef because Eastern Market Beef were members, or a member of a multiemployer group that were signatory parties to the current collective bargaining agreement and that if we were desirous of terminating that contract the union would have to obtain approval from all the other signatory. This I considered at that time to be impossible.

On March 23, 1979, Respondent completed the purchase of the Wolverine plant facilities at Scott Street.

On or about April 15, 1979, President Rohtbart telephoned Seely. What occurred is revealed by the following credited excerpts from Seely's testimony:

> Q. And who called who?
>
> A. Mr. Marcus Rohtbart called me at approximately 4:00 o'clock in the afternoon.
>
> Q. What did he say and what did you say?
>
> A. He said to me, "Harold, we have to have a new contract." And I said, "Marcus, what's the hurry? You've got a contract that runs until November." I said, "We're covered. There's no problem." And he said, "No, I am having trouble with the bank. We had a lot of money involved and we have loans and the bank has to have some assurances before we can move over there to the Scott Street operation that we have to have a contract in effect." And I said, "Marcus, it is late in the day. Maybe I can make it tomorrow or possibly next week." Mr. Rohtbart said to me, "No, I am leaving town. You have to come over right now."

Following the above-referred-to conversation, Seely left his office and went to Respondent's office and met with President Rohtbart, Richardson, and Respondent's attorney, Hyman. What occurred is revealed by the following credited excerpts from Seely's testimony:

> Q. And what was said and by whom?
>
> A. Well Mr. Rohtbart again impressed or attempted to impress me with the fact that they had to negotiate a new agreement before they moved to Scott Street, that it was imperative and again, in his words, that they have a contract in effect when they made the move. One of the main—the primary purpose, as he explained to me, was that he had no intention of moving over to the new facility and then having to enter into negotiations and face a possible strike in November of 1979. I said that that made sense to me. I said, "So your only purpose in early negotiations are negotiating a new contract was to establish labor peace for operation in a new facility." And, he assured me that that was the only reason.
>
> Q. Was anything else said?
>
> A. Yes. I said, "As long as you have told me what your position is, I will tell you what our fears are." I said, "There has been talk in an membership meeting that I got from the membership that the company had planned to discontinue their participation in the various trust funds; pension, health and welfare, dental, optical, and prescription drug funds. So, there is a fear on the part of the union and the employees that the company intends to withdraw their participation from those funds." At that point, Mr. Rohtbart said, "Well, what can we do to assure you that we will not withdraw from the funds or hurt the employees?" And, I gave him some examples of what could happen. And, he said, "Well, I don't want to hurt the employees. What do you need?" I said, "I will need a written commitment from the company that the company will not withdraw from the funds, thereby protecting the employees interest." He looked around to Mr. Hyman and he said, "Can we do that?" And, Mr. Hyman assured him that we could. He then directed Mr. Hyman to draw up such a letter and present it to the union. And, I said, "When we get that letter, we can begin negotiations."

On Monday, April 2, 1979, Eastern Market Beef Processing Corporation held a special meeting of its board of directors. What occurred is revealed by the following excerpts of the minutes of said meeting:

> A Special Meeting of the Board of Directors was held at the office of the Company on Monday, April 2, 1979. All Directors were present.
>
> A discussion was had regarding the affairs of the Company. The Company has acquired a new plant located at 1825 Scott Street, Detroit, Michigan. The Company will be required to purchase equipment and remodel said plant. The operations to be conducted at said plant are different from the operations presently conducted by Company at its plant at 1545 Alfred Street, Detroit, Michigan.
>
> Upon motion duly made, seconded and carried, it was unanimously
>
> RESOLVED, That Company hereby establishes two divisions to be known as the Scott Street Division and the Alfred Street Division.
>
> FURTHER RESOLVED, That the business of the Scott Street Division shall be conducted at 1825 Scott Street, Detroit, Michigan, and the business of the Alfred Street Division shall be conducted at 1545 Alfred Street, Detroit, Michigan.
>
> FURTHER RESOLVED, That seperate bank accounts and separate books and records shall be maintained for each Division.
>
> FURTHER RESOLVED, That transfers of merchandise from one Division to another Division shall be invoiced and billed by the transferor Division and paid by check by the transferee Division.
>
> FURTHER RESOLVED, that each Division shall be maintained as a separate profit center.

On or about April 17, 1979, Plant Manager Richardson transmitted a letter to Seely. In said letter, Respondent gave the requested assurances as is revealed by the following excerpts from said letter:

> Management at Eastern Market Beef offers this letter to the union in order to show our good faith and to maintain labor peace.
>
> On February 9, 1979, a letter was sent to Mr. Armstrong inviting the union negotiating committee to meet with management and discuss the possibilities of subcontracting. We are anxious to resolve this matter with the present union and the present work force.
>
> Eastern Market Beef does not intend to revoke any of the benefits, embodied in the current Collective Bargaining Agreement dated November 22, 1979, that are presently being enjoyed by employees.

Following the receipt of Richardson's April 17, 1979, letter, Seely set up a meeting to elect a bargaining committee and to obtain proposals for demands to use in negotiation on a new contract. There is nothing in the record to indicate the exact date of such scheduled meeting.

On or around May 1, 1979, Seely received information from the Union's chief shop steward that Respondent had posted a copy of a letter from Attorney Hyman to Armstrong.[12] Later that day, a copy of the referred-to letter was hand-delivered to the Union's office. Such letter was as follows:

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[12] Exactly what was said by the union chief shop steward to Seely is not revealed in more detail.

May 1, 1979

Mr. Maynard Armstrong
Amalgamated Meat Cutters and
Butcher Workmen of North America
Local Union 26
211 Woodward Ave., Room 408
Detroit, MI 48201

Re: Potential Subcontracting at Eastern Market Beef

Dear Mr. Armstrong:

In both our letters of February 9, 1979 and April 16, 1979, the employer, Eastern Market Beef, has expressed the urgency of meeting with the bargaining committee to discuss the potential effects of subcontracting on bargaining unit members. I have met with you at the plant and discussed this on one occasion.

As our letter of April 16, 1979 indicates, we do not intend to revoke any of the benefits embodied in the current collective bargaining agreement. I do not know what further we could have done to express the urgency of meeting with the bargaining committee and discussing these matters.

Still you have failed to heed our request to come to the table and negotiate. It is unfortunate for both the employer and the union that you have not done so. We are at a point in time where we are forced to negotiate with subcontractors. We intend to be negotiating with subcontractors during the month of May. Your failure to respond to our repeated requests has left us no other alternative.

/s/ Douglas A. Hyman
Douglas A. Hyman, Attorney
for Eastern Market Beef

DAH/pap

Following the receipt of the above letter, Seely telephoned Richardson. What occurred is revealed by the following credited excerpts from Seely's testimony:

> Q. What was said during the conversation?
>
> A. Okay I then called Mr. Richardson and explained to him that the letter obviously was not intended for the union but was intended for the employees. I said that I did not appreciate the company posting a letter that was addressed to the union, posting it for the employees' intimidation before we had a chance to look at it. Further, I said to Mr. Richardson, I said, "Look, the company is telling us that they want to negotiate and then your hanging this sub-contracting thing over our head." I said, "You go ahead and talk to the sub-contracts first. And when you get through with them we will sit down and talk with you." And then Mr. Richardson said, "Look, we don't want to talk to any subcontractor. Let's just get started negotiating a contract so we can move."
>
> Q. Was anything else said?
>
> A. I think it was at that point that I told him that I had scheduled a meeting for the purpose of electing a bargaining committee and drawing up a proposal and I said that as soon as I was done he would get a copy of the proposals and we could begin.

Thereafter, Local 26 prepared proposals for negotiations. On May 14, 1979, Local 26 met with certain Respondent officials to discuss the oncoming negotiations. At such time, Local 26 presented certain proposals. Attending for Respondent were David Rohtbart, son of President Rohtbart, and Plant Manager Richardson. Attending for Local 26 were Seely, Chief Steward Kitka, Pat Hardy, Dave Dziepak, and apparently six other members. What occurred in effect is revealed by the following credited excerpts from Seely's testimony:

> Q. (By Mr. Howell) What was discussed at this first preliminary meeting?
>
> A. At the preliminary meeting most of the discussion was centered around the urgency on the company's part.
>
> Q. Who was doing the talking?
>
> A. Mr. Richardson. The urgency of reaching an agreement so that the move could be made to the new facility, the company further said—

* * * * *

> Mr. Richardson again. That Mr. Rohtbart senior and he had decided that a target date should be picked at which time an agreement should be reached. Must be reached. And if no agreement were reached by that date that the company would start sub-contracting the work.
>
> Q. Was anything else said?
>
> A. Well, I at that point, explored with Mr. Richardson about what he specifically meant by subcontracting. Because I was of the opinion or the feeling that sub-contracting as I have known it in the past was not being applied here in the interpretation of Mr. Richardson. So, I asked him to explain what he meant by sub-contracting. And, he told me that, "Our plan is to set up a satellite company in the new facility at Scott Street and have them do the work that is presently being done by the Alfred Street operation."

The first real bargaining session occurred on May 16, 1979. Later, on May 22, 1979, Richardson transmitted a letter to Seely which stated: "This is to clarify and inform you that Eastern Market Beef Processing Corp. will be negotiating its new contract by itself and on its own, apart from the Detroit Meat Wholesalers Assoc." Following this, there were around seven bargaining sessions with the last bargaining session occurring on June 7, 1979. It appears that the parties had reached agreement on all items for a new contract excepting the parties could not reach agreement on certain cost-of-living provision language.

The respective positions of the parties were as revealed by the following credited excerpts from Seely's testimony:

> Q. What was the union's position?

> A. The union's position was we had proposed a semiannual cost of living adjustment which would have allowed full adjustment of cost of living without regard to maximums. The company's position was that there would be a continuation of the cost of living formula in the old contract which provided for a ten cent cap every six months.

What occurred with respect to the disagreement on the cost-of-living language in the proposal and the proposal as a whole is revealed by the following credited excerpts from Seely's testimony:

> Q. What occurred at this June 7th, 1979 bargaining session?
>
> A. Well when we reached a point where we could not agree on the cost of living language, the company then requested that the union take the offer to the employees, to the membership, for a vote. And requested also that the union—first ask the union if we would recommend it for acceptance. We said that we would not. The company had requested, or asked if we would take the package to the members with no recommendation. And, we agreed that we would.

Thereafter on June 12, 1979, Local 26 held a ratification vote for the contract proposals. These were rejected by the Union's membership.

On June 13, 1979, Seely telephoned Richardson and related the results of the vote by the membership. What occurred is revealed by the following credited excerpts from Seely's testimony:

> Q. What did he say and what did you say?
>
> A. Well it was the following morning and I was reporting to him the results of the vote that had been taken. I would like to point out that was a secret ballot vote. I explained to Mr. Richardson that the final proposal of the company had been rejected by a vote of 76 to 6 and that we were interested in getting back to the bargaining table. Mr. Richardson asked me if Mr. Shapiro was back in town and I said that he was not yet back and, he said, "Well have Mr. Shapiro call me as soon as he gets back and we will get back together again."

In the meantime certain employees had been hired by Respondent to engage in cleanup work at the facility it had purchased on Scott Street. On June 16, 1979, Respondent assigned production jobs at the Scott Street facility. On the same day Respondent recognized the Industrial, Technical, and Professional employees, a Division of National Maritime Union, AFL-CIO, as the exclusive collective-bargaining agent for its Scott Street plant employees. On June 17, 1979, Respondent executed a collective-bargaining agreement with NMU. The bargaining unit covered by such contract is as follows:

> All production and maintenance employees employed by the Respondent at its plant located at 1825 Scott Street, Detroit, Michigan; but excluding office employees, employees of independent contractors, sales personnel, professional employees, and guards and supervisors as defined in the National Labor Relations Act.

During the week preceding June 17, 1979, Howard Shapiro, Local 26's business agent, was in Washington, D.C., in connection with the merger which changed Local 26 from being Amalgamated Meat Cutters and Butcher Workmen of North America, Local 26, AFL-CIO, to United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC. Shapiro returned to Detroit on the night of June 17, 1979. During the week following, Shapiro telephoned Plant Manager Richardson's office on Monday, Tuesday, and Wednesday (June 18, 19, and 20, 1979). On such occasions, the person who took Shapiro's call informed him that Richardson was not available.[13] Said person, however, took Shapiro's name and telephone number and told him that Richardson would return his telephone call.

On June 21, 1979, Shapiro transmitted the following letter to Respondent:

> As you are aware, at the urgent behest of the Company, we have been in negotiations with you for more than a month, despite the fact that our current agreement is not due to expire until November of this year.
>
> We responded to the urgency of your request because of your representation that it was necessary to finalize a new agreement preparatory to moving into a new plant which would necessitate a revolutionary change in your methods of operation.
>
> During this one month period we have attempted in all good faith to arrive at a new, mutually acceptable agreement. However, as you know, the most recent proposal by the Company was voted down in a secret ballot vote by an overwhelming majority.
>
> I have since that time requested that we resume negotiations in an attempt to resolve the outstanding issues. You have failed to set a date for this purpose, and phone calls I have made to you have found you unavailable and were not returned.
>
> Additionally, you have begun operations in the new plant, hiring approximately 30 new employees who will be performing the same work covered by our existing and un-expired [sic] Collective Bargaining Agreement.
>
> It appears to me that you have provoked serious doubts about the good faith bargaining required by law and implemented over many years in the relationship between your Company and the Union.
>
> We hereby assert that the so-called new plant is an integral part of the operation of the Eastern Market Beef Company and demand that the new employees hired by you receive all the wages and conditions provided for in our Collective Bargaining Agreement.

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[13] Shapiro in his testimony revealed that the person who took his telephone calls was a female. Shapiro described her as the operator who took his telephone calls.

> Should you fail to do so, the Union will be compelled to utilize its full resources under law to assure compliance with the contract and the full protection of the wages, conditions and seniority of your employees.
>
> We do not seek a confrontation with your Company. We much prefer to resolve things peaceably and maintain and strengthen a decent relationship which has existed over the years.
>
> It is my sincere hope that you feel the same way.
>
> May I expect to hear from you soon.
>
> Very truly yours,
> /s/ Harold L. Shapiro
> Harold L. Shapiro
> Deputy Trustee
>
> HLS:is
> cc: Ted Sachs
> Charles A. Hayes
> I. Mark Steckloff, with enclosure

On June 26, 1979, Plant Manager Richardson transmitted a reply to Shapiro's June 21, 1979, letter, as is revealed by the following:

> Thank you for your June 21, 1979 letter. As I am sure you are aware, I was unable to meet last week because Markus was out for several days and I was extremely busy for reasons I am sure you well understand.
>
> When we made our last offer to you, it was my fondest hope that the union would recommend it to the employees and that the employees would approve it. Unfortunately, our best offer was rejected by an overwhelming majority.
>
> To remove any possible doubt in your mind, it is our current intention to continue to operate the Alfred Street facility.
>
> We reject the other assertions set forth in your June 21, 1979 letter.
>
> If after reviewing the above you still desire to meet, please give me a call and we can set up a meeting this week.

On the next day, Local 26 filed an unfair labor practice charge which was docketed as Case 7-CA-16527. Such charge alleged in effect that Respondent "Since in or about May. 1979," had refused to bargain in good faith by repudiating the collective-bargaining agreement in existence between Respondent and Local 26 and entered into on December 15, 1977, and effective November 22, 1976, to and including November 22, 1979. Such conduct was alleged to be violative of Section 8(a)(5) and (1) of the Act.

Around July 23, 1979, an agent or agents for Local 26 commenced monitoring activities at Respondent's Scott Street plant, and commenced organizational efforts directed at Respondent's Scott Street plant employees. On August 2, 1979, the Regional Director issued a letter advising the parties that he was refusing to issue a complaint in Case 7-CA-16527.

Among the employees who worked at the Scott Street plant and who engaged in some union activity toward the end of July and first part of August were employees J. C. Bonner and Elmer Jordon. On or about August 1, 1979, Respondent discharged J. C. Bonner. On or about August 6, 1979, Respondent discharged Elmer Jordon. On August 7, 1979, Local 26 filed unfair labor practice charges against Respondent. Such charges, docketed as Case 7-CA-16680, allege in effect that Respondent had discriminatorily discharged Bonner and Jordon because of their activities on behalf of the Union. Such conduct is alleged to constitute conduct violative of Section 8(a)(3) and (1) of the Act. Following this, on August 21, 1979, Local 26 took an appeal to the General Counsel from the Regional Director's August 2, 1979, refusal to issue a complaint in Case 7-CA-16527. On the same day, August 21, 1979, Local 26 filed an amended charge in Case 7-CA-16680, alleging in effect that Respondent had assisted and recognized NMU improperly and in violation of Section 8(a)(1) and (2) of the Act.

On September 6, 1979, Kearis, president of Local 26, transmitted a letter to Respondent Plant Manager Richardson. Said letter in effect notified Respondent of Local 26's desire to negotiate changes in the existing collective-bargaining agreement between the parties. At the same time Local 26 gave notice to the Federal Mediation and Conciliation Service of the proposed modification of the existing contract.

On September 28, 1979, the Regional Director issued a complaint in Case 7-CA-16680. Such complaint alleges conduct violative of Section 8(a)(3), (2), and (1) of the Act. At the same time the Regional Director refused to issue complaint in the broadest scope of Section 8(a)(2) of the Act.

On or about October 1, 1979, Business Representative Seely spoke to Plant Manager Richardson concerning negotiations and whether Respondent intended to negotiate as part of the multiemployer group or intended to negotiate on an individual basis. Richardson indicated to Seely that Hyman would handle the negotiations from that point on. On October 1, 1979, Seely transmitted a letter to Attorney Hyman and requested a response as to whether Respondent intended to bargain individually or as a group. Said letter indicated that enclosed with such letter were proposals for the new collective-bargaining agreement. Thereafter, on October 4, 1979, Hyman, by letter, indicated receipt of Seely's October 1, 1979, letter, advised that Respondent intended to negotiate on an individual basis, and informed Seely to feel free to contact him at his office.

On October 9, 1979, the General Counsel denied the Charging Party's appeal from the Regional Director's refusal to issue a complaint in Case 7-CA-16527.[14] On October 10, 1979, the Charging Party appealed the Regional Director's refusal to issue complaint in Case 7-CA-

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[14] As noted previously, the charge therein alleged conduct violative of Sec. 8(a)(5) and (1) of the Act and referred to an alleged repudiation of the collective-bargaining agreement.

16680 in certain aspects with regard to alleged conduct violative of Section 8(a)(1) and (2) of the Act.[15]

On or about October 23, 1979, Hyman, for Respondent, transmitted the following letter to Seely for Local 26.

> I am writing this letter to inquire when and if you intend on negotiating with Eastern Market Beef on the Alfred Street plant. I have discussed this matter with you on several occasions and you have informed me that you would get back to me.
>
> I received your cover letter dated October 1, 1979 in which you inquired as to whether we would be bargaining as a group or individually. On October 4, 1979, I answered with my letter informing you that we intended to negotiate individually. Since that date, I have heard nothing further from you regarding these negotiations.
>
> Please be put on notice that the employer is, and has at all times, been ready, willing, and able to negotiate on the Alfred Street facility. Please contact me so that we may arrange to negotiate at times mutually agreeable to both parties.

On or about October 23, 1979, James Williams III, for the USDA, gave Plant Manager Richardson a memorandum dated October 23, 1979. Such memorandum referred apparently to a prior inspection date of July 23, 1979, of various "projects" of correction which had been due to start on 8-15-79 and due to have been completed by 9-15-79, and due to start on 9-12-79 and to be completed by 10-12-79. Further, such memorandum indicated that Williams had to have from Respondent the dates when corrective action would be taken and completed. Such memorandum indicated that, if this were not done, the areas mentioned would have to be "rejected."[16]

Sometime after Seely received Hyman's October 23, 1979, letter, Respondent and the Union agreed to have a bargaining session on October 29, 1979. Considering the timing of events, I find it reasonable to infer that the agreement to have a bargaining session on October 29, 1979, occurred after Respondent had received Williams' October 23, 1979, memorandum.

In the meantime, on March 23, 1979, when Respondent purchased the "Scott Street plant," Respondent entered into certain financial arrangements with the Michigan National Bank of Detroit as is revealed by excerpts from a summary of transactions in evidence as an exhibit. Such excerpts are as follows:

> SUMMARY OF TRANSACTIONS
>
> On March 23, 1979, EMB purchased from Wolverine Packing Co. the plant and equipment located at 1825 Scott Street, Detroit, Michigan, for $1,500,000 cash. The purchase price was allocated as follows:

Land and Building	$841,720.00
Equipment	$658,280.00

> On the same day, EMB borrowed $1,500,000 from Michigan National Bank of Detroit. The promissory note evidencing said debt bears interest at 1/2 of 1% over prime and is payable in monthly installments beginning May 1, 1979, of $12,500 per month plus accrued interest. A balloon final payment of $312,500 plus accrued interest is due on April 1, 1987.
>
> On the same day, EMB entered into a loan agreement with MNB covering a $2,500,000 line of credit including obligations on outstanding letters of credit. The interest on the line of credit loan is prime. Letter of credit charges are 1/2 of 1% per annum. EMB agreed to maintain compensating balances with MNB of $600,000, of which $300,000 must be collected funds.
>
> Present and future obligations and debts of EMB to MNB are secured by a mortgage on the Scott Street real estate and by a security interest in all presently owned and hereafter acquired equipment, inventory, accounts, etc.
>
> The foregoing summary is a general outline only and the complete terms of the transactions are set forth in the documents attached.

At some point of time between March 1979 and October 22, 1979, Respondent's letter line of credit had been increased by the Michigan National Bank of Detroit to $4 million. In any event, on October 22, 1979, the Michigan National Bank of Detroit approved a "reapproval" of a $4 million letter line of credit and approved a $500,000 term loan to be added to the existing $1-1/2 term loan.

Around October 25, 1979, President Rohtbart spoke to Peter P. Miller of the Michigan National Bank of Detroit and told him that he needed $2 million as an additional loan. Miller told Rohtbart the bank had extended him loans in an amount as considered possible and that the bank was not willing to extend any higher loan.[17]

F. *The Closing of the Alfred Street Plant*

On October 29, 1979, Local 26 and Respondent met at the Union's offices as scheduled. What occurred is revealed by the following credited excerpts from Seely's testimony:

> Q. Who was present?
>
> A. Present was Pete Kitka, the chief steward, Dave Dziepak, committee man, Robert Walker, an executive board member of Local 26, who had been

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[15] Although the timing of these events might suggest that the October 10, 1979, appeal was with knowledge of the General Counsel's October 9, 1979, action, I would find the evidence insufficient to so establish. If the October 9, 1979, action were by letter, it would not appear that the parties would be aware of the same by October 10, 1979. The parties may have been aware of such actions by telegrams, or by telephone communication. However, the facts do not so establish.

[16] The evidence does not reveal whether the October 23, 1979, memorandum from Williams occurred *before* or after Hyman had transmitted his letter of October 23, 1979, to Seely.

[17] I credit that the conversation took place. Rohtbart's testimony revealed that he was very knowledgeable about money, collateral, and other facts of business life. Considering all of the facts, I am not persuaded that Rohtbart seriously sought said loan. Rather, I am persuaded that Rohtbart sought to obtain the answer he expected and received the same.

> working with me on negotiations. And for the employer were Mr. Hyman, and a man I believe whose name was Woods, his associate.
>
> Q. Okay what was said and by whom?
>
> A. The union had its proposals all drawn up and spread out in front of the union committee and was ready to commence negotiations on the set of proposals. Mr. Hyman sat down, reached into his briefcase, and brought out several copies of a letter which he passed—
>
> * * * * *
>
> Yes this is a letter that Mr. Hyman had delivered at the bargaining table.

The letter delivered to the Union and bargaining committee was as follows:

> Dear Mr. Seeley & Bargaining Committee Members:
>
> The employer, Eastern Market Beef Processing Corporation, regrets to inform you that we are here today to negotiate the closing of the Alfred Street Plant. The purpose of this negotiating session is to negotiate the closing of the plant and the effect of the closing on current employees at the Alfred Street facility.
>
> Economic conditions have made it impossible to continue the operation of the Alfred Street facility. The conditions involve but are not limited to the following:
>
> (A) Less credit availability.
> (B) Higher interest costs.
> (C) Tighter margins
> (D) United States Department of Agriculture requirements for refurbishing the Alfred Street facility which must be met prior to licensing.
>
> The employer has every intention of paying off accrued vacation time, accrued sick pay time, and with dealing with all pending grievances which remain unsettled as of the date of this agreement.
>
> Respectfully yours,
> /s/ Douglas A. Hyman
> Douglas A. Hyman
> Attorney for Eastern
> Market Beef Processing
> Corporation

After deliverance of the letter, what occurred is revealed by the following credited excerpts from Seely's testimony:

> We read the letter. And I said, "Do you intend to keep operating at the Scott Street facility?" And, he said, "Yes." And, I said, "Will any of the Alfred Street employees be transferred over to the Scott Street facility?" And his answer was, "We are taking applications." And I said, "Are you going to recognize seniority at the Scott Street application of the Alfred Street employees?" He said, "No. We are taking applications." I said, "On those employees that you do hire will you recognize their Alfred Street seniority?" And, he said, "No." And, I said, "Do you really intend to put a 160 people out on the street just like that?" And, he shrugged, you know like tough.
>
> Mr. Sykes: I object, your honor, and move to—
>
> The Witness: That's what he did.
>
> Mr. Sykes: Your honor, I object and move to strike the witnesses—
>
> The Witness: I am testifying under oath, your honor.
>
> Mr. Sykes: —Characterization of that's tough.
>
> Judge Stone: I will strike the words and impression like that's tough. If the witness is testifying that he in effect shrugged his shoulders, I will allow the record to still show that. Go ahead.
>
> Q. (By Mr. Howell) Did he advise you of a date?
>
> A. Yes he did.
>
> Q. What did he say?
>
> A. He told me that the plant would be closed at the expiration of the contract which was November 23rd.

After the October 29, 1979, meeting between Respondent and Local 26, the facts reveal a number of unfair labor practice charges and letters exchanged by the parties in such a manner that the same appeared similar to that of filing pleadings and motions.

On November 1, 1979, Local 26 filed an unfair labor practice charge against Respondent. In such charge, docketed as Case 7-CA-17014, Local 26 in effect reiterated its earlier charge in Case 7-CA-16527, added more detailed language relating to discrimination and transfer of work, and added a of refusal-to-bargain allegation concerning the closing of the Alfred Street plant. In sum, the charge alleged conduct violative of Section 8(a)(5), (3), and (1) of the Act.

On November 2, 1979, Hyman, attorney for Respondent, transmitted a letter to Seely which set forth the following relating to the meeting earlier held on October 29, 1979.[18]

> Dear Mr. Seeley:
>
> Please accept this letter as a follow up to our plant closing negotiations which took place on October 30, 1979 at your offices at 10:00 a.m. in the morning.
>
> During that meeting, we explained to you we would be closing the Alfred Street facility and also discussed briefly, the reasons for closing. In that meeting, I informed you that the employer has every intention of negotiating the effects of plant closure on current employees at the Alfred Street facility. At that meeting, I informed you and your negotiating committee that we have every intention

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[18] Said letter set forth that such meeting was held on October 30, 1979. The testimony revealed that such meeting was held on October 29, 1979. Whether such meeting was held on October 30 or on October 29, 1979, would not vary the effect of the meeting.

> of paying off accrued sick time, accrued vacation time and with dealing with any and all pending grievances.
>
> It is important that you contact me so that we may arrange a time and place to work out the final phases of the plant closure. I will be expecting to hear from you within the next week, as to an agreeable time and place to work out the figures and final dollar amounts that may be due to employees.

Following this November 2, 1979, letter was a letter dated November 8 and a letter dated November 12, 1979. The sum effect of such letters reveals an effort to have the Union negotiate concerning the effects of the closing of the Alfred Street plant.[19]

At some point of time, apparently around November 12, 1979, Local 26 filed a grievance concerning Respondent's decision to close the Alfred Street plant.

On November 16, 1979, Attorneys Kruszewski and Steckloff, for Local 26, transmitted a letter to Plant Manager Richardson with copies of the same apparently transmitted to Local 26, Howell (of Region 7 of the National Labor Relations Board), and to Douglas Hyman (attorney for Respondent). Said letter set forth a contention that Respondent had been under an obligation to bargain with Local 26 about the decision to close the Alfred Street facility, demanded that Respondent fulfill such obligation before carrying out its intention to close, demanded transfer rights to the Scott Street facility for the Alfred Street employees, requested certain specific information relating to Respondent's decision and actions, demanded an audit of Respondent's books, and demanded that negotiations resume.

On or around November 20, 1979, Respondent's attorney, Hyman, responded to the foregoing letter by transmittal of a telegram and a letter. The telegram was transmitted to Seely and Shapiro of Local 26, referred to Kruszewski's letter of November 16, and indicated that Hyman was waiting for Local 26 to contact him with dates "to negotiate the decision to close and to negotiate the effect of closure if it does take place." The letter was transmitted to Kruszewski with copy thereof to Seely. Said letter referred to Kruszewski's November 16, 1979, letter, and set forth the following:

> As you know, Eastern Market Beef has requested bargaining over the decision and effects of the contemplated closing of the Alfred Street plant for sometime. On October 30, 1979, I hand carried a letter to the union at a negotiating session relative to same and was ready, willing and able to discuss any aspects of the contemplated closing and effects. On November 2, 1979, November 8, 1979 and November 12, 1979, I wrote the union a letter relative to the foregoing.
>
> It is unfortunate at this late date that the union now desires us to contact them relative to a meeting; it would seem that the union could have called me instead of having you write a letter requesting me to contact them. Be that as it may, I have this date, sent a telegram to the union requesting to know what dates they are available to meet.
>
> The company not having heard from the union, has gone ahead and made plans for the immediate discontinuance of production effective upon the termination of the contract. We are still ready to discuss the long term future of the plant including the decision and effects of any permanent closure.
>
> Relative to the information you have requested us to tender to the union, we will take that up with the union as requested in the last paragraph of your November 16, 1979 letter. We will, of course, provide the union such information as is required by the National Labor Relations Act as amended.

On November 21, 1979, Local 26 filed a suit in the United States District Court, Eastern District of Michigan, Southern Division. Such suit, against Respondent, was directed toward prohibiting Respondent's closure of the Alfred Street plant.[20] Following the filing of the suit, apparently with notice to Respondent and with the presence of Respondent's attorney, Hyman, in court, United States District Judge, Honorable Ralph M. Freeman, issued a temporary restraining order directed at restraining Respondent from closing its Alfred Street plant. On the same day, after the filing of said suit in court, Respondent filed an unfair labor practice charge against Local 26. Such charge was docketed as Case 7-CB-4620 and alleged that Local 26, since October 1, 1979, had refused to bargain with respect to a decision to close the Alfred Street facility and with respect to the effects of the closing of such facility.

On November 27, 1979, a hearing was conducted, and Judge Freeman dissolved the temporary restraining order issued in Case 9-74420 on November 21, 1979. On the same date or the next day, Respondent closed down its operations at its Alfred Street plant.[21]

On November 28, 1979, the Regional Director for Region 7 of the National Labor Relations Board issued a letter setting forth that he was declining to issue a complaint in Case 7-CA-17014 (involving refusal-to-bargain charges—Sec. 8(a)(5) and (1) of the Act). At some point of time in the first week of December 1979, Respondent and the Union met and discussed certain grievances that were outstanding. On December 7, 1979, Respondent transmitted a letter setting forth in effect a request that the charges in Case 7-CB-4620 be withdrawn. Apparently, the Regional Director approved said withdrawal request on or about that date.

On December 10, 1979, Local 26 initiated an appeal of the Regional Director's decision not to issue a complaint in Case 7-CA-17014. On the same day, Respondent and

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[19] I note that the parties during the events spoke of the "closing" of the Alfred Street plant. Further, the facts reveal that, with respect to the operation of the Alfred Street plant, such plant was closed on November 27, 1979. Respondent, however, amended its pleadings to admit only that it ceased operations on or about November 26, 1979.

[20] Docketed as Case 9-74420.

[21] Respondent had planned to cease operations at its Alfred Street plant on November 23, 1979. However, Respondent continued such operations during the time of the pendency of the temporary restraining order issued on November 21, 1979, and ceased its operations after dissolution of the same. Thus, it appears that Respondent ceased its operations of the Alfred Street plant on or about November 27 or 28, 1979.

Local 26 met and negotiated an agreement relating to certain grievances.

On December 18, 1979, Respondent's attorney, Hyman, transmitted a letter to Kruszewski, Local 26's attorney. Certain excerpts from such letter are as follows:

> Enclosed please find documentation pursuant to your request and letter dated November 16, 1979.
>
> Since June 1, 1979 and prior to your letter, the employer moved two 8200 cryovac machines, one bonematic, and a portion of a box conveyor from the Alfred Street facility.
>
> The employer has determined that at the Alfred facility, it costs $9.05 per man per hour to process meat. At the Scott Street facility, it costs approximately $6.93 per man per hour to process meat. These figures do not include any fringe benefits.
>
> Again, I would like to inform you, that the employer is not pleading poverty therefore, we will not permit an examination of the books under any circumstances. By now, it should have become obvious to all parties involved that a meat packing plant in the City of Detroit cannot remain competitive unless the meat is processed on the rail.
>
> In conclusion, if you would review the affidavit previously submitted by Markus Rothbart, it will become obvious to any objective person that 1979 has been a catastrophic year in the meat business.
>
> I am anxiously awaiting your response so that we may make a final decision on whether or not to close the Alfred Street facility.

In January 1980, Respondent let a contract for certain repairs or changes to the Alfred Street plant. The expenditure for such work was in the amount of $33,030.

Later, on February 28, 1980, Respondent's attorney, Hyman, by letter, advised Local 26's attorney, Kruszewski, that Respondent had decided to sell the Alfred Street facility and that the sale was expected to be consummated immediately.

G. *Miscellaneous*

1. Some of the testimony of witnesses and the exhibits in the case suggest that economic considerations had some bearing on Respondent's actions in this case. As to Respondent's actions concerning the acquisition of the Scott Street plant and the attempt to bargain for a new contract in mid-1979, the facts are sufficient only to support a finding that President Rohtbart considered that Respondent would end up with a better financial arrangement with the purchase of such plant, changed operational procedures, and new wage agreements.

The evidence as presented concerning financial conditions covered Respondent and its wholly owned subsidiaries. The record does not reveal what such subsidiaries are. Further, such records for 1980 contained data relating to both the Alfred Street and Scott Street plants and negates a real comparison of the different systems of operation. One of Respondent's letters alludes to the cost of production but excludes therefrom the cost of fringe benefits. Further, Respondent's letters refer to "economic" reasons but also set forth that Respondent was not pleading poverty. In sum, the facts relating to Respondent's initial acquisition of the Scott Street facility and the attempt to negotiate a new contract are sufficient only to show that President Rohtbart believed that Respondent would end up with a better financial arrangement with the purchase of said plant, changed operational procedures, and new wage agreements.

The above affords little help toward the understanding of the events in June 1979, whereby Respondent commenced operations with new employees and different wages and other conditions at Scott Street as compared to Alfred Street. The instant proceeding is not one whereby Respondent planned to and did subcontract work to another employer or where Respondent *ceased* operations entirely because of economic conditions. It can always be said that if a respondent could obtain a different contract with wage rates or other conditions of a nature to be more financially advantageous to itself that such has economic overtones. Such does not constitute a defense, however, to unilateral changes of contractually agreed-to conditions during the time of the contract. In sum, most of the evidence relating to economics has little relevance to the issues in this proceeding.

The same problem as to relevance or materiality of the economic evidence is also presented with respect to Respondent's termination of the Alfred Street employees. As indicated later herein, Respondent's actions in June 1979 in hiring employees for the Scott Street plant and in unilaterally setting wages and conditions were violative of Section 8(a)(1), (3), and (5) of the Act. This being so, Respondent's ultimate November 1979 action of termination of employees without having corrected the earlier unfair labor practice makes the "economic" factors largely immaterial.[22]

2. The evidence relating to a comparison of the operation and other factors pertaining to Respondent's Alfred Street and Scott Street plants may be summarized as follows:

On April 2, 1979, Respondent established two divisions to be known as the Scott Street Division and the Alfred Street Division. Such divisions were to have separate bank accounts, books, and records; transfers of merchandise from one division to the other would be handled by invoice, bills, and checks; and the two divisions were to be handled as separate profit centers. James Richardson was plant manager at Alfred Street prior to June 16, 1979, and appears to have continued such responsibilities thereafter until November 23, 1979. The evidence on such point is scanty. However, Respondent presented into the record a document which Richardson testified was given him around October 23, 1979, by an agent of the United States Department of Agriculture. Such document indicated that it was directed to Plant Manager Richardson and concerned itself with the contention at the Alfred Street plant. The overall tenor of the facts indicates that Richardson functioned as plant manager of both the Alfred Street plant and the Scott Street plant and that he had assistants to help him supervise the plants.[23] The facts are clear that Richardson handled labor relations for both plants in the matter of collective bargaining. The customers and suppliers for both the plants were the same. The employees at both the plants were engaged in the fabrication and processing of beef. It may be said that all except a small number of the employees at the Scott Street plant engaged in such fabrication and processing. A few employees at the Scott Street plant engaged in maintenance and laundry work not performed by employees in the bargaining unit at the Alfred Street plant. The testimony of Richardson as to whether rendering work was performed at the Alfred Street plant was confused. It appears that a few employees performed such work at the Scott Street plant and that such rendering work was not performed at the Alfred Street plant.[24]

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[22] See *Burroughs Corporation*, 214 NLRB 571, 579 (1974).

It appears that, at times before the termination of the Alfred Street plant, Respondent had had to utilize services of public cold storage warehouses. At the Scott Street plant, Respondent had a cold storage warehouse of its own. The record is silent as to whether after June 16, 1979, Respondent, for its Alfred Street plant, utilized its Scott Street plant storage facilities, or whether it had to use public cold storage warehouses. From the overall testimony as to finances, the evidence suggests that Respondent would have used its cold storage warehouse at the Scott Street plant for needs at the Alfred Street plant.[25] Further, Respondent had an automatic weigher at the Scott Street plant and did not have a similar weigher at its Alfred Street plant.

Around the middle of August 1979, Respondent moved its business office from the Alfred Street plant to its Scott Street plant, and commenced its office functions from such changed location. Further, several items of machinery were moved from the Alfred Street plant to the Scott Street plant. Some of such machinery was replaced at the Alfred Street plant by machinery which served the same functions.

H. *Contentions and Conclusions*

1. Hiring of employees and establishment of wages and terms and conditions of employment of employees at Respondent's Scott Street plant

The General Counsel contends and Respondent denies that Respondent discriminatorily selected employees for hiring for commencement of its Scott Street plant operation instead of utilizing the employees who were engaged at Respondent's Alfred Street plant. The General Counsel contends and Respondent denies that Respondent discriminated in employment conditions and refused to bargain with the Union by unilaterally setting wages and terms and conditions of employment for employees at Respondent's Scott Street plant. The General Counsel contends and Respondent denies that Respondent violated Section 8(a)(1), (3), and (5) of the Act by the above-referred-to conduct.

Considering all of the facts, I find merit in the General Counsel's contentions. Thus, the credited facts reveal that Respondent's agents told Local 26's agents that the Alfred Street plant would be closed and that Respondent was going to move its operations to a new facility at Scott Street. Respondent's agents told Local 26 that it desired a new contract geared to its contemplated new type "boning on the rail" operation. Thereafter, despite the fact that the existing contract did not expire until November 22, 1979, the parties attempted to negotiate a new contract. After the parties had reached agreement on all items except certain cost-of-living proposals, Respondent requested Local 26 to submit the same to the membership. Such was done and the proposal was rejected. It was only then, and without notice, that employees outside the bargaining unit were hired. It was also, and without notice, that Respondent instituted at the Scott Street plant new wages and working conditions which were different from the wage scales and conditions of employment in existence at its Alfred Street plant.

Respondent contends in effect that it intended to have two divisions and that it only ceased operations of the Alfred Street plant in November because of certain economic problems. In this regard, only Respondent's minutes of April 2, 1979, tend to support such contention. It should be noted, however, that the handling of the affairs of the Alfred Street plant and the Scott Street plant as contemplated very well could only be a bookkeeping device so as to know clearly the profitability or lack thereof of the "rail-boning" procedure. Contrary to this contention is the fact that Respondent was bargaining with Local 26 for a contract at a time when the old contract was still in existence and would be in existence for 5 or 6 months. Further, no evidence was presented to reveal that Respondent was thinking of refurbishing the Alfred Street plant or that it communicated to the Union that it had refurbished the Alfred Street plant. Even after notices from the USDA in July 1979 of problems to be corrected, Respondent took no steps to correct building problems at the Alfred Street plant. If Respondent had actually planned to continue operations of two plants, I am persuaded that Respondent's request for loans, made *prior* to *October 22, 1979,* would have included amounts sufficient for the Alfred Street plant operation. The sum of the facts reveals that Respondent in May and June had decided to move its Alfred Street plant operation to the Scott Street plant and had determined to utilize its existing bargaining unit as its employee unit at the Scott Street plant. Similar to the reasoning in *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972); and *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249 (1974), Respondent's determinations as set forth above fixed its obligation to bargain with Local 26. This being so, Respondent was not free to determine unilaterally wages and terms and conditions of its Scott Street plant employees since the same were covered by an existing collective-bargaining agreement. It follows that Respondent's unilateral setting of new terms of wages, hours, and conditions of employment constituted conduct violative of Section 8(a)(1) and (5) of the Act. It further follows that Respondent's determination to hire employees not in the existing bargaining unit, following bargaining unit employees' rejection of the contract Respondent desired, and in the context wherein Respondent had previously thereto decided to move its bargaining unit employees to the new location at Scott Street, constitutes conduct violative of Section 8(a)(1) and (3) of the Act.[26]

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[23] A finding, however, that Richardson from June 16, 1979, onward was plant manager only at Scott Street would not affect the ultimate findings of facts herein.

[24] A different finding as regards the rendering work would not affect the overall findings of facts herein.

[25] A different finding would not affect the overall findings herein.

2. The termination of operations at the Alfred Street plant and the termination of these employees

The General Counsel alleges and contends in effect and Respondent denies that Respondent violated Section 8(a)(1), (3), and (5) of the Act by terminating its Alfred Street plant employees and terminating the Alfred Street plant operations on November 27, 1979.

It has been previously found in effect that Respondent had decided before June 1979 that it would move its Alfred Street plant employees to the Scott Street plant, that its bargaining unit at the Scott Street plant would be the Alfred Street plant unit, and that Respondent had bargained with Local 26 on such a basis. This being so, Respondent's contract covering its Alfred Street plant employees covered its Scott Street plant unit, and Respondent was not free to make unilateral changes in the terms and conditions for its Scott Street employees absent consent by the Union. It, thus, was found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally setting terms and conditions of employment for the Scott Street employees which were different from the existing terms and conditions covering the Alfred Street plant employees.

The facts reveal in effect that commencing around June 16, 1979, Respondent engaged in conduct of discrimination against the Alfred Street plant employees by not employing them at the Scott Street plant under the terms and conditions of the existing collective-bargaining contract with Local 26. The facts also reveal that Respondent gave misinformation to Local 26 and disguised its plans. Such conduct clearly constitutes violation of Section 8(a)(1) and (5) of the Act.

Further, the facts as later set out reveal that Respondent, commencing around June 16, 1979, engaged in conduct violative of Section 8(a)(1) and (2) by rendering aid and assistance to the Industrial, Technical, and Professional Employees, a Division of National Maritime Union, AFL-CIO, by recognition of such union and by executing a collective-bargaining agreement with said Union in the face of Local 26's rights and claims, and by other acts.

Considering all of the facts, I find it clear that Respondent terminated its Alfred Street plant and employees of such plant without bargaining with Local 26, and that such conduct was violative of Section 8(a)(5) and (1) of the Act. I also find it clear that Respondent's termination of the Alfred Street employees constituted a discriminatory termination in violation of Section 8(a)(1) and (3) of the Act.

Thus, where the facts reveal that Respondent had determined that its employees at the Scott Street plant would be its Alfred Street plant bargaining unit and thereafter has violated Section 8(a)(1) and (3) of the Act by the hiring of other employees and has violated Section 8(a)(1) and (5) of the Act by unilaterally setting different wages and terms and conditions for the Scott Street employees as compared to the Alfred Street plant employees, absent a correction of such unfair labor practices or other evidence persuasive of good-faith bargaining, the facts preponderate for a finding of failure to bargain in good faith as to the termination of the Alfred Street plant when such occurred. Thus, the facts preponderate for a finding that Respondent's termination of the Alfred Street plant operations constituted conduct violative of Section 8(a)(5) and (1) of the Act. Similarly, where Respondent's discriminatory conduct in the hiring of new employees has not been corrected and in the absence of affirmative steps to eliminate any effect of discrimination upon the Alfred Street plant employees, the facts preponderate for a finding that Respondent's termination of the Alfred Street plant employees on November 27, 1979, constituted discriminatory conduct based on their membership and support of Local 26 and in violation of Section 8(a)(1) and (3) of the Act.

The General Counsel contends and Respondent denies that Respondent violated Section 8(a)(3) and (1) of the Act by not transferring or allowing Alfred Street plant employees to transfer to the Scott Street plant. The facts are clear that the Union clearly sought to have Alfred Street plant employees transferred to the Scott Street plant in November 1979, and that Respondent set forth in effect that it would not do so but would accept "applications" for employment. In the context of all of the facts, such conduct reveals that Respondent has not transferred and has refused to allow Alfred Street plant employees to transfer to Scott Street. In the context of the findings of conduct violative of the Act otherwise, such conduct is found to constitute violations of Section 8(a)(1) and (3) of the Act.

I would note further that the facts reveal that Respondent's letter of October 29, 1979, and statements made by Respondent's agents to the Union revealed in effect that the decision to close Alfred Street had already been made and that negotiations were in real effect only to be about the effects of the closing. Further, the overall facts reveal in my opinion that Respondent, as of June 16, 1979, only intended to operate the Alfred Street plant until the end of the collective-bargaining agreement and that the overall plans were to rid itself of the existing bargaining unit and Local 26 because of difficulties in obtaining the contract Respondent desired.

Briefs and arguments suggest that the factual issues in this case warrant a consideration of "subcontracting" issues. In my opinion, this case does not involve a subcontracting issue. Rather, Respondent planned on moving a bargaining unit of employees from one plant to a different plant and bargained with Local 26 on such basis. Under such circumstances, Respondent's bargaining unit when it hired new employees at the Scott Street plant and when it continued its Alfred Street plant at the same time constituted one unit and Respondent violated Section 8(a)(1) and (5) by setting wages and terms and conditions of employment for the Scott Street employees different from those in effect at the Alfred Street plant. Thus, an offer to bargain about the effects of closing of the Alfred Street plant without considering the Alfred Street plant and Scott Street plant employees as part of one bargaining unit in effect constituted a meaningless offer to bargain.

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[26] See *P.A. Hayes, Inc. and P.H. Mechanical Corp.*, 226 NLRB 230 (1976).

In sum, the facts reveal that Respondent violated Section 8(a)(1) and (5) of the Act by failure to bargain about its decision to close the Alfred Street plant, and violated Section 8(a)(1) and (3) of the Act by its selection of the Alfred Street plant employees for termination as part of a plan to rid itself of its Alfred Street plant bargaining unit and obligation to bargain with Local 26.

3. Recognition and assistance to the NMU

The General Counsel alleges and contends and Respondent denies that Respondent violated Section 8(a)(1) and (2) of the Act by (1) recognizing Industrial, Technical, and Professional Employees, a Division of National Maritime Union, AFL-CIO, as the exclusive collective-bargaining agent for employees in a production and maintenance unit at Respondent's Scott Street plant, (2) executing a contract with NMU, (3) assisting NMU in obtaining support from the Scott Street plant employees, (4) granting NMU access to the Scott Street plant during working hours for the purpose of encouraging those employees to sign authorization cards, and (5) threatening to withhold paychecks of employees until they signed membership authorization cards for NMU.

Considering all of the facts, it is clear that Respondent had an obligation to recognize United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, as the exclusive collective-bargaining representative of the employees at the Scott Street plant as the same or extended portion of the established Alfred Street plant unit, at the time when Respondent recognized, and executed a collective-bargaining agreement with, the Industrial, Technical, and Professional Employees, a Division of National Maritime Union, AFL-CIO, as the exclusive representative of a P&M unit of employees at the Scott Street plant.[27] Thus, it is clear that Respondent was not free to recognize, or enter into a contractual relationship with, NMU as the representative of the Scott Street plant employees and the recognition and establishment of a contractual relationship with such union for such employee complement clearly constituted unlawful aid and assistance to NMU in violation of Section 8(a)(1) and (2) of the Act.

The facts reveal that Respondent did grant access in June and July 1979 to NMU agents to its Scott Street plant to see employees after Respondent had entered into a contractual relationship with the NMU. Further, it is clear that such NMU agents spoke to employees and solicited employees to sign cards. Whether such cards were union authorization cards or "dues checkoff" cards is not clearly established. For the same reasons previously given, the granting of access to the NMU agents to the Scott Street plant, at a time when Respondent was obligated to recognize and bargain with the United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, clearly constituted unlawful aid and assistance to NMU in violation of Section 8(a)(1) and (2) of the Act.[28]

The General Counsel's allegation relating to a threat was as follows: "On or about August 17, 1979, Respondent through its agent, James Richardson, at its Scott Street plant threatened to withhold the paychecks of its employees until they signed membership authorization cards for NMU."

There was no evidence presented concerning acts by James Richardson. Employee Beeman testified in effect that he commenced work around July 24, 1979, signed a NMU card around August 17, 1979, was told on such date by someone, who he stated was a supervisor named Larry, that he could not get his check because a lady wanted to see him in the office, went to the office and had a short conversation with the lady in the office, and was told that he had to sign a card before he could get his check because Respondent was getting stricter. On cross-examination, Beeman testified that all that "Larry" told him was that the secretary wanted to see him and that he signed some insurance papers while in the office. "Larry" Selig was not presented as a witness on the above issue.[29]

Considering all of the facts, I am not persuaded that the testimony of Beeman has sufficient probative value to establish that an agent of Respondent threatened employees that paychecks would be withheld until they signed union membership authorization cards. First, the supervisor who was alleged to have made such threats was James Richardson. No evidence was presented to reveal that Richardson had any involvement with employee Beeman on the occasion that Beeman allegedly signed a union authorization card.[30] Beeman initially indicated that a supervisor named Larry had told him that he could not get his check, that "the lady wanted to see" him in the office. On cross-examination, Beeman testified that Larry only told him that the lady in the office wanted to see him. Thus, the evidence is insufficient to reveal that a supervisor named Larry threatened Beeman that his check would be withheld until he signed a union card. Accordingly, the allegation of violative conduct in such regard will be recommended to be dismissed.

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[27] The General Counsel, at the hearing, abandoned any contention that NMU was not designated by a majority of employees in the appropriate bargaining unit at the time of recognition and execution of the collective-bargaining agreement between Respondent and NMU.

[28] As to the issues of whether Respondent has violated Sec. 8(a)(1) and (2) of the Act, I do not find it necessary to determine whether Respondent would have violated the Act if Respondent had not been obligated to recognize and bargain with said Local 26 but, faced with a claim for recognition by said Local 26 and in the face thereof, recognized and bargained with said NMU Union. Nor do I find it necessary to determine whether certain conduct of Respondent, as alleged, would be violative of Sec. 8(a)(1) and (2) of the Act if not undertaken in the face of an obligation to recognize and bargain with Local 26 or a realistic claim for recognition by said Local 26. Further, I find it unnecessary to discuss some of the other evidence relating to aid to NMU since the same would not add to the ultimate findings herein. Thus, the evidence relating to employees, away from the plant, seeing NMU agents getting out of cars driven by a respondent supervisor has little if any value in resolving the issues herein.

[29] Respondent had a supervisor named Laurence "Larry" Selig.

[30] An employee named Jimmy Wheeler was present with Beeman and the lady secretary.

I. *The Alleged Discriminatory Discharge*

1. J. C. Bonner

J. C. Bonner was initially employed by Respondent on July 13, 1979, and worked thereafter until he was discharged on August 1, 1979. Bonner was employed as a meat boner and his immediate supervisor was Benny Govaere. Sometime within several days of July 13, 1979, Supervisor Govaere warned Bonner about "disturbing" employees on the workline.

During the last part of July 1979 Dan Calloway, a representative for Local 26, was parking near the entrance to the Scott Street plant. Bonner had known Calloway when Bonner had worked for Wolverine Packing at the Scott Street site. At such time Bonner had been a member of Local 26.

On or about July 29 or 30, 1979, Bonner met with Calloway at noon and had lunch with Calloway. Later, on July 31, 1979, around noontime, Calloway gave Bonner some union authorization cards.[31]

After seeing Calloway, Bonner returned to work. After work, Bonner again saw Calloway and explained that he had not had enough time to get anyone to sign union authorization cards. Bonner told Calloway that the employees had finished work and had started leaving for home.[32] Bonner promised to get some union cards signed for Calloway by the next day.

On August 1, 1979, Bonner and several other employees met Calloway at noon and had lunch with him. Supervisor Selig was observed appearing to be looking where Calloway and Bonner were near the plant entrance. Apparently, the employees with Bonner signed union authorization cards. Bonner had signed a union authorization card on July 31, 1979. Bonner gave these cards to Calloway. At lunch Bonner had a sandwich and several beers.[33] Bonner returned to work. Later that afternoon, Supervisor Govaere observed that Bonner was walking up and down the production line talking to employees, that employees were at least momentarily stopping from work, and that Bonner appeared to be laughing and joking and was leaving his work station.[34] What occurred then is revealed by the following credited excerpts from Govaere's testimony:

> Q. What, if anything, did you say to him when you called him over to the side.
>
> A. Well, I told him to stop disrupting the line, and at the time I noticed alcohol on his breath, so I told him that I can smell alcohol, and I don't want you disrupting the line. Just calm down, and stay at your station and do your work.
>
> Q. Do you know about what time of the day this was approximately?
>
> A. Shortly after lunch. It would be between say a quarter to one and one o'clock, somewhere in there.
>
> Q. Then what did you do, if anything, after you talked to him?
>
> A. The balance of the day I just observed him.
>
> Q. What did you observe?
>
> A. A continuation of the same thing.
>
> * * * * *
>
> Q. What, if anything, did you do at the end of the shift?
>
> A. I called him in the office, and I told him this was the last straw, because the previous times—
>
> * * * * *
>
> Q. What did you say, if anything, to Mr. Bonner when he was in the office?
>
> A. I said this was the last straw because I had previously warned you within the previous two weeks about disrupting the line, nothing about drinking. I hadn't warned him about that. I told him this was the last straw because of the drinking and the continuation of disturbing the line after I had warned him right after lunch time.

Following this, Govaere terminated Bonner from his employment. An employee named Jordon later spoke to Supervisor Govaere about taking Bonner back in a couple of weeks. Govaere indicated that he would do so.[35] Thereafter, Respondent did not call Bonner back to work.

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[31] The General Counsel's evidence relating to the events leading to Bonner's discharge is contradictory of itself and reveals much confusion. Thus, Bonner testified to the effect that he first saw Calloway on July 31, 1979, that several days later he received union authorization cards, and that the next day he was fired. Calloway's testimony suggests that he first saw Bonner on July 30 or 31, 1979, that he gave him union cards on such occasion, and that Bonner was discharged the next day. Jordon's affidavit indicates that he and others were with Bonner and Calloway on July 30, 1979, that he and Bonner received union cards from Calloway and that Bonner was discharged several days later. Considering the logical consistency of all of the evidence, I find the facts as set forth.

[32] Bonner's testimony concerning the obtaining of signatures to union cards was confused and contradictory. Such testimony did not have the ring of truth. I discredit his testimony to the effect that he received signed union cards at any time prior to the receipt of one or two signed cards while in Calloway's car on August 1, 1979. Although Calloway appeared to be a truthful witness, considering the logical consistency of all of the evidence, Jordon's affidavit relating to cards distributed by Jordon, and Bonner's and Calloway's testimony as a whole, I am persuaded that Calloway's testimony was mistaken as to the number of cards received from Bonner on August 1, 1979, before Bonner's discharge.

[33] Many of the questions directed to Bonner and the other witnesses were leading in nature. To one such question, Bonner replied that he only had "one" beer at lunch. At another point, Bonner replied in effect that "We had a beer or two."

[34] The General Counsel presented testimony through witnesses for the purpose of establishing that Bonner did not talk any more or louder than others, and that his condition was normal. The questions were leading in nature, and the answers to the questions were qualified. Thus, the witnesses qualified their statements and indicated as an example that their answers were "to the best of their knowledge." Howard testified relating to Bonner's condition that "wasn't nothing violent, you know he wasn't intoxicated or nothing you know. At least to my knowledge."

[35] In making these findings I have considered the affidavit of Jordon as evidence and have carefully considered the same in view of Jordon's own interest in the proceedings at the time he gave such affidavit. I do not find the affidavit to be reliable evidence except as is consistent with the facts found herein.

2. Conclusions—discharge of Bonner

The sum of the facts reveals that Bonner engaged in some union activity before his discharge on August 1, 1979, that Bonner was seen by a supervisor with an agent for Local 26 prior to his discharge, and that Respondent has some animus toward Local 26. The facts also reveal, however, that Respondent had warned Bonner, within 2 or 3 weeks of his discharge, about disturbing the production line, that such warning was unrelated to any possible union activity by Bonner, that on August 1, 1979, Bonner did have the odor of alcohol on his breath at work and was away from his work station talking to other employees. I found Govaere to be a thoroughly truthful appearing witness and credit that he observed Bonner's conduct and considered that he was disturbing other employees. Considering all of the evidence, I am persuaded that the facts preponderate for a finding that Respondent discharged Bonner on August 1, 1979, for cause.

3. Elmer Jordon

Jordon started working for Respondent on July 26, 1979. Jordon's job was that of a lugger (loader), and the rate of pay for such job was one of the highest in the plant. On Friday, July 27, 1979, around 3:15 p.m., Jordon spoke to Local 26's agents, Calloway and Armstrong. At the time Jordon, Calloway, and Armstrong were at Calloway's car which was parked on Scott Street near the plant. As Jordon was leaving in Calloway's car, Jordon saw Govaere driving Govaere's car. Apparently there was not a great distance between the two cars.[36]

On July 30, 1979, around 12 to 12:30 p.m., Jordon, an employee named Simmons, and Bonner were in Calloway's car. Calloway gave each some union cards. After work that day Jordon passed out some union authorization cards to fellow employees.

On July 31, 1979, Jordon was at a lunch wagon located close to the plant. At such time Jordon passed out a few union cards to fellow employees. While at the lunch wagon Jordon saw Supervisors Govaere and Selig nearby, approximately 10 feet away. Govaere and Selig were looking at him.[37]

On August 1, 1979, Jordon again passed out some union cards to fellow employees at lunchtime. Later that afternoon Jordon learned that Respondent had discharged Bonner. After work Jordon went and spoke to Govaere about Bonner's discharge. What occurred when Jordon asked Govaere about the reason for Bonner's discharge is revealed by the following excerpts from Jordon's affidavit.

> I asked him why he fired "Pee Wee." He said, "For one thing, Pee Wee has too much mouth." I said "What do you mean too much mouth." He said, "You know what I mean." I said I didn't. He said "Another thing I smelled alcohol on his breath when he come from work." I asked if it interfered with his work. He said, "No, but we don't have them here at all." He said, "If you're not careful you're next." I said, "Man, the guy has a family." I said, "Me and you go back a ways why don't you talk to him in a few days." Benny said, "I'll agree to that." I said, "Will you give me your word?" Benny said, "Yes." Nothing else was said that I can recall.

Jordon went out of the plant and related to Local 26's agents Calloway and Bonner what Govaere had said. Jordon then passed out some union cards to employees who apparently were leaving work. During the time period that Jordon was passing out union cards outside the gate, Govaere drove nearby and apparently momentarily paused.[38]

On or about August 2 or 3, 1979, Jordon passed out and collected some union cards before he punched in for work. Later, employees were told to go to the lunchroom. In the lunchroom were Plant Manager Richardson, some supervisors, and an NMU agent. Richardson told the employees that with cards being passed out that there were rumors that there was not a union there and that he was there to clear it up. There then ensued a discussion about the NMU union. Jordon was one of the employees who asked a question or two about the Union.

After the meeting Jordon asked Richardson what he was going to do about Bonner. Richardson said that it was up to Benny Govaere. Later, around 12:45 p.m., Jordon, at lunchtime, went to Calloway's car which was parked on Scott Street. Calloway and Armstrong, Local 26 agents, and Bonner and another person were present. On such occasion Jordon gave Calloway some cards. While there, Govaere was nearby at the guard shack. On such occasion Govaere looked at Jordon.

On the morning of August 6, 1979, Supervisor Govaere asked Jordon if he could break "fronts." Jordon told Govaere that he could. Govaere instructed Jordon to break fronts. Govaere did so until he was later ordered to unload some trucks. Around noon Jordon was on his way to the lunchroom when he was told by an employee named "Buster" that Calloway wanted to see him. Govaere was nearby at the time.[39] Jordon went outside the plant to Calloway's car. About this time Jordon saw Govaere go to Govaere's car about 12-15 feet away from Calloway's car. Jordon left with Calloway to get a sandwich.

Jordon returned to work and completed his shift. At the end of the shift Jordon was told that Govaere wanted to see him. Jordon then went to see Govaere. What occurred is revealed by the following excerpts from Jordon's affidavit:

> I went downstairs and Benny was waiting at the foot of the steps. He said, "Bouncer, I want to talk to you." I said, "What is it about." He said, "We're going to have to let you go. We don't have enough

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[36] The evidence is insufficient to establish that Govaere saw Jordon and Calloway.

[37] The evidence is insufficient to establish that Govaere and Selig were observing Jordon when he was passing out union cards.

[38] The evidence is insufficient to reveal that Jordon was *passing* out *union* cards at the exact time that Govaere drove by and paused. Nor is it sufficient to reveal that the "pause" was more than a stop preceding the entrance into a street.

[39] The evidence is insufficient, however, to establish that Govaere heard what "Buster" said. Buster did not testify in the proceeding.

> work to keep you." I replied, "What do you mean you don't have enough work to keep me you just hired four guys this morning." He said, "We'll call you. You are not a knife man you are lugger." I said, "I said that is what you hired me in as." I told him that [I] make a rail and one half fronts in an hour. [A rail and a half is about 120 fronts.] One job of a knife man is to break fronts.) He said that I had only broken 10 or 12 fronts in an hour. I called him a liar. I asked to see Jim Richardson. He said Jim was gone for the day . . . .

Later that evening Jordon spoke to Richardson about his being laid off. What occurred is revealed by the following credited excerpts from Richardson's testimony.[40]

> We needed approximately a hundred fronts done an hour, and even after a week or two of attempts, he was still down to thirty or forty fronts an hour. So, I told Mr. Jordon that I cannot afford to pay him seven dollars and twenty-five cents an hour, or seven dollars and ten cents an hour, whatever it was back then, and I could not afford to pay him that kind of money just for a laborer's rate, and we were going to have to lay him off until we would build the loading back up.
>
> He said, you mean I am fired.

On August 7, 1979, Jordon returned to speak to Richardson. What occurred is revealed by the following credited excerpts from Richardson's testimony:

> That was in the evening. He came back the next morning at approximately six or six-thirty in the morning, and he approached me in the cooler, and he said, why did you fire me.
>
> I tried to explain to him we really didn't have enough work for him, and that once the operation got going, that I could justify his existence as strictly an unloader because he wasn't working fast enough to handle the other part of it, we would bring him back.
>
> He got all upset and told me, that I would be the last guy—he would be the last guy I would ever fire, and that I would see him another time. I got worried and Bennie happened to be standing there with me. I didn't know whether he was talking about me, or he was talking to Bennie, but anyways I asked him to please leave the plant.
>
> * * * * *
>
> Well, after he told me that, I said, look we are parting company. You are fired. I am not going to have someone threatening me or management.

In addition to the foregoing, Richardson credibly testified to the effect that Jordon was laid off because of lack of need for him as a loader. As indicated, Richardson credibly testified to the effect that Jordon was later fired because of belief of a threat by Jordon.[41]

4. Conclusions concerning Jordon's discharge

The facts are sufficient to establish that, prior to Jordon's discharge, he had engaged in some union activity and at least had been seen by supervisors talking to known Local 26 agents. The facts are also sufficient to reveal that Respondent had some animus against Local 26. However, the facts reveal a legitimate basis for the layoff and ultimate discharge of Jordon. The General Counsel seems to emphasize that Govaere made statements to Jordon, after Bonner's discharge, to the effect that if he were not careful he would be next. However, the total remarks are to the effect that Respondent did not keep employees who had the odor of alcohol on their breath and that Jordon should be careful in such regard. Considering all of this, the facts are insufficient to reveal that Respondent discriminatorily laid off and then fired Jordon. Accordingly, the allegations of unlawful conduct in such regard will be recommended to be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (2), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

With regard to the 8(a)(5) violations, I shall recommend that Respondent, upon request, bargain collectively with United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, concerning the effects upon the represented employees of the plant relocation from Alfred Street to Scott Street, particularly the transfer rights of such employees, and further that Respondent recognize and, upon request, bargain collectively with said Local 26 as the exclusive bargaining representative of all employees who are engaged in janitorial, receiving, boning, breaking, cutting, grinding, slicing, curing, preparing, processing, sealing, wrapping, bagging, prefabricating, of all meat products, sausage, poultry, fish and sea food products, whether such products are fresh, frozen, chilled, cooked, cured, smoked or barbecued, including those employees operating equipment used in wrapping, cubing, tenderizing such meat products and who perform those duties where such products are prepared, employed by the Employer at the facility located at 1545 Alfred Street, or at 1825 Scott Street, Detroit, Michigan, but excluding office clerical employees, guards and supervisors as defined in the Act. Moreover, I shall recommend that during the period of negotiation toward a new contract that Respondent be ordered to maintain in effect the terms of the collective-bargaining agreement with Local 26 which was in force at Respondent's Alfred Street plant at the time of relocation, unless the parties mutually agree to do otherwise, and to apply the provisions of said collective-bargaining agreement to all employees who were members of the bargaining unit at the time of the termination of the Alfred Street plant, including the provisions of said agreement, if any, applicable to laid-off employees, as well as to all employees in the unit as it exists at the Scott Street plant, excepting as to provisions of a non-mandatory nature, or until after an impasse has been reached.

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[40] In the conversation Richardson told Jordon in effect when the loading built back up that he would be hired again.

[41] I do not find statements in Jordon's affidavit to the effect that Richardson told him that he was "an instigator" to be reliable. Thus, I note that as to many details set forth in such affidavit that such details have not been corroborated even when there were other potential witnesses. It is clear that Jordon had an interest in the proceeding and that the affidavit *was given after* charges had been filed on his behalf. As noted at the hearing, hearsay statements by Calloway, apparently relating to what Jordon stated that Govaere had said, were rejected. I would note that if the same had been received that such statements in fact are contradictory of Jordon's affidavit. Thus, Calloway's testimony in the nature of an offer of proof was that Jordon said that Govaere said he was an instigator. Jordon's affidavit attributed such remarks to Richardson. There is a great suspicion in this case as to the reliability of testimony of Bonner and of Jordon's affidavit as regards any predischarge distribution of union cards by Jordon and Bonner.

With regard to the 8(a)(2) violations, I shall recommend that Respondent be ordered to withdraw recognition from Industrial, Technical, and Professional Employees, a Division of National Maritime Union, AFL–CIO, as the exclusive collective-bargaining representative of any of the employees in the appropriate unit described above as the unit represented by United Food and Commercial Workers International Union, Local 26, AFL–CIO–CLC, or as the exclusive collective-bargaining representative of a unit described as follows:

> All production and maintenance employees employed by the Respondent at its plant located at 1825 Scott Street, Detroit, Michigan; but excluding office employees, employees of independent contractors, sales personnel, professional employees, and guards and supervisors as defined in the National Labor Relations Act.

I shall also recommend that Respondent be ordered to cease and desist from giving effect to any collective-bargaining agreement with said NMU to the extent that it purports to cover employees in either described unit.

With regard to the 8(a)(3) violations, I shall recommend that Respondent offer the Alfred Street plant employees represented by Local 26, who were terminated as a result of Respondent's unlawful actions, immediate reinstatement at the Alfred Street or Scott Street plants, to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.[42] In addition, I shall recommend that Respondent be required to make whole each of the aforementioned employees for backpay from the date of the discrimination against them to the date that Respondent offers reemployment to them in compliance with the instant decision, backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[43]

Further, as to employees hired at the Scott Street plant at different terms and conditions of employment than those enjoyed by the Alfred Street plant employees, it will be recommended that Respondent make such Scott Street employees whole for loss of wages or other benefits are suffered as a result of Respondent's unilateral setting of wages and terms and conditions of employment for the Scott Street plant. Computations of loss of wages and benefits are to be computed in the same manner as indicated above.

In view of Respondent's widespread violations of Section 8(a)(1), (2), (3), and (5), as referred to above, and the nature of the same revealing a general disregard for employees' fundamental statutory rights, a broad cease-and-desist order will be recommended. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Eastern Market Beef Processing Corp., Alfred and Scott Street Divisions, Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, Local 26, AFL–CIO–CLC, and Industrial, Technical, and Professional Employees, a Division of National Maritime Union, AFL–CIO, each is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in the selection of employees for hire, retention, or discharge, and/or by acts which have the inherent effect of discrimination in employment, Respondent has encouraged membership in Industrial, Technical, and Professional Employees, a Division of National Maritime Union, AFL–CIO, and discouraged membership in United Food and Commercial Workers International Union, Local 26, AFL–CIO–CLC, by discriminating in regard to tenure of employment, thereby engaging in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

4. The following employees constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees who are engaged in janitorial, receiving, boning, breaking, cutting, grinding, slicing, curing, preparing, processing, sealing, wrapping, bagging, prefabricating, of all meat products, sau-

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[42] Discharging if necessary any employee hired at the Scott Street plant.

[43] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

> sage, poultry, fish and sea food products, whether such products are fresh, frozen, chilled, cooked, cured, smoked or barbecued, including those employees operating equipment used in wrapping, cubing, tenderizing such meat products and who perform those duties where such products are prepared employed by the Employer at its facilities or facility located at 1545 Alfred Street, or at 1825 Scott Street, Detroit, Michigan, but excluding office clerical employees, guards and supervisors as defined in the Act.

(b) Since in or about 1972, and continuing to date, United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, by virtue of a series of collective-bargaining agreements with Respondent, the most recent one being effective from November 22, 1976, until November 22, 1979, has been the designated exclusive collective-bargaining representative of the unit of Respondent's employees described above.

5. By unilaterally setting terms and conditions of employment, by refusing to bargain about the relocation of an existing appropriate collective-bargaining unit, by refusing to bargain about the termination of a part of an existing appropriate collective-bargaining unit, or about the termination of an identifiable group of employees in such appropriate collective-bargaining unit, and by related acts, Respondent has engaged in conduct of refusing to bargain with United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, as exclusive collective-bargaining representative as regards terms and conditions of employment of employees in an appropriate collective-bargaining unit and thereby has violated Section 8(a)(5) and (1) of the Act.

6. By recognizing and entering into a collective-bargaining agreement with, and by rendering aid and assistance to Industrial, Technical, and Professional Employees, a Division of National Maritime Union, AFL-CIO, Respondent has aided and assisted a labor organization and thereby has engaged in conduct violative of Section 8(a)(2) and (1) of the Act.

7. By the foregoing and by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, Respondent has engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[44]

The Respondent, Eastern Beef Processing Corporation, Alfred and Scott Street Divisions, Detroit, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Transferring work or relocating appropriate bargaining unit operations from one plant site to another without giving notice to, bargaining with, or with the consent of the exclusive collective-bargaining representative of said appropriate bargaining unit described hereinafter.

(b) Unilaterally setting wages, fringe benefits, and other terms and conditions of employees in an appropriate bargaining unit or part thereof without giving prior notice to, bargaining with, or with the consent of the exclusive collective-bargaining representative of said appropriate bargaining unit, or otherwise refusing to bargain with said Union in any other manner.

(c) Refusing to transfer or allow employees to transfer from one part of an appropriate bargaining unit to another part of said appropriate bargaining unit because of their membership in United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, or any other labor organization.

(d) Engaging in conduct of giving misinformation or acting in a disguised manner so as to deceive the exclusive collective-bargaining representative of its employees in its representation of the employees in the appropriate bargaining unit described hereinafter with respect to matters of transfers of work or employees or relocation of operations.

(e) Terminating operations or employees without giving notice to, bargaining with, or with the consent of the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit described hereinafter.

(f) Engaging in conduct of relocation of business operations or otherwise discriminating against employees so as to rid itself of contractual obligations or bargaining obligations otherwise with United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, or any other union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit as follows:

> All employees who are engaged in janitorial, receiving, boning, breaking, cutting, grinding, slicing, curing, preparing, processing, sealing, wrapping, bagging, prefabricating, of all meat products, sausage, poultry, fish and sea food products, whether such products are fresh, frozen, chilled, cooked, cured, smoked or barbecued, including those employees operating equipment used in wrapping, cubing, tenderizing such meat products and who perform those duties where such products are prepared employed by the Employer at its facilities or facility located at 1545 Alfred Street, or at 1825 Scott Street, Detroit, Michigan, but excluding office clerical employees, guards and supervisors as defined in the Act.

(g) Granting recognition to, executing a collective-bargaining agreement with, or otherwise maintaining, enforcing, or giving effect to recognition or bargaining agreements with, or otherwise aiding and assisting or granting access to agents thereof to Respondent's premises to Industrial, Technical, and Professional Employees, a Division of the National Maritime Union, AFL-CIO, or aiding or assisting said Union in any other manner to be and/or as the exclusive collective-bargaining representative of any of the employees in the appropriate unit described above or of the employees in the below described unit:

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[44] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

> All production and maintenance employees employed by the Respondent at its plant located at 1825 Scott Street, Detroit, Michigan; but excluding office employees, employees of independent contractors, sales personnel, professional employees, and guards and supervisors as defined in the National Labor Relations Act.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer to the Alfred Street plant employees terminated on or about November 27, 1979, immediate and full reinstatement tc the employee's former position, discharging if necessary employees hired for work at the Scott Street plant facility or, if such position no longer exists, to a substantially equivalent position, without prejudice to the employee's seniority or other rights previously enjoyed, and make each whole for any loss of pay or other benefits suffered by reason of the discrimination against each in the manner described above in the section entitled "The Remedy."

(b) Make whole all Scott Street plant employees for any loss of wages or other benefits, if any, suffered as a result of the unilateral institution of different wages, terms, and conditions of employment then in effect in the established bargaining unit.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Withdraw recognition from Industrial, Technical, and Professional Employees, a Division of the National Maritime Union, AFL-CIO, as the exclusive bargaining representative of any of the employees in the appropriate unit described above as the unit represented by United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, or of the employees in the below-described unit:

> All production and maintenance employees employed by the Respondent at its plant located at 1825 Scott Street, Detroit, Michigan; but excluding office employees, employees of independent contractors, sales personnel, professional employees, and guards and supervisors as defined in the National Labor Relations Act.

(e) Rescind any existing collective-bargaining agreement with Industrial, Technical, and Professional Employees, a Division of the National Maritime Union, AFL-CIO, covering employees in the above-referred-to bargaining units.

(f) Reimburse all employees for all initiation fees and dues paid by them to Industrial, Technical, and Professional Employees, a Division of the National Maritime Union, AFL-CIO, through dues checkoff since on or about June 17, 1979.

(g) Recognize United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, as the exclusive collective-bargaining representative of employees at its Alfred Street and/or Scott Street plant in the unit described above in paragraph 1(f), and institute the terms and conditions of employment set forth in the collective-bargaining agreement it had with such Union until November 22, 1979, excepting such provisions which might be of a nonmandatory bargaining type, unless and until the parties have agreed upon a new collective-bargaining agreement or impasse has been reached.

(h) Upon request, bargain in good faith with United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, as exclusive bargaining representative of the employees in the unit of employees described in paragraph 1(f) above, for a new collective-bargaining agreement covering wages, rates of pay, hours, and other terms and conditions of employment, and as to the effects of the relocating of the plant.

(i) Post at Respondent's plants at Detroit, Michigan, copies of the attached notice marked "Appendix."[48] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(j) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of unlawful conduct not specifically found to be violative herein be dismissed.

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[48] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT transfer work or relocate appropriate bargaining unit operations from one plant site to another without giving notice to, bargaining with, or with the consent of the exclusive collective-bargaining representative of said appropriate bargaining unit described hereinafter.

WE WILL NOT unilaterally set wages, fringe benefits, and other terms and conditions of employment in an appropriate bargaining unit or part thereof without giving prior notice to, bargaining with, or with the consent of the exclusive collective-bargaining representative of said appropriate bargaining unit, or refuse to bargain with said union in any other manner.

WE WILL NOT refuse to transfer or allow employees to transfer from one part of an appropriate bargaining unit to another part of said appropriate bargaining unit because of their membership in United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, or any other labor organization.

WE WILL NOT engage in conduct of giving misinformation or act in a disguised manner so as to deceive the exclusive collective-bargaining representative in its representation of the employees in the appropriate bargaining unit described hereinafter with respect to matters of transfers of work or employees or relocation of operations.

WE WILL NOT terminate operations or employees without giving notice to, bargaining with, or with the consent of the exclusive collective-bargaining unit described hereinafter.

WE WILL NOT engage in conduct of relocating of business operations or otherwise discriminate against employees so as to rid ourselves of contractual obligations with or bargaining obligations otherwise with United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, or any other union as the exclusive collective-bargaining representative of employees in the bargaining unit described hereinafter as the appropriate bargaining unit.

WE WILL NOT grant recognition to, execute a collective-bargaining agreement with, or otherwise maintain, enforce, or give effect to recognition or bargaining agreements with, or otherwise aid and assist or grant access to agents thereof to Respondent's premises to Industrial, Technical, and Professional Employees, a Division of the National Maritime Union, AFL-CIO, or aid and assist said Union in any other manner as the exclusive collective-bargaining representative of any of the employees in the appropriate unit described hereinafter as the appropriate bargaining unit or of the employees in the below-described unit:

> All production and maintenance employees employed by us at our plant located at 1825 Scott Street, Detroit, Michigan; but excluding office employees, employees of independent contractors, sales personnel, professional employees, and guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accordance with Section 8(a)(3) of the Act.

WE WILL offer to the Alfred Street plant employees terminated on or about November 27, 1979, immediate and full reinstatement to the employee's former position, discharging if necessary employees hired for work at the Scott Street plant facility or, if such position no longer exists, to a substantially equivalent position, without prejudice to the employee's seniority or other rights previously enjoyed, and make each whole for any loss of pay or other benefits suffered by reason of the discrimination against each, with interest.

WE WILL make whole all Scott Street plant employees for any loss of wages or other benefits, if any, suffered as a result of the unilateral institution of different wages, terms, and conditions of employment then in effect in the established bargaining unit, with interest.

WE WILL withdraw recognition from Industrial, Technical, and Professional Employees, a Division of the National Maritime Union, AFL-CIO, as the exclusive bargaining representative of any of the employees in the appropriate bargaining unit or as the exclusive collective-bargaining representative of a unit described above.

WE WILL rescind any existing collective-bargaining agreement with Industrial, Technical, and Professional Employees, a Division of the National Maritime Union, AFL-CIO, covering employees in the above-referred-to bargaining unit.

WE WILL reimburse all employees for all initiation fees and dues paid by them to Industrial, Technical, and Professional Employees, a Division of the National Maritime Union, through dues checkoff since on or about June 17, 1979.

WE WILL recognize United Food and Commercial Workers International Union, Local 26, AFL-CIO-CLC, as the exclusive collective-bargaining representative of employees at our Scott Street plant in the unit described below, and institute the terms and conditions of employment set forth in the collective-bargaining agreement we had with such Union until November 22, 1979, excepting such provisions which might be of a nonmandatory bargaining type, unless and until the parties have agreed upon a new collective-bargaining agreement or impasse has been reached. The appropriate bargaining unit is:

All employees who are engaged in janitorial, receiving, boning, breaking, cutting, grinding, slicing, curing, preparing, processing, sealing, wrapping, bagging, prefabricating, of all meat products, sausage, poultry, fish and sea food products, whether such products are fresh, frozen, chilled, cooked, cured, smoked or barbecued, including those employees operating equipment used in wrapping, cubing, tenderizing such meat products and who perform those duties where such products are prepared employed by us at our facilities or facility located at 1545 Alfred Street, or at 1825 Scott Street, Detroit, Michigan, but excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL, upon request, bargain in good faith with United Food and Commercial Workers International Union, Local 26, AFL–CIO–CLC, as exclusive bargaining representative of the employees in the unit of employees described above, for a new collective-bargaining agreement covering wages, rates of pay, hours, and other terms and conditions of employment, and as to the effects of the relocating of our plant.

All our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization, except to the extent provided by Section 8(a)(3) of the Act.

EASTERN MARKET BEEF PROCESSING CORPORATION, ALFRED AND SCOTT STREET DIVISIONS

Millwright-Technical Engineers Local 2158 of the United Brotherhood of Carpenters and Joiners of America *and* FMC Corporation, MHS Division and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 111, affiliated with AFL-CIO. Case 33-CD-242

October 30, 1981

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by FMC Corporation, MHS Division, alleging that Millwright-Technical Engineers Local 2158 of the United Brotherhood of Carpenters and Joiners of America violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 111, affiliated with AFL-CIO.

Pursuant to notice a hearing was held before Hearing Officer Donald M. Glynn on March 12, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, all parties filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Delaware corporation with its principal place of business in Colmar, Pennsylvania, is engaged in the engineering, manufacture, and installation of material-handling equipment. The parties additionally stipulated that during the past year the Employer has purchased and received materials valued in excess of $50,000 which were shipped directly to its various jobsites throughout the United States, including its Silvis, Illinois, jobsite and has performed services for customers throughout the continental United States, which services are valued in excess of $50,000. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated and we find that the Millwrights and the Iron Workers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

On or about December 1, 1980, the Employer began preparatory work for the installation of an overhead power and free conveyor system at the John Deere Foundry in Silvis, Illinois. The employees represented by the Iron Workers performed the preparatory work. Sometime after the commencement of the preparatory work, Duane Booi, construction manager for the Employer, received a telephone call from the business manager for the Millwrights, Doug Banes. Banes indicated that he felt that the employees represented by the Millwrights were entitled to some of the work on the installation of the conveyor system and suggested that a meeting be held to discuss the matter. An on-site meeting was held among representatives of the Millwrights, the Iron Workers, and the Employer on January 27, 1981. Various proposals for assigning the work were offered during that meeting but no decision was made on the work assignment issue. Subsequently, the Employer again assigned the work in dispute to the employees represented by the Iron Workers.

On the morning following the assignment of the work to the employees represented by the Iron Workers, Booi was contacted again by Banes who indicated that Booi would probably be sorry that he made the assignment to the ironworkers because Banes was planning to call his union "Brothers" around the country and would make life "miserable" for the Employer wherever it worked from then on. Thereafter, Booi received a series of telephone calls from Millwrights business managers in various parts of the country. In essence, these business managers informed Booi that they had been contacted by Millwright Locals 2158 about the problem at the John Deere Foundry in Silvis and that they had been asked by Local 2158 to "hurt" or to make "trouble" for the Employer the next time it did work in their respective jurisdictions by, for example, refusing to make estimates for the Employer's jobs.

By mailgram dated January 31, 1981, Banes informed Booi that the Millwrights' dispute with the Employer concerning the John Deere Foundry was being referred to a Joint Industry Board consisting of representatives from a local contractors association, a millwright contractors association, and the Millwrights.[1] Although the Employer employed no millwrights at the jobsite at that time, the mailgram stated that the dispute concerned the Employer's failure to pay proper wages and fringe benefits to millwrights employed at the John Deere Foundry. Booi attended the subsequent hearing before the Joint Industry Board but did not participate because the Employer claimed the issue was jurisdictional and not contractual. The decision of the Joint Industry Board, as stated in its February 13, 1981, letter to the Employer, was that the Employer had violated its collective-bargaining agreement with the Millwrights by failing to pay proper wages and fringe benefits to millwrights "employed by it at John Deere Foundry" and by failing to procure a surety bond in the principal sum of $20,000. The Joint Industry Board ordered the Employer to post the bond, pay the proper wage rates, and make delinquent benefit payments.

By letter to the Employer dated February 18, 1981, William C. Weaver, business manager for the Iron Workers, stated that he was aware of the decision of the Joint Industry Board, but that the Iron Workers did not participate in that board and did not recognize any of the actions of the Joint Industry Board as binding on the Iron Workers. Additionally, Weaver advised the Employer that the Iron Workers intended to take all necessary action, including a strike, to prevent the Employer from reassigning the disputed work to the employees represented by the Millwrights.

B. *The Work in Dispute*

The work in dispute involved the installation of an overhead power and free conveyor system at the John Deere Foundry in Silvis, Illinois.

C. *Contentions of the Parties*

The Employer contends that the employees represented by the Iron Workers should continue to perform the work. In this regard, the Employer notes that the ironworkers have performed the identical work in the past and that that arrangement has proven to be both efficient and economical, and prevents the duplication of men and machines that would be required if the work was divided between the ironworkers and the millwrights. The Employer additionally argues that the ironworkers are more skillful at making the critical welds at the high elevations involved in the installation of the conveyor system and accordingly there is less risk to men and machinery if the employees represented by the Iron Workers perform the disputed work. With regard to collective-bargaining agreements, the Employer argues that its agreements with both the Millwrights and the Iron Workers cover the disputed work and that the 1953 "Conveyor Agreement" between the Iron Workers and the Millwrights is too ambiguous to rely on in any event in assigning the disputed work.[2] Finally, the Employer contends that there is no uniformity in either area or industry practice and so these factors cannot be determinative in making an award of the disputed work.

The Iron Workers essentially agrees with the Employer. It adds that the Employer's preference should be given some weight in determining who should receive the work.

The Millwrights takes the position that the employees represented by the Iron Workers are entitled to perform the work on the superstructure, but that the employees represented by the Millwrights should install the conveyor system below the superstructure. In this regard, the Millwrights argues that the millwrights have welding skills in addition to their ability to align and level the conveyor system and to execute other tasks in its basic assembly. The Millwrights also contends that the industry and area practice is to use composite crews of iron workers and millwrights, and that both the Millwrights collective-bargaining agreement with the Employer and the "Conveyor Agreement" entitle the employees represented by the Millwrights to perform the work below the superstructure. The Millwrights concedes that there might be a minimal loss of efficiency in using a composite crew, but argue that this loss is offset by the advantage of gaining the job skills which the millwrights possess. Finally, the Millwrights argues that the Employer's preference should not be given controlling weight in making an award of the work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

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[1] The Joint Industry Board is provided for in art. IX of the Millwrights collective-bargaining agreement with the Employer. If the Joint Industry Board decision fails to settle a contract dispute, under the contract the Millwrights may take the dispute to arbitration. A refusal to submit a dispute to the Joint Industry Board or to arbitration or to abide by a determination of either the Joint Industry Board or an arbitrator vitiates the agreement's no-strike clause. A separate procedure is provided in the agreement for the resolution of jurisdictional disputes.

[2] The Employer is not a party to the "Conveyor Agreement."

It is uncontested that Booi, construction manager for the Employer, received numerous telephone calls from business agents of the Millwrights in various parts of the country threatening to make "trouble" for the Employer if it commenced working in their respective jurisdictions. These statements reasonably conveyed to Booi that the Employer would suffer adverse economic consequences if it failed to reassign the work to the employees represented by the Millwrights.[3] Additionally, the Millwrights presentation of the matter to the Joint Industry Board on the ground that the Employer had violated the collective-bargaining agreement with regard to wages and fringe benefits, despite the fact that the Employer, at that time, employed no millwrights at the John Deere Foundry, was clearly a pretense adopted to mask the coercive tactics employed in an effort to force the Employer to reassign the work to the employees represented by the Millwrights.[4] Furthermore, we find no evidence of any method agreed upon by all parties for adjustment of the dispute.[5]

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[6] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[7]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

As the Employer contends, both operative collective-bargaining agreements arguably assign the disputed work to the respective contracting Unions. Thus, article I, "Craft Jurisdiction, Jurisdictional Disputes," sections 2-4, of the Iron Worker collective-bargaining agreement with the Employer "claims for its members . . . conveyors." Similarly, the Millwrights collective-bargaining agreement with the Employer at article I, "Recognition and Scope," section 3, "Occupational Scope," states that this "agreement covers all millwright work, including . . . conveyors." Other conceivably relevant functions claimed are similarly overlapping in scope.

The Employer is not a signatory to nor bound by the 1953 "Conveyor Agreement" between the Iron Workers and the Millwrights. By its terms, its purpose is to "settle jurisdictional disputes directly between the two trades." It is sometimes used by employers who hire composite crews to divide conveyor installation work between the employees represented by the Millwrights and employees represented by the Iron Workers. Those employers who testified that they used the "Conveyor Agreement" in assigning work conceded that the agreement is ambiguous and subject to various interpretations.

Accordingly, this factor does not support an assignment of the work to either group of employees.

2. Company and industry practice

The testimony revealed that although composite crews of ironworkers and millwrights are frequently used in the installation of conveyor systems, crews composed of ironworkers or millwrights alone have also successfully installed conveyor systems. The Employer installed another power and free conveyor system at John Deere in 1977 using only ironworkers. Accordingly, this factor does not favor assignment of the work to either group of employees.

3. Relative skills

It appears that both the employees represented by the Millwrights and the employees represented by the Iron Workers possess the requisite skills for installation of power and free conveyor systems. There is some testimony in the record that the ironworkers are more skilled at doing the welding, particularly that done high in the air. There is also testimony that the millwrights are more skilled with certain facets of the installation such as alignment, but Construction Manager Booi testified that the Employer had received no complaints from John Deere with respect to those aspects of the installation on the job it had done for John Deere in 1977 using only ironworkers. John Deere was apparently sufficiently satisfied with the workmanship on the previous job to reemploy the Employer for the installation job over which the instant dispute has arisen. Accordingly, this factor does not support an award of the work to either group of employees.

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[3] *Sheet Metal Workers' International Association, Local Union No. 41, AFL-CIO (B & W Metals Company, Inc.)*, 231 NLRB 122, 123 (1977).

[4] *Brotherhood of Teamsters & Auto Truck Drivers Local No. 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Pacific Maritime Association)*, 224 NLRB 801, 807 (1976). We note in addition that Weaver, the business manager of the Iron Workers, contacted the Employer and threatened to take all necessary action, including a strike, if the Employer reassigned the work.

[5] The Iron Workers did not participate in the above-mentioned proceeding before the Joint Industry Board and was not bound by its determination.

[6] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[7] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

4. Economy and efficiency of operation

The record reflects that the use of composite crews of millwrights and ironworkers generally requires some duplication of personnel and equipment. Construction Manager Booi testified that if the employees represented by the Millwrights performed the work on the conveyor system under the superstructure additional supports would be required and it would be necessary to redesign the installation apparatus. The Millwrights concedes that composite crews may result in some loss of efficiency. This factor favors assignment of the disputed work to the group of employees represented by the Iron Workers.

5. Employer past practice and preference

Consistent with its own past practice, the Employer initially assigned the disputed work herein to the employees represented by the Iron Workers exclusively, and continues to maintain that assignment. Accordingly, the Employer's past practice and current assignment favor an award of the work to the group of employees represented by the Iron Workers.

6. Joint Board determinations

As noted, the Iron Workers did not participate in the Joint Industry Board determination assertedly made under the collective-bargaining agreement between the Millwrights and the Employer. Accordingly, this factor does not favor an award of the work to either group of employees.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the Iron Workers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of economy and efficiency of operation and the Employer's past practice and current assignment. In making this determination, we are awarding the work in question to employees who are represented by the Iron Workers, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of the FMC Corporation, MHS Division, who are represented by the International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 111, affiliated with AFL-CIO, are entitled to perform the installation of the overhead power and free conveyor system at the John Deere Foundry in Silvis, Illinois.

2. Millwright-Technical Engineers Local 2158 of the United Brotherhood of Carpenters and Joiners of America is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require FMC Corporation, MHS Division, to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Millwright-Technical Engineers Local 2158 of the United Brotherhood of Carpenters and Joiners of America shall notify the Regional Director for Region 33, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

Roth's IGA Foodliner, Inc. *and* **United Food & Commercial Workers Union Local No. 143-A, AFL-CIO.** Case 36-CA-3768

October 30, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on December 3, 1980, an amended charge filed on January 15, 1981, a second amended charge filed on January 26, 1981, and a third amended charge filed on January 30, 1981, by United Food & Commercial Workers Union Local No. 143-A, AFL-CIO, herein called the Union, and duly served on Roth's IGA Foodliner, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 19, issued an order consolidating cases, a consolidated complaint, and a notice of hearing on January 30, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges, the order consolidating cases, the consolidated complaint, and the notice of hearing before an administrative law judge were duly served on the parties to the proceeding.

The complaint alleges that certain employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. It further alleges that on or about May 21, 1980, a majority of the employees of Respondent in that unit designated and selected the Union as their representative for the purpose of collective bargaining. The complaint further alleges that Respondent engaged in various forms of unlawful conduct, including interrogation, promises of increased benefits, grants of pay raises, threats of discharge, and bribery, all in violation of Section 8(a)(1) of the Act.

Respondent filed an answer, admitting in part and denying in part the allegations of the complaint, and requesting that the complaint be dismissed. Subsequently, on August 4, 1981, Respondent by stipulation withdrew its answer, with the exception that Respondent continued to deny the allegation that the unit found appropriate constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(c) of the Act. The parties further stipulated that, if the Board found the undenied allegations of the consolidated complaint to be true, that as a matter of law a bargaining order is the appropriate remedy. The stipulation agreement was executed by Respondent, the Charging Party, and counsel for the General Counsel.

On August 10, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, seeking a Board finding that Respondent has violated Section 8(a)(1) of the Act as alleged in the complaint and a Decision and Order against Respondent in conformity with the allegations of the complaint, including a bargaining order.

On August 14, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. No response was filed.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

With respect to the unfair labor practices, the complaint alleges the following:

(1) The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All meatcutters, meat department sanitation employees, meat wrappers, and the head meatcutter/meat department manager employed by the Respondent at its Canby, Oregon, facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(2) On or about May 21, 1980, a majority of employees of Respondent in the unit described above designated and selected the Union as their exclusive representative for the purpose of collective bargaining.

(3) At all times since May 21, 1980, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit described above, for he purpose of collective bargaining.

(4) On November 21, 1980, an NLRB election was held for the employees in the unit described above in Case 36-RC-4348. On November 26, 1980, the Union filed timely objections to the election.

(5) On or about November 5, 1980, in and about the vicinity of its Woodburn facility, Respondent,

through its manager and agent, Darrel Rybloom, instructed an employee not to join the Union after his prospective transfer to Respondent's Canby facility.

(6) On or about November 18 and 20, 1980, in and about the vicinity of its Canby facility, Respondent, through Darrel Rybloom, interrogated its employees concerning how they intended to vote in the impending NLRB election.

(7) On or about November 18, 20, and 24, 1980, in and about the vicinity of its Canby facility, Respondent, through Darrel Rybloom, promised its employees increased benefits if they voted against the Union.

(8) On or about November 18, 1980, in and about the vicinity of its Canby facility, Respondent, through Darrel Rybloom, threatened its employees with discharge by saying that, if the Union won the NLRB election, its employees might be "down the street."

(9) On or about November 20, 1980, in and about the vicinity of its Canby facility, Respondent, through Darrell Rybloom, bribed its employee to vote against the Union by giving its employee a promissory note, the conditions of which Respondent fulfilled on or about December 18, 1980.

(10) On or about December 18, 1980, Respondent gave pay raises to its employees employed in the bargaining unit described above, for the purpose of persuading its employees to abandon their support of the Union.

(11) On or about January 6, 1981, in and about the vicinity of its Woodburn facility, Respondent, through its manager and agent, Richard Thurman, threatened to discharge its employee because it believed its employee gave a statement to the NLRB.

(12) By the above-described acts and conduct Respondent has engaged in and is engaging in a course of conduct precluding the holding of a fair rerun election among the employees.

(13) The unfair labor practices described are so serious and substantial in character and nature as to warrant the entry of a remedial order requiring Respondent, as of November 18, 1980, to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit described above.

(14) By the acts and conduct described above, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and Respondent thereby has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

As stated above, Respondent by stipulation withdrew its answer to the complaint, with the exception that it continued to deny the appropriateness of the unit. Having thereby, in effect, failed to deny the allegations, and as no good cause to the contrary has been shown, the allegations in the complaint concerning the unfair labor practices are deemed to be true and are so found to be true.[1]

Respondent's only contention concerns the appropriateness of the bargaining unit. On June 17, 1980, the Union filed a petition under Section 9(c) of the Act, in Case 36-RC-4348, seeking to represent all meatcutters, wrappers, and meat department sanitation employees employed by the Employer at its Canby, Oregon, facility. On October 17, 1980, the Regional Director for Region 19 issued a Supplemental Decision and Direction of Election providing for an election among the following employees of the Respondent:

> All meatcutters, meat department sanitation employees, meat wrappers, and the head meatcutter/meat department manager employed by the Respondent at its Canby, Oregon, facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Thereafter, Respondent timely filed a request for review of the Supplemental Decision and Direction of Election. Respondent argued that the Canby meat department employees were an accretion to the already existing unit of meat department employees at Respondent's other eight stores. Respondent contended that the Canby store manager's lack of day-to-day supervision over its meat department employees, the significant employee interchange among Respondent's stores, and the interest of the union representative for the eight-store unit in representing the Canby employees rebutted the presumption of single-store unit appropriateness. By telegram dated November 13, 1980, the Board denied Respondent's request for review.[2] Respondent has presented no further evidence that would warrant reconsideration of that decision. The unit is appropriate as found by the Regional Director.

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[1] Rules and Regulations of the Board, Sec. 102.20, Series 8, as amended; *Jerry C. Wilson, et al., d/b/a Wilson & Sons*, 193 NLRB 350 (1971), and cases cited therein. In view of its stipulation, Respondent admits that at all times since May 21, 1980, the Union has been designated and selected by the majority of employees in the unit as their exclusive representative. Respondent also does not deny the allegation that, by its conduct, it has precluded the holding of a fair rerun election among the employees in that unit.

[2] An election was conducted on November 21, 1980, among the employees of the described unit. The Union failed to obtain a majority of votes cast. The tally showed one for, and one against, the Petitioner, with no challenged ballots.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(1) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues, including the unit determination, raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is an Oregon corporation engaged in the operation of nine retail stores in northwestern Oregon. The facilities in Canby and Woodburn are the only locations involved in this proceeding. During the past 12 months, a representative period, Respondent, in the course of its business operations, had gross sales of goods and services valued in excess of $500,000. In that time Respondent also purchased and caused to be transferred and delivered to its facilities within the State of Oregon goods and materials valued in excess of $50,000 directly from sources outside the State, or from suppliers within the State which in turn obtained such goods and materials directly from sources outside the State.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

United Food & Commercial Workers Union Local No. 143-A, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The 8(a)(1) Violations

Respondent has admitted, and we have found as true, the unfair labor practices alleged in the complaint. Accordingly, we find Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom.

The parties have stipulated that as a matter of law a bargaining order is the appropriate remedy. We agree.

First, the unit involved here is small. The tally of ballots shows approximately three eligible voters. Experience has shown that an employer's unlawful conduct is magnified when it is directed at a small number of employees. Second, the unlawful acts of interrogation, bribery, threat of discharge, promise of increased benefits, and the instruction not to join the Union, detailed above, were committed by General Manager Darrel Rybloom, who was clothed with at least the apparent authority to carry out his threats. Third, the traditional remedy of a cease-and-desist order, notice posting, and a rerun election would not erase the effects of Respondent's unlawful post-election pay raises. These unit employees would not be likely to miss the inference that the source of benefits so conferred is also the source from which all future benefits must flow. *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405, 409 (1964). For these reasons we find that the possibility of ensuring a fair election through traditional remedies is slight, and that employee sentiment, as expressed on May 21, 1980, is better protected by a bargaining order. See *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

We therefore shall order that Respondent, upon request, bargain with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

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[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Roth's IGA Foodliner, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers Union Local No. 143-A, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All meatcutters, meat department sanitation employees, meat wrappers, and the head meatcutter/meat department manager employed by the Employer at its Canby, Oregon, facility but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By the acts and conduct described in the ruling above, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Roth's IGA Foodliner, Inc., Silverton, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Instructing its employees not to join the Union upon transfer to its Canby facility.

(b) Interrogating its employees concerning how they would vote in any Board election.

(c) Promising its employees increases in benefits if they would vote against the Union in any Board election.

(d) Threatening its employees with discharge based on a union victory in any Board election.

(e) Bribing its employees to influence their votes in any Board election.

(f) Granting any further pay raises or increases in benefits without bargaining with the Union.[4]

(g) Threatening to discharge its employees for offering statements to the Board.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Canby and Woodburn, Oregon, facilities copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

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[4] This Order is not to be construed as requiring a rescission of the benefits granted subsequent to the election.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT instruct employees not to join the Union upon transfer to our Canby facility.

WE WILL NOT interrogate employees concerning how they would vote in any Board election.

WE WILL NOT threaten employees with discharge in the event the Union wins any NLRB election.

WE WILL NOT promise increased benefits to employees in return for votes against the Union in any NLRB election.

WE WILL NOT bribe or attempt to bribe any employees to vote against the Union in any NLRB election.

WE WILL NOT grant pay raises to employees to persuade them to abandon support of the Union.

WE WILL NOT threaten to discharge employees for giving statements to the NLRB.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL, upon request, bargain with United Food & Commercial Workers Union Local No. 143-A, AFL-CIO, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All meatcutters, meat department sanitation employees, meat wrappers, and the head meatcutter/meat department manager employed by the Employer at its Canby, Oregon, facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

ROTH'S IGA FOODLINER, INC.

Laborers International Union of North America, AFL-CIO, Local 282 *and* Hannin Roofing and Sheet Metal Company, Inc. and United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, Local 208. Case 14-CD-632

September 30, 1981

DECISION AND DETERMINATION OF DISPUTE

By Members Fanning, Jenkins, and Zimmerman

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Hannin Roofing and Sheet Metal Company, Inc., herein called the Employer, alleging that Laborers International Union of North America, AFL-CIO, Local 282, herein called the Laborers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, Local 208, herein called the Roofers.

Pursuant to notice, a hearing was held before Hearing Officer Michael Jamison on July 9, 1981.[1] All parties appeared[2] and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Kentucky corporation with its principal place of business in Paducah, Kentucky, is engaged in the construction business. During the past year, the Employer purchased goods from outside the State having a value in excess of $50,000. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, as amended, and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Laborers and the Roofers are labor organizations within the meaning of Section 2(5) of the Act.

A. *Background and Facts of the Dispute*

The Employer has a contract to construct a built-up roof on part of the Sikeston power plant in Sikeston, Missouri. The Employer is a subcontractor to Triangle Insulation of Paducah, Kentucky. Triangle Insulation is a subcontractor to Babcock & Wilcox, the general contractor. On June 3, eight roofers employed by the Employer unloaded materials at the worksite. Ernie Brown, the Laborers chief steward for this worksite, advised the Employer's job superintendent, Doug Graham, that shoveling the roofing gravel and cleaning up the roof debris should be done by employees represented by the Laborers. Brown asked Graham to speak with the Laborers business agent and principal officer, Jim Bollinger. Although he tried to reach him by phone, Graham never spoke with Bollinger. Graham did, however, consult with the Employer's president and with the business agent for Roofers Local 144 concerning the use of laborers to do the work in question and, after such consultation, on Thursday, June 4, he advised Brown that the Employer would assign the work to its employees represented by the Roofers. According to Graham, Brown then reiterated that the work belonged to employees represented by the Laborers, and also stated that "if you do not sign a laborers contract and employ 2 laborers by Friday [Bollinger] was going to put a picket on this job." Brown denied doing anything other than, on June 3, asking Graham to speak with Bollinger. In any event, beginning on June 8 and continuing through June 10, the Laborers picketed the Employer's worksite with a sign that read: "Notice to the Public. Hannin Roofing has no contract with Laborers Local 282." Pursuant to the general contractor's request, the Employer ceased its operations at the jobsite pending resolution of this dispute. At the time of the hearing the work remained unfinished.

B. *The Work in Dispute*

The work in dispute involves moving (i.e., shoveling) roofing gravel at ground level and the daily cleanup of debris resulting from the application of roofing materials at the Sikeston power plant in Sikeston, Missouri. It involves about 1 to 2 hours' work daily.

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[1] All dates are in 1981.

[2] United Union of Roofers, Waterproofers and Allied Workers, Local 144, appeared at the hearing as a Party in Interest.

C. *The Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. The Employer urges that the existing collective-bargaining agreement, employer and area practice, economy and efficiency of operation, and its assignment and preference require a finding that the work was properly assigned to employees represented by the Roofers.

The Roofers agrees with the Employer.

The Laborers takes the position that there is no jurisdictional dispute within the meaning of the Act as there exists no reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. It urges that Brown's statement could not be a threat because only Bollinger had the authority to take men off a jobsite or establish a picket line. Further, it argues that the picket line was only informational; however, it contends that, if the Board finds there is reasonable cause to believe there is such a dispute, the work in question should be assigned to laborers because the work is traditionally done by such employees, the Employer has no International or other pertinent collective-bargaining agreement with the Roofers, and area practice is to assign the work to employees represented by the Laborers. It further contends that the work in question does not require any of a roofer's specialized skills, and that economy would not dictate using roofers since there is substantial cleanup required at the worksite.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

There is evidence that on June 3 Brown, the Laborers chief steward at the site, told Graham, the job superintendent of the Employer, that the Employer would have to hire employees represented by the Laborers; that, subsequently, after Brown was informed that roofers would get the work, he warned Graham that if the Employer "did not sign a laborers contract and employ 2 laborers by Friday [the Laborers business agent] was going to put a picket on this job"[3] and that on the first workday after the Laborers deadline passed unheeded, the Laborers set up a picket at the worksite with a sign directed at the Employer. In these circumstances, we find reasonable cause to believe that the Laborers sought and demanded the disputed work, and in furtherance thereof threatened to picket and picketed the Employer to force a change in the assignment of the work, in violation of Section 8(b)(4)(i) and (ii)(D), as charged.

There is no evidence of an agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[4] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[5]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreement

The Employer had a collective-bargaining agreement with the Roofers[6] on the Sikeston power plant job. Article II of that agreement setting forth the unit work provides, in pertinent part:

> (b) above deck roof vapor barriers of all kinds; roof insulation of all kinds, including foil and urethane composition and built-up roofing of all kinds including hot and cold applied; prepared, plastic, fluid applied, sheet applied and mastic roofing; all associated roof surfacing including aggregates, coating, traffic planks and decks and decorative finishes; and the necessary metal flashing to make watertight;
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> * * * * *

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[3] We need not conclusively resolve the conflict in testimony between Brown and Graham on this point, since the Board only is required to find there is reasonable cause to believe that Sec. 8(b)(4)(D) had been violated before making a determination of the dispute out of which the alleged unfair labor practice has arisen. *United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al. (Wendnagel & Company)*, 116 NLRB 1063, 1066 (1956).

[4] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[5] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

[6] The literal language of the collective-bargaining agreement would not cover the jobsite in question. Thus the geographic jurisdiction of the collective-bargaining agreement does not include any of Missouri. This limitation results from the fact that Local 208's jurisdiction does not extend to this area. Rather this project falls within the jurisdiction of neighboring Local 144, the party in interest in this case. However, Local 144 had given the Employer permission to use Local 208-represented employees on this jobsite. Since Local 208-represented employees were being used, it was their contract with the Employer, despite the limiting language as to jurisdiction, which was being applied to this jobsite.

(e) all unloading, handling and hoisting of all tools and materials to be used in connection with the work described in Paragraphs II, a, b, c and d above . . . .

(f) all other work in connection with or incidental thereto.

We find that section (e) of the above agreement encompasses the movement of roofing gravel at ground level and that section (f) is broad enough to cover cleanup duties. Thus, the Employer's collective-bargaining agreement with the Roofers covers the work in dispute.

The Employer has no contract with the Laborers. We conclude, therefore, that the relevant collective-bargaining agreement favors an assignment of the disputed work to employees represented by the Roofers.

2. Employer preference, assignment, and past practice

The Employer assigned the work here to roofers and prefers an assignment to that group of employees. It presented evidence that on a prior job in the same general geographical area it used employees represented by the Roofers to handle gravel and to clean up roofing debris. We find the factors of employer preference, assignment, and past practice favor an award to employees represented by the Roofers.

3. Industry practice

The Employer presented testimony from three of its competitors working within a 100-mile radius of this project. One of them uses employees represented by the Roofers, exclusively, for the disputed work while the other two competitors regularly use employees represented by the Roofers for the transport of gravel, though they both mentioned isolated examples when employees represented by the Laborers did cleanup work. The Laborers presented evidence that its employees had shoveled gravel and done cleanup on other projects. We find that the industry practice is mixed and favors neither group of employees.

4. Economy and efficiency of operation

The Employer's president testified that it would take about 1 hour daily to shovel gravel and another hour daily to do cleanup. He further testified that, because both tasks are normally done at the end of each workday, if the Employer were to hire employees represented by the Laborers it would have to hire two people and pay each of them for a full 8-hour day even though it only had 1 hour's worth of work for each one. However, if roofers did the disputed work, the employees doing the disputed work could do other roofers' chores the remainder of the workday. Although the Laborers argued that, if the Employer hired laborers to do the disputed work, those hired could also do other chores, there is nothing here to indicate that any such work was available. Thus, the factor of economy and efficiency favors assignment of the disputed work to employees represented by the Roofers.

5. Skills

The work does not require any special skill. Therefore both groups of employees are equally capable of performing the work. This factor favors neither group of employees.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the Roofers are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement, the Employer's preference, assignment, and past practice, and efficiency and economy of operation, all of which favor an award of the disputed work to the employees represented by the Roofers. In making this determination, we are awarding the work in question to employees who are represented by the Roofers, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Hannin Roofing and Sheet Metal Company, Inc., who are represented by United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association Local 208, are entitled to move (i.e., shovel) roofing gravel at ground level and to the daily cleanup of debris resulting from the application of roofing materials at the Sikeston power plant in Sikeston, Missouri.

2. Laborers International Union of North America, AFL–CIO, Local 282, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Hannin Roofing and Sheet Metal Company, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Laborers International Union of North America, AFL–CIO, Local 282, shall notify the Regional Director for Region

14, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconistent with the above determination.

L & M Radiator, Inc. ***and*** **Ruby Carter and Jackie Johnson. Cases 18-CA-6621-1 and 18-CA-6621-2**

October 30, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On March 31, 1981, Administrative Law Judge Richard L. Denison issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, L & M Radiator, Inc., Hibbing, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order,[4] except that the attached notice is substituted for that of the Administrative Law Judge.

Member Jenkins, concurring in part:

I would not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). The Administrative Law Judge correctly found that Respondent's alleged lawful reasons for the discharges were "false" and "pretext." Thus, there was no genuine lawful motive in existence here; only the unlawful one was genuine. *Wright Line* was directed only at resolving the causation issue when a genuine lawful cause or purpose exists along with a genuine unlawful cause. To use *Wright Line* where only the unlawful cause is genuine is to engage in a sham analysis which can have only one outcome; and such sham application eventually stultifies the analysis and its effectiveness in treating the real problem to which it was directed.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

> We will not lay off, punish, or otherwise discriminate against Jackie Johnson, Ruby Carter, Sandra Roberts, or any other employee, because they have engaged in protected concerted activities for their mutual aid or protection.
>
> We will not threaten our employees that they will not be recalled to employment from layoff because they engaged in protected concerted activities with other employees for their mutual aid or protection.
>
> We will not in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[2] Respondent has also excepted to the Administrative law Judge's remedy and Order directing that the employees in question be offered immediate and full reinstatement with backpay, computed in accordance with traditional Board formulas. Any contentions that Respondent may raise concerning the interim earnings of the affected employees or whether reinstatement to their former jobs has indeed been offered to them are properly matters for the compliance stage of these proceedings.

In concluding that Respondent discharged employee Sandra Roberts unlawfully, we find it unnecessary to rely on the fact that her attendance record was placed in evidence.

[3] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

We deny Respondent's motion to remand this proceeding to the Administrative Law Judge and to reopen the record to receive allegedly suppressed evidence. The additional evidence was neither newly discovered nor unavailable at the time of the hearing. Additionally, we find that the proffered evidence, even if accepted, would not affect the result reached herein. Nor does the fact that Respondent, who was not represented by an attorney at the hearing, engaged the services of an attorney subsequent to the issuance of the Administrative Law Judge's Decision merit granting Respondent's request. See *James Innaco, d/b/a Skyline Transport*, 228 NLRB 352 (1977).

[4] Contrary to our concurring colleague, we do not agree that reference to *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), in the present situation results in a "sham analysis." We adhere to our holding in *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130, fn. 1 (1981). There we stated that we saw no need to comment on an administrative law judge's resort to a *Wright Line*-type analysis if the correct result was reached. Our statement in *Castle Instant Maintenance* is equally applicable to the present situation.

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their own choosing, and to engage in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL offer Jackie Johnson, Ruby Carter, and Sandra Roberts immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, plus interest, they may have suffered as a result of our discrimination against them.

L & M RADIATOR, INC.

DECISION

STATEMENT OF THE CASE

RICHARD L. DENISON, Administrative Law Judge: This case was heard at Hibbing, Minnesota, on November 20 and 21, 1980, arising from charges in Cases 18–CA–6621–1 and 18–CA–6621–2 filed on March 27, 1980, and later amended, respectively, by Ruby Carter and Jackie Johnson, individuals. The complaint issued May 28, 1980, as amended, alleges that Respondent violated Section 8(a)(1) of the Act by laying off Jackie Johnson on October 23, 1979, and employees Ruby Carter and Sandra Roberts on October 24, 1979, and thereafter failed and refused to recall these employees, because they engaged in protected concerted activities by protesting employees' working conditions.[1] It is also alleged that Respondent further violated Section 8(a)(1) of the Act on or about January 31, 1980, when Respondent's president told two of the laid-off employees that they would not be recalled to work because they engaged in protected concerted activities. Respondent's answer denies the allegations of unfair labor practices alleged in the complaint.

Upon the entire record in the case, including my observation of the witnesses and consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and the amended answer admits that, at all times material herein, Respondent is a Minnesota corporation with an office and place of business in Hibbing, Minnesota, where it is engaged in the manufacture and nonretail sale and distribution of radiators and related products. Only Respondent's Hibbing, Minnesota, facility is involved in this proceeding. During the 12-month period ending December 31, Respondent, in the course and conduct of its business operations, sold and shipped from its Hibbing, Minnesota, facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Minnesota. During the same period of time Respondent purchased and received at its Hibbing, Minnesota, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Minnesota. The answer admits, and I find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

At its Hibbing, Minnesota, plant Respondent manufactures radiators for earth moving equipment, primarily for the mining industry, and also performs repair services for that industry in the area of the Mesabi Iron Range, utilizing an hourly paid work force of approximately 50 to 60 shop employees.

Respondent's work force is not represented by any union. Newly hired employees are provided with a copy of Respondent's publication entitled "A Handbook For Our Employees," signed by Company President Alex Chisholm, which sets forth Respondent's policies, work rules, and benefits. Page 23 of the handbook is entitled "Suggestion Box" and states:

> L & M Radiator, Inc. has a Suggestion Box for suggestions by employees.
>
> Each suggestion will be answered and the answer posted.
>
> If you have a gripe, don't complain to your fellow worker. Come where you can get action!
>
> The doors of the supervisor's office are always open, along with management.

Page 24 of the handbook is entitled "Employee Problems." This section sets forth a two-step procedure, which the employee is encouraged to utilize in order to get "a cause of dissatisfaction . . . off your chest." Briefly, the employee is invited to orally discuss the problem with his immediate supervisor. Upon receiving an answer 3 days later, if the employee is still dissatisfied, he may take the matter up with his supervisor's superior, and obtain a decision within 3 days.

Page 25 of the handbook contains a section entitled "Grievance Committee," which states:

> L & M Radiator, Inc. has a Grievance Committee, selected by the employees, which constitutes a Union.
>
> The meetings are held on the first Thursday of each month between the hours of 3:00 and 4:00 P.M. in the employees' lunchroom.
>
> These meetings give you, the employee, the opportunity to voice grievances or make suggestions regarding working conditions. A committee, elected by the employees, will submit these problems to

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[1] Hereafter, all dates are in 1979 unless otherwise specified.

management within a few days of the Grievance Meeting.

Jacqueline Johnson was hired by Respondent on May 6, 1975. For the first 1-1/2 years of her employment she worked in the tubemaking area as a tube machine operator. Thereafter, she moved to the platemaking area where she worked on header sheets until permanently laid off on October 23. During slow periods at the Company, she also performed work in the assembly area. At the time of her termination Johnson had worked in the plate department longer than any other employee except Sandra Roberts. Roberts was hired on May 3, 1974, and also worked on the tube machine for 9 months before moving to the plate department where she remained until her permanent layoff on October 24. Ruby Carter became employed by the Company on May 8, 1975, and worked on the tube machine during the entire period of her employment with Respondent, except briefly from December 1975 to June 1976, when she worked in the office. Thus, Carter was the Company's most experienced tube machine operator.

B. *The Events Surrounding the March 8 Meeting*

Undisputed and credited testimony by the three above-named employees reveals that on an unspecified date about the first of March, Ruby Carter placed a suggestion in the Company's suggestion box, recommending that management hold a special meeting with the employees to resolve difficulties which had arisen between the employees and Foremen Tom Turin and Fred Odegaard. Pursuant to this request, Company President Alex Chisholm met with both shifts in the plant lunchroom at 3 p.m. on March 8. Immediately prior to this meeting Johnson, Carter, and Roberts met briefly with Production Manager James Hocking in Johnson's work area, and told Hocking about the problems with the foremen which they intended to raise during the lunchroom meeting. Hocking encouraged the three workers not to be afraid to speak out, assuring them that Chisholm would listen to them as he had in the past.[2]

The meeting in the lunchroom began with Johnson, who was a member of the official employee grievance committee, asking Chisholm what had happened to the Company's open door policy. When Chisholm asked what she meant, Johnson answered that apparently there had been some communication breakdown, and that some of the employees felt they could no longer go over a foreman's head. Then Carter related a specific example, describing how Foreman Tom Turin became angry and grabbed her arm after Carter had contacted Hocking about her malfunctioning machine when her complaints to Turin had been ignored. Then Sandra Roberts described how, in her opinion, Fred Odegaard had lied to her about her scheduled workdays, and an incident in which Turin lost his temper, shouted at her, and swore at her husband when he protested Turin's conduct.

Employee Gary Fairchild then spoke up in confirmation of the three women's accusations of verbal abuse by Odegaard, while John Martin defended Turin, stating that he thought Turin was a good foreman. Then Chisholm asked if they thought all of the foremen should be fired, and, after a period of silence, Johnson said that the purpose of the meeting was not to have anyone fired, but to make Chisholm aware of what was happening in the shop, in order to resolve their problems and get along better with the foremen. Johnson, Roberts, and Carter were the only employees who raised specific complaints. Then the subject was changed to other problems of the shop engineering, and questions about the equipment, after which the meeting ended.

C. *Jacqueline Johnson*

On Monday, March 12, Johnson reported to work about 4 p.m. following a medical checkup at an outside clinic. Sometime previously Johnson had been away from work for 7 months after having a hysterectomy, returning only when released by the doctor. On this particular day the medical appointment lasted an hour longer than expected, and Johnson was 1 hour later than her estimate. Upon her arrival she was informed by employee Gary Fairchild that Alex Chisholm wanted to see her about her attendance. Remembering the March 8 meeting, Johnson became afraid and nervous, obtained permission to take the remainder of the day off as a vacation day, and went home. However, later that evening, having composed herself, she telephoned Chisholm at his home. Chisholm stated that he had paged both Ruby Carter and Johnson, and found neither of them there. He said he had pulled Johnson's attendance record, which he stated was terrible. Johnson answered that she would come in the next morning and discuss this matter with him, and Chisholm agreed. Next, Johnson called Hocking, told him what had happened, and solicited his support. After promising to defend her, Hocking stated he was sorry, and had not expected the meeting to go that way.

The following morning Chisholm and Johnson met alone in Chisholm's office. Chisholm had Johnson's attendance record brought in, and Johnson asked how it had been scored. Chisholm stated that it had been brought on the surface by the March 8 meeting, following which one of the foremen told Chisholm that Carter and Johnson would not know what was going on about something they should do, because they had never done anything. Johnson then defended her attendance record, insisting that the absences had been excused. She said she had been out 7 straight months for surgery, under the care of a doctor, and that two other times she had been in the hospital, once for an on-the-job injury, and another time for bronchitis following a physical by the Company's doctor. On other occasions, Johnson stated, she had always obtained permission from her foreman to leave the plant. At this point Chisholm exploded, stating that he was not running a "goddamned nursing home," and if he were he would fire everybody and hire all part-time help, which would be cheaper because he would not have to pay the benefits. Johnson tried to explain that apathy was developing in the shop because the employees did not know to whom they could talk. She said that if enough apathy developed, the people "weren't going to bust their—for them . . . ." Johnson also pointed out that some of the time she had missed, she had made up by either staying later or working on Saturdays. Then Chisholm asked if Johnson, Roberts, and Carter were the only ones that had any "b—" to speak about their grievances, and Johnson answered that they were the only ones with "b—" in the Company. Then the discussion turned to some of the Company's equipment. Johnson asked if it were going to be possible to get an NC punch for the plate area. Chisholm said that the Company could not afford it at that time. Johnson insisted that it was needed, and the discussion ended with an angry Chisholm stating it was his "goddamned company" and he would run it the way he wanted. He said that Johnson's attendance was being monitored, and she would be terminated if there were any more bad attendance. Shortly thereafter that same day, Johnson received a written warning stating that her attendance was "very poor," and "that in the future you will be very closely monitored, and if you continue to miss work you will be discharged regardless of the excuse."[3]

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[2] Hocking corroborated Johnson's account of the premeeting discussion.

Thereafter, between March 13 and her layoff on October 23, Johnson missed only 3 days of work. Each was for medical reasons, and each was excused. On one occasion during the summer, while working at a drill press in the shop, Chisholm approached Johnson and complimented her on her attendance.

On October 23 Fred Odegaard called Johnson to his office and told her she was going to be laid off. He said work was slow, and the Company had seven more employees than the year before. Therefore, he said, four people were going to be laid off. The other employees he named were Ruby Carter, Sandra Roberts, and Bob Olsen. Johnson asked why they were not going by seniority, and Odegaard responded Respondent was doing it by departments. She asked how the decision was made, and Odegaard stated he did not know since the front office did not tell him. He said the layoff was going to be temporary until things picked up, but he did not know what the duration of the layoff would be. Johnson asked why she was chosen, and why Respondent was laying off the older ones. Odegaard simply answered that Respondent was going by departments, not the overall shop. Johnson's attendance or production was not mentioned during the interview.

Later in the day, about 5 p.m., Johnson decided to confront Chisholm about her layoff. She went to Chisholm's office, where she spoke to him alone. She said that she wanted to know how he arrived at the decisions to lay off the selected employees. Chisholm stated that he, Dick Braun, Jim Hocking, and Fred Odegaard had made the decisions, and "felt these were the people that the Company could do without the best." Johnson asked if her attendance had been bad, and Chisholm responded that it had been good since the March 8 meeting. She then asked if her production or work had failed. Chisholm said no, it had been good. Then Johnson said, "Well, what it comes down to, then, is a personal vendetta." Chisholm responded, "If you wish." Johnson then asked if the layoff were going to be permanent or temporary, and Chisholm stated that she could consider it permanent, but that the Company had a policy not to hire anyone for 90 days. Johnson asked for a layoff slip, and Chisholm promised to provide her with one. Then she left.

Although Johnson had subsequent contacts with the Company, she never received the layoff slip. On January 31, 1980, Johnson went to the plant to seek reemployment because the 90-day period mentioned by Chisholm in her exit interview had just passed. She was accompanied by Ruby Carter, who had also been laid off, as described elsewhere in this Decision. They met with Chisholm alone in his office. After reminding him that 90 days had passed, Johnson asked if they were going to be rehired. Chisholm said the Company had no intention of rehiring them. Carter asked why, and Chisholm answered that they were not happy working there and were always complaining. Carter commented that most of her complaints had to do with safety issues, citing an incident involving spray painting about 2 days before her layoff. Chisholm retorted, "You didn't see any bodies lying at that point, did you?" Then Johnson pressed Chisholm once again for the real reason for their layoffs, and Chisholm stated that they had viciously attacked the foreman. He also said Carter had attacked him, "Johnson and Carter were the two biggest bitchers in the Company," and he would get rid of anybody who was a pain in the "a—." Then Carter said that she thought Chisholm would want to be aware of the problems in the shop, but Chisholm concluded the interview by reiterating that they were not happy there and should go to the mines where maybe they would be treated better.

Carter corroborated Johnson's version of this conversation, recalling specifically that Chisholm became angry and threw his pencil on the desk when Carter attempted to explain that there were things in the plant he should know about, in response to Chisholm's statement that the two women were not happy there. She also specifically remembered Chisholm stating that "they were the two biggest bitchers in the Company," and that he had to get rid of people who were a pain in the "a—." Chisholm did not deny making these remarks, which I find violated Section 8(a)(1) of the Act as alleged in paragraph 4 of the complaint.

D. *Ruby Carter and Sandra Roberts*

Prior to the March 8 meeting Carter had never received a written warning. She had received one verbal warning from Foreman Fred Odegaard in 1977. Like Johnson, Carter received a written warning on March 13, following an interview in Chisholm's office. During their brief discussion Carter noted she had been sick and under the care of a doctor, but would try to improve. Chisholm stated he was sympathetic about her family and health problems, but her attendance would be monitored very carefully thereafter, and, if it continued to falter, she would have to be terminated. The written warning described her attendance record as "horrendous," and stated she would "be monitored extremely closely in the future and will be let go if you continue to miss work, regardless of the excuse."

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[3] Johnson had received one prior written warning, a "pink slip," given to a group of employees for horseplay when they "threw the foreman in the tank." There is no contention that this incident was in any way considered with respect to Johnson's subsequent termination.

Thereafter, Carter's attendance improved. In July, Chisholm approached Carter at her job in the platemaking department, and congratulated her on that improvement. Nothing else of significance transpired until a few days before Carter was laid off. On that occasion Carter stopped working and went to Chisholm to protest spray paint fumes, which were making Carter and other employees sick. Carter put her arm around Chisholm's waist and asked if there were something he could do. Chisholm sharply retorted, "If you don't like it, find yourself another job," and walked away. Two days later, on October 24, Carter was laid off. At that time she was called to Jim Hocking's office by Fred Odegaard. Sandra Roberts also attended the same exit interview and was laid off at the same time. Roberts had received no prior warnings of any kind. Carter and Roberts asked why they had been selected for layoff. Hocking responded that the decision had come from the "front office," and that he, Odegaard, and Turin had nothing to do with the choices. He said there was a lack of work, Respondent had to get rid of four people, and he could not tell them why or when they would be called back.[4]

E. *Respondent's Defense, Discussion, and Concluding Findings*

Respondent contends that the October layoff originated with Chisholm's sudden decision that the Company had too many employees. Chisholm testified that he personally decided upon the selection of Johnson and Carter based on a review of their "horrendous attendance records." Although Chisholm claimed his examination of the two employees' records was part of an overall review of a number of employees' files, of which Johnson and Carter were the worst offenders, Chisholm was unable to remember the names of any other employees reviewed or warned. Chisholm also testified that Roberts was not selected for layoff on the basis of her attendance record, but because of her production, although he admitted that she had never been warned about her alleged deficiencies, and that he did not know what the problem was concerning her production. Chisholm stated that apparently Johnson's and Carter's attendance records had been bad throughout their employment at the Company, but that over the last 5 to 7 years Production Manager Hocking had not put anything in their files in writing reflecting this. Chisholm also conceded that Johnson's and Carter's attendance records improved after their written warnings were issued on March 13, and that he "could have" commended Johnson about her improvement. Finally, Chisholm conceded that it was Johnson's and Carter's complaints about the foremen and his discussion with the foremen about those complaints that prompted him to examine their attendance records.

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board stated:

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Counsel for the General Counsel's *prima facie* case has, in my view, been clearly established. Indeed, Respondent not only failed to contradict the General Counsel's evidence, but, moreover, corroborated it in many instances through the testimony of Respondent's president, Alex Chisholm. Thus, it is established that Johnson, Roberts, and Carter, who had never before been warned about either poor attendance or low production, provoked Company President Chisholm by voicing their grievances against their foremen in a meeting called for that purpose pursuant to Respondent's established suggestion system. It is conceded that immediately thereafter this activity prompted Chisholm to review Johnson's and Carter's personnel files resulting in the issuance of written warnings for attendance. Thereafter their attendance improved, but nonetheless they were selected for layoff. In a postdischarge conversation Chisholm told them that they were the two worst "bitchers" in the plant. Roberts, the third employee to complain at the March 8 meeting, received no warnings at all before her layoff for insufficient production, a condition which Chisholm was unable to describe in detail, and for which she never provided any statistical support. Under all these circumstances there can be little question but that the General Counsel has established a *prima facie* case of discrimination against employees for engaging in protected concerted activities by protesting about their working conditions to their employer. Under the test enunciated by the Board in *Wright Line*, the burden shifts to Respondent to prove that Johnson and Carter would have been laid off in any event because of their absentee records, and that Roberts would have been released because of her production. I find that Respondent has failed to meet its burden. Aside from Alex Chisholm's testimony, when called as a witness by counsel for the General Counsel pursuant to Rule 611(c) of the Federal Rules, Respondent's entire defense consisted of documentary evidence in the form of Johnson's, Carter's, and Roberts' attendance records, the names and classifications of employees from January 1978 to January 1980 showing employees laid off and new employees hired, and financial and sales data during this period. Not only does this material fail to carry the day for Respondent, in the face of the strong uncontradicted evidence of discrimination presented by the General Counsel, but also certain aspects of this material tend to support rather than refute the General Counsel's case. Thus, for example, Sandra Roberts' attendance record is included as an exhibit, despite the fact that Chisholm testified that attendance had nothing to do with Roberts' selection for layoff. These documents also reveal that over the period outlined the only layoffs which occurred were those of Johnson, Carter, Roberts, and Olsen in October. Not one scintilla of evidence was offered by Respondent to show that Johnson, Carter, and Roberts, respectively, would have been laid off for poor attendance or poor production irrespective of their protected activities. Furthermore, Respondent did not even succeed in proving that, absent the events surrounding the March 8 meeting, there would even have been a layoff. Undisputed testimony by Carter, Johnson, Roberts, and other employee witnesses clearly demonstrated that in times past, when slow periods had occurred, Respondent normally kept its employees working at whatever odd jobs could be found around the plant. Some of the other long service employees who testified could not remember when there had been a previous layoff in the plant. Finally, employees Ronald Hendrickson and Rick Norenberg remembered Chisholm telling them that Ruby Carter had attacked him.

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[4] Nothing in Hocking's testimony disputed the employees' account of their exit interview. Hocking testified that the foremen normally administered the Employer's policies concerning absenteeism and discipline, and that Chisholm's participation in this area of plant administration was not customary. He testified he first learned there was going to be a layoff on the day the initial layoff occurred, when Odegaard called him to Dick Braun's office where Chisholm announced that Respondent was going to lay off Jacqueline Johnson, Sandra and Dennis Roberts, and Ruby Carter. Chisholm instructed Odegaard and Hocking to select a fifth employee for layoff, and Respondent picked Bob Olsen. Later, Hocking and Odegaard persuaded Chisholm not to include Dennis Roberts. At this point in his testimony Hocking's memory failed quite suddenly, and he could remember nothing further, in response to counsel for the General Counsel's questions, about Chisholm's reasons for selecting the four laid-off employees. From carefully listening to his testimony and observing his demeanor, I can only conclude that for some reason Hocking was very uncomfortable at being called as a witness for the General Counsel and was afraid of displeasing his former Employer. In my view, however, this factor is an insufficient basis on which to discredit his earlier testimony supporting that of the alleged discriminatees, and. therefore, since contradictory testimony is absent, he is credited.

Since there is a total absence of evidence that Roberts' selection for layoff was motivated by deficient production, I find this reason, advanced by Respondent, to be false. Since no other reason has been advanced or proven by Respondent with respect to Roberts, the General Counsel's evidence stands unrefuted. With respect to Johnson and Carter, Respondent has failed to come forward with evidence to prove, under the circumstances presented, that Johnson and Carter would have been discharged for excessive absenteeism. Instead, the evidence considered as a whole clearly shows that Company President Alex Chisholm seized upon Johnson's and Carter's absentee records as a pretext for eliminating employee activists from Respondent's plant. I find and conclude that Respondent violated Section 8(a)(1) of the Act when it laid off Jacqueline Johnson, Sandra Roberts, and Ruby Carter.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By laying off Jackie Johnson on October 23, and Ruby Carter and Sandra Roberts on October 24, and by telling employees that they would not be recalled because they engaged in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

The Remedy

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, I find it necessary to order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily laid off Jackie Johnson, Ruby Carter, and Sandra Roberts, I find it necessary to order that Respondent offer them immediate and full reinstatement with backpay computed on a quarterly basis, plus interest as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[5]

I shall also order Respondent to post an appropriate notice encompassing all violations found to have occurred.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondent, L & M Radiator, Inc., Hibbing, Minnesota, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off or otherwise discriminating against Jackie Johnson, Ruby Carter, Sandra Roberts, or any other employee for the purpose of discouraging employees from engaging in protected concerted activities for their mutual aid or protection.

(b) Threatening employees that they will not be recalled to employment from layoff because they engaged in protected concerted activities with other employees for their mutual aid or protection.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Jackie Johnson, Ruby Carter, and Sandra Roberts immediate and full reinstatement to their former positions or, if such positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, in the manner set forth in the section of this Decision entitled "The Remedy."

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[5] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility at Hibbing, Minnesota, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Browning-Ferris Industries of Pennsylvania, Inc. *and* Edward J. McDeavitt. Case 6-CA-13801

November 2, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 12, 1981, Administrative Law Judge William A. Gershuny issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in opposition to Respondent's exceptions to the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Browning-Ferris Industries of Pennsylvania, Inc., Carnegie, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interfere with, restrain, and coerce employees in the exercise of the rights guaranteed them under the Act, by discharging them or barring them from our premises or causing their discharge or debarment.

WE WILL make whole Edward McDeavitt, Charles Tully, and Edward Pontius for any loss of earnings they may have suffered as a result of our unlawful conduct of August 24, 1980, with interest.

WE WILL offer Edward McDeavitt, Charles Tully, and Edward Pontius reinstatement to their former or substantially equivalent positions either independently or jointly with one of our brokers or contractors, that employer willing. In the event jobs are not available, we will place these employees on a preferential hiring list at our refuse operations where we employ drivers.

WE WILL give written notice to our trucking brokers and contractors that we have no objection to the employment of these employees or their presence on our premises.

BROWNING-FERRIS INDUSTRIES OF
PENNSYLVANIA, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge: A hearing was held on June 1-2, 1981, in Pittsburgh, Pennsylvania, on complaint issued October 28, 1980, alleging a violation of Section 8(a)(1) of the Act. At issue is (1) whether Respondent, a refuse contractor with the City of Pittsburgh, is a joint employer of drivers employed by independent brokers to operate broker-owned tractors used to haul Respondent's refuse trailers; and (2) whether Respondent discharged or caused to be discharged such drivers in violation of Section 8(a)(1) of the Act.

Upon the entire record, including my observation of witness demeanor, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that Respondent, engaged in the hauling of refuse with annual interstate shipments in excess of $50,000, is an employer engaged in commerce within the meaning of the Act.

II. UNFAIR LABOR PRACTICE

Except as specifically discussed below, the relevant facts are not in dispute.

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

A. *Relationship Between Respondent and Drivers*

Respondent contracts with the city of Pittsburgh to operate a refuse transfer site to which city trucks haul collected refuse, after which it compacts the refuse and hauls it to a landfill area. By law, refuse must be transported to the landfill area within 24 hours. Respondent's failure to comply subjects it to fine and cancellation of the contract. The transfer site is owned by the city, but compaction equipment is owned by Respondent and operated by its employees, who are members of a Teamsters local.

Respondent contracts with independent truckers, commonly referred to in the trade as "brokers" to furnish all tractors and all drivers to haul Respondent's trailers between the transfer station and the landfill area. Pursuant to oral agreements, brokers are compensated on a per load basis, with Respondent additionally providing coveralls for the drivers and coverage under its group medical plan for one driver per tractor. The decision as to which driver receives the coverage is made by the broker. Brokers are required to carry liability insurance and are liable for safety violations related to their tractors. The agreements are terminable at will by either party.

None of the tractors bears any broker identification. The trailers, and many of the coveralls provided by Respondent both to the drivers and to some of its own employees, bear Respondent's logo. The brokers repair their own trucks and purchase them with no financial assistance from Respondent.

Respondent, by posted notice at the transfer station, establishes the starting times, i.e., two shifts beginning at 6 a.m. and 6 p.m., 6 days a week. Generally, Respondent is concerned only that tractors and drivers are available at the transfer station when there is refuse to be handled. The actual scheduling of drivers is done by the brokers, who frequently drive the tractors themselves without regard to shift.

Because brokers are compensated on a per load basis, load logs are maintained both by Respondent's bin loader and the drivers, on forms provided by Respondent. The logs are turned in to Respondent's office, where they are reconciled and copies provided to the brokers. Respondent issues bimonthly checks to the brokers for their services and the latter, in turn, pay the drivers. Neither Respondent nor the brokers withhold for taxes.

Respondent establishes vehicle speed limits at both the transfer station and landfill area and, because the landfill area can be reached only by two narrow public roads, often specifies which of the two roads is to be used by drivers approaching and leaving the area.

At the transfer station, Respondent directs the trucks to specified loading areas and, at the landfill area, directs the trucks to the specific dumping area.

Because Respondent's equipment is costly, it has a requirement for approval of the drivers furnished by the brokers. That approval consists of on-the-job observation by Respondent. If a driver is incompetent, the broker is notified and the driver not permitted on the premises. Similarly, because of its contractual obligation to haul refuse promptly, Respondent "criticizes" drivers who arrive late at the transfer station or leave early.

Additionally, credible testimony of drivers and brokers, unrefuted by Respondent who did not offer testimony in this regard, indicates that Respondent's transfer plant manager, Moersch, on occasion effectively discharged and rehired drivers:

> (a) In July 1980, when driver Tully went home early with the tractor, Moersch said to him, "you can go home permanently . . . yes, I am firing you" and told the broker he wanted another driver and that Tully "no longer was allowed on the property." Several days later, when Tully asked Respondent's Vice-President Curtis for his job back, Curtis stated there was no reason why he could not get his job back. When Moersch was informed, he told Tully to return to work the following day.
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> (b) In 1977, Moersch "fired" another driver, broker Anderson's son.
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> (c) On another occasion, when broker Anderson, driving his own tractor, left early, Moersch ordered him to report to his office the next day and there told him that neither the owner-operators nor the drivers were boss at the transfer station, but that he, Moersch, was.
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> (d) In February 1978, when driver Pontius improperly used a piece of Respondent's equipment to push his tractor and was accused of damaging the equipment, Moersch told broker Dietrich that Pontius was not allowed on the property. Moersch, when asked by Pontius for his job back, told him that he had gotten rid of one of the four bad apples; when told that Respondent's landfill manager Fazio had no objection to Pontius' return as a driver so long as he did not use Respondent's equipment, Moersch told Pontius that it was okay for him to return to work the following Monday.
>
> (e) And, finally, on Sunday evening, August 24, 1980, Moersch telephoned driver Tully at home, telling him that his truck was "fired" and that he should not report in the following morning with the truck; he telephoned broker Anderson's wife at home, telling her that Respondent did not want the Anderson truck anymore and that "Tully's fired;" and he telephoned broker Buzy at home, telling him that driver McDeavitt was no longer allowed on Company property.

Two other incidents further reflect the relations between Respondent and the drivers. In late August 1980, Vice President Curtis asked a driver to erase obscenities from the side of Respondent's trailer, despite the fact that Respondent had responsibility to clean the trailers. And, also in 1980, Respondent's controller, Bright, under emergency conditions where garbage was strewn from an overloaded trailer at a state police station, asked a driver to assist him and other Respondent employees in the cleanup operation. The driver refused, stating that it was not a part of his job.

I conclude, for reasons set forth below, that, at all relevant times herein, Respondent and the independent trucking brokers were joint employers of those drivers employed by the brokers.[1]

Of course, the fact that the brokers concededly are independent contractors *vis-a-vis* Respondent is not determinative of the issue as to the relationship between Respondent and the brokers' drivers.

Where, as here, there is no contention that the drivers themselves were independent contractors, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964), teaches that the real issue, a factual one, is whether a respondent "possessed sufficient control over the work of the employees to qualify as a joint employer with [the actual employer]." Accord: *N.L.R.B.* v. *Jewel Smokeless Coal Corp.*, 435 F.2d 1270 (4th Cir. 1970).

An examination of the facts in *Greyhound, Jewel Smokeless*, and other cases is instructive in the application of the joint employer test. In *Greyhound*, it was subsequently held that respondent was a joint employer with its cleaning contractor, where Greyhound established work schedules, assigned and supervised cleaners and prompted the discharge of one of the cleaners. 368 F.2d 778 (5th Cir. 1966). In *Jewel Smokeless*, Respondent, a lessor of coal lands, was determined to be a joint employer of miners employed by independent mining contractors, where respondent gave financial assistance in the purchase of equipment, provided engineering and inspection services, furnished workmen's compensation coverage, and terminated union activity by cutting off electric power to the mine to discourage union activity. Similarly in *Hamburg Industries, Fidelity Services, Inc. & Industrial Technical Services, Inc.*, 193 NLRB 67 (1971), the Board found Respondent to be a joint employer of maintenance repair employees provided by a contractor whose sole business was to provide manpower, where Respondent controlled the scope and quality of the work, scheduled the work, and indirectly controlled wages. And in *Mansion House Management Corporation, and Central Parking System of St. Louis, Inc.*, 195 NLRB 250 (1972), respondent was found liable, as a joint employer, for the discharge of security guards employed by a contractor, where it exercised control and direction over the day-to-day activities of the guards and both its employees and guards wore substantially identical uniforms.

On the other hand, where a respondent's control is a consequence of Federal law and regulation, such as is the case with regulated common carriers, a joint employer determination may not be warranted. *N.L.R.B.* v. *Tri-State Transport Corp.*, 649 F.2d 993 (4th Cir. 1981). In the present case, however, the brokers were not certified and there is no evidence or contention that Respondent's control over the drivers was mandated by law.

The evidence, as reviewed above, demonstrates beyond doubt that not only did Respondent effectively discharge and rehire the drivers in a number of instances, it also treated the drivers as its own employees in a number of other respects. In July 1980, Moersch "fired" driver Tully and then rehired him; in 1977, he barred Pontius from the property and later allowed him to return to work; on August 24, 1980, he "fired" McDeavitt and Tully; and on another occasion he told a broker that he, Moersch, and not the brokers or drivers, was the "boss" at the transfer station. Moreover, it is significant that at no time did Respondent attempt to insure safe and dependable driver performance by calling upon the brokers to take corrective action. Moersch in fact considered himself as the drivers' supervisor and, on a day-to-day basis, exercised that authority without regard to (and without objection from) the brokers.

Respondent also held out the drivers as its own employees by providing them with coveralls bearing the company logo and by providing medical insurance to certain of the drivers under its own group plan. And, finally, it established the hours of employment for the drivers, as opposed to simply requiring, under the contract, 24-hour service from the brokers.

B. *The Drivers' Concerted Activities*

In early August 1980, drivers Tully, McDeavitt, and Pontius talked among themselves and with other drivers about increased wages and benefits. Over the years, numerous conversations with other drivers concerning working conditions had been held. The drivers are not represented by a union. These conversations were informal and occurred while the drivers were waiting around the transfer station and landfill area. While there was no effort to conceal either the fact or the subject matter of the conversations, rarely was there present an employee of Respondent in the vicinity. Even then, noisy machinery was in operation, making it most unlikely that the conversations were overheard.

On Sunday, August 24, 1980, most of the drivers met at Tully's home to discuss a course of action. Agreed upon was an approach to the brokers for increased wages and benefits and, if the brokers were unable to renegotiate their agreements with Respondent, then a direct approach to Respondent "to see if they could do anything for us" by way of increasing broker compensation under the contract. There was no agreement at that time as to whether the drivers would strike.

The brokers were aware of the scheduled meeting, having been informed by the drivers at least 1 week before. Respondent also had prior knowledge of the meeting. Moersch admitted to contoller Bright that he knew "weeks before" that the drivers were talking of meeting and Vice President Curtis told Bright he also knew of the meeting, because the drivers had come to him for "more money" and he had informed them to "see your brokers."

I find that the drivers did engage in protected concerted activity on and prior to August 24, 1980, and that Respondent had actual knowledge of such activities.

C. *The Alleged Wrongful Terminations*

Within several hours of the drivers' meeting on the afternoon of Sunday, August 24, 1980, Respondent terminated broker Anderson's contract for one truck and reduced broker Buzy's contract from four to three trucks.

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[1] At the conclusion of the hearing, counsel for the General Counsel moved to amend the complaint to allege an alternate theory of liability based on Respondent's status as a nonemployer. The motion is granted, but the issue is not addressed in view of the conclusion herein that Respondent is a joint employer.

More specifically, Anderson's two drivers, Tully and Pontius, and Mrs. Anderson were telephoned by Moersch and told that the Anderson truck was "fired" and was not to be brought in the next day because there was no trailer for it to haul. No other reason was given to them for the action. Also that night, Moersch telephoned McDeavitt, one of Buzy's eight drivers, and told him that he was fired and would no longer be permitted on Respondent's property. No reason for the discharge ever was given by Moersch to McDeavitt or broker Buzy.

No other trucks or drivers were affected by Moersch's actions of August 24.

Respondent's controller Bright, the only management witness to testify, stated that, following a demand by the brokers in early August for substantial increases under their agreements, Respondent began negotiating with a new broker for five trucks at the then current per load rate. Other brokers, he said, who were dissatisfied with those rates, could terminate their agreement with Respondent. The new broker, Horse Trucking, contracted with Respondent during the second week of August and, by the end of the month, began operations with three trucks.

Bright testified that Respondent's decisions on August 24, 1980, were made by Operations Manager Pittman and Vice President Curtis and communicated to the affected drivers and brokers by Moersch. The fact that the drivers' meeting occurred only hours before, he stated, was "purely coincidental." Of the four brokers, it was decided to terminate Anderson's contract for one truck, driven by Tully and Pontius, because Respondent was not satisfied with its performance. It was not there when refuse had to be transported and there were outstanding and unsatisfied damage claims against Anderson. Buzy was reduced from four to three trucks because "we had to cut back" in light of a new contract with Horse Trucking. Bright testified that, as a part of the Buzy decision, McDeavitt, one of the "least desirable" of Buzy's "was to go . . . we didn't want him . . . and we asked that when Buzy's truck went down, McDeavitt go with it."

Several days later, when Tully and Anderson asked why the Anderson's truck was fired, Curtis replied "because of obscenities on the side of the trailer" which Tully and Pontius hauled, adding that, in another 4 to 5 months, none of the brokers would be there.

The obscenities referred to consisted of a drawing of Vice President Curtis performing an unnatural sexual act with the brokers and the words, "kill Curtis." While trailers often contained obscenities written by finger in the dust and grime, this obscenity was unique. On Friday, August 22, Curtis had asked Tully and Pontius if they were responsible. Each denied responsibility and Pontius, at Curtis' request, erased the obscenity.

The outstanding damage claims against Anderson consisted of a $560 claim for damage to an out-house and a $500 claim for damage to a gate.

On the basis of the overwhelming record evidence in this case, I find that reasons assigned by Respondent for its August 24 actions are wholly pretextual and that the true reason, and indeed the sole reason, for its termination of one contract and modification of another and its firing of Tully and McDeavitt and its barring of Pontius from company property was to interfere with, thwart, and restrain the exercise by the drivers of their Section 7 right to seek increased wages and benefits. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

The only drivers affected by Respondent's August 24 actions were the very three who were spearheading the drive for increased wages. Its actions occurred only hours after the drivers' first meeting and only hours before the start of the Monday 6 a.m. starting time. Respondent, despite its purported negotiations with a new contractor, never disclosed either to the other brokers or the drivers that certain cutbacks would be made to make way for the new broker. Bright's testimony as to the new contract was evasive and elusive as to when negotiations had been concluded, the number of trucks to be provided by the new broker and when the broker commenced operations. Accordingly, his testimony cannot be credited. Given the fact that Respondent's contract with the city was subject to cancellation if garbage were permitted to accumulate, it is unlikely that Respondent would have precipitously terminated its existing contracts before the new broker was in operation. In addition, Respondent refused to give any reason on Sunday for its actions; its subsequently advanced reason having to do with the unreliability of the Anderson truck (and its drivers, Tully and Pontius) had not been raised prior to the hearing; its unsatisfied property damage claims against broker Anderson were not of recent vintage and Anderson had not been pressed to satisfy them; the reason stated by Curtis the following day, i.e., obscenities on the trailer, had not been expressed by Moersch and, in any event, Respondent had not indicated it would be a cause for discharge and cancellation of contract; and its decision to bar McDeavitt as the "least desirable" of Buzy's eight drivers is unsupported by any credible evidence that McDeavitt was less reliable and less safe than the other seven drivers.

I conclude that Respondent, in discharging Tully, Pontius, and McDeavitt and/or barring them from the premises on August 24, 1980, violated Section 8(a)(1) of the Act.

III. REMEDY

Counsel for the General Counsel seeks an order requiring Respondent to cease and desist from engaging in the unlawful conduct, to post an appropriate notice and to notify its current brokers that it has no objection to the employment of Tully, Pontius, and McDeavitt. He seeks also an order requiring backpay and interest to run until (a) a broker offers a driver the same or substantially equivalent position, (b) Respondent offers such to the driver, or (c) a driver obtains substantially equivalent employment elsewhere. And, finally, he seeks an order requiring Respondent to offer broker Anderson a new contract, similar to the one terminated on August 24, 1980, for one truck.

Where, as here, a joint employer unlawfully discharges or causes the discharge of an employee it is appropriate to direct reinstatement by Respondent independently or jointly with an existing broker, *Jewell Smokeless Coal Corporation*, 175 NLRB 57 (1969), or, in the event jobs are not available, to place the employee on a preferential hiring list at its operations where it is an employer of drivers. It is also appropriate to direct that Respondent notify brokers that it has no objection to their employment of the drivers[2] and to direct backpay and interest in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

It is inappropriate, however, to compel restoration of the Anderson contract for a number of reasons. First, Anderson admittedly was at all relevant times an independent contractor. Second, Anderson was not alleged in the complaint to be a discriminatee and was not joined as a party to this proceeding. Third, neither the Act nor its legislative history suggests the existence of Board jurisdiction over the contractual relationship of employers subject to the Act and their independent contractors or the terms of such contracts. Fourth, the original agreements with Anderson and the other brokers were oral and terminable by either party at will. And fifth, restoration of the contract is unnecessary to effectuate the purposes of the Act under the circumstances of this case.

Upon the foregoing findings of fact, conclusions of law and the entire record and, pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Respondent, Browning-Ferris Industries of Pennsylvania, Inc., Carnegie, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from interfering with, restraining, and coercing employees in the exercise of their rights under Section 7 of the Act, by discharging them or barring them from the premises or causing their discharge or debarment.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole Edward McDeavitt, Charles Tully, and Edward Pontius for any loss of earnings they may have suffered by reason of Respondent's unlawful activities, to be determined and computed in the manner set forth in the Decision and Order and to run until (a) the same or substantially equivalent position is offered them by Respondent or one of its brokers or contractors or (b) a driver obtains substantially equivalent employment elsewhere.

(b) Offer the above-named employees reinstatement to their former or substantially equivalent positions either independently or jointly with one of its brokers or contractors, that employer willing. In the event jobs are not available, Respondent shall place those employees on a preferential hiring list at its refuse operations where it is an employer of drivers.

(c) Give written notice to its trucking brokers and contractors that it has no objection to the employment of the above-named employees or their presence on Respondent's promises.

(d) Post at its principal office and at its offices at the refuse transfer station and the landfill area involved in this case copies of the attached notice marked "Appendix."[4] Copies of said notice on forms provided by the Regional Director for Region 6, shall, after having been signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered with other material.

(e) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[2] Indeed, Pontius already has been employed by another of Respondent's brokers. For this reason, Respondent's contention that Tully and Pontius, as drivers of the trailer with the obscenities written on its side, are not entitled to reinstatement is without merit. Respondent, by its actions, has announced that their reinstatement would not be inconsistent with a current employer-employee relationship.

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[4] In the event that this Order is enforced by a Judgment of a United States court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board.

Bob's Big Boy Family Restaurants, a Division of Marriott Corporation *and* Local No. 37, Bakery & Confectionery Workers International Union of America, AFL-CIO. Case 31-CA-8128

November 3, 1981

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 28, 1978, the National Labor Relations Board issued its Decision on Review in the underlying representation case in this proceeding[1] in which it found that a contract between Respondent and Bob's Employees' Association (the Association) was not a bar to the petition filed by the Charging Party (the Union) because it contained a "members only" provision, and because the petition was filed in a timely fashion according to the contract's effective date appearing on the cover page of the contract distributed to employees.

On May 9, 1978, the impounded ballots from an election conducted on January 17, 1978, were opened and the tally of ballots revealed that a majority of employees voting in the election had voted for the Union. Accordingly, on May 17, 1978, the Union was certified as the exclusive bargaining representative of the employees in the appropriate unit.

Commencing on or about June 7, 1978, and at all times thereafter, Respondent has refused to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. After this refusal to bargain, on September 29, 1978, the Board, on the basis of an 8(a)(5) complaint and the General Counsel's Motion for Summary Judgment, issued an Order compelling Respondent to recognize and bargain with the Union.[2]

Thereafter, Respondent petitioned the United States Court of Appeals for the Ninth Circuit to set aside the Board's Order. The General Counsel cross-applied for enforcement of the same Order. On July 28, 1980, the court denied enforcement of the bargaining order and remanded the case to the Board for further consideration.[3] The court found that it was unable properly to review the Board's finding that Respondent was "estopped" to deny the election petition was timely filed because the Board had not specifically indicated whether its estoppel rationale was based on the theory of equitable estoppel or instead was "a new exception" to the contract-bar rules "based upon some other principle." The court also concluded that the Board had departed from its own precedent by considering extrinsic evidence in construing the meaning of the alleged "members only" provision of the contract under consideration here. In addition, the court found it difficult to distinguish the instant case from *H. L. Klion, Inc.*, 148 NLRB 656 (1964), where the Board held that an ambiguous wage increase provision was not an unlawful members-only provision when read in the context of the contract's union-security clause. The court also remanded this portion of the case so that the Board could exclude extrinsic evidence, and consider its precedent, e.g., *H. L. Klion*, and explain why that precedent should be disregarded if the Board wished to reach a contrary result on this issue.

Thereafter, the Board accepted the court's remand and notified the parties that they could file statements of position with regard to the issues raised by the remand. The Union filed a statement of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the entire case in light of the court's decision, which we accept as the law of the case, and the statement of position on remand, and we now enter the following findings.

1. In its original Decision the Board found the contract between Respondent and the Association was not a bar to the Union's petition. The contract between Respondent and the Association was apparently effective from December 11, 1974, to December 31, 1977. However, the contract distributed to employees by the Association, with Respondent's knowledge, contained on its cover the dates "January 1, 1975 to December 31, 1977." Thus, the petition filed by the Union on October 13, 1977, was untimely as to the dates in the text of the contract, but timely as to the cover dates. The Board reasoned that these conflicting dates created a situation from which the correct time for filing a petition could not be determined, and stated that Respondent was "estopped" from asserting the contract as a bar to the Union's petition. For the following reasons, we reaffirm that conclusion on remand.

The Board's contract-bar rules are designed to balance the twin goals of employee freedom of choice and industrial stability. For example, contracts may bar a representation petition for up to 3 years.[4] This contract-bar rule provides employee or

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[1] 235 NLRB 1227.

[2] 238 NLRB 700.

[3] 625 F.2d 850.

[4] See *General Cable Corporation*, 139 NLRB 1123 (1962), which enlarged the period of the basic contract-bar rule from 2 to 3 years.

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union petitioners the opportunity to file petitions at reasonable, identifiable times to change or eliminate the employees' bargaining representative if they so desire, and at the same time affords a reasonable period of stability for the contracting parties and employees. The Board has also provided for a "window period" during which petitions may be filed to be timely with respect to an existing contract.[5] And when an employee, or other petitioner, seeks to determine the proper time to file a representation petition, it is axiomatic that one would look first to the existing contract between the employer and the union to determine the appropriate dates for filing such a petition.

Here, Respondent and the Association signed a collective-bargaining agreement, an original of which Respondent locked in its vault. The Association distributed copies of the contract to employees, and Respondent knew of this distribution. However, the cover page of this contract indicated dates which differed from the effective and expiration dates contained in the 29th provision at the end of the contract originally signed.[6] As noted, the Petitioner's representation petition was filed within the appropriate "window period"[7] according to the dates stated on the front of the contract distributed by the Association, but was 2 days late under the same rule according to the effective date on the inside of the contract.

In these circumstances, we believe the contract urged by Respondent as a bar to the petition should not operate to deny its employees the opportunity to vote on union representation. In answer to the court, we note that, in stating in its original Decision that Respondent "should be estopped from asserting contract bar," the Board did not intend to use the formal legal doctrine of "equitable estoppel" in denying Respondent's claim contract bar. Rather, the Board analyzed the factual situation presented by the conflicting dates of the contract which was given to the employees, and concluded that barring the petition in these circumstances would not effectuate the purposes of the Act.

Also in response to the court, we note that the Board in its Decision did not attempt to apply a "new exception" to its contract-bar rules. Rather, it sought to effectuate its rule that, where parties to a contract create a situation in which a petitioner cannot clearly determine the proper time for filing a petition, the ambiguity does not inure to the benefit of the parties but instead means that the petition will not be barred.[8] Thus, as was indicated in *Cabrillo Lanes supra*, where an employer and a union have created a situation which precludes a clear determination by a potential petitioner of the proper time for filing a new petition, such a situation does not stabilize labor relations. This is the situation that obtains here. Based on this finding the Board in the earlier proceeding concluded that the contract should not operate as a bar. We reaffirm that finding and conclusion here.[9]

2. As to the alleged "members only" provision, we accept as the law of the case the court's finding that extrinsic evidence must be excluded from our consideration of this issue. In light of this holding, and the court's opinion that our previous Decision was inconsistent with Board precedent,[10] we must conclude that the collective-bargaining agreement involved here does not contain an illegal members-only provision. However, we still find the contract is not a bar to the petition, for the reasons stated above.

Accordingly, we affirm our earlier Order requiring Respondent to bargain with the Union[11] and restate it herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bob's Big Boy Family Restaurants, a Division of Marriott Corporation, Glendale, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local No. 37,

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[5] See *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962), modifying *Deluxe Metal Furniture Company*, 121 NLRB 995 (1958).

[6] The "original" contract locked in Respondent's vault did not contain the "cover page" of the contract distributed to employees.

[7] See fn. 5, above.

[8] See, e.g., *Delto Company, Ltd. d/b/a Cabrillo Lanes*, 202 NLRB 921 (1973). Compare, e.g., *Thiokol Corporation*, 215 NLRB 908 (1974); see, generally, *Union Fish Company*, 156 NLRB 187 (1965).

[9] Although we do not rely on the doctrine of equitable estoppel in reaching our result here, we note that the four elements necessary for invoking the doctrine—knowledge, intent, mistaken belief, and reliance—are present here. Thus, as more fully stated above, Respondent knew of the Association's circulation of the misleading document, and had a duty, with the Association, not to create an ambiguous situation or at the very least to attempt to clear up the ambiguity. The affected Union could rely only on the facts presented, which it did, believing that the petition was timely filed.

Finally, in addressing the issue raised by the reviewing court "whether it was the attorney who detrimentally relied upon the printed contract's cover dates in determining when to file the election petition and whether that reliance was reasonable," 625 F.2d at 854, we note that there is nothing in the record to indicate that the attorney saw *any* contract prior to his filing the petition, or that the attorney did other than ministerially file the petition on instructions of the Union as appears from the face of the petition. In any event, it is not the Union's right per se to file a petition that is at issue. The paramount concern is with employee rights.

[10] *H. L. Klion, supra*. In that case, the Board found that an ambiguous wage provision of a contract, when read in the context of the union-security provision, was not an unlawful provision.

[11] 238 NLRB at 702–703.

Bakery & Confectionery Workers International Union of America, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent at its facilities located at 830 Sonora Avenue, Glendale, California, and 611 Sonora Avenue, Glendale, California, excluding all other employees, truckdrivers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities at 830 Sonora Avenue, Glendale, California, and 611 Sonora Avenue, Glendale, California, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER JENKINS, dissenting:

I concurred in the Board's original Decision on Review in the representation case in this proceeding solely on the basis that the contract between Respondent and the Association included a members-only provision which invalidated it for contract-bar purposes.[13] Like my colleagues I accept as the law of the case the reviewing court's finding that the health benefits provision at issue here is not on its face an invalid members-only clause. However, as before, I cannot agree with the majority's conclusion that, in any event, the dates on the cover of the contract circulated to employees created such confusion that the contract could not operate as a bar to the Union's petition under our contract-bar rules.

It has long been Board law that, when contracts of more than 3 years' duration are involved, the date to measure the appropriate time for filing a petition is from the third anniversary of the start of the contract.[14] The effective date of the contract here—December 11, 1974—can be readily ascertained from the body of the contract. Thus, in clear language embodied in a substantive provision the agreement sets forth the date on which it was signed and its duration. This provision and the date of signing are not buried away in the middle of the contract; rather they appear at the end of the contract near the signature page. It stretches the imagination to believe that anyone receiving a copy of such a contract could not peruse its contents and quickly locate the operative dates.[15] The contract does not create confusion; it is precise in its terms. Accordingly, I would find it to bar the Union's petition, and would dismiss the complaint.[16]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local No. 37, Bakery & Confectionery

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[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[13] See 235 NLRB at 1228, fn. 11.

[14] *General Cable Corporation*, 139 NLRB 1123 (1962); *Union Carbide Corporation*, 190 NLRB 191 (1971).

[15] I cannot understand how the majority's explanation about the Union's attorney's involvement in this case justifies a different result. If the attorney read the contract, he should have seen the controlling provision. If information were conveyed to him over the phone or by other method, he should have asked what the date of signing was.

[16] *Cabrillo Lanes, supra*, extensively relied on by the majority, is factually dissimilar. In *Cabrillo Lanes*, two contracts, each purportedly agreed to by the employer and the union, were in evidence, but each contained a different termination provision. In such circumstances, the Board properly held that such a difference "created a situation which precludes a clear determination by a potential petitioner of the proper time for filing a new petition." 202 NLRB at 923. Here, we do not have to determine which of two contracts is controlling. Rather, the agreement containing the alleged confusing cover dates contains the *same* contractual provisions as the one signed by Respondent and the Association. A clear determination as to when to file a petition could be made simply by reading the contract.

Workers International Union of America, AFL–CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees employed at our facilities located at 830 Sonora Avenue, Glendale, California, and 611 Sonora Avenue, Glendale, California, excluding all other employees, truckdrivers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

BOB'S BIG BOY FAMILY RESTAURANTS, A DIVISION OF MARRIOTT CORPORATION

Marriott In-Flite Services, a Division of Marriott Corporation *and* International Association of Machinists and Aerospace Workers, AFL-CIO. Case 29-CA-7913

November 3, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge duly filed by International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the IAM, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint and notice of hearing, dated May 16, 1980, against Marriott In-Flite Services, a Division of Marriott Corporation, hereinafter referred to as Respondent. The complaint alleges that Respondent has engaged in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing were duly served on the parties. Respondent filed an answer to the complaint, denying that it committed any unfair labor practices and setting forth certain affirmative defenses.

Thereafter, the parties entered into a stipulation of facts and jointly petitioned the Board to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and an order. The parties stipulated that the charge, the complaint, and the answer, as well as the transcripts and exhibits in *Marriott In-Flite Services, a Division of Marriott Corporation*, 258 NLRB No. 99 (1981),[1] constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties also waived a hearing before, and the making of findings of fact and conclusions of law by, an administrative law judge, and the issuance of an administrative law judge's decision.

On January 27, 1981, the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, counsel for the General Counsel filed a brief in support of his position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, including the exhibits, the brief, and the entire record in this proceeding, and hereby makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent has at all times material herein been a Delaware corporation, with its principal office and place of business in Washington, D.C., and with various other places of business in the States of Maryland, New York, Florida, California, and other States. Respondent is, and has been at all times material herein, engaged in the airline catering, hotel, and restaurant service businesses. During the past year, a representative period, in the course and conduct of its business operations, Respondent purchased and caused to be shipped directly from firms located outside the State of New York to its facilities at John F. Kennedy International Airport and LaGuardia Airport, New York City, New York, food products, supplies, and other goods and products valued in excess of $50,000.

The parties have stipulated, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Association of Machinists and Aerospace Workers, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Air Transport Lodge 1894, herein called Lodge 1894, is, and has been at all times material herein, a chartered local of the International Association of Machinists and Aerospace Workers, AFL-CIO, and is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Facts*

On September 27, 1978, the Board certified Lodge 1894 as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All employees of Respondent, employed at its Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employ-

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[1] In that case the Board found, *inter alia*, that Respondent engaged in bad-faith bargaining, unlawfully implemented certain unilateral changes, and engaged in an unlawful withdrawal of recognition. The Board also found that Respondent did not have a reasonably based good-faith doubt as to Lodge 1894's continued majority status.

> ees, guards and all supervisors as defined in Section 2(11) of the Act.

At all times since September 27, 1978, Lodge 1894 has been, and is presently, the exclusive collective-bargaining representative for the employees in the above-described unit.[2]

On March 29, 1980, Respondent raised by 11 percent the existing wages of, and granted an additional holiday to, all the employees in the above-described unit, without prior notice to the IAM and Lodge 1894, and without having afforded them an opportunity to negotiate and bargain with Respondent concerning such changes.

B. *Contentions of the Parties*

The General Counsel contends that Respondent violated Section 8(a)(5) and (1) by unilaterally granting the wage increase and additional holiday discussed above. Respondent contends that it engaged in the above conduct pursuant to its established practice of improving the wage-benefit package of its nonrepresented employees on a yearly basis at each of its facilities in the United States in order to keep its employment standards on a par with area standards. Respondent further contends that it engaged in the alleged unlawful conduct pursuant to its past practice of effectuating a nationwide policy to increase benefits on a yearly basis. Respondent also contends that on October 12, 1979, it withdrew recognition from Lodge 1894 as the exclusive collective-bargaining representative of the unit employees, based on Respondent's alleged good-faith doubt that Lodge 1894 represented a majority of the unit employees. Respondent further submits that it continued to withhold recognition from Lodge 1894 based on that good-faith doubt. Respondent did not file a brief in support of its contentions, and neither the IAM nor Lodge 1894 filed briefs.

C. *Conclusions*

In accordance with our decision in *Marriott In-Flite Services, a Division of Marriott Corporation, supra*, we find initially that Lodge 1894 has been at all times material herein the exclusive collective-bargaining representative for the employees in the above-described unit. We also find, consistent with that decision, that Respondent did not have a good-faith doubt when it withdrew recognition of Lodge 1894.

Further, we reject Respondent's contention that the wage increase and the additional holiday were granted pursuant to a policy of making annual improvements in wages and benefits in order to keep Respondent's employment standards on a par with area standards. The record discloses no evidence of such a policy.[3] We note further that the alleged policy as set forth in the stipulation applies only to Respondent's "non-represented" employees, and, as we have found, Lodge 1894 has been at all times material herein the collective-bargaining representative of the unit employees.

In view of the foregoing, we find that Respondent violated Section 8(a)(5) and (1) by granting unit employees an 11-percent wage increase and an additional holiday without prior notice to Lodge 1894 and without having afforded Lodge 1894 an opportunity to negotiate and bargain with Respondent concerning such changes.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact, conclusions, and the entire record, we making the following:

CONCLUSIONS OF LAW

1. Marriott In-Flite Services, a Division of Marriott Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, AFL-CIO, and Air Transport Lodge 1894, are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

3. All employees of Respondent employed at its Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for collective bargaining pursuant to Section 9(b) of the Act.

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[2] See *Marriott In-Flite Services, a Division of Marriott Corporation, supra*, where the Board made the same finding.

[3] As noted previously, Respondent did not file a brief in support of its contentions.

4. At all times since September 27, 1978, Air Transport Lodge 1894 has been the exclusive representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By granting unit employees an 11-percent wage increase and an additional holiday without prior notice to Lodge 1894 and without having afforded Lodge 1894 an opportunity to negotiate and bargain concerning such changes, Respondent has violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1), we shall order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. We shall order Respondent to bargain upon request with Lodge 1894 with respect to the unilateral changes concerning the employees' wages and the additional holiday, and embody in a signed agreement any understanding which may be reached.

We shall also order Respondent to cease and desist from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Marriott In-Flite Services, a Division of Marriott Corporation, New York City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Implementing changes with respect to the wages and holidays of employees without notifying Air Transport Lodge 1894 and without affording Air Transport Lodge 1894 an opportunity to bargain over such changes; provided, however, that nothing in this Order shall be construed to require Respondent to withdraw any increased benefits found herein to have been granted unlawfully.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain with Air Transport Lodge 1894 as the exclusive representative of the employees in the above-described unit with respect to changes in wages, rates of pay, hours, and other terms and conditions of employment, and embody in a signed agreement any understanding which may be reached.

(b) Post at its New York City, New York, place of business copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT implement changes with respect to the wages and holidays of employees without notifying Air Transport Lodge 1894 and without affording Air Transport Lodge 1894 an opportunity to bargain over such changes. Air Transport Lodge 1894 is the exclusive bargaining representative of the employees in the following appropriate bargaining unit:

> All of our employees employed at our Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively in good faith with Air Transport Lodge 1894 as the exclusive representative of the employees in the above-described unit with respect to wages, hours, and other terms and conditions of employment and, upon request, embody in a signed agreement any final understanding reached by the parties.

MARRIOTT IN-FLITE SERVICES, A DIVISION OF MARRIOTT CORPORATION

Fibracan Corp. ***and*** **Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Hudson Valley Area Joint Board.** Cases 2-CA-16369 and 2-CA-16381

November 4, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 16, 1980, Administrative Law Judge Howard Edelman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief in opposition to exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

In doing so, we adopt the Administrative Law Judge's finding that employee Van Nostrand was lawfully discharged for her use of profane language on March 16 and 21,[2] and that absent her use of profanity there was no reason for Plant Manager Minton to single her out from the other nine employees who also walked out on March 16 and whose employment Minton continued. As more fully described by the Administrative Law Judge, Van Nostrand directed profanity against the plant manager at the meeting preceding the March 16 walkout and again at the March 21 interview to discuss her continued employment, when after being specifically informed by Minton that he found her earlier use of abusive language objectionable, she replied by repeating the prior profanity.[3] We find this repeated and blatant use of profanity in reply to a supervisor's statement of its objectionability amounted to insubordination. Consequently, the Respondent's response was a lawful exercise of its rights to maintain order and respect. See *N.L.R.B.* v. *Thor Power Tool Company*, 351 F.2d 584 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964). Thus, even taking into full consideration the context in which these remarks were made, we find that this intentional insubordination is sufficiently egregious to remove Van Nostrand's activities from any protection they might have otherwise enjoyed.[4] See *New Process Gear, Division of Chrysler Corporation*, 249 NLRB 1102, 1108-09 (1980); *Calmos Combining Co.*, 184 NLRB 914, 914-915 (1970).[5] Therefore, unlike our dissenting colleague, we agree with the Administrative Law Judge that the Respondent's discharge of Van Nostrand did not violate the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Fibracan Corp., Walden, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

MEMBER JENKINS, concurring in part and dissenting in part:

Contrary to my colleagues, I cannot agree with the Administrative Law Judge's findings and conclusions pertaining to the discharge of Lisa Van Nostrand. In all other respects, I am in agreement with my colleagues.

With regard to Van Nostrand, the evidence indicates that on Friday, March 16, 1979, Van Nostrand, along with nine other employees, engaged in

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[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's findings that the March 16 walkout, in protest of the discharge of Shift Supervisor Johnson, was protected concerted activity and his related findings that the 10 suspensions following that walkout and the subsequent discharge of employee La Bar were unlawful because they were based on the employees' participation in the walkout. We note that the conversation between Plant Manager Minton and employee Day in which Minton compared the Respondent's benefits with the benefits of other employers in the area occurred on the workday following Hulzenga's discharge, apparently April 2, and not March 21, as stated by the Administrative Law Judge.

[2] No evidence was presented that profanity is commonly directed at supervisors at Respondent's plant, although the record shows its use is not rare among the employees.

[3] According to Minton's testimony, which the Administrative Law Judge credited, Minton started this interview with Van Nostrand by stating:

> Lisa, we have only two things to discuss. One, if you want your job back, and number two, whether I want to take you back because you embarrassed me in front of the other employees when you used the abusive language that you did.

Van Nostrand, at this point replied, "I still think that you're a rotten son of a bitch." (At the March 16 meeting, she had called Minton an s.o.b. m—f—.)

[4] The cases cited by our colleague are distinguishable in that in none of those cases did the Board find, as we do here, the misconduct sufficiently egregious to deny an employee the protection of the Act.

[5] See, generally, *Atlantic Steel Company*, 245 NLRB 814, 816 (1979).

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protected concerted activities by walking off their jobs to protest the discharge of a supervisor. Thereafter, on Monday, March 19, Plant Manager Minton sent the following mailgram to all employees who walked off the job, including Van Nostrand:

> Due to your refusal to work Friday, March 16, you are hereby suspended for 2 days. If you desire to continue your employment, come in to see me Wednesday [March 21] between 8:00 a.m. and 4:00 p.m. to discuss your employment . . . . If you do not contact me by Wednesday, I will consider you terminated.

It is undisputed that the 2-day suspension of these employees, including Van Nostrand, was attributable solely to their protected walkout and that the Employer's imposition of discipline based on such conduct violated the Act. The evidence further reveals that on March 21, in response to Minton's mailgram, the aforementioned employees assembled at the Employer's premises and were interviewed separately by Minton in his office. Minton commenced his interview with Van Nostrand by stating to her that there were only two things to discuss: one, whether she wanted her job back, and two, whether he wanted to take her back. Minton then told Van Nostrand that he had been embarrassed by her profanity directed toward him at a meeting which Minton had attended with Van Nostrand and other employees on March 16, immediately preceding the walkout. At this point in the interview, Van Nostrand replied, "I still think you're a rotten son of a bitch." Minton then asked Van Nostrand to wait in the breakroom and following his interviews with the remaining employees, who were reinstated, Minton called Van Nostrand back into his office and informed her that he had decided to terminate her because of her use of abusive language.

Based on the foregoing, my colleagues conclude that the Employer's discharge of Van Nostrand was lawful because it was attributable solely to Van Nostrand's use of profanity, including her comments to Minton at the March 21 interview. However, such a finding entirely overlooks the fact that the basis for Van Nostrand's discharge stems from a situation which the Employer itself created by virtue of its commission of unfair labor practices. Thus, the evidence clearly establishes that Van Nostrand was unlawfully suspended for 2 days because of her participation in a protected walkout. Contemporaneous with the implementation of the unlawful suspension, the Employer's March 16 mailgram, again unlawfully, placed Van Nostrand's employment tenure in serious jeopardy and required Van Nostrand affirmatively to contact the Employer in order to avoid being discharged for her protected activity. Thereafter, Van Nostrand appeared at the interview with Minton and was immediately told a relevant matter to be discussed was whether the Employer wanted to take her back. Minton then made reference to Van Nostrand's use of profanity at the March 16 meeting, which immediately preceded the protected walkout, thereby evoking at the interview a profane comment from Van Nostrand.

In these circumstances, in agreement with the General Counsel's exceptions, I find that Minton's March 21 interview with Van Nostrand was integrally related both to Van Nostrand's protected activities pertaining to the walkout and to the Employer's commission of unfair labor practices in connection therewith, and that her use of profanity on March 21 must be viewed in this context and not in isolation. Further, I note particularly that the Employer not only implemented the unlawful 2-day suspension because of Van Nostrand's protected activities, but also, both before and at the outset of the March 21 interview, virtually placed the burden on Van Nostrand to convince the Employer not to discharge her because of those activities. In view of the Employer's repeated violations of Van Nostrand's statutory rights, I find that the Employer is not privileged to base its discharge on Van Nostrand's March 21 outburst. *Louisiana Council No. 17, AFSCME, AFL-CIO*, 250 NLRB 880, 889 (1980); *Max Factor & Co.*, 239 NLRB 804, 818-819 (1978). Rather, in my view, such a basis for discharge is causally related to Van Nostrand's protected activities in walking off the job, and to the unlawful conduct of Minton, both at the time of Van Nostrand's suspension and at the later interview. Accordingly, I would find that the Employer's discharge of Van Nostrand was attributable to her exercise of protected concerted activities, and would further find that, inasmuch as Van Nostrand's March 21 outburst occurred in the context of the Employer's own unfair labor practices, her comments to Minton, while not to be condoned, are not so serious as to remove her activities from the protection of the Act. *United States Postal Service*, 250 NLRB 4 (1980). Therefore, I would find that Van Nostrand's discharge violated Section 8(a)(1) of the Act. *J. P. Hamer Lumber Company*, 241 NLRB 613 (1979).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT suspend or terminate employees or in any other manner discriminate against them with regard to their hire or tenure of employment or any term or condition of employment because they engage in activities protected under Section 7 of the Act.

WE WILL NOT create the impression of surveillance of the union activities of our employees.

WE WILL NOT threaten our employees with discharge if they join Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC, Hudson Valley Area Joint Board, herein called the Union, or any other labor organization or if they engage in other union activities.

WE WILL NOT interrogate our employees concerning their activities on behalf of the Union, or any other labor organization.

WE WILL NOT threaten our employees to reduce employee benefits and withhold wage increases because of their membership in or activities on behalf of the Union or any other labor organization.

WE WILL NOT threaten our employees to close our plant if they select the Union or any other labor organization to represent them.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL make whole Lisa Van Nostrand, Alice Hulzenga, Carol Thompson, Marie La Bar, Alice Lubitz, Lori Day, Roberta Lubitz, Cynthia Ciatto, Patty Williams, and Ann Hornbeck for their lost earnings, plus interest.

WE WILL offer Marie La Bar immediate and full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole for her lost earnings, plus interest.

FIBRACAN CORP.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge: This case was heard before me on December 10 through 13, 20, and 21, 1979, and on January 9 through 11, and 22, 1980, in Newburgh, New York. The consolidated complaint in the above-captioned cases issued on May 25, 1979, on charges filed on April 9 and 13, 1979, by Amalgamated Clothing and Textile Workers Union, AFL–CIO, Hudson Valley Area Joint Board, herein called the Union.

The complaint alleges, *inter alia*, that Fibracan Corporation, herein called Respondent or the Company, violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act, by suspending and discharging employees for engaging in protected concerted activities, and interrogating and threatening employees, in violation of Section 8(a)(1) of the Act, and discharging employees because of their membership in or activities on behalf of the Union in violation of Section 8(a)(3) of the Act.

Briefs were filed by counsel for the General Counsel and counsel for Respondent. Upon consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New York corporation with its principal office and place of business located in Walden, New York, where it is engaged in the manufacture, sale, and distribution of paper cups and related products. During the past year, Respondent sold and shipped from its Walden, New York, facility products valued in excess of $50,000 directly to points located outside the State of New York.

The complaint alleges, Respondent's answer admits, and I find that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent's answer admits, and I find that Amalgamated Clothing and Textile Workers Union, AFL–CIO, Hudson Valley Area Joint Board is a labor organization within the meaning of Section 2(5) of the Act.[1]

III. CONCLUDING FINDINGS

Background

Respondent employs approximately 50 employees at its Walden, New York, location of which approximately 40 employees are classified as production employees. None of the employees employed by Respondent are represented by the Union or any other labor organization.

Respondent operates three production shifts from Monday through Friday. The shift hours are 8 a.m. to 4 p.m., 4 p.m. to 12 midnight, and 12 midnight to 8 a.m. Each shift is supervised by a shift supervisor, who is admittedly a supervisor within the meaning of the Act. The shifts, with the supervisors, are rotated every 2 weeks. The shift supervisors report directly to the plant manager who is in overall charge of the plant. The plant manager reports directly to Edgar DeLusa, president at Respondent's Canadian facility (the parent company).

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[1] Respondent amended its answer at the hearing to admit the complaint allegation concerning the status of the Union.

The production employees are generally classified as packers and machine operators.

Respondent commenced operation sometime during the summer of 1978. Lawrence Minton, Respondent's plant manager since March 5, 1979, concedes that upon his assumption of the position of plant manager he observed a number of safety problems that existed and required correction. Among the problems he observed were the stacking of large rolls of bottom stock on end which tended to increase the risk of falling and causing injury, smoking was permitted in production areas, there was an inadequate number of fire extinguishers in the plant, there were no protective guards on the head rimming area of the cup machines, there were no see through plexiglass shields over the metering gears of the cup machines, the waxers were operating at an unnecessarily high temperature which resulted in waxfires, the 6-foot stiller machine was not provided with a protective guard, there was no spring loaded shield to enclose the cup oven opening of the patio waxer, there was no light signals to indicate whether the machines were running, there was a shortage of first aid kits, there was oil and excessive wax buildup on the production floor, and many other safety problems. As a result of these safety problems, a number of employees suffered a variety of injuries, some of them serious.

Minton, as set forth above, became plant manager on March 5, 1979, succeeding Sam Faulls who stayed on in a transitionary consulting capacity. At the time Minton became the plant manager, the shift supervisors were Michael Johnson, Gerald Shafer, and James Bruyn.

Michael Johnson was extremely popular with the employees on his shift. He was an excellent mechanic who had been employed by Paper Machine Company (PMC), the company who had manufactured Respondent's cup machines, immediately prior to his employment with Respondent. He would maintain and repair the machinery for his shift. He would move heavy paper rolls for the employees and take them to the employees' machines.[2] Johnson would train new employees, instruct the employees as to first aid, and run and clean the machines when the shift was short handed. In addition, his shift consistently maintained the highest production. However, he was rather loose in his supervision of employees and permitted them to smoke and take snacks on the production floor by their machines, a questionable safety practice. On March 9, 1979, Johnson wrote a letter to Minton that he showed to the employees on his shift wherein he expressed concern for the safety conditions that existed in the plant and implored Minton to correct these unsafe conditions. As a result of Johnson's ability to repair and maintain the plant machines, his high production records, his loose supervision, and his apparent concern for the employees' safety, the employees under his supervision were devoted to him.

Minton testified that when he replaced Faulls as plant manager, on March 5, 1979, he felt resistance to his supervision from Faulls and Johnson. For example, both Johnson and Faulls opposed different operating techniques established by Minton concerning waxing cups, conveying cups, and removing the cups from the chutes. In addition, Johnson stressed production. Minton felt Johnson sacrificed quality in order to achieve production. Minton wanted to clean up and reorganize the plant which would require Saturday work. Johnson refused to work on Saturdays. According to Minton when he assumed the job of plant manager, he ordered an end to smoking and taking snacks by the machines. He marked off an area on the production floor to be used as the smoking area. Yet, according to Minton, despite his rule concerning smoking, Johnson continued to permit employees under his supervision to smoke by their machines. On March 15, Minton observed Johnson smoking a cigarette while lying under a machine. He called him into his office and spoke to him about it. Johnson said it was his business what he did on his shift. On March 16 Minton decided to discharge Johnson and Faulls because of his feelings that both individuals were resistant to his ideas and because of the problems he was having with Johnson set forth above. Minton notified Faulls and Johnson of his decision on March 16 around 8 a.m.

The March 16 Walkout

When Johnson left Minton's office following notification of his discharge, he met with Lisa Van Nostrand, an employee on his shift. He told Van Nostrand of his discharge. Van Nostrand then called a number of employees on Johnson's shift to tell them that Johnson was discharged. Among the employees called by Van Nostrand was Alice Hulzenga, who also proceeded to call a number of employees on Johnson's shift and inform them of his discharge. During these phone calls, the employees decided they would meet with Minton prior to the start of their shift at midnight to protest Johnson's discharge. There is some question as to whether they intended to walk out in protest of Johnson's discharge, whatever the result of their proposed meeting with Minton, or whether they would meet with Minton, listen to what he had to say, and then decide what if any action to take. In either event, I do not find it material to the decision of this case.

At 11:45 p.m., all the employees on the Johnson shift, except for Clara Miller and Brenda McGinnes met in the break room. Also present from another shift were Linda Sanservire, Alice Hulzenga's sister, Debbie Wieczurak, and Eileen Loertsher, an employee on Johnson's shift who was out on disability at the time. The employees on the Johnson shift punched their timecards in at 11:45 p.m. but met in the break room rather than proceeding to work.

Minton testified that around 11:30–11:45 he arrived at the break room with Greg Jenks, Johnson's replacement. As he and Jenks entered the room, Van Nostrand screamed at him, "Why did you fire Mike you son of a bitch mother fucker?" According to Minton, Van Nostrand was very upset throughout the meeting. It was obvious to him she had been crying. She kept repeating over and over, "What am I going to do, I can't find Mike [Johnson]."[3] Minton informed the employees that he had discharged Johnson and Faulls and that Greg Jenks would be their new supervisor. Hulzenga then protested that Jenks was not qualified. Minton disputed this and proceeded to set forth Jenks' experience.

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[2] Most of the production employees were female employees. Johnson's shift was an all female shift.

The General Counsel's witnesses, Van Nostrand, Hulzenga, Sanservire, and La Bar, testified in substance that the employees, particularly Van Nostrand and Hulzenga, pointed out to Minton that, with Johnson gone, their working conditions would be less safe since Johnson was an excellent mechanic who was able to maintain the machinery in a safe condition and was additionally sincerely concerned with safety conditions in the plant. The employees also pointed out that Johnson's shift had the top shift production in the plant and implied that production would drop as a result of Johnson's termination. Minton's testimony essentially corroborates that of the General Counsel's witnesses. In this connection, Minton testified that a number of employees asked him, "How are we going to work safely with Greg [Jenks]," and "we had top production; what are we going to do without Mike?" Other employees pointed out that Johnson was an excellent mechanic and, without him to maintain the machines, their productivity would go down. In this connection Minton testified as follows:

> JUDGE EDELMAN: Was the subject of safety conditions discussed at all during this meeting?
>
> MINTON: Safety conditions were only discussed in respect that its going to be less safe with Mike (Johnson) not out there.
>
> JUDGE EDELMAN: Who said that?
>
> MINTON: Generally all of them . . . .

In view of the testimony of the General Counsel's witnesses and the candid admissions of Minton, I find that the purpose and thrust of this meeting was to protest the discharge of Johnson because the employees believed his discharge would have an adverse affect on their safety conditions and on their production.

The meeting was by all accounts a volatile meeting; tensions were high and voices raised. The meeting lasted about a half hour. It ended when the employees walked out. According to Minton, the employees stated they were leaving because Johnson was fired. All shift employees scheduled to work that night except for Anna Munderville refused to report to work and left the plant.[4]

The only significant issue in dispute in connection with what took place during this meeting is the abusive and profane language attributed to Van Nostrand by Minton set forth and described above.

Supervisor Greg Jenks, Respondent's witness, generally corroborated Minton's testimony concerning Van Nostrand's profane statements directed to Minton. Van Nostrand denied using such language and asserted that at all times during this meeting she treated Minton "with respect."

For reasons set forth below in the section of this Decision relating to the discharge of Van Nostrand, I credit Minton and Jenks and find that Van Nostrand directed to Minton the obscene and profane language attributed to her by Minton and Jenks.

March 16 was a Friday. On Monday, March 19, Minton sent the following mailgram to all those employees, including Van Nostrand, who had walked out on March 16:

> Due to your refusal to work Friday, March 16, you are hereby suspended for 2 days. If you desire to continue your employment, come in to see me Wednesday [March 21], between 8:00 a.m. and 4:00 p.m. to discuss your employment. Requirements, Greg Jenks will be the new supervisor. If you do not contact me by Wednesday, I will consider you terminated.

The mailgram was signed by Minton.

The evidence, including the admissions of Minton, establishes the employees met with Minton on March 16 for the purpose of protesting the discharge of Supervisor Johnson, because they believed that his discharge would adversely affect their safety conditions and their productivity, which was a factor in their job evaluation. When such meeting failed to achieve Johnson's reinstatement, the employees walked out to further protest his discharge.

The Board has held that a walkout by employees to protest the discharge of a supervisor who they believe has a direct impact on their job interests and on their job performance is protected under Section 7 and that if an employer discharges or suspends these employees for engaging in such walkout he violates Section 8(a)(1) of the Act. *Puerto Rico Food Products Corp., Trade Winds Foods Inc. and Island Can Corp.*, 242 NLRB 899 (1979); *Holiday Inn of Henryetta*, 198 NLRB 410 (1972); *Howard Manufacturing Company, Inc.*, 227 NLRB 1858 (1977); *F. C. F. Papers Inc., a Division of the Mead Corporation*, 211 NLRB 657 (1974); *Dobbs House, Inc.*, 135 NLRB 888 (1962).

Clearly safety conditions in the plant and quantity of production, where employee job evaluation is in part based on such production, are factors which have direct impact on employees' job interests and job performance. *Sargent Electric Company*, 237 NLRB 1545 (1978); *Lloyd A. Fry Roofing Company, Incorporation, of Delaware*, 237 NLRB 1005 (1978); *Modern Carpet Industries Inc.*, 236 NLRB 1014 (1978); *Union Boiler Company*, 213 NLRB 818 (1974).

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[3] Throughout the hearing there was considerable testimony that Van Nostrand was pregnant by Johnson and that they were to be married. Van Nostrand denied she was pregnant by Johnson. On the basis of overwhelming testimony by numerous of the General Counsel's and Respondent's witnesses, I conclude that Johnson and Van Nostrand had a close personal relationship. I find it unnecessary to determine whether Van Nostrand was pregnant by Johnson or whether they were to be married.

[4] The following employees scheduled to report to work on the March 16 shift participated in the walkout: Lisa Van Nostrand, Alice Hulzenga, Carol Thompson, Marie La Bar, Alice Lubitz, Lori Day, Roberta Lubitz, Cynthia Ciatto, Patty Williams, and Ann Hornbeck.

Moreover, the evidence set forth above clearly establishes that the employees had reason to believe that Johnson's continued employment would have advanced and improved safety conditions and continued top production. That Respondent had good and sufficient reason to discharge Johnson is immaterial as to whether the employees' walkout to protest his discharge is protected. *Puerto Rico Food Products Corp., supra.*

There is no question that the employees were suspended because of their walkout. The mailgrams notifying the employees of their suspension for the March 16 walkout conclusively establish the reason for the suspension.

Accordingly, I find that the employees walked out on March 16 to protest the discharge of Supervisor Johnson who they believed improved their safety conditions on the job and achieved top quantity shift production, and that their suspension by Respondent because of such walkout violated Section 8(a)(1) of the Act.

The Discharge of Lisa Van Nostrand

On March 21, around 10 a.m., the employees who had received the mailgrams described above, assembled in the break room. Minton interviewed each employee separately in his office. Van Nostrand was the first employee to be interviewed.

Minton testified he began his interview with Van Nostrand by stating to her that there were only two things to discuss. One, whether she wanted her job back and, two, whether he wanted to take her back. Minton then pointed out that he had been embarrassed by her profanity directed toward him during the March 16 meeting. According to Minton, Van Nostrand replied, "I still think you're a rotten son of a bitch." At this point, Minton told Van Nostrand to wait in the break room because he was going to have to decide whether he wanted to take her back. Van Nostrand then left and waited in the break room with the other employees.

Van Nostrand testified that Minton stated he had two things to discuss with her: whether he wanted her back and whether she wanted to come back. Van Nostrand replied she needed her job and was here for her job. Minton then asked her if she were still seeing Johnson, and she replied she was here about her job and not about Johnson. Minton then told her that he did not feel Respondent could use her any longer. Van Nostrand asked whether she was fired and Minton replied, "No, you're quitting, you quit when you walked out." Van Nostrand then left and returned to the break room. Van Nostrand denies the use of profane language attributed to her by Minton during the March 21 interview. For reasons set forth below, I credit Minton's version of this interview and find that Van Nostrand used the profanity during the March 21 interview attributed to her by Minton.

Minton then interviewed all other employees who had received similar mailgrams. All of these employees with the exception of Van Nostrand were informed by Minton that they could return to work that night.[5]

Following Minton's initial interview with Van Nostrand, he next interviewed Hulzenga. Hulzenga testified that Minton asked her if she wanted her job back and she said she did. Minton then asked her what her problems were and Hulzenga mentioned various problems she believed related to the safety of the plant operation. Minton agreed that there were indeed numerous safety problems in existence but that they would be corrected. He informed Hulzenga that from now on the female employees would no longer be required to lift heavy paper rolls. La Bar testified to a similar conversation about safety problems in the plant with Minton during her interview.

Van Nostrand testified that following her initial interview with Minton, she remained in the break room although not specifically instructed to do so by Minton. According to Van Nostrand, following Hulzenga's interview, Hulzenga told her that Minton wanted to speak to her following his interviews with the other employees.

Sandra Simzak, an employee, called by Respondent, testified that she happened to be present in the break room after Van Nostrand completed her initial interview with Minton and that, during a brief conversation with her, Van Nostrand told her that she had called Minton a "stupid fuck."[6]

Minton testified that following his interviews with the remaining employees he called Van Nostrand into his office. At this time, he told her he had decided to terminate her because of her abusive language. Minton testified in this connection as follows:

> Judge Edelman: Do you recall whether you made up your mind that you were going to discharge her at the time she reported to your office on the 21st?
>
> Minton: No, I hadn't.
>
> Judge Edelman: Could you pinpoint what she said during the interview which became the deciding factor in your decision to fire her?
>
> Minton: It was when she called me a rotten son of a bitch (On March 21).

Van Nostrand testified that after Minton had interviewed the remaining employees, Minton summoned her to his office and informed her that he had considered the matter and he did not wish to continue her employ. Van Nostrand asked if she were fired and Minton replied that she had quit.

The discharge of Van Nostrand presents a clear credibility issue. Minton asserts that he was both angered and embarrassed by the profanity directed to him by Van Nostrand during the March 16 meeting. He further asserts that her discharge was triggered by her utterance of similar profanity directed to him during the March 21 interview.

Van Nostrand, on the other hand, denies the profanity attributed to her by Minton and asserts that, at all times during the March 16 meeting and March 21 interview, she treated Minton "with respect." As set forth above, I credit Minton.

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[5] The employees who were reinstated on March 21 with the exception of Van Nostrand are set forth above in fn. 4.

[6] Van Nostrand was not called to rebut this testimony.

Minton's testimony in connection with Van Nostrand's use of profanity directed toward him during the March 16 meeting is essentially corroborated by Jenks.

I was very impressed with the demeanor of both Minton and Jenks. Both individuals were consistently responsive to questions put to them on both direct and cross-examination. Minton was particularly candid in his response to questions put to him on cross-examination and frequently made admissions against Respondent's interest. In contrast, I was not impressed with Van Nostrand's demeanor, particularly during cross-examination during which she was extremely hostile and at times argumentative. Additionally, she was often vague and unresponsive.

Further, the testimony of employees called as witnesses by both the General Counsel and Respondent tends to establish that Van Nostrand did utter the profanity attributed to her by Minton and Jenks at the March 16 meeting and by MInton at the March 21 interview. In this regard, the General Counsel's witness, Anne Hornbeck, testified that during the March 16 meeting, Van Nostrand repeatedly used the words "fuck," "shit," and "cocksucker," although Hornbeck was unable to testify whether such profanity was directed at Minton.

Even Hulzenga, the General Counsel's witness and close friend of Van Nostrand, was rather equivocal on this issue. When asked whether Van Nostrand called Minton "a son of a bitch," she testified, "The word was used many times." However, I do not recall whether it came from "Lisa's (Van Nostrand's) mouth."[7]

Respondent's witness, Sandra Simzak, testified that, following Van Nostrand's initial interview with Minton on March 21, she admitted calling Minton a "stupid fuck." This testimony was not rebutted by Van Nostrand.

Additionally, there is evidence that Van Nostrand had directed similar profanity to Sam Faulls, the plant manager prior to Minton. In this regard, Supervisor Jim Bruyn testified that sometime in December 1978, when Van Nostrand was demoted from lead operator to operator by Sam Faulls, the plant manager at the time, he heard Van Nostrand call Faulls a "no good bastard," a "miserable fuck," and a string of similar obscenities. This testimony also was not rebutted by Van Nostrand.

Accordingly, based on the above considerations, I find that Van Nostrand directed the profane language to Minton during the March 16 meeting and during the March 21 interview attributed to her by Minton.

The evidence established that, with the exception of Van Nostrand, Minton reinstated every emoloyee who participated in the walkout on March 16. Minton denies he discharged Van Nostrand because she took part in the walkout on March 16. He contends that he refused to reinstate Van Nostrand on March 21 solely because of the profanity she directed to him during the March 16 meeting and during the March 21 interview.

The evidence establishes that the most outspoken employee during the March 16 meeting that preceded the walkout was Hulzenga. Other outspoken employees included La Bar. Van Nostrand, who was emotionally upset concerning the whereabouts of Johnson with whom she had a strong personal relationship, contributed very little to the discussion centering on the reasons for Johnson's discharge and its affect on the employees, except for vile and profane language she directed to Minton in the presence of other employees. Therefore, absent her use of such profanity, there would be no reason for Minton to single her out and refuse to reinstate her while at the same time reinstating every other employee who took part in the walkout.

Further, Minton's mailgram to all employees, including Van Nostrand, participating in the walkout would appear to have contemplated reinstatement. Had he wished to discharge her for her role in the March 16 walkout he could have sent her an appropriate mailgram or none at all. That Van Nostrand was the only employee not reinstated following the interviews on March 21 suggests that it was something that took place during her interview on March 21, which resulted in her termination rather than her participation in the walkout. In this connection during Hulzenga's and La Bar's interviews, the most outspoken employees during the March 16 meeting, Minton engaged in sincere discussion with them concerning the reasons for the walkout and during these interviews conceded there were safety problems and assured the employees that they would be corrected. These discussions, with the most active participants of the March 16 meeting which led to the walkout coupled with the reinstatement of all employees who participated in the walkout, except for Van Nostrand, lead me to believe that Minton recognized the problems precipitating the walkout and was willing to let bygones be bygones. Accordingly, I do not believe Minton refused to reinstate Van Nostrand because she participated in the walkout. Rather, I conclude that Van Nostrand was discharged solely because of the vile and profane language she directed to Minton on March 16 coupled with similar profanity directed to Minton on March 21. Accordingly, I conclude that Respondent did not violate the Act as alleged by his discharge of Van Nostrand.

Union Organization and Company Knowledge

On March 22, following her discharge, Van Nostrand spoke with her mother and informed her of the events surrounding her discharge. Van Nostrand's mother contacted a friend who in turn contacted the Union. Pursuant to this contact with the Union, Union Manager Robert Redlo telephoned Van Nostrand. Van Nostrand described the March 16 walkout and the unsafe conditions that existed throughout the plant. Redlo explained to Van Nostrand the advantages of union representation and how the Union might be able to help the employees concerning working conditions. Van Nostrand agreed to contact those employees who might be interested in the Union.

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[7] On direct examination Hulzenga denied that Van Nostrand directed any profanity to Minton. The General Counsel's witnesses, La Bar, Day, and Sanservire, also generally denied that Van Nostrand directed any profanity to Minton. However, Sanservire testified that obscenities were freely used through the course of the meeting. Day testified that she was in the back of the room while Minton and Van Nostrand were in front and it was hard to hear what was going on because everyone was talking at once. Neither Hulzenga nor La Bar impressed me as a credible witness. Their credibility is discussed below in connection with Hulzenga's discharge.

On March 23, Van Nostrand contacted Hulzenga at home and asked her if she would be interested in trying to organize the employees.

In order to advertise a planned union meeting scheduled for April 1, Van Nostrand prepared a written notice entitled the "Pajama Game." The notice set forth that a union meeting would be held on April 1 at the nearby Unitarian Meeting House.

On March 26, Van Nostrand gave Hulzenga a packet of pajama game leaflets and asked her to distribute them among the employees.

On or about March 27, Hulzenga gave a number of pajama game leaflets to an employee on one of the other shifts and asked her to pass them out. Hulzenga also gave La Bar some of the leaflets to distribute. Hulzenga then distributed leaflets to employees in the break room prior to the start of their shift. La Bar additionally distributed some leaflets during her shift hours. There is no evidence that Minton or any supervisory employees observed Hulzenga or La Bar distributing these leaflets. Neither Minton nor any supervisor spoke to La Bar or Hulzenga about the Union.

On March 28, Neil Bolsten, an employee, asked his shift supervisor, Jim Bruyn, if he were going to Lisa's (Van Nostrand's) pajama party. Bruyn asked him what he meant and Bolsten handed him a copy of the pajama game leaflet. Bruyn told Bolsten if he wanted to go to the meeting he should go.

Later on the same shift, Sandra Simzak, another employee, came over to Bruyn, her supervisor, with a packet of leaflets and told him that Linda Sanservire had given them to her to give out. Bruyn told her not to give them out. Simzak gave them instead to Bruyn.

On March 29, Bruyn gave Minton a copy of the pajama game leaflet. This would appear to be Minton's first knowledge of union organization.

On March 29, Anne Hornbeck was present in Minton's office. Minton and Hornbeck were discussing local schools. Minton, who was new to the area, was trying to find a suitable school in which to enroll his children. During this discussion, Minton mentioned that he was aware that the Union was trying to organize the employees and had scheduled a union meeting for April 1. He then told Hornbeck that he could not stop the Union from trying to get in.

On March 21, Lori Day, an employee, was present in Minton's office. Jenks was also present. Minton had written the words Blue Cross-Blue Shield on a blackboard. Minton told Day that the Company had the best benefits in the area but that if a union wanted to come in she should listen to what they had to say and then make them put it in writing and, if they were willing to put it in writing, he would listen to them.

On April 1, the union meeting was held at the Unitarian Meeting House as scheduled. About 20 employees were present. Union Manager Robert Redlo was present for the Union. Redlo explained the benefits of Union representation and informed the employees present that if they wanted to join the Union they would have to sign union authorization cards. All employees present signed cards at this meeting and returned the signed cards to Redlo. Among the employees who were present and signed cards were Hulzenga, La Bar, and Day. La Bar and Day were given extra cards to distribute to other employees.

On April 4, at 10 a.m., Hulzenga, La Bar, and Van Nostrand met with Redlo outside the plant.

Redlo, accompanied by the three women, then went inside. Redlo asked the receptionist to see Minton. The four individuals waited for Minton to appear. In about 15 minutes Minton appeared with two policemen. Redlo introduced himself to Minton and told Minton his Union represented a majority of employees and requested recognition. Minton asked them to leave and they left. Minton states he summoned the police because of a rumor he had heard about possible union violence.

Interrogation and Threats

Linda Sanservire testified that, on March 29, Supervisor Gerald Shafer asked her to come to his office. When Shafer and Sanservire were alone in Shafer's office, Shafer told her he knew about the scheduled union meeting and that the Company knew who the representatives of the Union were, and that he had a list of those employees planning to attend. Shafer stated he knew Hulzenga and Lisa were behind it. Shafer then stated that any employee involved with the Union would be let go. He asked Sanservire whether she was going to the union meeting because of her sister (Hulzenga). Sanservire said she was going for herself and Shafer asked her not to go. Shafer told Sanservire he had lost a job once because of a union; that unions were no good; that if a union came in the employees could lose a few holidays and raises would not be forthcoming; and that, if necessary, the Company would close the doors.[8]

During his direct examination, Minton denied he authorized or was aware of Shafer's statements to Sanservire.

La Bar testified that, on March 28, she and Supervisor Jenks were discussing the plant generally. It was brought up by one of them that the Company's Canadian plant was unionized. La Bar asked Jenks why the employees could not have a union at this plant; Jenks replied that before a union came in to this plant Respondent would rather close the plant down.[9] Jenks did not deny this statement.

I find the following undenied statements by Supervisors Shafer and Jenks to be attributable to Respondent and violative of Section 8(a)(1) of the Act.

I find Shafer's statement to Sanservire that he knew about the scheduled union meeting, that he had a list of those employees planning to attend, and that he knew Hulzenga and Lisa (Van Nostrand) were behind it constitutes creating the impression of surveillance. *Jarva Incorporated*, 235 NLRB 1047 (1978).

I find Shafer's statement to Sanservire that any employees involved with the Union would be let go constitutes an unlawful threat of discharge. *Didde-Glaser, Inc.*, 233 NLRB 765 (1977).

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[8] Shafer was not called as a witness by Respondent. He left Respondent's employ in April 1979.

[9] The complaint was amended at the hearing to allege that the statement by Jenks concerning plant closure was a violation of Sec. 8(a)(1).

I find Shafer's questioning of Sanservire as to whether she was going to attend the union meeting constitutes unlawful interrogation. *La-Z-Boy Tennessee*, 233 NLRB 1255 (1977).

I find Shafer's statement to Sanservire that if the Union came in the employees could lose a few holidays and raises would not be forthcoming constitutes a threat to reduce benefits and withhold raises. *Petco Inc., Interstate*, 238 NLRB 1297 (1978); *Jamaica Towing, Inc.*, 236 NLRB 1700 (1978).

I find Shafer's statement to Sanservire that if necessary (to keep the Union out) the Company would close its doors and Jenks' statement to La Bar that before a union came in Respondent would rather close the plant down constitutes an unlawful threat to close the plant. *Bruce Duncan Co., Inc.*, 233 NLRB 1243 (1977).

Discharge of Alice Hulzenga

Alice Hulzenga was employed by the Company at the time of her discharge on March 30 as a lead operator. She held this position since December 1978.

On March 29, a broken seam clamp was discovered on the machine that Hulzenga was operating. Minton and Supervisor Jenks were examining the broken seam clamp which appeared to have resulted from a stress fracture. While they were examining the seam clamp Hulzenga stated, "I think someone's trying to sabotage us." Neither Jenks nor Minton suspected sabotage at the time.

On March 30, at 6:30 a.m., Supervisor Jerry Shafer told Minton that Linda Sanservire, Hulzenga's sister, told him (Shafer) the night before that Hulzenga had done something in the plant that would be found out and for which she might go to jail. Shafer told Minton that Sanservire would not divulge what it was Hulzenga had done. Minton told Shafer to submit to him a written memo concerning this conversation. Shafer did so. The memo is dated March 30.[10]

During this same conversation with Minton, Shafer told him that he had found alcohol in the glue barrel, which reduces the efficiency of the glue and Speedy Dry, a substance normally sprinkled on the floor to absorb oil, in the filter of the 16-ounce cup machine. This would cause the machine to stop running. In addition, he told Minton that someone had turned the heat dials on the 12-ounce machine up to maximum levels. This could cause the machine to malfunction. Minton took no action at this point.

On March 30 when Hulzenga reported to work at 8 a.m. she was assigned by Jenks to work the 7- and 9-ounce cup machine. In addition, she was assigned to train a new employee by having him observe her operate these machines.[11]

Sometime during the morning on March 30, the lower ink pan of the 7-ounce machine operated by Hulzenga overflowed. The cup machines have two ink pans, an upper and lower pan. Each pan contains a different color ink. A printer contacts each pan and prints a particular legend on the cup. Jenks corrected the overflow by unkinking the plastic hose connected to the bottom of the ink pan.

Around 1:30 p.m., the top ink pan on the 9-ounce machine being operated by Hulzenga overflowed. This is a more serious overflow than an overflow of the lower ink pan because the ink overflow mixes with the ink of a different color in the bottom pan. As a result the cause of the upper pan overflow has to be corrected and the ink in the lower pan, which is being recycled, has to be changed. In addition, the printing plate and hose attached to the lower ink pan must be cleaned, resulting in considerable downtime for the machine.

When Jenks observed this overflow he at first attempted to clear it by sticking a screwdriver into the hose at the bottom of the pan, thus removing the obstruction. However, this effort was unsuccessful. This hose leads to a container which recycles the ink back to the top of the pan.

At this point, Minton arrived, removed the hose, a 3- to 4-foot section, and took it to a nearby sink where he ran water through it. He discovered the cause of the obstruction to be a small wad of steel wool which he removed. There was no evidence elicited which would dispute Minton's claim that the steel wool in the recycle hose was the cause of the overflow.

According to the testimony of Minton, Jenks, and Supervisor Bruyn, the only possible way a wad of steel wool, sufficient in size to plug the recycle hose, could become lodged in the hose would be for it to be intentionally placed there. A physical examination of the pan and recycle hose supports this testimony. The pan is a flat pan about 1 inch high. Ink enters the pan through a tube over one end of the pan. The ink flows to the height of a bushing located in the center of the pan which protrudes about three-eighths of an inch above the bottom of the pan. The inside diameter of the bushing is about three-fourths of an inch and the inside diameter of the recycle hose below the bushing slightly more than three-fourths of an inch. Minton testified that normally steel wool would not be used for any purpose in the vicinity of the ink pan. Moreover, if a wad of steel wool sufficient in size to plug the hose were to accidently fall into the ink pan it would sink to the bottom of the pan rather than become lodged in the bushing. Hulzenga testified that, shortly before the overflow, she saw employee Bob Kubilius cleaning the printer which is located above the ink pan with steel wool. This testimony appears to be a speculation by Hulzenga that particles of steel wool may have fallen into the pan and clogged the hose accidentally. Kubilius denied that he ever used steel wool to clean the cup machines. However, it is obvious from the physical setup of the pan that, assuming Hulzenga's testimony to be true, particles falling from the printer into the pan would settle to the bottom. Moreover, any particles which might float on the top would flow freely through the bushing and hose. According to Minton, there have been no other instances, either prior to March 30 or subsequent thereto, where an ink pan overflow was caused by a steel wool blockage in the recycle hose.

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[10] Shafer left the employ of the Company shortly after March 30. He was not called by the Company to testify. Sanservire denied making such statements to Shafer. I find it unnecessary to determine whether in fact Sanservire made the statements attributed to her by Shafer. I do find that Shafer informed Minton of the statements attributed by Shafer to Sanservire. I make this finding based on Minton's credibility as set forth and discussed above, and on Shafer's memo which was written in his own hand and dated March 30.

[11] Hulzenga denies she was assigned to work the 9-ounce machine. For reasons set forth below, I credit the testimony of Jenks who testified he assigned her to the 9-ounce machine and the testimony of Jenks and Minton who testified that they observed her working both the 7- and 9-ounce machine that day up to around 1:30–2 p.m.

Accordingly, I find that the ink overflow of the top pan was caused by a wad of steel wool forced into the recycle hose. I further find that this was an intentional act.

Around 2 p.m., a few minutes after Minton discovered the steel wool in the recycle hose, he asked Jenks to send Hulzenga into his office. Hulzenga reported to Minton's office several minutes later. Minton showed Hulzenga the wad of steel wool he had removed from the recycle hose of the 9-ounce machine and told her this was the cause of the overflow.

According to Hulzenga, she told Minton that Kubilius was cleaning the printer of the 9-ounce machine with steel wool. Minton replied that he had to let her go. Minton testified that he told Hulzenga that he believed she was responsible for plugging the recycle hose and that he had reason to believe she was responsible for some of the other things that have been going on in the plant over the last couple of days. He did not elaborate on what other things he was referring to.[12]

Minton then told Hulzenga that he had a conversation with Shafer concerning a conversation Shafer had with Sanservire. He did not relate the details of the conversation between Shafer and Sanservire described above. He then told Hulzenga that he was terminating her. Hulzenga stated, "Larry [Minton], I'm not going to argue with you." She then left Minton's office.

After Hulzenga left Minton's office, she went to the plant floor. She informed employees Loertsher and La Bar that she had been terminated. Both Loertsher and La Bar proceeded to shut off their machines and, without obtaining permission, left the plant with Hulzenga. Loertsher and La Bar carpool with Hulzenga. Hulzenga had driven them to work this day. There is no public transportation available and employees use carpools exclusively as a means of transportation to and from work.

Hulzenga denied that she put the wad of steel wool in the recycle hose causing the overflow on the 9-ounce machine. She also denied responsibility for the alcohol in the glue barrel, Speedy Dry in the filter, the changed settings on the heat dials, the broken seam clamp, and the overflow on the 7-ounce machine. I conclude that there is insufficient evidence to establish whether Hulzenga was actually responsible for any of these incidents.

Hulzenga also denied that she was assigned to operate the 9-ounce machine on March 30. She testified that she was assigned only the 7-ounce machine and that Loertsher was assigned to operate the 9-ounce machine. Loertsher and La Bar corroborate this testimony. Hulzenga conceded that she took over operation of the 9-ounce machine on March 30 during Loertsher's morning break and again during her lunch period of one half hour which took place about noon. Jenks, on the other hand, testified that he assigned Hulzenga to the 7- and 9-ounce machines and he and Minton testified that they observed Hulzenga operate the machine at various times throughout the day. For the reasons set forth immediately below, I credit Minton and Jenks.

For the reasons set forth above, I found Minton and Jenks to be credible witnesses. Additionally, Minton and Jenks' testimony is supported by company records. In this connection, Minton and Jenks testified that in a given week whichever employee was assigned to operate the 7-ounce machine would also be assigned to operate the 9-ounce machine. Jenks testified that Hulzenga was assigned to operate the 7- and 9-ounce machines the week of March 30 because they were the oldest machines in the plant and had maintenance problems which required the assignment of the most capable operator to insure that they would run effectively. Respondent's breakdown records support the testimony of Minton and Jenks. They establish that Hulzenga was assigned and operated both machines on March 27 and 29.[13]

The breakdown reports also establish that, on March 30, Hulzenga was assigned to operate the 7-ounce machine. No breakdown report was filled out for the breakdown of the 9-ounce machine.[14]

Hulzenga, on the other hand, was unable to recall who was assigned to work the 9-ounce machine on any other day that week other than March 30, when she alleges Loertsher was assigned to operate the 9-ounce machine, although the breakdown reports filled out by her establish that she operated the 9-ounce machine on March 27 and 29. Further, Hulzenga testified that it was she who made the machine assignments and that, during the week of March 30, only three operators were present including herself and that she assigned one operator to a machine in accordance with the standard procedure. This testimony however is in direct conflict with the breakdown reports for the week of March 30 which establish that she worked both the 7- and 9-ounce machines on March 27 and 29. Moreover, on her direct testimony, Hulzenga placed the crucial breakdown on the 9-ounce machine to have taken place at 10:30 a.m. On rebuttal, she correctly placed the time around 1:30 p.m.

Loertsher testified on rebuttal that she was assigned to and operated the 9-ounce machine on March 30. I found

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[12] This is an apparent reference to the broken seam clamp, the alcohol in the glue, Speedy Dry in the filter, the heat dials being set to a maximum level on the 12-ounce machine, and the overflow on the 7-ounce machine.

[13] Breakdown reports are filled out by the employees operating the machine only if the machine breaks down. Apparently there were no breakdowns on either machine on March 28.

[14] I do not find it significant that no breakdown report was submitted for the 9-ounce machine on March 30 since the breakdown which occurred took place immediately prior to Hulzenga's discharge and Loertsher's exit from the plant with La Bar and Hulzenga. It would appear no breakdown report was submitted because whether Hulzenga or Loertsher was operating the 9-ounce machine, both individuals left the plant shortly after the breakdown and there was insufficient time for the operator to prepare such report.

Loertsher to be a totally incredible witness. Throughout her testimony, and especially on cross-examination and on questions that were put to her by me, she avoided eye contact and constantly cast her eyes downward toward her lap. She also answered questions in a very tentative manner. However, the most significant factor in my evaluation of her credibility was her inability to recall any of the details concerning the overflow which precipitated Hulzenga's discharge. When questioned on cross-examination whether she had any problems with the lower pan on the 9-ounce machine around 1:30 p.m., the approximate time of the overflow which immediately preceded Hulzenga's discharge, she could not recall. She did recall that a breakdown took place sometime during the day but could not recall whether the breakdown involved the upper or lower pan or whether the breakdown took place in the morning or shortly before Hulzenga's discharge. Nor did she recall Minton and Jenks coming over to investigate the problem and Minton removing the hose to clean it, nor his discovery of the wad of steel wool as the cause of the overflow. Her inability to recall such unusual events which immediately preceded and precipitated Hulzenga's discharge and occurred on her last day of work for Respondent convinces me most conclusively that her testimony was totally fabricated.[15] Moreover, except for March 30, Loertsher was unable to recall the machines to which she was assigned to operate that week.

In support of Minton's and Jenks' testimony, Loertsher admitted that Hulzenga generally operated both the 7- and 9-ounce machines at the same time.

I do not credit La Bar's testimony that she observed Loertsher operate the 9-ounce machine on March 30. My general impression of La Bar's demeanor was that she was frequently vague and unresponsive to questions put to her on cross-examination. Further her answers on cross-examination were often given in a defiant tone of voice, an indication to me of hostility. Moreover, La Bar gave contradictory testimony in connection with critical issues involved herein. In this regard La Bar initially testified that Loertsher operated the 9-ounce machine during the entire week of March 30. However, this was contradicted by the breakdown reports described above. When this was pointed out to La Bar she subsequently conceded she could not recall which machines were being operated by any employees during the week of March 30, except that she did recall that Hulzenga operated the 7-ounce machine and Loertsher operated the 9-ounce machine on March 30.

Following Hulzenga's discharge, Jenks filled out an employee warning record form. Upon the heading of "Company Remarks," Jenks wrote, "Employee walked off job March 16, 1979. Since returned job performance has been marginal. Day in question (March 30) the printing units on two machines which this operator was responsible for overflowed." This form further indicated that Hulzenga had received a prior warning on March 21 concerning the walkout on March 16. Under the heading "Action to be Taken," Minton filled out, "Employee terminated due to poor work performance." Minton testified that he listed poor work as the reason for Hulzenga's discharge rather than suspected sabotage which he asserts was the actual reason because he did not want the record to reflect such a serious offense explaining, "that's just my inner type thing." He testified that the notation concerning the March 16 walkout and March 21 warning merely reflected prior conduct the Company considered improper. Minton testified the sole reason for Hulzenga's discharge was suspected sabotage.

Upon consideration of all of the evidence, I conclude that Minton discharged Hulzenga because he believed that she had intentionally caused the overflow of the upper ink pan on the 9-ounce cup machine as described above, and may have been responsible for some recent malfunctions, breakdowns, and unusual occurrences described above, rather than because of her participation in the March 16 walkout or her activities on behalf of the Union.

I conclude that Hulzenga's participation in the March 16 walkout was not a factor contributing to her discharge on March 30. In this regard Minton reinstated all employees, including Hulzenga, who participated in the walkout except Van Nostrand who was discharged for cause as set forth and described above. In addition, during Hulzenga's reinstatement interview on March 21, Minton candidly acknowledged existing safety problems and sought Hulzenga's suggestions for correcting them. This interview, as described by Hulzenga's testimony, indicated that Minton wanted to put the walkout behind, let bygones be bygones, and work with the employees toward correcting the existing safety problems. In this spirit he told Hulzenga that from now on female employees would no longer be required to lift heavy paper rolls. I credit Minton's explanation as to why the Company's records contained the notations described above concerning the March 16 walkout and March 21 warning. I also credit Minton's explanation as to why he noted in the Company's records that Hulzenga was discharged for poor work rather than suspected sabotage.

I further conclude that Hulzenga's activities on behalf of the Union was not a factor contributing to her discharge. The evidence establishes that Hulzenga was one of the most active employee union supporters. She distributed "Pajama Game" leaflets to employees, attended the April 1 union meeting, signed a union authorization card, and distributed other cards to employees. Although there was no direct evidence to establish that Minton or other supervisory employees observed such activity, Shafer's statement to Sanservire that he knew that Van Nostrand and Hulzenga were behind the Union is evidence that Shafer at least was aware that Hulzenga was playing an important role in the union organization, although he may not have been aware of her specific activities. If Shafer were aware of Hulzenga's participation, so in all probability was Minton. However, knowledge of union activity standing alone is not sufficient to support an allegation of a discriminatory discharge. There must be sufficient evidence of union hostility or opposition to a union, strong enough so that a conclusion can be drawn that the employer was willing to violate the law by the discharge of an employee, to keep the union out. *Manmouth College*, 204 NLRB 554 (1973), enfd. *sub nom. Weinberg* v. *Manmouth College*, 491 F.2d 752 (3d Cir. 1974); *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel*, 229 NLRB 1094, 1107 (1977).

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[15] Loertsher walked out with La Bar immediately following Hulzenga's discharge. She received a suspension for such unauthorized walkout. However, Loertsher never returned to work following her walkout on March 30. The complaint does not allege Loertsher's suspension as a violation of the Act.

The facts of this case fail to establish such hostility or opposition to the Union. Other than a single conversation between Shafer and Sanservire in which Shafer made a number of unlawful statements and a single unlawful statement by Jenks to La Bar, the record is devoid of other evidence of hostility or opposition to the Union. There is no evidence to establish that Respondent was waging an antiunion campaign. To the contrary, the evidence establishes that Minton, the plant manager, who had overall responsibility for the entire operation, displayed a neutral position toward the Union. Such attitude is evidenced by his statement to Hornbeck on March 29 that he could not stop the Union from coming in, and his statement to Day on March 31 that she should listen to the Union and he would listen to the Union. I do not attribute the hostility that may be evidenced by Shafer's and Jenks' unlawful statements to two employees to Minton. I therefore conclude that Minton's hostility or opposition to the Union was not so strong that he would discharge Hulzenga or any other employee in order to keep the Union out.

The evidence leads me to conclude that Minton discharged Hulzenga solely because he believed that she intentionally caused the overflow in the upper ink pan on the 9-ounce machine on March 30 and may have been responsible for other recent malfunctions, breakdowns, and strange occurrences. The evidence establishes that Minton had ample cause for such belief. In this connection, on March 29, a day prior to Hulzenga's discharge Hulzenga told Minton and Jenks who were at the time examining a broken seam clamp on her machine which had apparently resulted from a stress fracture, "I think someone's trying to sabotage us." The following day, at 6:30 a.m., Supervisor Shafer told Minton that Hulzenga's sister, Linda Sanservire, had told him that Hulzenga confided in Sanservire that she had done something in the plant for which she might go to jail. Such statement would reasonably imply sabotage. In addition, Minton was informed at the time about the presence of alcohol in the glue barrel, Speedy Dry in the air filter, and the heat dials being turned up, all of which would appear to be caused by an intentional act. Therefore when the upper ink pan on Hulzenga's machine overflowed several hours following Minton's conversation with Shafer and the cause of such overflow was discovered to be an intentional act, and apparently sabotage, it was certainly not unreasonable for Minton to believe that Hulzenga was responsible for such occurrance as well as the others described above. Under such circumstances, immediate discharge would be expected. *Leon Ferenbach, Inc.*, 213 NLRB 373, 387 (1974).

Accordingly, I conclude that Hulzenga was discharged because Minton believed and had good reason to believe that Hulzenga was guilty of sabotaging the Company's equipment and not because of her participation in the March 16 walkout or because of her membership in, or activities on behalf of, the Union.

Discharge of Marie La Bar

Marie La Bar was first employed by the Company in November 1978. In February 1979, she was promoted to the position of quality control supervisor.[16]

On March 30, at or about 2-2:30 p.m., Hulzenga informed La Bar and Loertsher that she had just been discharged and was going home.

La Bar testified that at or about the same time she saw Minton who told her that he had fired Hulzenga. According to La Bar, she told Minton that she would be leaving because she carpooled with Hulzenga.[17] According to La Bar, Minton told her he understood, but he wanted her to report to work the next (work) day.[18]

Minton denied that he gave La Bar or Loertsher permission to leave. He testified that he came out of his office shortly after he had discharged Hulzenga and observed La Bar and Loertsher leaving. When he asked where they were going, La Bar replied she was leaving.

Jenks, the shift supervisor, testified that, at 2:30 p.m., he observed La Bar and Loertsher leaving the plant. He heard La Bar state, "That's my ride" and observed La Bar and Loertsher get into Hulzenga's car. The shift ended at 4 p.m.

La Bar testified she left work with Hulzenga because she was upset about Hulzenga's discharge and additionally because she had no other way to get home.

On Monday, April 2, neither La Bar nor Loertsher reported to work. La Bar testified that she did not report to work because of Hulzenga's discharge.

On April 2, at 2:14 p.m., Minton sent the following mailgram to Loertsher:

> Due to your refusal to work Friday, March 30, you are hereby suspended for two days. If you desire to continue your employment, come in to see me Wednesday, April 4, between 8:00 a.m. and 4:00 p.m., to discuss your employment requirements. If you do not contact me by Wednesday, I will consider you terminated.

Loertsher never returned to the Company.[19]

On April 2, at 2:22 p.m., Minton sent the following mailgram to La Bar:

> Due to the fact that you walked off the job twice in the last two weeks, once on March 16, and on March 30, you are hereby terminated.

The mailgrams were written out by Jenks pursuant to Minton's instructions on March 30, after La Bar and Loertsher had left. However, Jenks reminded Minton that La Bar and Loertsher depended on Hulzenga for a ride home and Minton agreed to wait until the afternoon of April 2 to see if the employees returned to work before sending the mailgrams.

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[16] It was stipulated that La Bar is not a supervisor within the meaning of the Act.

[17] As set forth above, employees traveled to and from work by car because there was no public transportation available. During the week of March 30, Hulzenga, La Bar, and Loertsher drove to work in Hulzenga's car.

[18] March 30 was a Friday; the next workday was Monday, April 2.

[19] As set forth above Loertsher's suspension was not alleged in the complaint, or by counsel for the General Counsel as a violation.

Minton testified that his main reason for discharging La Bar was the fact that she was a leadgirl and was expected to set a proper example for other employees. He testified, "She had walked out and had not even bothered to call Monday morning (April 2), and being an employee of that nature, she was not expendable." However, this testimony contradicted Minton's affidavit which was consistent with his mailgram to La Bar.

The evidence above establishes that, although La Bar and Loertsher left work without permission immediately following Hulzenga's discharge, Minton took no action based on Jenks' advice to Minton that both La Bar and Loertsher depended on Hulzenga for transportation to and from the job, there being no public transportation available. It was only after both individuals failed to report to work on April 2 that mailgrams were sent to the respective invididuals notifying La Bar of her discharge and Loertsher of her suspension. The mailgram to Loertsher notified her she was suspended because of her walkout on March 30. Loertsher, as set forth above, had not participated in the walkout of March 16. The mailgram to La Bar notified her that she was discharged because she had walked out on March 16 and again on March 30. Based on the disparate treatment between Loertsher and La Bar in that Loertsher, unlike La Bar, was merely suspended, rather than being discharged, I conclude that La Bar's discharge resulted at least in part from her participation in the March 16 walkout. In view of this evidence, and his affidavit which contradicts his testimony, I do not credit Minton's explanation that La Bar was discharged rather than being suspended because she was a leadgirl who was not expendable. Moreover, when Minton was asked what the difference was between a lead operator and operator, he replied, "Not a whole lot, primarily as the lead operator she (La Bar) has more experience." In this connection both La Bar and Loertsher earned the same rate of pay.

Counsel for the General Counsel additionally contends that La Bar ceased work and walked out on March 30 in order to protest the unlawful discharge of Hulzenga and that such walkout was protected concerted activity. The Board has held that a walkout to protest the discharge of a fellow employee whether such discharge was lawful or unlawful is protected concerted activity. *Auto-Truck Federal Credit Union*, 232 NLRB 1024, 1028 (1977). As set forth by the Administrative Law Judge in *Auto-Truck Federal Credit Union, supra*, "[T]here is nothing of more moment or concern to employees than matters of discharge." However, the evidence does not establish that La Bar and Loertsher left work to protest Hulzenga's discharge. La Bar testified that when she encountered Minton immediately following Hulzenga's discharge, but after Hulzenga informed La Bar of her discharge, she told him she would be leaving with Hulzenga because she carpooled with her. Similarly Jenks testified that following Hulzenga's discharge he observed La Bar and Loertsher leaving the plant and heard La Bar state, "that's my ride" and get into Hulzenga's car. Since there was no public transportation in the area, it was reasonable for Minton and Jenks to believe La Bar's stated reason for leaving. That they did in fact believe this is evidenced by Jenks reminding Minton on the morning of April 2, when he was about to send the mailgram discharging La Bar, that La Bar and Loertsher depended on Hulzenga for transportation. Although La Bar testified that she left March 30 and failed to report to work on April 2 because of Hulzenga's discharge, I find there is no evidence that she communicated this to Minton or Jenks. Assuming that in La Bar's mind she was leaving work to protest Hulzenga's discharge, her statements to Minton and Jenks contradict such state of mind and it is unreasonable to assume that Minton was aware or should have been aware of such asserted reason for her leaving work on March 30 and failing to report for work on April 2. Therefore, I reject the General Counsel's contentions.

However, as I have concluded that La Bar's discharge resulted at least in part because of her participation in the March 16 walkout which I have concluded to be a protected concerted activity, I conclude that her discharge was therefore unlawful and a violation of Section 8(a)(1). *Clarklift of Atlanta Inc.*, 237 NLRB 461, 471 (1978); *McGraw Laboratories, a Division of American Hospital Supply Corporation*, 206 NLRB 602 (1978).

It was also alleged that La Bar was discharged because of her activities on behalf of the Union. The evidence establishes that La Bar was less active on behalf of the Union than Hulzenga. Further, unlike Hulzenga, there is no evidence that the Company had direct or indirect knowledge of La Bar's union activity. Additionally, as set forth above in connection with Hulzenga's discharge, I am unable to find sufficient union animus to compel a finding that the Company would discharge an employee to keep the Union out. I therefore conclude that La Bar was not discharged because of her membership in or activities on behalf of the Union.

Discharge of Lori Day

Lori Day began work on January 17, 1979, as a packer. She was supervised by Mike Johnson before he was replaced by Jenks. On April 2, during her work shift, Day passed out two union authorization cards to employees who signed them and returned them to Day. There is no evidence that the Company's representatives saw this.

On April 6, at or about 10 a.m., Delora Miller, the quality control supervisor who had replaced La Bar, assigned Day and three other packers the job of scraping the floor.[20] Miller, concededly had the authority to assign such work. Moreover, Day concedes that the floor scraping duties assigned to her by Miller were among the job duties of the packers. Day and the three other packers at first refused to scrape floors. Subsequently, the three packers did scrape the floor but Day continued in her refusal to do so. Day testified she refused to scrape the floor because she felt that Miller's tone of voice when making the job assignment was rude. Miller then told Jenks about Day's refusal to perform the assignment and Jenks summoned Day to his office.

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[20] As set forth above, it was stipulated that the quality control supervisor was not a supervisor within the meaning of the Act. The three packers referred to above were Kathy, Jean, and Cindy.

Jenks asked Day what the problem was. Day replied that scraping floors was hard work and employees on other shifts did not scrape floors. Day also complained that Miller had not asked her to scrape the floor in a nice way. Jenks told Day that what employees did on other shifts and how Miller spoke to her were not the issue. He informed Day that he considered scraping floors to be among the job duties of packers and asked Day if she would do the work. Day refused.

Jenks stated he would have to write this up and prepared an employee warning record in Day's presence. Under the heading of "company Remarks," Jenks wrote, "Employee refused an order to scrape wax on the floor around the heaters. When further questioned, she refused a second time. This is considered part of the routine cleaning procedure." Under the heading, "Action to be Taken," Jenks inserted "Referred to plant manager. Termination recommended." This record was signed by Day. Jenks then told Day that as of now she was suspended until he spoke with Minton. Day left the plant and went home.

When Minton returned to the plant later that day, Jenks explained to Minton the details surrounding Day's suspension and Minton told Jenks to do whatever he thought was necessary. Jenks told Minton that she had refused to work and there was no way to overlook it. Minton then authorized Jenks to send a mailgram notifying Day of her discharge.

Day had received a prior written warning for using abusive language to the then-quality control supervisor, La Bar, in March and a prior oral warning for an unauthorized shutdown of her machine.

On the evening of April 6, Day received the following mailgram from Jenks:

> You were suspended for two days on March 19 and 20, for walking off the job on March 16. This is your second offense regarding refusal to work. Therefore, you are terminated as of this date.

Jenks testified repeatedly and I conclude creditably in response to questions put to him by me and on cross-examination that the sole reason for Day's discharge was her continued refusal to perform a work order and that, absent any prior warnings, an employee's outright refusal to perform work assigned would result in termination under any circumstances. He denied that the March 16 walkout was in any way a contributing factor in the decision to discharge Day.

Jenks testified that the mailgram sent to Day merely documented her prior work record and notified her of her discharge.

The evidence described above establishes conclusively that Day flatly refused to perform a work assignment issued to her by Miller, a lead person with authority to issue such assignment. When Miller complained to Jenks about Day's refusal to perform the work assignment given to her, Jenks then spoke with Day concerning her refusal to perform her work assignment and asked her if she would perform the assignment at this time. Day, for the second time flatly refused. Such conduct represents the clearest form of insubordination imaginable. It is hard to conceive that any employer faced with such insubordination would not fire the insubordinate employee on the spot. The evidence establishes this is in effect exactly what Jenks did. In Day's presence he prepared an employee record and under the heading of "Company Remarks" briefly described the insubordination. Under action to be taken he recommended termination. Jenks credibly testified that he did not terminate her on the spot because he was a new supervisor and was not certain he had such authority. It is significant that during his conversation with Day he did not at any time bring up the subject of the March 16 walkout. His action in writing up the report recommending termination took place immediately following Day's second refusal to carry out the work assignment. The recommendation for termination was in short spontaneous, immediately following Day's insubordination. Jenks' subsequent conversation with Minton amounted to no more than MInton ratifying Jenks' recommendation. Significantly, there was no discussion in this conversation of the March 16 walkout. Minton's ratification of Jenks' recommendation to terminate Day was made solely on the basis of the facts surrounding Day's refusal to perform a work assignment as related to him by Jenks. Under these circumstances Jenks' contention that the mailgram notifying Day of her discharge merely set forth her prior work record and that the sole reason for the discharge was her insubordination is believable, and I credit Jenks in this regard.

Additionally, as set forth above, I find that following the walkout Minton was willing to let bygones be bygones. Further, Day was not among the most outspoken employees during the March 16 meeting which preceded the walkout.

For the same reasons set forth in my analysis above, I conclude that the Company's animus toward the Union was insufficient to conclude that it would discharge Day or any other employee in order to keep out the Union. Additionally, the evidence establishes that Day was even less active in connection with the Union than either La Bar or Hulzenga and that the Company had no direct or indirect knowledge of her activities.

Accordingly I conclude that Day was discharged solely because of her insubordination described above and not because of her participation in the March 16 walkout or because of her membership in or activities on behalf of the Union.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The employees of Respondent who participated in a walkout on March 16, 1979, to protest the discharge of their shift supervisor, Michael Johnson, were engaged in protected concerted activities within the meaning of Section 8(a)(1) of the Act.

4. By suspending employees Lisa Van Nostrand, Alice Hulzenga, Carol Thompson, Marie La Bar, Alice Lubitz, Lori Day, Roberta Lubitz, Cynthia Ciatto, Patty Williams, and Ann Hornbeck on March 19, because of their participation in the walkout described above in paragraph 3 of this section of the Decision, Respondent has violated Section 8(a)(1) of the Act.

5. By creating the impression of surveillance of the union activities of its employees, by threatening employees with discharge if they joined or engaged in union activities, by interrogating employees concerning their activities on behalf of the Union, by threatening to reduce employee benefits and withhold wage increases from employees because of their membership in or activities on behalf of the Union, and by threatening to close the plant if the Union came in, Respondent has violated Section 8(a) (1) of the Act.

6. By discharging its employee, Marie La Bar, on April 2, 1979, because of her participation in the walkout described above in paragraph 3 of this section, Respondent has violated Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices described in paragraphs 4, 5, and 6 of this section affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act, including the posting of the notice [omitted from publication] attached to this Decision.

Since I have found that Respondent discriminatorily suspended Lisa Van Nostrand, Alice Hulzenga, Carol Thompson, Marie La Bar, Alice Lubitz. Lori Day, Roberta Lubitz, Cynthia Ciatto, Patty Williams, and Ann Hornbeck, I shall recommend that Respondent make whole all of the above employees, for any loss of earnings they may have suffered from the date of their suspension on March 19 until their reinstatement on March 21.[21]

Since I have found that Respondent discriminatorily discharged Marie La Bar on Arpil 2, 1979, I shall recommend that Respondent be ordered to offer her immediate and full reinstatement to her former job or, if it no longer exists, to a substantially equivalent position of employment, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered from the date of her discharge until the date of Respondent's offer of reinstatement.

The backpay for said employees shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[22]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[23]

The Respondent, Fibracan Corporation, Walden, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending or terminating employees or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment because they engage in activities protected under Section 7 of the Act.

(b) Creating the impression of surveillance of the union activities of its employees.

(c) Threatening its employees with discharge if they join Amalgamated Clothing and Textile Workers Union, AFL-CIO, Hudson Valley Area Joint Board, herein called the Union, or any other labor organization or engage in other union activities.

(d) Interrogating its employees concerning their activities on behalf of the Union, or any other labor organization.

(e) Threatening its employees to reduce employee benefits and withhold wage increases because of their membership in or activities on behalf of the Union or any other labor organization.

(f) Threatening its employees to close its plant if they select the Union or any other labor organization to represent them.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Lisa Van Nostrand, Alice Hulzenga, Carol Thompson, Marie La Bar, Alice Lubitz, Lori Day, Roberta Lubitz, Cynthia Ciatto, Patty Williams, and Ann Hornbeck for their lost earnings in the manner set forth in the Remedy.

(b) Offer Marie La Bar immediate and full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for her lost earnings in the manner set forth in the Remedy.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

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[21] As set forth above, I have concluded that Van Nostrand was discharged for cause on March 21, 1979.

[22] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Post at its Walden, New York, plant copies of the attached notice marked "Appendix."[24] Copies of said notice on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

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[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Ah Chu Company *and* Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers International Union, AFL-CIO. Case 20-CA-15425

November 6, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 15, 1981, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Ah Chu Company, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We agree with the Administrative Law Judge's finding that a unit limited to sundry department employees at the Mission Street store is appropriate. We do not agree, however, with his rationale, nor do we think that the cases he cited, such as *Zim's Foodliner, Inc. d/b/a Zim's IGA Foodliner, et al. v. N.L.R.B.*, 495 F.2d 1131 (7th Cir.), cert. denied 419 U.S. 838 (1974), enfg. 201 NLRB 449 (1973), are apposite. In those cases, the Board found that a unit limited to a single facility was appropriate when that facility was sold or otherwise separated from a multifacility bargaining unit.

The 1978-81 collective-bargaining agreement between the Union and Volume Merchandise excludes pharmacy employees and sundry department employees from its coverage. The pharmacy employees historically have been represented by Local 648 of the same International Union, and this Local represented those employees when Respondent acquired the lease for the pharmacy department in April 1978. Local 648 initially requested that Respondent recognize it as the bargaining representative of the pharmacy employees, but soon dropped its demand for recognition.

Volume Merchandise purchased the Mission Street store from Don Kurtz, and leased the sundry department to Kurtz in late 1978 or early 1979. (The Administrative Law Judge erroneously stated this date as January 1980.) Volume Merchandise and the Union then entered into the collective-bargaining agreement that specifically excluded the sundry department employees from the bargaining unit, as mentioned above. Instead, these employees became part of the unit located at the Geary Boulevard store, which Kurtz still owned, and were covered by the collective-bargaining agreement between the Union and the Geary Boulevard store. In May 1980, Kurtz sold the lease for the sundry department to Respondent. Both pharmacy employees and sundry department employees at the Mission Street store then worked for Respondent.

In finding that the Mission Street store sundry department employees form an appropriate unit in and of themselves, we rely upon *Stroehmann Brothers Company*, 252 NLRB 988 (1980), enfd. in an unpublished opinion 108 LRRM 2280 (3d Cir. 1981). In that case, Ward Foods, Inc., the predecessor employer, operated a bakery and distribution facility in which there were two units of employees. One unit consisted of route salesmen, over-the-road drivers, and mechanics, and the other unit contained production, maintenance, and shipping employees. Shortly before it sold the facility, Ward ceased production, laid off its production employees, and operated only as a distribution center. We found that a unit of shipping employees was appropriate essentially because they had been represented separately and apart from the employees in the other bargaining unit, albeit the shipping employees had been part of a larger unit. Here, the sundry department employees too had been part of a larger bargaining unit. They have never been part of a unit that included pharmacy employees. Indeed, the pharmacy employees have always been a unit by themselves, represented by a different local, Local 648. In light of the separate representation of the pharmacy employees on one hand and the sundry department employees on the other, the unit of sundry department employees is appropriate because another union has represented those employees (though in a larger unit), and because "it may reasonably be assumed that, as a result of transitional changes, the employees' desires concerning unionization [have not] likely changed." *Id.* at 989, citing *Mondovi Foods Corporation*, 235 NLRB 1080, 1082 (1978).

[3] Member Jenkins would award interest on backpay in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

259 NLRB No. 25

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT discourage membership in Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers Union, AFL-CIO, or any other labor organization, by refusing to hire employees who are members of that union, or any other labor organization, and thereby discriminate against employees or applicants for employment in regard to hire and tenure of employment.

WE WILL NOT refuse to recognize and bargain collectively with Local 1100 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All employees performing selling and nonselling work in the sundry department operated at 2558 Mission Street, San Francisco, California; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain, upon request, with the above-named Union as exclusive bargaining representative of our employees in the unit found appropriate.

WE WILL offer immediate and full employment to Alice Dominici, Lucilla Edison, and Susanna Lopez without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired since we took over the operation of the sundry department at the Mission Street store, and WE WILL make them whole for any loss of pay, plus interest, they may have suffered as a result of our discrimination against them.

AH CHU COMPANY

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon a charge filed by Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers International Union, AFL-CIO (hereafter called the Union),[1] on June 13, 1980, and an amended charge filed on July 30 against Ah Chu Company (hereafter called the Respondent), the Regional Director for Region 20 issued a complaint and notice of hearing on August 29.[2] In essence, the complaint alleges that the Respondent purchased the lease of the sundry department of a discount store operation from an owner whose employees were represented by the Union and covered by a collective-bargaining agreement. Further, that after the purchase, the Respondent unlawfully refused to hire the employees of the previous owner and unlawfully refused to recognize the Union as the exclusive bargaining representative of the employees in the leased departmeut. In addition, it is asserted that the Respondent refused to adhere to the terms and conditions of the existing collective-bargaining agreement covering these unit employees. The complaint asserts that by this conduct the Respondent has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* (hereafter called the Act). The Respondent filed an answer which admits certain allegations of the complaint, denies others, and specifically denies the commission of any unfair labor practices.

A hearing was held in this matter on February 3, 1981, in San Francisco, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and present material and relevant evidence on the issues. Briefs were submitted by all parties and have been duly considered.

On the entire record in this case, including my observation of the witnesses and their demeanor while testifying, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Ah Chu Company, Respondent herein, is a sole proprietorship with its office and place of business located in San Francisco, California. The Respondent is an enterprise engaged in the sale of retail drugs and sundry products. During the calendar year ending December 31, 1979, the Respondent, in the course of its business operations, derived gross revenues in excess of $500,000. During a similar period, the Respondent purchased and received at its San Francisco facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of California. Based on the above, I find that the Respondent is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[1] The name of the Union appears as amended at the hearing.

[2] Unless otherwise indicated, all dates herein refer to the year 1980.

II. THE LABOR ORGANIZATION INVOLVED

Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

The discount store in which the Respondent purchased the lease operation of the sundry department was one of three such stores in San Francisco. One store was located on Alemany Boulevard, another on Mission Street, and the third on Geary Boulevard. These stores have a long history of changes in ownership over a period of years. However, the employees of the various leased departments have traditionally been represented by the Union with the exception of the pharmacy and shoe department employees. The employees in these latter departments were traditionally represented by different locals of the same International Union.

Some time in 1976 or 1977 (the exact date is not clear in the record), the three stores were owned by Payless Drug Stores Northwest, Inc., and operated under the name of Value Giant. Don Kurtz then purchased the Alemany Boulevard store from Payless within the same time frame and changed the name of that store to Giant Value. When Kurtz purchased the Alemany Boulevard store, he negotiated a contract with the Union covering the employees of the various leased departments except those under the jurisdiction of sister locals. At some unspecified date in 1977, Kurtz then purchased both the Mission Street and Geary Boulevard stores from Payless. A separate collective-bargaining agreement was negotiated with the Union covering the employees at these latter two stores for the period beginning August 1, 1977, and ending July 31, 1978. (G.C. Exh. 2.) By its terms, this contract lumped the employees at the Geary and Mission stores into a single bargaining unit as distinguished from the bargaining unit at the Alemany store.[3] However, the two contracts (Alemany and Geary-Mission) were identical in their substantive terms.

In April 1978, the Respondent purchased the leases for the pharmacy concessions from Kurtz at all three stores. Local 648 of the same International Union represented the pharmacy employees of the Respondent's predecessor at these stores. This local requested that the Respondent recognize it as the exclusive bargaining representative for the pharmacy employees after the Respondent took over the leases. Edwin Chu, owner of the Respondent, referred the union representatives to his labor consultant, Tyrone Cochran. Unrefuted testimony by Cochran discloses that, after he consulted with the representatives of Local 648, that Union no longer manifested an interest in representing the Respondent's pharmacy employees and dropped its demand for recognition.

B. *The Respondent's Takeover of the Sundry Department at the Mission Street Store*

Sometime in late 1978, Kurtz began to run into financial difficulties with the operation of the stores. In January 1980, Kurtz sold the Mission store to Volume Merchandise, who was a lessee of Kurtz at that particular facility. As part of the arrangement, Kurtz retained operation of the sundry department as a lessee of Volume. A new contract was negotiated between the Union and Volume for the Mission store employees coming within the Union's jurisdiction. (Resp. Exh. 1.) Although the employees working in the sundry department, now leased by Kurtz, would have normally been covered by this aggrement,[4] the Union and Volume attached a provision, by way of an appendix to the contract, specifically excluding these employees and making them a part of the unit with the Geary store of Kurtz.[5]

LaVere "Moe" Heilesen, business representative of the Union, testified that under the terms of the agreement with Volume, the Union considered the seniority rights and the payroll coverage of the sundry department employees to be combined with that of the Giant Value Geary store employees. But for all other purposes, according to Heilesen, the employees were covered under the Volume Merchandise contract, which the Union considered to be the master agreement. Ray Vetterlein, a labor consultant who represented Kurtz in all of his transactions involving the Giant Value stores, stated that he was confronted with a complex bargaining problem because Volume did not want to assume Kurtz' layoff list for the sundry department employees. Therefore, according to Vetterlein, he negotiated with the Union to get a separate agreement for Volume which specifically excluded the employees of the sundry department. Vetterlein stated the sundry department employees were made an "adjunct" to the Geary store unit and they were covered under the Geary contract. He further testified this modification (sec. 5 of the appendix to the contract) was put into the agreement specifically at the Union's request in order to protect the seniority and layoff rights of the sundry department employees.

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[3] Thus, the employees at the Geary and Mission stores shared seniority and layoff and recall rights.

[4] The provision in the contract between the Union and Volume relating to leased departments is as follows:

> Section 21. Leased Departments.
>
> A. The Employer agrees that any employees performing work covered by this Agreement in leased or licensed departments, under subcontract or as demonstrators, shall be members of the Collective Bargaining Unit as defined in this Agreement, and the Employer agrees to retain and exercise full control over all of the terms and conditions of employment of all such employees.
>
> B. It is recognized by the Union that the terms of the Employer's lease or license arrangements obligate the lessee or licensee to pay the wages and observe the other terms of this Agreement, and the Union agrees that the Employer is entitled to place the financial responsibility for meeting the cost of observance of this Agreement upon said lessees and/or licensees.

[5] The provision in the appendix to the contract between the Union and Volume affecting the employees of the sundry department reads as follows:

> 5. Sundry Department Employees:
>
> Irrespective of the terms of Section 21 of this Agreement all Sundry Department employees shall be covered by and part of the d.b.a. by and between Giant Value 5250 Geary Boulevard, San Francisco, California, and Local 1100.

Kurtz continued to experience financial problems and, several months prior to June, entered into negotiations with Volume and the Respondent to have the Respondent purchase the lease for the sundry department as well as a liquor license held by Kurtz at the Mission store. These arrangements were finalized on May 8 and the Respondent was to take over operation of the sundry department at Mission Street on June 1. (Resp. Exhs. 4 and 5.)[6]

During the time Kurtz leased the sundry department at the Mission Street store, Robert McGrath was the manager and Ellen Wentworth was the assistant manager. In addition, six employees worked in the department and were part of the bargaining unit. These employees were: Alice Dominici, Lucilla Edison, Sara Gilbert, Gee Gwing Hung, Susanna Lopez, and Euwanda Sexton.

Although Kurtz and the Respondent attempted to keep their negotiations private, the unit employees quickly gained knowledge of the pending change in ownership of the lease. Dominici worked in the department as a cashier and stock clerk. She testified that at least 2 months prior to the Respondent taking over the lease, she spoke with McGrath about the employment prospects for the employees after the lease was transferred. According to Dominici, McGrath stated he had talked with Chu and the employees would be retained. On May 30, Dominici again spoke to McGrath about the employees' fate after the Respondent took over the department. She stated McGrath said Chu wanted to keep the employees. Dominici insisted she wanted to hear this directly from Chu and she went to speak with him in the pharmacy. According to Dominici, Chu said he wanted to keep the employees but was having problems between Local 648, a union he wanted, and Local 1100, which currently represented the employees. She stated Chu advised her to take a week off and fill out an application for employment. He told the employee that McGrath would contact her.[7] Dominici said Chu indicated he could not say much more at that time because it would create further problems for him.

Dominici testified that her last day of work in the sundry department was May 31. She was never contacted by McGrath but returned to the store sometime between June 16 and June 20. While there, she spoke with McGrath and commented that it did not seem as if the employees would be getting their jobs back. According to Dominici, McGrath replied that he did not know because "things were pretty lousy."

Edison worked in the camera section of the sundry department. She was classified as a department head and under the contract received a higher wage rate than the regular sales employees. She testified that, approximately 2 months before the Respondent took over the department, she questioned McGrath about her future employment. According to Edison, McGrath stated that Chu was going to keep her along with Dominici and Lopez. Since she knew Chu, Edison went directly to him to inquire about her job prospects under the new management. Edison testified Chu said he was not sure of the arrangements at that time. He indicated he wanted to retain Edison, but was having problems. On cross-examination, Edison acknowledged that she told Chu she had a job offer from a pharmacy in the area called "Joe's Pharmacy." She stated, however, that in her conversation with Chu she did not indicate she was going to accept the pharmacy job.

Edison further testified that she had another conversation with Chu on May 30. She said Chu informed her that he still wanted her to take over the camera section of the sundry department, but he was having trouble with the Union. According to Edison, Chu said he wanted to drop Local 1100 and get Local 648 to represent the employees. As in the case of Dominici, Chu advised Edison to take a week off and he would contact her about the job. Edison testified that during this conversation Chu asked if she would be willing to join Local 648 and give up her membership in Local 1100. Edison replied that it depended on her position with the Respondent and the money arrangements. After the transfer of the lease from Kurtz to the Respondent, Edison was not hired by the Respondent.

Lopez worked as a cashier and a sales clerk in the Mission store during Kurtz' operation of the sundry department. She testified that approximately 3 weeks before the change in ownership, she asked McGrath about her employment situation under the new management. She asked McGrath if the employees would keep their jobs and was told they would. Lopez posed the same question to McGrath the following week. According to her testimony, McGrath stated he had spoken to Chu and that the Respondent intended to retain the employees after the transfer of ownership. Lopez' last day in the department was May 30. She stated she asked McGrath what she was supposed to do (about her future employment by the Respondent). McGrath replied, according to Lopez, that the employee should wait a few days and she would be contacted. However, Lopez was never called by the Respondent.

McGrath was called as a witness in the case. He stated that, after Kurtz and the Respondent agreed to the terms of sale of the lease, it became common knowledge among the employees that Chu was taking over the operation of the department. He stated he was questioned on numerous occasions by Dominici, Edison, and Lopez about what would happen to the employees' jobs.[8] Each time he was questioned by the employees, McGrath stated he told them the Respondent wanted to keep all of the employees but did not know whom he would retain.

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[6] Under the terms of the agreement between the Respondent and Kurtz, the Respondent purchased all of the inventory and fixtures in the sundry and liquor departments as well as Kurtz' liquor license.

[7] McGrath had accepted an offer from Chu 3 weeks previously to remain as manager of the sundry department after the transfer of the lease.

[8] According to McGrath, Sexton was on disability at the time of the sale of the lease, Gilbert indicated she wanted to retire, and Gwing Hung decided to transfer to the Geary store.

He advised the employees to fill out a new application for employment with the Respondent.

Because of the anxiety expressed by the employees, McGrath said he urged Kurtz during the transition period to issue a statement to them explaining their job rights. On May 19, Kurtz had McGrath and Wentworth circulate a memorandum to the employees stating that those employees with high enough seniority could elect to transfer to the Geary store. (Resp. Exh. 3.)[9] The employees were given until May 29 to make this election. All employees choosing to remain at the Mission store were to be scheduled to work through May 26, but would be paid through May 29.

On May 23, Kurtz issued another memorandum to the employees indicating that the inventory and transfer date had been changed to May 29. According to this memorandum all employees were to be terminated on May 28 and Gee (Gwing Hung) and Edison were eligible to transfer to the Geary store.[10] He cautioned there was no guarantee of employment by the new owner. (Resp. Exh. 2.)

Chu testified that the Respondent actually took over the lease on June 1 and the department was closed May 31 in order to take inventory. He stated that when the Respondent assumed operation of the sundry department, he transferred employees in from his other pharmacies to staff the department. Chu acknowledged that he spoke with Dominici and Edison regarding their chances of being employed by him once he took over the management of the department. According to Chu, he told Dominici that he did not know what his labor situation was going to be but she would have to reapply for employment. He further stated he advised Dominici he had enough help, and it would take a month or so to see if there would be any openings.

Chu admitted that when he spoke with Edison, he was rather evasive. He testified this was due to the fact that he felt the employees would come under the jurisdiction of Local 648 rather than Local 1100.[11] Chu further testified that when Edison informed him of the job offer she had from Joe's Pharmacy, he became curious about the procedure for employees transferring from Local 1100 to Local 648. Therefore, he asked Edison about making such a transfer and she indicated she would find out and advise him.

Regarding McGrath's purported offers of employment to the employees, Chu denied that he ever authorized McGrath to tell the employees they would be hired by the new management. Chu stated he told McGrath to inform the employees, when asked about jobs, that he simply did not know what the situation would be.

Sometime in July, Heilesen came into the store and was introduced to Chu by McGrath. According to Chu's testimony, Heilesen stated that the Respondent would have to hire all of the former employees back and execute a contract with the Union. Heilesen told Chu that if he did not do this, Volume would close down the sundry department. Chu referred Heilesen to Tyrone Cochran, his labor consultant, and offered to give Heilesen Cochran's telephone number. Chu stated that Heilesen indicated he knew Cochran and would get in touch with him.

Vetterlein testified that after the deal was consummated between Kurtz and the Respondent, he had many conversations with union representatives about the fate of Kurtz' former employees. According to Vetterlein, the Union threatened to picket Volume to force Chu to hire Kurtz' employees in the sundry department. He stated that the Union took the position that Volume had the contract which covered these employees at the Mission store, and the Union intended to picket in order to force Volume to compel Chu to hire the employees and execute an agreement with the Union. Vetterlein testified that he urged the Union to use the transfer rights in the agreement covering the sundry department employees at the Mission and the Geary stores. He stated, however, that the Union rejected this suggestion because it wanted Chu to pick up the employees laid off at Mission.

Cochran testified that in late May Chu informed him of the arrangement he had made with Kurtz to acquire operation of the sundry department. Cochran stated he felt that, because Chu had the pharmacies at the various Giant Value stores, Local 648 would seek to assert jurisdiction over the sundry department employees at Mission. Cochran stated that this was his belief even though he was aware that in the San Francisco area Local 648 covered pharmacy employees and Local 1100 covered sundry department employees in discount operations when located in the same building. When contacted by the Respondent's attorney during the negotiations for the purchase of the lease, Cochran testified he informed the attorney that the Respondent did not have to keep the employees of the prior owner of the lease. He told the attorney that, if the Respondent did keep the employees, he would have to pay the higher wage rates called for in the collective-bargaining agreement with the Union. Cochran further testified that after Heilesen contacted Chu he placed a call to Heilesen but was never able to get him nor were his calls ever returned by the union representative.

Concluding Findings

The General Counsel and the Charging Party argue that the Respondent is the successor employer to Kurtz in the operation of the sundry department at the Mission store. As such, it is contended that the Respondent refused to hire the employees of its predecessor because of their union affiliation and thus avoid having to bargain with the Union as the exclusive representative of these employees.[12]

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[9] Only three employees had enough seniority to qualify to make the transfer. They were Edison, Gwing Hung, and Gilbert.

[10] Gwing Hung transferred to the Geary store. Edison testified she did not elect to transfer because there were no openings at that store for a department head. Therefore, if she opted to transfer, she would have to work at a reduced wage rate.

[11] Chu indicated this was his belief even though none of the employees at his pharmacies were represented by Local 648.

[12] The complaint alleges that the appropriate bargaining unit is:

> All employees performing selling and non-selling work in the sundry department operated by Respondent at 2558 Mission Street, San Francisco, California; excluding all other employees, guards and supervisors as defined in the Act.

The Respondent, on the other hand, contends that the bargaining unit is not that urged by the General Counsel or the Union. Respondent states that prior to the sale of the lease, the sundry department employees were specifically made a part of the Geary bargaining unit, and after the sale the unit at the Mission store became a part of the Respondent's pharmacy department. In addition, the Respondent argues that it is not a successor to Kurtz and therefore under no duty to bargain with the Union. The Respondent contends that the sundry department employees were either terminated, placed on layoff, or transferred by Kurtz to the Geary store at the termination of his lease. Respondent further contends that as the new owner of the lease it was under no obligation to employ the individuals working for Kurtz nor did it refuse to employ them because they were members of the Union.

I find that the Respondent's first argument—that a unit limited to sundry department employees at the Mission store is not an appropriate one—is without merit. Although the Respondent's position on this point is not articulated in precisely these terms, it in effect states that the continuity of the bargaining unit was destroyed when the Respondent took over the ownership of the lease at the Mission store. To support this position, Respondent relies on the collective-bargaining agreement between Giant Value and the Union, which placed the Mission and Geary stores in a single bargaining unit and the subsequent collective-bargaining agreement between Volume and the Union, which specifically retained the sundry department employees of the Mission store in the Geary unit. Thus, according to the Respondent's argument, its purchase of the lease at Mission caused a severance from the prior unit and the sundry department became merged with the Respondent's pharmacy department at that store.

While this argument contains some elements of persuasiveness, it overlooks the fact that the Board has consistently held, with court approval, that a much reduced bargaining unit may be treated as a miniature of the predecessor's larger unit. See, e.g., *Nazareth Regional High School* v. *N.L.R.B.*, 549 F.2d 873 (2d Cir. 1977), enfg. 222 NLRB 1052 (1976); *Zim's Foodliner, Inc.* v. *N.L.R.B.*, 495 F.2d 1131 (7th Cir. 1974), enfg. 201 NLRB 905 (1973). Cf. *N.L.R.B.* v. *Band-Age, Inc.*, 534 F.2d 1 (1st Cir. 1976), enfg. 217 NLRB 449 (1975). The sale of the sundry department in the instant case is analogous to the sale of a single store which prior to the sale was part of a multistore bargaining unit. Such was the case in *Zim's Foodliner* where individual stores of a multistore bargaining unit were sold separately. The Board and the court found that the stores were operated at the same location, with the same physical plant and equipment, served the same products to the same customers, and the employees had the same job functions and immediate supervision as they had in the larger predecessor unit. Thus, it was determined that the fractionalized unit was an appropriate one.

In the instant case, there is no evidence in the record to contravene the contention of the General Counsel or the Charging Party that the Respondent sold the same type of products and provided the same kinds of services to the same spectrum of customers as did the predecessor prior to the transfer of the lease. Furthermore, the sundry department was operated in the same location—the Mission Street store—and was under the supervision of the same general manager who ran the department for the predecessor employer. Therefore, with the exception of the employee complement (which will be discussed *infra*) the "employing industry" remained identical to that which prevailed prior to the sale of the lease at the Mission store. In these circumstances, the contraction of the sundry department unit to the Mission store does not render it any less appropriate as a bargaining unit. *Nazareth Regional High School, supra; Zim's Foodliner, supra.* See also *N.L.R.B.* v. *Foodway of El Paso, a Division of Kimbell Foods, Inc.*, 496 F.2d 117 (5th Cir. 1974).

The finding that the unit is appropriate leads to the more central question of whether the Respondent is a successor employer obligated under the circumstances here to hire the predecessor's employees and bargain with the Union. Under the Supreme Court's holding in *Howard Johnson* v. *Detroit Joint Board*,[13] and *N.L.R.B* v. *Burns International Security Services*,[14] a successor employer is not obligated to hire any of the work force employed by his predecessor. But, as pointed out in both decisions, a successor employer cannot refuse to hire the predecessor's "employees solely because they are union members or to avoid having to recognize the Union."[15] Therefore, the central issue here is not whether the Respondent was obligated to hire the employees of his predecessor but, rather, whether the Respondent refused to hire these employees because they were members of Local 1100 and thereby avoid having to bargain with that union.

In my judgment, the record warrants a finding that the Respondent unlawfully refused to hire those of the predecessor's employees who were available and willing to work at the Mission store after the transfer of ownership of the lease. The testimony of the former employees (Dominici, Edison, and Lopez) as well as that of Chu and McGrath graphically demonstrates that the employees became aware of the sale of the sundry department at least a month before its effective date. Further, upon gaining this knowledge, all of the employees were concerned over whether they could expect employment with the Respondent after the change in ownership of the lease. They engaged in repeated conversations about their job prospects with McGrath who, 3 weeks prior to the change in ownership, agreed to work in the same capacity as general manager for the Respondent. All three of the predecessors' employees testified they were told by McGrath they would be hired by the Respondent and that McGrath indicated that his assurances were based on his conversations with Chu. Contrary to this, McGrath testified that he told the employees on each occasion that he was apprised that the Respondent would like to keep all of them but did not know which ones would be retained. He advised the employees to fill out new applications. Chu, on the other hand, stated he instructed McGrath to tell the employees, when questioned about future employment, that he did not know what the Respondent intended. This variance in the statements of Chu and McGrath casts serious doubts on the reliability of their testimony. Accordingly, I find the testimony of the employees to be more convincing and trustworthy.

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[13] *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO*, 417 U.S. 249 (1974).

[14] *N.L.R.B.* v. *Burns International Security Services, Inc., et al.*, 406 U.S. 272 (1972).

[15] *Howard Johnson* v. *Detroit Joint Board, supra* at 262, fn. 8; *N.L.R.B.* v. *Burns International Security Services, supra* at 280–281, fn. 5.

The testimony also indicates that Dominici and Edison were not satisfied with McGrath's assurance and each went to Chu independently. Dominici stated that Chu told her he wanted to keep the employees, but was having problems between Local 648 and Local 1100. At this time Chu indicated he wanted the employees to be represented by Local 648. In this same vein, Edison testified that Chu told her that on May 30 he was having trouble with Local 1100 because he wanted to drop that union and get Local 648. Although Chu denied telling this to Dominici and Edison, I do not credit him. Their testimony regarding Chu's statements comports with the testimony of Cochran, Respondent's labor consultant. When first apprised by Chu that the Respondent intended buying Kurtz' lease at Mission, Cochran told Chu's attorney that the Respondent did not have to keep the employees but, if they were retained, the Respondent would have to pay the higher wage rates required by the collective-bargaining agreement with the Union. Cochran also stated he reminded Chu he might have jurisdictional problems between Locals 648 and 1100, even though he was aware at that time that none of Chu's pharmacy employees at any of the stores were represented by a union.[16] This unrefuted testimony by Cochran lends support to the statements of Dominici and Edison that Chu did not want Local 1100 representing his employees. Further, it warrants the inference that Chu was concerned by the higher wage rates he would have to pay if he hired the predecessor's employees, since they were members of Local 1100. It also serves to explain why Chu asked Edison if she would consider giving up her membership in Local 1100 and transferring to Local 648.

In light of the above, I find that the credited testimony warrants the conclusion that the Respondent did not hire Dominici, Edison, or Lopez for the reasons that they were members of Local 1100. In making this finding, I rely on the assurances given the employees by McGrath that they would be hired by the Respondent only to the extent that it indicated the Respondent was considering employing these individuals until advised that it would be burdened with a union it did not want.[17] I find, therefore, that by refusing to hire these three employees because of their union affiliation, the Respondent violated Section 8(a)(3) and (1) of the Act. *Karl Kallmann, d/b/a Love's Barbeque Restaurant, No. 62* v. *N.L.R.B.*, 640 F.2d 1094, 1100 (9th Cir. 1981), enfg. in pertinent part 245 NLRB 78 (1979); *Macomb Block and Supply, Inc.*, 223 NLRB 1285 (1976).[18]

The finding that the Respondent refused to hire the three employees of its predecessor because of their union affiliation further warrants the inference that this action was taken in order to allow the Respondent to avoid any bargaining obligation, as a successor employer, with the Union. The record reveals that the Respondent brought in three employees, in addition to Chu's wife, from its other pharmacies to work in the sundry department at Mission. Thus, it becomes evident that, had the Respondent hired the three employees of its predecessor, the Union would have maintained its majority status in the unit and the Respondent, as the successor employer, would then have been under an obligation to recognize and bargain with the Union. *N.L.R.B.* v. *Burns International Security Services, Inc., supra.* Therefore, the Respondent cannot now be permitted to evade its legal obligations through its own wrongdoing in refusing to hire its predecessor's employees. *Karl Kallmann* v. *N.L.R.B., supra* at 1100–01; *N.L.R.B.* v. *Foodway of El Paso, supra.* Accordingly, I find the Respondent has also committed a violation of Section 8(a)(5) of the Act. *J. R. Sousa & Sons, Inc.*, 210 NLRB 982 (1974). See also *K. B. & J. Young's Super Markets, Inc.* v. *N.L.R.B.*, 377 F.2d 463 (9th Cir. 1967).

CONCLUSIONS OF LAW

1. The Respondent, Ah Chu Company, is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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[16] Moreover, Cochran testified he was aware that Locals 648 and 1100 represented separate units of pharmacy and sundry department employees even when these units were in the same discount store location.

[17] Counsel for the General Counsel and the Charging Party contend that the other employees of the predecessor were also victims of an unlawful refusal to hire. I reject this contention as being unsupported in the record. McGrath testified that Sexton was on disability at the time of the sale of the lease and there is no indication in the record that she would have been considered for hire by the Respondent. McGrath also testified that Gilbert stated she did not wish to transfer to the Geary store and that she wanted to go on retirement or layoff. Thus, she voluntarily removed herself from consideration for hire by the Respondent. Gwing Hung opted to transfer to the Geary Street store and thereby removed himself from consideration for employment after the transfer of the lease.

Although these three individuals were alleged in the complaint to be discriminatees, they were not available at the hearing. Counsel for the General Counsel and the Charging Party asserted they were not aware that the Respondent would defend on the ground that these individuals were not available for employment after the transfer of the lease. A brief recess was taken to afford counsel an opportunity to secure these witnesses but they were not found. Counsel for the Charging Party made offers of proof regarding testimony they would have given. The offers of proof were rejected since the complaint and notice of hearing setting the hearing date had been issued some 5 months previously, and there was no showing as to good cause—other than the claimed surprise—why these witnesses were not available.

[18] Respondent contends that none of the employees filed an application for employment as requested and, thus, there was no refusal to hire them. This argument is without merit since Chu's conversations with Dominici and Edison made it clear to the employees that their union affiliation was an impediment to consideration for hire. Therefore, the failure of the employees to undertake a useless act is no defense to the unlawful refusal to hire. *Macomb Block and Supply, Inc., supra.*

3. The following constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees performing selling and non-selling work in the sundry department operated by Respondent at 2558 Mission Street, San Francisco, California; excluding all other employees, guards and supervisors as defined in the Act.

4. By refusing to retain or hire three sundry department employees of Giant Value, after purchasing the lease for and operating that department at the Mission Street store, because they were members of the Union, the Respondent has discriminated against these employees with regard to hire and tenure of employment in violation of Section 8(a)(3) and (1) of the Act.

5. By unlawfully refusing to retain or hire the three sundry department employees of Giant Value because of their union affiliation, the Respondent has evaded its obligation, as successor to Giant Value, to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

6. The above conduct constitutes unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has committed unfair labor practices within the meaning of Section 8(a)(3), (5), and (1) of the Act, it shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since the Respondent has unlawfully evaded its obligation, as successor to Giant Value, to bargain with the Union as exclusive representative of its employees in an appropriate unit, it shall be ordered to bargain in good faith, upon request, with the Union and embody in a signed agreement any understanding reached. The Respondent shall be further ordered to offer immediate employment to Alice Dominici, Lucilla Edison, and Susanna Lopez in the same positions they held when the Respondent purchased the lease for the sundry department at the Mission Street store from Giant Value or, if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, all employees hired since Respondent took over operation of the sundry department. In addition, the Respondent shall make whole these three employees for any loss of pay they may have suffered by reason of the discrimination against them by paying each a sum of money equal to that which she would have normally earned as wages from the date of discrimination to the date of employment, less net earnings during such period. Interest on said wages shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[19]

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[20]

The Respondent, Ah Chu Company, San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers Union, AFL-CIO, or any other labor organization, by refusing to hire employees who are members of that union, or any other labor organization, thereby discriminating against employees or applicants for employment in regard to hire and tenure of employment.

(b) Refusing to recognize and bargain collectively regarding rates of pay, wages, hours, and other terms and conditions of employment with the above-named union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees performing selling and non-selling work in the sundry department operated by Respondent at 2558 Mission Street, San Francisco, California; excluding all other employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Alice Dominici, Lucilla Edison, and Susanna Lopez immediate and full employment, without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired since the Respondent took over operation of the sundry department at the Mission Street store, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them in the manner set forth in this Decision entitled "The Remedy."

(b) Recognize and, upon request, bargain in good faith with Local 1100 as the exclusive representative of its employees in the appropriate bargaining unit set forth above with respect to rates of pay, wages, hours, and other terms and conditions of employment. In the event an understanding is reached, embody the terms of said understanding in a signed agreement.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

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[19] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Post in the sundry department at the Mission Street, San Francisco, California, store, copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Board."

Jefferson County Community Center, Inc. *and* Community Center Professional Employees Association, Colorado Education Association, NEA. Case 27-CA-7349

November 9, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

Upon a charge filed on June 9, 1981, by Community Center Professional Employees Association, Colorado Education Association, NEA, herein called the Union, and duly served on Jefferson County Community Center, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 27, issued a complaint on June 15, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 19, 1981, following a Board election in Case 27-RC-5990,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about June 3, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising certain "affirmative defenses."

On July 21, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 29, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Motion for Summary Judgment, Respondent admits the request and its refusal to bargain with the Union. It, however, challenges the Union's certification, reiterating its contentions in the underlying representation proceeding that the Board lacks jurisdiction over its operations; that the Regional Director improperly included certain employees and excluded certain others from the bargaining unit; that the Board improperly overruled certain of Respondent's challenges and objections to the first election; and that the Acting Regional Director improperly overruled its objection to conduct affecting the second election.

Review of the record herein, including the record in Case 27-RC-5990, reveals that on February 1, 1980, the Union filed a representation petition under Section 9 of the National Labor Relations Act. On June 27, 1980, after a hearing, the Regional Director issued his Decision and Direction of Election in which he found that the Board had jurisdiction over Respondent, rejecting Respondent's assertions that it was a political subdivision of the State of Colorado. He also found that Respondent possessed sufficient control over the employment conditions of its employees to enable it to bargain effectively with a labor organization. Further, contrary to Respondent's positions, he included in the bargaining unit certain employees who Respondent asserted were supervisors and employees who were working on 1-year Federal grants and he excluded employees not directly involved in client care or contact. The Regional Director directed an election in two voting groups consisting of professional and nonprofessional employees, respectively. Respondent filed with the Board a timely request for review of the Regional Director's decision in which it reiterated the arguments previously rejected by the Regional Director. On August 4, 1980, the Board denied Respondent's request for review.

Thereafter, the first election was conducted by mail and manual balloting. The professional employees voted 37 for, and 17 against, inclusion in the same unit with the nonprofessional employees, with 12 challenged and 4 void ballots. The overall

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[1] Official notice is taken of the record in the representation proceeding, Case 27-RC-5990, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

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tally revealed 60 votes for, and 59 against, the Union, with 18 challenged and 3 void ballots. Respondent challenged the 18 voters on the grounds that they were no longer employed and further asserted that certain of them had been improperly included in the unit. It also filed timely objections to the election alleging, in substance, that certain prounion alleged supervisors had intimidated antiunion or undecided employees; that there were irregularities regarding the mailed ballots; that a ballot of a professional employee should have been voided; that the Board agent interfered with the election; and that a ballot had been fraudulently cast by an ineligible employee. Thereafter, the Regional Director ordered a hearing on Respondent's challenges and objections. On November 6, 1980, the Hearing Officer issued his report in which he recommended that the challenges to certain ballots be sustained, that the challenges to the remaining ballots be overruled, that the objection relating to the fraudulently cast ballot be sustained, and that the remaining objections be overruled. He further recommended that if, after the issuance of the revised tally, the fraudulently cast ballot was determinative, the election be set aside and a second election be directed. Respondent filed timely exceptions to the Hearing Officer's report. On March 24, 1981, the Board adopted the Hearing Officer's report.

Subsequently, the ballots, the challenges to which had been overruled, were opened and counted and a revised tally issued which revealed that the fraudulently cast ballot was determinative. Therefore, in accordance with the Board's March 24 order (not published in volumes of Board Decisions), a second election was conducted on May 4, 1981. The professional employees voted 23 for, and 49 against, inclusion in the same unit with the nonprofessional employees, with 2 challenged ballots. In addition, the professionals cast 53 votes for, and 19 against, the Union, with 2 challenged ballots. The tally for the nonprofessional employees showed 17 votes for, and 55 against, the Union, with 2 challenged ballots.

Respondent filed a timely objection to the second election in which it contended that the Regional Office had interfered with the election by allowing the professional employees to vote again on whether they desired to be included in the same unit with the nonprofessional employees. The Acting Regional Director issued his Supplemental Decision and Certification of Representative on May 19, 1981, in which he overruled Respondent's objection, certified the Union as the bargaining representative of the professional employees, and certified the results of the election among the nonprofessional employees. Respondent filed a request for review of the Acting Regional Director's Supplemental Decision which was denied by the Board on June 19, 1981. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and finally determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[3]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Jefferson County Community Center, Inc., a Colorado corporation, with its principal office and place of business at Arvada, Colorado, provides educational and health services for the developmentally disabled. During the fiscal year ending June 30, 1979, it had revenues in excess of $3,700,000, and purchased goods valued at $15,000 directly from points outside the State of Colorado.

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[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] Respondent asserts in its answer to the complaint that it was not served with the charge, although it does not renew this contention in its response to the Motion for Summary Judgment nor in its response to the Board's Notice To Show Cause. The record reveals that Respondent was served with the charge.

Respondent also denies pars. 2(c), (d), and (e) of the complaint which allege that during the fiscal year ending June 30, 1979, it had revenues in excess of $3,700,000 and purchased goods valued at $15,000 directly from points outside the State of Colorado, that it receives in excess of $220,000 annually from Federal funds which are transferred directly across state lines, and that it is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. However, the Regional Director, in asserting jurisdiction in his Decision and Direction of Election, found that for the fiscal year ending June 30, 1979, Respondent had revenues of $3,724,222, that it purchased goods valued at approximately $15,000 directly from outside the State of Colorado, and received in excess of $220,000 annually from Federal funds which were transferred directly across state lines. Subsequently, the Board denied Respondent's request for review in which it raised the issue of jurisdiction, and Respondent does not now offer to adduce any new evidence.

In addition, it receives in excess of $220,000 annually from Federal funds which are transferred directly across state lines.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Community Center Professional Employees Association, Colorado Education Association, NEA, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/-student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees[4] and supervisors as defined in the Act, and all other employees.

2. The certification

On May 4, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 27, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 19, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about May 28, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit.

Commencing on or about June 3, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since on or about June 3, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

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[4] The complaint inadvertently describes the appropriate unit as excluding professional employees, whereas it is clear from the record that nonprofessional employees are excluded from this unit of professional employees.

CONCLUSIONS OF LAW

1. Jefferson County Community Center, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Community Center Professional Employees Association, Colorado Education Association, NEA, is a labor organization within the meaning of Section 2(5) of the Act.

3. All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 19, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 3, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Jefferson County Community Center, Inc., Arvada, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Community Center Professional Employees Association, Colorado Education Association, NEA, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its offices and facilities copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Community Center Professional Employees Association, Colorado Education Association, NEA, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees and supervisors as defined in the Act, and all other employees.

JEFFERSON COUNTY COMMUNITY
CENTER, INC.

Inland Steel Company *and* **Dale Ray.** Case 13-CA-18261

November 9, 1981

DECISION AND ORDER*

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 5, 1981, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and counsel for the General Counsel filed cross-exceptions and supporting brief and in response to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order,[2] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Inland Steel Company, East Chicago, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Make whole all mechanical maintenance employees of No. 11 Coke Battery who suffered reduction of their lunch break from 30 minutes to 20 minutes and the elimination of their washup time by paying such employees for 15 minutes per day 5 minutes for washup time and 10 minutes for lunchtime) from July 20 1978, to September 23, 1978."

2. Substitute the following for paragraph 2(d).

"(d) Remove and expunge from its files any reference to the two disciplinary warnings issued to employee Dale Ray on December 4, 1978, notify him in writing that this has been done and that evidence of these unlawful warnings will not be used as a basis for future discipline against him, and make him whole for any loss of pay he may have suffered as a result of his refusal to perform painting on December 2 and 3, 1978, in the manner set forth for loss of earnings in the section of this Decision entitled 'The Remedy.'"

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

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* On January 20, 1982, Respondent requested en banc consideration of a motion for reconsideration of that portion of the Board's Order in this proceeding regarding the promulgation of rules regarding lunch periods and hours of employment in the coke battery. At the request of the parties, Respondent's motion was held in abeyance in order to provide all parties an opportunity to resolve the issue in a manner satisfactory to all concerned.

Thereafter, on March 15, 1982, the Board received the General Counsel's and Respondent's joint motion to amend the Board's Order. Respondent contends, and the General Counsel and Charging Party now agree, that par. 2(a) of the Administrative Law Judge's Order, which was adopted by the Board, added new terms and conditions of employment to the existing contract. The parties are in agreement that the terms and conditions of employment of Respondent's mechanical employees would have changed irrespective of the unfair labor practices committed by General Foreman Sanger. Upon amendment of the Board's Decision and Order as requested, Respondent agrees to comply with the Board's Order and withdraws its previously filed motion for reconsideration.

The Board, having duly considered the matter, on April 1, 1982, granted Respondent's request to withdraw its motion for the Board en banc to consider the contemporaneous motion for reconsideration; granted the General Counsel's and Respondent's joint motion to amend the Board's Order; and amended its Order. The Board's Order and the notice for posting herein reflect that amendment.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent has also contended that the Administrative Law Judge's interpretation of the evidence and his credibility findings were biased and prejudiced. Upon careful examination of the Administrative Law Judge's Decision and the entire record, we are satisfied that the contentions of Respondent in this regard are without merit.

Finally, in accord with the General Counsel's exceptions, we hereby correct two inadvertent errors made by the Administrative Law Judge in sec. II,D,1, of his Decision. The Administrative Law Judge's reference to Ray's assignment of rustproofing steel blocks and spare parts as "usual" is inaccurate; the word "usual" should read "unusual"; (2) also in sec. II,D,1, the Administrative Law Judge inaccurately stated that Sanger's recollection of the time of his decision to assign Dale Ray to rustproofing shifted from late June or July to early July or mid-July 1978. The record reveals that Sanger initially testified that he decided to assign Ray to rustproofing around August 20, 1978, and later testified that Ray was assigned to rustproofing around the end of June or beginning of July 1978. Neither of these inaccurate statements affects the ultimate disposition of this case.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

WE WILL NOT threaten employees with more rigid working conditions because they initiate or process a grievance under our collective agreement with Local 1010, United Steelworkers of America, AFL-CIO, or otherwise seek to vindicate provisions of the collective-bargaining agreement, or because they engaged in other protected concerted activity covered by the National Labor Relations Act.

WE WILL NOT reduce the length of employees' lunch breaks, eliminate washup time, or otherwise impose harsher conditions of employment upon employees because fellow employees are initiating or processing grievances under our collective-bargaining agreement with Local 1010, United Steelworkers of America, AFL-CIO, or any other labor organization, or because they engage in union or other protected concerted activities for the purpose of collective bargaining or other mutual aid and protection.

WE WILL NOT discourage the filing and processing of grievances under a collective-bargaining agreement or other union activity on behalf of Local 1010, United Steelworkers of America, AFL-CIO, or any other labor organization, by discriminating against its employees in the assignment or scheduling of work or by other changes in wages, hours, or conditions of employment.

WE WILL NOT assign employees to perform rustproofing, painting, or other work, or assign them to the midnight shift or otherwise affect their wages, hours, or conditions of employment because they initiated or processed a grievance or because they engaged in union or other protected concerted activities for the purpose of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL rescind General Foreman Robert Sanger's July 20, 1978, announcement and July 21, 1978, statement of rules regarding lunch periods and hours of employment for the interim period of start-up in the No. 11 Coke Battery; and WE WILL make whole all mechanical maintenance employees of No. 11 Coke Battery who were denied a washup period at the end of their shift and had their lunch period reduced from 30 minutes to 20 minutes, by paying each employee for 15 minutes per day 5 minutes for washup time and 10 minutes for lunchtime) from July 20, 1978, to September 23, 1978.

WE WILL make whole the mechanical employees of No. 11 Coke Battery, because we unlawfully penalized them on or about July 21, 1978, for taking a 15-minute washup period, by paying them any loss of earnings, plus interest, they may have suffered, by removing and expunging from their personnel files all references to the unlawful disciplinary actions taken against them, and by informing them in writing both that we have expunged our files and that evidence of our unlawful actions will not be used as a basis for future discipline against them.

WE WILL make Dale Ray whole for any loss of earnings he may have suffered as a result of the discrimination against him, with interest.

WE WILL remove and expunge from Dale Ray's personnel file and our records all copies or other evidence of the disciplinary letters we issued to him on December 4, 1978, and WE WILL notify him, in writing, both that this has been done and that evidence of these unlawful letters will not be used as a basis for future discipline against him.

INLAND STEEL COMPANY

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge: Upon a charge filed by Dale Ray, an individual, the Regional Director for Region 13 of the National Labor Relations Board issued a complaint and notice of hearing in this case on January 31, 1979. The complaint, as amended, alleges that Respondent, Inland Steel Company, referred to below as the Company, violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*, herein called the Act. The Company, by its timely answer, denies commission of the alleged unfair labor practices.

Upon the entire record, including my observation of the demeanor of the witnesses at the hearing, and after due consideration of the briefs[1] filed by the General Counsel and the Company, I make the following:

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[1] The General Counsel's motion to correct the record is granted. The corrections are contained in Appendix A of this Decision. [Omitted from publication.] I also find merit in the General Counsel's motion requesting me to disregard writings which appear to be arbitration decisions which are labeled attachments "A" and "B" and which the Company appended to its brief. As the Company did not offer the proffered written evidence and authenticate it at the hearing, I have granted the General Counsel's motion and have disregarded them.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Company, a Delaware corporation, is engaged in the manufacture of steel products. In the course of its business operations, the Company annually receives at its East Chicago, Indiana, plant materials valued in excess of $50,000, all of which are shipped directly from points outside the State of Indiana. In its answer, the Company admits the foregoing data and concedes that at all times material it was an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

The complaint alleges, the Company in its answer admits, and I find that Local 1010, United Steelworkers of America, AFL-CIO, referred to as the Union, is, and has been at all times material to this case, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

The Company's plant, known as the Indiana Harbor Works, employs approximately 24,000 persons. Since 1942, the Union has been the bargaining representative of the Company's production and maintenance employees under a series of collective-bargaining agreements, the latest of which has been in effect since August 1, 1977.

In March 1978,[2] Dale Ray, a company employee, testified in a National Labor Relations Board hearing in Case 13-CA-16952. Thereafter, on June 15, Administrative Law Judge Benjamin K. Blackburn issued a decision in that case, which the Board adopted,[3] concluding that the Company had violated the Act "[b]y maintaining a no-distribution rule which forbids employees to distribute literature in nonwork areas on nonwork time and which requires them to obtain prior approval of such material by submitting a copy to management before even bringing it into the plant . . . . [238 NLRB at 1206.]" Administrative Law Judge Blackburn also found that the Company violated the Act "by conditioning the right of Thomas Zangrilli and Dale Ray to report for work on October 2, 1977, on compliance with an invalid no-distribution rule . . . . [*Id.* at 1207.]" In July Ray and fellow employees filed a grievance complaining that salaried foremen had performed bargaining unit work.

The issues presented are: (1) whether the Company, in response to the grievance, violated Section 8(a)(1) of the Act by threatening employees with strict working conditions; (2) whether the Company carried out that threat and thus violated Section 8(a)(3) and (1) of the Act, by curtailing the lunch period and washup time previously enjoyed by its No. 11 Coke Battery mechanical employees; and (3) whether the Company assigned No. 11 Coke Battery mechanic Dale Ray to rustproofing and painting for more than 5 months and transferred him to the night shift for 1 week in retaliation for his participation in the earlier Board unfair labor practice proceeding and because of his role in the filing of the grievance.

B. *Alleged Interference, Restraint, and Coercion*

During the week of July 17, Dale Ray, who was a mechanic employed in No. 11 Coke Battery, discussed the pending grievance with No. 11 Coke Battery's general mechanical foreman, Robert Sanger. Sanger asked Ray why he was filing a grievance. Ray replied that it was not his grievance alone, that there were eight employees involved, and that the cause of the grievance was the employment of salaried foremen to do bargaining unit employees' work.

Sanger pressed Ray for the names of the foremen who had been doing the unit work. Ray responded that it was Mechanical Foreman Lawrence Woodworth of No. 11 Coke Battery, and some other mechanical foremen who had been working at the plant on weekends, when "there was no one else working."

Sanger sought to persuade Ray that the grievance was unwarranted. Sanger said that Foreman Woodworth "had made an honest mistake" and that Woodworth had not been a salaried supervisor "for that long." Sanger added that he "could guarantee that it would not happen again" and questioned the need for filing the grievance.

Ray insisted that the grievance was warranted in light of the wages lost by unit employees. Ray hastened to argue that anyone who had been in the Company's employ as long as Woodworth had should recognize that salaried foremen did not perform unit work.

Sanger suggested that employees bring their complaints to him rather than immediately file a grievance. Ray replied that, if Sanger wished, the other grieving employees might agree to meet with Sanger. However, Ray disclaimed the role of spokesman for the group.

At this, Sanger expressed his view that such a meeting was unnecessary, and that Ray could convey Sanger's thoughts to the other grievants. Sanger added that, if any of them wanted to discuss the matter with him at that point, they could do so. Ray agreed to convey Sanger's sentiments to the concerned employees.

In the wake of Ray's last response, Sanger warned that the "department could be run one of two ways." He explained in substance that No. 11 Coke Battery could continue to operate "with a little bit of give and take" or it "could be run by the book," a circumstance "which could be worse" for employee Ray than it would be for Sanger. At this, Ray insisted that the grievance "was important" and that he intended "to pursue it." Sanger concluded the conversation stating, "If that's the way you feel about it, have the griever contact me and set up a meeting."[4]

On or about July 15, Mechanical Foreman Kenneth Gearhart, a supervisor in No. 11 Coke Battery, while driving in a truck at the Company's plant, with employee

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[2] Unless otherwise stated all dates are in 1978.

[3] *Inland Steel Company*, 238 NLRB 1204 (1978).

[4] My findings regarding the foregoing conversation between General Foreman Sanger and employee Ray are based on the latter's full and forthright testimony. In his testimony, Sanger admitted that he discussed the grievance with Ray on or about July 17 or 18. However, Sanger's version does not include a warning of changed atmosphere in No. 11 Coke Battery. Nor did Sanger's testimony include a denial that he made the threat attributed to him by Ray. In assessing the two versions, I note that, unlike Ray, who appeared to be giving his best recollection of the details of the conversation, Sanger was content to provide a superficial account.

Patrick O'Sullivan, spoke of the pending grievance concerning supervisors performing unit work. In this context, Gearhart remarked: "If these guys go through with this grievance, things are going to get much worse in this department."[5]

Under Section 7 of the Act,[6] employees enjoy the right to file grievances with their collective-bargaining representative regarding wages, hours, and conditions of employment. *General Motors Corporation, Packard Electric Division*, 232 NLRB 335 (1977). It follows that a threat of reprisal against employees because they have filed a grievance regarding one of those concerns interferes with, restrains, and coerces employees in the enjoyment of that right, and therefore violates Section 8(a)(1) of the Act. *A & W Products Company, Inc.*, 244 NLRB 1128, 1129 (1979). *Precision Castings Corporation, Division of Aurora Corporation, a wholly owned subsidiary of Allied Products Corporation*, 233 NLRB 183, 188 (1977).

I find here that Sanger's remarks to Ray included a warning of reprisal for the No. 11 Coke Battery employees resort to a grievance regarding their claim that a supervisor had wrongfully deprived them of wages by performing unit work. Considered in context Sanger's remarks about the manner in which No. 11 Coke Battery could be operated was a threat that he, who was their general foreman, had authority to impose strictures to make life more difficult for all of the employees because three of them had filed a grievance. I find that this threat was likely to restrain, coerce, and interfere with the employees in their enjoyment of their Section 7 right to file grievances under the collective-bargaining agreement. I therefore find that by Sanger's warning the Company violated Section 8(a)(1) of the Act. I also find that Gearhart's more direct warning violated Section 8(a)(1) of the Act.[7]

C. *The Reduction of the Lunch Break and the Elimination of Washup Time for the Mechanical Employees of No. 11 Coke Battery*

On or about July 20, Sanger told the mechanical employees of No. 11 Coke Battery that they were only entitled to a 20-minute lunch period and that there would not be any washup time at the end of their shift. This announcement came 1 day after Sanger had observed his mechanical employees leaving their work area approximately 20 minutes before the termination of their shift. Along with his announcement regarding lunch periods and cleanup time, Sanger told the mechanical employees of No. 11 Coke Battery that they would lose pay for 30 minutes due to their early departure on the previous day. On July 21, Sanger posted a notice at No. 11 Coke Battery which announced the following:

> For the interim period before start-up the hours of work for the Mechanical gang shall be 6:30 A.M. to 2:30 P.M. This means that you will report to the Mechanical Turn Foreman ready for a work assignment promptly at 6:30 A.M. It further means that you will not leave your assigned work area to go home before 2:30 P.M. The lunch period shall be a paid 20-minute period, conditions permitting, to begin at 12:00 noon and end at 12:20 P.M. Persons not complying with these guidelines will be subject to discipline.

At all times material, the collective-bargaining agreement covering Sanger's employees contained the following in article 10, section 1(b):

> The normal work day shall be eight (8) hours of work in a twenty-four (24) hour period. The hours of work shall be consecutive except when an unpaid lunch period is provided in accordance with prevailing practices.

However, prior to Sanger's announcement, his mechanical employees did not adhere to the letter of the quoted contract language.

I find from the testimony of employees Ray, Williams, and Powers that, prior to Sanger's announcement, No. 11 Coke Battery's mechanical employees, as a matter of practice, took a paid 30-minute period for lunch. Approximately 3 weeks before the posting of the notice quoted above, Mechanical Turn Foreman Kenneth Gearhart had admittedly instructed the No. 11 Coke Battery mechancial employees under his supervision to limit their lunch periods to 30 minutes between noon and 12:30 p.m. "until further notice." In view of Gearhart's instructions and the common practice of the mechanical employees, I find that Sanger, Gearhart's immediate supervisor, was at all times aware that his employees were enjoying 30-minute lunch periods prior to on or about July 20.

I find from the testimony of employees Ray, Williams, and Powers that, prior to Sanger's announcement and posted notice, the No. 11 Coke Battery's mechanical employees would regularly leave their respective work stations around 15 or 20 minutes before the termination of their shift and proceed to their locker room where they put away tools, washed up, changed clothes, and prepared to leave the plant.[8] Here again, the practice conformed to Foreman Gearhart's instructions to his employees.[9] As of the time of the hearing, the Company continued to implement the lunch hour and washup policies announced by Sanger in July.

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[5] My findings regarding Gearhart's remark to O'Sullivan are based on the latter's testimony. Of the two, O'Sullivan impressed me as being the more conscientious toward his role as a witness. Gearhart required reminders on no less than four occasions that "uhm-hum" is not a word. On occasions he appeared to be evasive during cross-examination by counsel for the General Counsel. In any event, Gearhart did not flatly deny the remarks attributed to him by O'Sullivan.

[6] In pertinent part, Sec. 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

[7] The complaint did not include an allegation that Gearhart's threat violated Sec. 8(a)(1) of the Act. However, as I find that Gearhart's remark was closely related to the subject matter of the complaint and was fully litigated, my finding that it violated Sec. 8(a)(1) accords with Board policy. *The Timken Company*, 236 NLRB 757, 758 (1978).

[8] In his testimony, Sanger conceded that it was "entirely possible" that foremen had granted mechanical employees a washup time at the end of their shift. However, I find that, prior to or on or about July 20, No. 11 Coke Battery's mechanical employees openly took washup time and that Foreman Gearhart expressly instructed employees to do so. I have also considered the infirmities in Sanger's testimony, as discussed elsewhere in this Decision, which impaired the reliability of his testimony. From these circumstances, I find that, prior to July 20, he was aware that his employees regularly enjoyed a washup period.

Throughout July and August, No. 11 Coke Battery was in the final stage of its 3-year construction period. No. 11 began production on September 23. On August 20, the Company divided No. 11 Coke Battery's mechanical employees into thee-shifts. Prior to that date, all mechanical section employees of No. 11 Coke Battery worked on a day shift.[10] The notice of July 21, recited above, was the first notice posted in No. 11 Coke Battery regarding hours of work. Further, the Company has never issued any notice concerning that topic to any of No. 11's other sections.

The General Counsel contends that the Company reduced the lunch break and eliminated washup time for the mechanical employees of No. 11 Coke Battery because employees Dale Ray, Jack Johnson, and Irvin Williams were pressing their grievance. The Company denies this contention and urges that only "legitimate business purposes" motivated its decision to impose these strictures. I find ample evidence to support the General Counsel's contention.

No doubt the sudden reduction of their lunch period from 30 to 20 minutes and the elimination of washup time were unpleasant changes in the working conditions of No. 11 Coke Battery's mechanical employees, and that the source of these announcements was, as General Foreman Sanger suggests, a nexus between his earlier confrontation with No. 11 Coke Battery mechanical employee Dale Ray and these changes.

General Foreman Sanger had become displeased with the stated intention of No. 11 Coke Battery employees Ray, Johnson, and Williams to press their grievance. Sanger's hostility towards the pending grievance provoked him into seeking a confrontation with Ray on or about July 17. In that encounter, Sanger sought to persuade Ray that the grievance was unnecessary. When Sanger saw that his effort was failing, Sanger threatened to operate "by the book," and warned that it would "be much worse for [Ray] than it would be for him" if Sanger did so. Thus did Sanger's hostility provoke him to threaten Ray and his fellow employees with less pleasant working conditions if Ray and his colleagues pressed their grievance. Ray, Johnson, and Williams did not waiver in their determination to press the grievance.

Finally, the timing of Sanger's announcements strongly suggests that he was carrying out his unlawful threat. Thus, they came a little more than 2 days after he had voiced his threat to supervise his employees "by the book."

I find no merit in the Company's contention that Sanger imposed the limitation on lunch and eliminated washup time because of changed operating conditions in the No. 11 Coke Battery. For, No. 11 Coke Battery did not begin production until on or about September 23.[11] Further, the Company did not show any change in No. 11's startup operations prior to Sanger's announcements and notice to otherwise explain the restrictions he imposed.

In sum, I find that General Foreman Sanger's imposition of strictures upon the lunch and washup practices of the No. 11 Coke Battery mechanical employees was motivated by his hostility toward the pending grievance of employees Johnson, Williams, and Ray. I also find that the deduction of 30 minutes' pay from wages due mechanical employees of No. 11 Coke Battery on or about July 19 was also motivated by the same hostility.

By these strictures and the penalty the Company unlawfully interfered with its employees' Section 7 right to file a grievance with their collective-bargaining representative and thereby violated Section 8(a)(1) of the Act. The same conduct also constituted discrimination in violation of Section 8(a)(3) of the Act. *General Motors Corporation, Packard Electric Division*, 232 NLRB 335 (1977).

D. *The Alleged Discriminatory Treatment of Dale Ray*

1. The facts

During the week beginning July 21, employee Stephen Bechtel overheard Foreman Gearhart discussing the grievance filed by Dale Ray, Irvin Williams, and Jack Johnson. Gearhart described Dale Ray as "a union man agitator type." He referred to Williams as a follower and expressed curiosity as to why Johnson was involved.[12]

Dale Ray's name came up at or about the same time in connection with an unfair labor practice proceeding against the Company. The July/August issue of the Union's newspaper, *Local 1010 Steelworkers at Inland Steel Company*, contained the following article under a headline "Members Stick Up For Their Rights—Back Inland Down":

> Tom Zangrilli and Dale Ray of #4 BOF came to work one night with a stack of newspapers to pass out to any one who might be interested. Because these papers had a radical point of view, the guards refused to let Tom and Dale enter the plant with them. The two knew that any employee has a right to distribute literature relating to the union or union activities in non-working areas (canteen, locker rooms, lunch shanties, etc.) on non-working times (before and after work, lunch and coffee breaks).

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[9] Ray testified that, prior to Sanger's notice, Foreman Gearhart had instructed the mechanical employees under his supervision to follow the washup practice. Gearhart testified that the only instructions he gave his employees about cleaning up was that they could police up their work areas beginning 10 minutes before the end of their shift. However, as I found Ray to be the more reliable witness, I have credited his testimony.

[10] The mechanical section is one of the seven sections constituting the No. 11 Coke Battery Department. As of January 15, 1979, No. 11 Coke Battery consisted of 380 hourly employees, 40 foremen, 7 general foremen, and 1 assistant superintendent. Sanger's mechanical section performs No. 11's maintenance. Its complement consists of 39 mechanics, 54 apprentices, and 14 foremen.

[11] I based this finding on the testimony of Company Superintendant McMorris.

[12] My findings regarding Gearhart's remarks are based on Bechtel's testimony. Gearhart did not deny making the remarks attributed to him by Bechtel.

> They refused to surrender their legal rights, and thus lost a day's pay.
>
> The Supreme Court affirmed employees' rights to distribute union literature on company property. The rulings upheld findings by two lower courts against a Time Inc. subsidiary and Beth Israel Hospital of Boston. In both cases, the Justices relied on long standing rulings that off-duty workers can solicit for a union except in "special circumstances" and can hand out literature in non-working areas.
>
> NLRB
>
> They took the matter to the National Labor Relations Board (NLRB). This is the federal agency in charge of administering the federal labor laws (not to be confused with the Inland Steel's Department of "Labor Relations.") *The NLRB said the Company was wrong and Inland was ordered to pay all time lost with interest.* A notice of this and the regulations governing distribution of literature must be posted by the Company where everyone can see it.
>
> Unless the Company appeals this decision and it is overturned by the Court (a highly likely possibility see article above) we can assume that they will not recognize our right to distribute union related literature in the plant.

The decision referred to in the quoted article was Administrative Law Judge Blackburn's decision in *Inland Steel Company*, Case 13-CA-16952.

On an occasion during the last 2 weeks of July, after Ray had received a copy of the Union's newspaper and after his conversation with Sanger, No. 11 Coke Battery's superintendent, Charles E. McMorris, summoned Ray to his office.[13] General Foreman Sanger had by this time described Ray to McMorris as the "spokesman" for the grieving employees. When Ray presented himself, McMorris showed him a copy of the Union's newspaper containing the quoted article. Although McMorris said he had seen the article, he asked Ray to summarize it. Ray explained that the article discussed a Board case concerned with distribution of literature in nonworking plant areas during nonworking time. McMorris asked what Dale meant by "nonworking areas and nonworking time." Dale explained that he meant "in the locker room before and after work and in the lunch room during the lunch break."

The two then joined issue on the question of distribution of literature. McMorris complained that the distribution of literature in the employees' locker room created a "very bad litter problem." He said he hoped that Ray would attempt some other means of communicating with his fellow employees. Ray expressed displeasure at employees who threw literature on the floor. However, he insisted that, if he believed there were a need for such distribution, he would do so and McMorris would be obliged to solve the litter problem. McMorris then focused his attention upon Ray's motive for distributing literature. McMorris said that Ray should not use his working hours at the plant in an attempt "to change people's ideas about the Union." Ray asserted that he knew what he was being paid for and that he also knew his rights, and that McMorris need not worry that Ray would exceed those rights. Ray added that he intended to use the rights. McMorris acknowledged Ray's rights but cautioned that if Ray exceeded those rights that he, McMorris, would have to do something about it.

McMorris drew Ray's attention to the current collective-bargaining agreement stating that he considered it to be "law," and that he adhered to it "to the letter." Ray responded that he also adhered to the contract. McMorris went on to explain how the Company had won a grievance against the Union at the arbitration stage which he, McMorris, had pressed. Ray asked McMorris if that were all that McMorris wanted to talk to him about, and McMorris responded yes, unless Ray had some other matter to raise.

Ray asked McMorris if it were possible to settle the pending grievance. McMorris rejected the suggestion on the ground that he believed that the matter should be taken through the grievance procedure. At this, the conversation broke off and Ray left McMorris' office.

On July 28, the grievance reached step one when General Foreman Sanger and the Union's official griever, employee J. Freeman, discussed the matter of a supervisor doing unit work. Thereafter, on August 7, Sanger decided to resolve the grievance by admitting that a supervisor had performed bargaining unit work, assuring the employees that a repetition of this infraction would not occur, and agreeing to make grieving employees Ray, Johnson, and Williams whole for their loss of wages. The Union accepted Sanger's resolution of the grievance.

Two hours before the conversation with McMorris, Foreman Alfred Hernandez assigned Ray to wash a Grove mobile crane with soap and water. Present at the time Hernandez gave Ray this instruction, were four or five mechanical employees including Mike Baculla. Dale Ray questioned Hernandez' instructions and reminded him that Baculla had washed the machine on the previous day. Hernandez responded that soap had not been available when Baculla washed the Grove on the previous day and that it was available now. Ray insisted that there was only "mill dirt" on the crane and expressed doubt that further washing would improve its appearance. Hernandez insisted that Ray wash the crane adding that "they" wanted Ray to wash it. Ray asked who Hernandez was referring to but received no response except direction to perform the work. As a matter of practice, prior to this incident, the crane's operators were responsible for washing it. Prior to Hernandez' assignment of that task to Ray the latter had not operated the Grove.[14]

On the day after Dale Ray's confrontation with Superintendent McMorris, Foreman Gearhart assigned[15] Ray

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[13] My findings regarding Ray's conversation with McMorris are based on Ray's and McMorris' testimony.

[14] My findings regarding the confrontation between Hernandez and Ray are based on Ray's testimony. Of the two, Ray seemed to have the more vivid recollection.

[15] Gearhart testified that he made the assignment on his own initiative in early July. Gearhart also testified that he made the assignment in part because Ray could not operate mobile equipment due to his vision. I also find from Stephen Bechtel's testimony that, before Ray began rustproof-

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to rustproofing some small steel blocks. Gearhart made the assignment at 7 o'clock that morning, instructing Ray to accompany him to the No. 11 Coke Battery's shop area, where the steel blocks were located. Gearhart instructed Ray to use a 1-inch paint brush to apply the compound from a 55-gallon drum. Gearhart instructed Ray to perform this task in an area of the shop where he would be by himself and where the floor was clear.

At the time Sanger made the assignment, Ray had been a mechanic for 2 years. Prior to that, he had undergone an apprenticeship at the Company's plant. In sum, Ray had been in the Company's employ for approximately 5-1/2 years.

There were other employees of lesser skill employed in No. 11 Coke Battery at the time of Ray's assignment. Apprentices and laborers were in its work force. The laborers were the lowest paid employees in the department. Ray and his fellow mechanics were among the most highly paid employees in No. 11 Coke Battery.

From late July 1978 until the middle of January 1979, Ray was assigned to rustproofing. First he covered steel blocks and later spare parts. He rustproofed two different types of blocks. The first was a rectangular block with a hole that had tap threads. He rustproofed approximately 4,000 of that variety. He also rustproofed 6,000 rectangular blocks, each of which had a round piece welded to it. In the course of this assignment, Ray heard fellow employees refer to him as "Rusty Jones."

Ray conceded that rustproofing was part of a mechanic's work. However, he also credibly testified that, while rustproofing is part of a mechanic's job, assignment to that task for a 5-month period was extraordinary. Indeed, his was the only incident of such an assignment that he knew of.

Other witnesses considered Ray's assignment to be abnormally long. James Lanigan, who had been in the Company's employ for approximately 4 years at the time of the hearing, and had been in No. 11 Coke Battery since March 1978, considered the length of Dale's assignment to rustproofing to have been unusual for a mechanic. Lanigan was not aware of another mechanic or apprentice mechanic in No. 11 Coke Battery ever having been assigned to rustproofing for more than 1 week at a time.

Mechanic Jack Johnson, an employee of No. 11 Coke Battery since June 1, and a company employee for 4 years, was not aware of any No. 11 Coke Battery mechanic, aside from Dale Ray, who had been assigned to rustproofing for 5 months or longer. Further, based on his experience of 4 years with the Company, he considered Ray's assignment to be unusual.

Irvin Williams, who at the time of the hearing had been a company employee for 3-1/2 years and had been employed in No. 11 Coke Battery for approximately 14 months as a welder, was not aware of any employee at No. 11 Coke Battery, other than Dale Ray, who had ever been assigned to do rustproofing for 5 months or longer. Nor was he aware of any employee of No. 11 Coke Battery who had been assigned to do rustproofing for more than a month at a time. Employee Wayne Powers, who at the time of the hearing had been employed by the Company for 7 years and worked in No. 11 Coke Battery as a mechanical apprentice for approximately 1 year, was not aware of any mechanic, other than Ray, whom the Company had assigned to do painting in No. 11 Coke Battery for 5 months or longer. Nor was he aware of any other mechanic or apprentice mechanic other than Ray who, as of the time of the hearing, had been assigned to do painting in No. 11 Coke Battery for 1 month or longer. He was not aware of a mechanic or apprentice mechanic other than Dale Ray who was assigned to do painting for more than 1 week in No. 11 Coke Battery. Finally, he testified credibly that Dale Ray's assignment of rustproofing was not a normal assignment.

The Company unsuccessfully attempted to show that Ray's assignment was considered favorably by No. 11 Coke Battery employees. General Foreman Sanger, Foremen Gearhart, Hernandez, and Johnson testified that employees inquired about obtaining Dale Ray's rustproofing assignment or similar work. However, Gearhart and Johnson punctuated their testimony in this regard with smiles and chuckles. Hernandez testified that he did not reply to employees Dale Hamilton and Richard Bailey. Sanger testified that he received similar inquiries from employees Jack Johnson and Dale Hamilton. However, employees Hamilton and Johnson both testified that they did not want to do rustproofing. Initially the Company's testimony suffers from the infirmity of being hearsay. However, the sarcastic demeanor of witnesses Gearhart and Johnson as they testified and the credible testimony of two current employees, Hamilton and Johnson, strongly suggested that Ray's fellow employees were not in fact envious of him.

On approximately six occasions between July 1978 and mid-January 1979, Dale Ray received brief assignments to handle mechanical breakdowns. However, he spent 90 to 95 percent of his time rustproofing. When Ray took a 2-week vacation during the last part of October and the first days of November, the Company assigned no one to perform the rustproofing.

On the day that Foreman Gearhart first assigned Ray to rustproofing, employee James Lanigan began to assist in the work. Lanigan had no definite work assignment and had been instructed by his immediate supervisor to assist employees who might need help. Lanigan chose to help Ray.

Approximately 20 minutes after Lanigan began assisting Ray, Gearhart approached. He inquired why Lanigan was assisting Ray. Upon hearing the explanation,

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ing, Gearhart with a chuckle took credit for devising "a good job for Mr. Ray." However, Sanger testified that it was his decision to assign Ray to rustproofing. I am doubtful of Sanger's recollection of the time of his decision which, in his testimony, he shifted from late June or July to early July or mid-July. I also rejected, as unreliable, Foreman Lawrence Johnson's speculation that Ray began rustproofing in late May. I have accepted Dale Ray's recollection of the timing of the assignment. His convincing testimony was corroborated by O'Sullivan and Foreman Hernandez.

As for the issue of who decided to make the assignment, I have accepted Sanger's admission. Of the two, he appeared more concerned than was Gearhart about Ray's grievance activity. By the time of the assignment Sanger had already evidenced his concern by imposing reprisals upon the mechanical employees. Further, of the two, Sanger seemed more at ease as he frankly took credit for the decision.

Gearhart directed Lanigan to seek another assignment.[16] For the next 2 months, Ray received no help in rustproofing. hereafter, on two or three occasions, the Company assigned an apprentice, for 1 day, to help Ray rustproof spare parts.

Foreman Gearhart also prevented other employees from coming in contact with Ray during the months of rustproofing. In the first month of this assignment, Ray overheard Gearhart on several occasions order employee Jack Johnson, who was either moving towards Ray's area or standing nearby, not to talk to Ray.[17] Gearhart issued a similar warning to employee Wayne Powers.[18] In each instance, Gearhart threatened to send the employee home if the employee violated the order.

Gearhart also issued warnings to employees Williams and O'Sullivan regarding their contacts with Ray. Out of Ray's presence, Gearhart told Williams to stay away from Ray, warning that Ray would "get Williams in trouble." Gearhart issued a similar injunction to employee O'Sullivan, also out of Ray's hearing.

On another occasion in August, Gearhart approached O'Sullivan at the plant after the latter had returned from Ray's end of the shop. After "shaking his finger like a parent," he warned O'Sullivan: "I don't want you down there talking to that man anymore. You're not supposed to talk to him." O'Sullivan protested: "I haven't been told that since I was out of grade school. My parents don't even have to tell me who I can or who I can't talk to anymore." Gearhart pointed his shaking finger at Dale Ray during this exchange. Prior to this encounter O'Sullivan had been talking to Ray for approximately one minute about O'Sullivan's recent vacation.[19]

Gearhart's instruction to employees Johnson, Williams, and O'Sullivan were unique. None of the three had ever before received instructions from company supervision to cease talking to, or remain away from, a fellow employee. Dale Ray also never heard a company supervisor give such instructions to employees regarding another employee.

Four or 5 weeks after Ray began rustproofing, he suggested a change in the procedure to General Foreman Sanger. Ray suggested taking the boxes in which the steel blocks were stored, putting a drain on them and a lid and filling the boxes with oil to prevent the blocks from rusting. Sanger rejected that process saying it would be too messy and that he wanted the blocks rustproofed with a brush.

In September, Ray complained to General Foreman Sanger about "rustproofing all the time." Ray asked why the Company could not employ an apprentice or laborer to do that work in view of the shortage of mechanics at No. 11 Coke Battery. Sanger responded that Ray had received the assignment because he was a mechanic and thus did not need constant supervision. Ray went on to complain that whenever he looked up from his work "there was a foreman standing over me or harassing me about something." Sanger denied being aware of such conduct by supervisors. Ray asked how long the rustproofing assignment would last. Sanger replied he did not know and that it could last "indefinitely." At this the conversation broke off.[20]

On the following day, the Company posted a shift schedule for No. 11 Coke Battery's mechanics covering the first week of October. The schedule showed that Ray was transferred from the day shift to the midnight shift. Thereafter, Ray worked on the midnight shift for only 1 week. The Company returned Ray to the day shift where he remained until the middle of February 1979. While assigned to the midnight shift, Dale Ray continued to perform rustproofing. To his knowledge no one continued his work on the day shift while he was on the midnight shift.

On or about December 2, Foreman Riggsby directed Ray to apply an undercoating paint to the storage loft located over the carpenters' area in No. 11 Coke Battery's mechanical shop. Ray balked at this assignment telling Riggsby that he did not believe that it was "a mechanic's job" and refused to perform the work. Riggsby told Ray to discuss the matter with General Foreman Sanger.

Ray immediately presented himself in General Foreman Sanger's office, where he complained that the assignment he had received from Riggsby was not a mechanic's work. In the exchange which followed, Ray suggested that the work be assigned to a painter or laborer. Sanger asked if Ray was refusing to do the work and Ray conceded that he was, whereupon Sanger sent Ray home.

On the following day, Ray reported for work. He met Supervisor Riggsby who asked, "Are you ready to paint the loft?" Ray again refused. Whereupon Riggsby moved Ray's timecard out of his pocket, punched it, and directed Ray to go home.

Ray did not report to work on December 4. Instead, he went to the Board's Chicago office where he filed an unfair labor practice charge in the instant case.

As a result of Ray's refusal to perform the assigned paint job on December 2 and 3, the Company issued two disciplinary statements to him on December 4. In addition, Ray lost pay for December 2, 3, and an additional 8 hours on December 14. After December 4, Dale returned to work and painted the loft, a job which required until the middle of January 1979.[21]

I also find from Ray's testimony that at the end of May 1979 Foreman Lawrence Johnson, a shift foreman assigned to No. 11 Coke Battery, disclosed to Ray that General Foreman Sanger had scolded Johnson on those occasions when Johnson had relieved Ray of rustproofing to perform mechanical breakdown work. Johnson also disclosed that the reason Sanger was irked by Johnson's actions was because Superintendent McMorris wanted Ray to perform the rustproofing and nothing else.

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[16] My findings regarding Gearhart's encounter with employee Lanigan are based on Ray's and Lanigan's testimony which was largely corroborated by Gearhart.

[17] My findings regarding this incident are based on Dale Ray's and Jack Johnson's testimony.

[18] I based my findings regarding Powers' encounter with Gearhart on Ray's and Powers' testimony.

[19] My findings regarding Gearhart's encounters with Williams and O'Sullivan are based on Williams' and O'Sullivan's testimony.

[20] Ray's detailed version of this conversation is largely corroborated by Sanger. However, Sanger seemed to gloss over the encounter and was not careful to remember details. I have, therefore, credited Dale Ray's version.

[21] My findings regarding the storage loft painting assignment are based on Ray's testimony and the Company's records.

2. Analysis and conclusions

There is much to show that prior to Dale Ray's assignment to rustproofing his superiors manifested annoyance at the grievance that he and two other employees had filed, and at the Board's decision indicating his right and the right of another employee to distribute union literature at the plant. Significantly, No. 11 Coke Battery's supervision considered Ray the leader of the grieving trio, and something of a union agitator.

General Foreman Sanger directed his animus at Ray to persuade him to withdraw the grievance. Sanger threatened reprisals against Ray's fellow employees and warned that it would "be worse for Ray" than it would be for Sanger if Sanger retaliated against the grievance. Ray remained steadfast in his intent to press the grievance.

Superintendent McMorris gave vent to his feelings by bluntly warning Ray to take care lest he go too far with his Section 7 right to distribute union literature and seek employee support for his union sentiment. McMorris also warned that he would run No. 11 Coke Battery strictly according to the contract. Ray insisted that he intended to exercise fully his Section 7 rights.

That Sanger imposed more onerous conditions on No. 11 Coke Battery's mechanical employees by truncating their lunch period and eliminating their washup time revealed his and the Company's willingness to resort to unlawful punishment when confronted with employees exercising their right to enforce a collective-bargaining agreement. These reprisals together with Foreman Johnson's disclosure suggest that Sanger and McMorris would not shrink from using a work assignment to punish a leading employee advocate of the Union and contract enforcement.

The opportunity to punish Dale Ray resoundingly appeared in the form of a lengthy menial job; 10,000 steel blocks needing rustproofing. Sanger admittedly seized this opportunity. The assignment to rustproof steel blocks and then spare parts for a total of 5-1/2 months was usual. The attempt to isolate Ray while he was thus engaged is further evidence of Sanger's and McMorris' punitive attitude. The chuckles of supervisors as they testified that other employees sought the same work reflect the tedium and unpleasant nature of the work. In September, when Ray complained to Sanger about the rustproofing, the general foreman responded. He transferred Ray to the midnight shift for 1 week. Finally, in December Sanger found one last opportunity to punish Ray. Well aware of Ray's resentment, Sanger assigned him to rustproofing a storage loft. In sum, I find strong support for the General Counsel's contention that the Company's treatment of Dale Ray ran afoul of Section 8(a)(3) and (1) of the Act.

However, I am not persuaded that the General Counsel has established a *prima facie* case showing that the Company violated Section 8(a)(4) and (1) of the Act. For, in his remarks to Ray, McMorris made no reference to Ray's participation in the Board proceeding in Case 13-CA-16592. Nor was there any reference in any of Sanger's remarks or in any other supervisor's remarks to Ray's role in that case. All of Superintendent McMorris' remarks focused on the limitations on Ray's right to distribute union literature and talk about his union sentiment during working hours at the plant.

To establish a violation of Section 8(a)(4) of the Act the record must show that the Company's discrimination against employee Ray was "because he has filed charges or given testimony under this Act." I find no such showing has been made. Accordingly, I shall recommend dismissal of the allegation that by its treatment of Ray the Company also violated Section 8(a)(4) of the Act.

The Company urges that its assignment of work to Dale Ray was free of unlawful motive. General Foreman Sanger, the management official who made these assignments to Ray, offered explanation of Ray's unusual treatment. However, I find Sanger's testimony casts serious doubt upon the Company's proffered defense.

Shifts in Sanger's testimony suggest a hasty improvision. He first testified that he chose Ray for rustproofing at the time that No. 11 Coke Battery's maintenance employees began going on shift work. However, at a later point in his testimony, Sanger testified that he assigned Dale Ray to do rustproofing before the mechanical employees began shift work. The record shows the mechanics in Sanger's section began shift work on August 20. According to Sanger's later testimony his decision was made "toward the latter part of June or first of July." Sanger also admitted that he was on vacation during the last week of June and at least through July 4.

I do not credit Sanger's explanation that he chose Dale Ray without knowledge of his qualifications other than that he was a mechanic, and that, for the latter reason, he and his foremen decided that Ray required only "a very minimum amount of supervision" and therefore was more suited to the assignment than an apprentice mechanic. Dale Ray Joined the No. 11 Coke Battery in March and his assignment to rustproofing came no less than 4 months later. I find it difficult to credit Sanger's testimony that by that time all he knew about Ray was that he was a mechanic. Moreover, the Company's records reveal that, on May 31 and June 30, No. 11 Coke Battery employed 8 mechanics and, that by July 31 this number increased to 22. Thus, it appears that the Company had at least seven other mechanics to chose from. Absent from Sanger's testimony is any specific comparison of Ray with the other No. 11 Coke Battery mechanics. A further infirmity in Sanger's testimony was his reluctance to characterize rustproofing. When counsel for the General Counsel asked him whether he would describe the application of rustproofing with a paint brush as a skilled job, Sanger's initial answer was: "I'm sure that some of your unions would describe that as a skilled job, yeah." When pressed again, Sanger answered, "I really don't know how to answer that." When reminded of his experience at Inland Steel and the fact that he was a supervisor of foremen in No. 11 Coke Battery, Sanger finally answered: "I would say semi-skill."

Nor am I satisfied with Sanger's explanation as to why he did not employ an apprentice mechanic to perform the work assigned to Ray. According to Sanger, he did not choose an apprentice to do the job on the ground that he and his foremen wanted to provide them with "as much exposure as possible in the fastest possible time to a coke battery." However, the startup date of the battery was September 23, almost 2 months after Sanger assigned the rustproofing to Dale Ray. This circumstance suggested that the apprentice mechanics of No. 11 Coke Battery did not have the desired opportunity to observe No. 11 Coke Battery in operation at the time Sanger selected Dale Ray. Further, there were no training classes for the mechanics in No. 11 Coke Battery. Nor was there any training material regarding the startup of the coke battery. In sum, I find Sanger's explanation regarding the failure to select an apprentice other than Dale Ray lacking in substance.

Further, the Company made no attempt to explain why it could not relieve Ray of the tedium of painting 10,000 steel blocks and an unknown number of spare parts by rotating the job among the mechanical employees under Sanger's supervision. Nor was there any explanation for Sanger's refusal to relieve Ray of the tedium of the rustproofing work in September, when Ray complained.

Finally, Sanger's excuse for his assignment of Ray to the midnight shift on the week of October 1 does not withstand scrutiny. According to Sanger, he needed three employees to replace two employees who were absent from the midnight shift. The two absent employees were involved in the mechanical maintenance of No. 11 Coke Battery. Two of the three replacements filled in for the two absent employees, the third replacement, Dale Ray, performed only rustproofing. The unanswered question is why Dale Ray had to do rustproofing on the midnight shift instead of the day shift.

In sum, I find the Company's explanation of its treatment of Dale Ray fatally lacking in substance. The absence of a plausible explanation leaves unrebutted the strong evidence of unlawful motive recited above. I therefore find that the selection of Dale Ray to perform rustproofing on the steel blocks, the spare parts, and the storage loft was calculated to cause Dale Ray discomfort, deprive him of job satisfaction, and finally, to provoke him into refusing a work assignment. The Company meted out this harsh treatment to Ray because of his stubborn insistence upon pressing the grievance and his stated determination to distribute literature regarding union activity on the premises, under the limitations carved out by Board law. I find, therefore, that by this treatment, including the disciplinary letters and loss of pay imposed upon Ray for his refusal to paint the loft, the Company violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Inland Steel Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 1010, United Steelworkers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company violated Section 8(a)(1) of the Act by threatening its employees with more rigid working conditions because they engaged in the protected concerted activity of filing and pursuing a grievance under a collective-bargaining agreement between the Company and the Union.

4. The Company violated Section 8(a)(3) and (1) of the Act by reducing the lunch break and eliminating the washup time for the mechanical maintenance employees of No. 11 Coke Battery, because fellow employees were pressing a grievance under a collective-bargaining agreement between the Company and the Union.

5. By assigning employee Dale Ray to perform rustproofing and painting work, and by assigning him to the midnight shift for a 1-week period, all because he engaged in union activity, including the distribution of literature on company premises and the pressing of a grievance under a collective-bargaining agreement, the Company violated Section 8(a)(1) and (3) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Company has not otherwise violated the Act.

THE REMEDY

Having found that the Company has engaged in and is engaging in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take affirmative action necessary to effectuate the purposes of the Act. I shall also recommend that the Company be ordered to restore the lunch period provided for the mechanical employees of No. 11 Coke Battery to 30 minutes, and that it restore to those same employees the 15-minute washup period provided prior to on or about July 21, 1978. I shall also recommend that the Company be ordered to make whole all mechanical employees of No. 11 Coke Battery who suffered loss of wages because they left their work area and took a 15-minute washup period on or about July 20, 1978. I shall also order the Company to make employee Dale Ray whole for the wages lost by reason of his refusal to perform painting on December 2 and 3, 1978, and to expunge from his personnel records all copies of the disciplinary letters the Company issued to him for such refusal. Interest on the backpay provided herein shall be computed in accordance with the Board policy described in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation, 231 NLRB 651 (1977).*

Upon the foregoing findings of fact, conclusions of law, and upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[22]

The Respondent, Inland Steel Company, East Chicago, Indiana, its officers, agents, successors, and assigns, shall:

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[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Threatening employees with more rigid working conditions because they seek to vindicate a collective-bargaining agreement by pressing grievances or by other concerted activity protected by Section 7 of the Act.

(b) Reducing lunch breaks, eliminating washup time, or otherwise imposing more onerous conditions of employment on employees because their fellow employees are processing a grievance under a collective-bargaining agreement between the Company and Local 1010, United Steelworkers of America, AFL-CIO, or any other labor organization.

(c) Discouraging the filing and processing of grievances under a collective-bargaining agreement or other union activity on behalf of Local 1010, United Steelworkers of America, AFL-CIO, or any other labor organization, by discriminating against its employees in the assignment or scheduling of work or by other changes in wages, hours, or conditions of employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Rescind General Foreman Robert Sanger's announcement of on or about July 20, 1978, and his published statement of rules regarding lunch periods and hours of employment which was posted on or about July 21, 1978, in No. 11 Coke Battery and restore to the mechanical employees of that department their practices regarding lunch hours and washup time as they existed prior to July 21, 1978.

(b) Remove all disciplinary warnings and rescind all money penalties and other disciplinary action imposed on the mechanical maintenance employees of No. 11 Coke Battery, who on or about July 20, 1978, exercised their established practice of taking a 15-minute washup period at the end of their shift.

(c) Make whole the employees who suffered loss of pay on or about July 20, 1978, because they took a 15-minute washup period at the end of their shift in the manner set forth for loss of earnings in the section of this Decision entitled "The Remedy."

(d) Remove and expunge the two disciplinary warnings issued to employee Dale Ray on December 4, 1978, and make him whole for any loss of pay he may have suffered as a result of his refusal to perform painting on December 2 and 3, 1978, in the manner set forth for loss of earnings in the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this recommended Order.

(f) Post at its East Chicago, Indiana, plant copies of the attached notice marked "Appendix B."[23] Copies of said notices on forms provided by the Regional Director for Region 13, after being duly signed by the Company's representative, shall be posted by the Company immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that that portion of the amended complaint which alleges that the Company violated Section 8(a)(4) of the Act be, and it hereby is, dismissed.

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[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Arnold Ready Mix Corporation *and* **Terry L. Montgomery.** Case 14-CA-14741

November 9, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND HUNTER

On August 28, 1981, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Arnold eady Mix Corporation, Imperial, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Add the following as paragraph 2:

"2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

"(a) Post at its facility in Imperial, Missouri, copies of the attached notice marked 'Appendix.'[6] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

"(b) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith."

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: The hearing in this case was held in St. Louis, Missouri, on May 12, 1981. Respondent is alleged to have violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The 8(a)(1) allegations primarily involve comments that an individual had been discharged for supporting the union and that he had forfeited his seniority even though reinstated. With respect to the 8(a)(3) allegations, it is alleged that Respondent discharged employee Terry Montgomery and refused to reinstate him because he engaged in union activity and/or protected concerted activity, including the filing of workman's compensation claims against Respondent. At a hearing before me, the parties were offered the opportunity to adduce evidence to support the respective positions. Upon the record as a whole, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

It is alleged and admitted that Respondent, Arnold Ready Mix Corporation (Respondent) is, and was at all times material herein, a corporation duly organized and existing under the laws of the State of Missouri. Respondent has maintained its principal office and place of business at Highway 61-67 in Imperial, Missouri. Respondent was at all times engaged in the manufacture, sale, and distribution of ready-mixed concrete and related products. During the fiscal year ending May 31, 1980, Respondent, in the course and conduct of its business operations at its Imperial place of business, manufactured, sold, and distributed products valued in excess of $500,000 of which products valued in excess of $50,000 were shipped from said place of business directly to points located outside the State of Missouri. On the basis of the above-admitted facts, I find that Respondent is, and was at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Local 30, Industrial Miscellaneous Workers Union (the Union) is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *8(a)(1) Allegations*

Paragraph 5 of the complaint alleges a number of 8(a)(1) violations. Paragraph 5(a) of the complaint alleges that Respondent's owner, Robert Smerker, threatened an employee with reprisals because employees had filed grievances against Respondent pursuant to the collective-bargaining agreement in effect between Respondent and the Union. Paragraph 5(b) alleges that sometime during November 1980[1] Respondent's co-owner, Charles Smerker, Sr., told employees that another employee, who had been discharged and subsequently reinstated, had been discharged for advocating the Union and had forfeited his seniority when reinstated.

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[1] The General Counsel excepts solely to the Administrative Law Judge's inadvertent failure to include in his recommended Order provisions requiring Respondent to take affirmative action to remedy the violation found. We find merit in the General Counsel's exceptions and shall modify the Administrative Law Judge's recommended Order accordingly.

[6] "In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading 'Posted by Order of the National labor Relations Board' shall read 'Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.'

With reference to the 8(a)(1) allegations and paragraph 5(a) of the complaint, Don Carter, union steward on the job at Arnold Ready Mix, testified that on October 3, he filed a grievance with Arnold Ready Mix and that shortly thereafter he had a conversation with Bob Smerker about the grievance. At that time, Smerker made threats to him, telling him that if employees kept filing grievances like this, he could always assign them to bad jobs and make sure they got bad references. The grievance apparently concerned Respondent's use of relatives as employees while other members of the Local were laid off and not working.[2] Bob Smerker who testified at length did not contradict Carter's testimony; in fact, he never commented on this portion of Carter's testimony. I credit Carter to the extent that Bob Smerker made two veiled threats to give employees reprisals for filing grievances concerning Respondent's practice of utilizing relatives as employees when other union members were out of work.

With respect to paragraph 5(b) of the complaint, Carter further testified that at a later point, sometime before December 5, 1980, he was in the drivers' room at the plant when Charlie Smerker finished a telephone call and commented to him that Terry Montgomery was back at the Labor Board. Smerker allegedly then stated that Montgomery had lost his seniority when he was fired the last time for trying to get the Union in. Charles Smerker denied making such comments with respect to this conversation concerning Montgomery. Smerker further testified that he was out of work because of a rupture for 3 to 4 weeks prior to December 5. Thus, in this situation I find it quite impossible and do not credit Carter's testimony that Charlie Smerker told Carter that Montgomery had lost his seniority when Respondent attempted to fire him the last time for getting the Union in.

I find, therefore, that Bob Smerker did make the comments alleged in paragraph 5(a); namely, that in the event of future grievance filing, employees would receive bad assignments and if they left they would get bad references from Respondent. With respect to the latter part of the 8(a)(1) allegations which involved Montgomery, I credit Charlie Smerker and find that he did not make the statement that Montgomery had been previously discharged and had lost seniority when subsequently rehired for advocating the Union. Accordingly, I find that Bob Smerker's response to the filing of the group grievance on October 3 was to threaten that reprisals would be taken against those employees continuing to file such grievances. I find this to be violative of Section 8(a)(1) of the Act.

B. *Section 8(a)(3) Allegations*

Section 8(a)(3) allegations are contained in paragraph 6 of the complaint. Paragraph 6 alleges that Respondent discharged employee Terry Montgomery on or about December 5 because Montgomery engaged in union activity and/or protected concerted activity, including the filing of a workman's compensation claim against Respondent.

At the time of his discharge, Terry Montgomery had been employed by Respondent to drive a concrete truck and to do general maintenance work since April 1978. In November 1979, Local 30, Industrial Miscellaneous Workers Union began organizing Respondent's employees. At this time Montgomery signed a union card. He acknowledged that he did not distribute any literature but stated that he had secured signed union authorization cards from other employees.[3]

Counsel for the General Counsel introduced, over the objections of Respondent's counsel, evidence of a prior settlement involving an alleged discriminatory discharge in November 1979. While I have admitted it, much of this is background material and I am not utilizing it as a basis for any findings of an unfair labor practice within the 10(b) period. To the extent that it may reflect antiunion animus, I have considered it. In this settlement, Montgomery had received a backpay settlement of $370 and had been reinstated to his job. Respondent claimed that this alleged discriminatory discharge was really a discharge stemming from costly damage to two of Respondent's trucks in which Montgomery was directly involved: one incident involved a broken crankshaft and the other a burned out engine due to a leak in a radiator hose.

With respect to the former incident, Robert Smerker testified that he talked with the representative of the manufacturer of that diesel engine who had informed him that the only way the crankshaft could have been broken was for the driver to be free wheeling, that is, driving without the gears being engaged, and then suddenly engaging the transmission at a higher speed then the motor was capable of taking. Montgomery testified that to his knowledge that was the only time they had had a crankshaft broken on that type of diesel engine. With respect to the latter incident where the engine got overheated, Montgomery was driving a truck and attempting to break in a new driver. Apparently after delivering some concrete, the truck had driven over something that had torn a hole in the hose and, as a result, all the water had leaked out of the radiator. The engine overheated and all the water ran out, causing the entire engine to be overhauled. Although Montgomery correctly claimed that the pressure guage was not operational, Robert Smerker stated that it is the responsibility of the driver, not the driver trainee, to make sure that the truck has been thoroughly checked.

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[1] All dates hereafter will refer to 1980, unless otherwise specified.

[2] Carter also testified that there had been a continuing conflict between the Union and Respondent because of this practice.

[3] I credit his testimony only to the extent that he got signed union cards after his discharge in November 1979 and not before this time as indicated in his November 16, 1979, Board affidavit. (Resp. Exh. 1).

It does appear that Montgomery had a history of improperly handling the Company's equipment. I credit Robert Smerker that the crankshaft could only have been broken because of Montgomery's negligence in driving the truck. In any event, these incidents which occurred in 1979 and early 1980 did not trigger Montgomery's discharge on December 10, 1980. The letter of dismissal, dated December 10, did not mention the broken crankshaft or the burned out engine. Consequently, while they serve to exemplify Montgomery's background as an employee, I do not consider them significant in determining whether his discharge was based on legitimate grounds or was discriminatorily motivated.

Montgomery acknowledged that he was working from April 26–30 when he injured his ankle, and that he was off work thereafter from the period of May 1 through September 5. With regard to this ankle injury on April 30, Montgomery testified that he filed a workmen's compensation claim and apparently received benefits under such claim until he received the medical release on or about September 5. While Respondent was not directly involved in the workmen's compensation claim other than to verify the facts surrounding it, Respondent does ultimately pay a higher workman's compensation based on the experience rating an employer gets. However, the award itself is paid by workman's compensation and did not directly involve Respondent.

On September 5, Montgomery received a medical release from his doctor. On September 25, he took such release in to Darrell Richardson, office manager of Respondent. Richardson said that he would accept the medical release but that he had no work for Montgomery at that time. It is not disputed that due to a fall off in the whole building industry there was less demand for concrete and that where Respondent had formerly employed some 20 drivers, it was only employing some 8 to 9 drivers in late 1980. Also Richardson credibly testified that Respondent's output in cubic yards of concrete had dropped 62 percent over that of the prior year.

Montgomery further testified credibly that he filed a grievance against Respondent on October 3 because he was not being assigned to any work. There was a meeting about this grievance in the latter part of October in Local 30's office and although it was presumably going to the second step, the grievance was apparently not resolved. It was on December 5 that Montgomery was recalled to work and became involved in incidents which Respondent claims led to his discharge.

On December 11, Montgomery received a letter (G.C. Exh. 2), dated December 10 from Darrell Richardson, Respondent's office manager, advising him that he was terminated. The letter contained six paragraphs in length and listed several reasons for his termination, including three incidents which occurred on December 5. The dismissal letter stated that on December 5 Montgomery had backed his truck into another truck; had left his truck unattended without the drum turning, resulting in the customer's refusing the material because it had started to set whereupon the entire load of 6 cubic yards of concrete had to be dumped; and he had failed to drain the truck's water tank, failed to leave the valves open, and failed to bring in the water hose as per posted instructions. The letter also stated that several customers expressed concern for the safety of the employees when Montgomery was backing the truck into the job and that some customers had requested that he not be sent to their jobs.

Montgomery testified that while it was true that he had not taken the water hose in, he claimed that he had drained his water tank and left his valves open on the night of December 5. He also acknowledged that on the same day he had backed into another truck on the plantsite, but that no damage was caused to either vehicle. Montgomery also stated that to his knowledge he had received no complaints from customers about his driving, had never been suspended, had never been reprimanded, and, except for the prior alleged discriminatory discharge in November 1979, had never been discharged.

As to the loss of 6 yards of concrete, Montgomery testified that on December 5 at 3 p.m., he was assigned to deliver a load (6 yards) of ready- mix concrete to Roy Holley at the "Holley" or "Sugar Creek" jobsite. The site was somewhere "off Highway 30, 3 or 4 miles back off a gravel road," and the concrete was to be used for the fittings of a house which was located up a hill. When Montgomery arrived at the site, he was reluctant to drive onto it as it was only a dirt road up the hill. Montgomery testified that he tried to get in touch with the office to see whether the jobsite had been checked out and whether he could drive onto the site. The message was relayed to him to go ahead and deliver the concrete. After getting Holley to sign the receipt, he attempted to get his ready-mix truck up the hill. He got part way up the hill and got stuck when his front wheels slid 18 inches off the roadbed. Montgomery then left with Bill Emerson, the general contractor, to call a wrecker to pull his truck free. However, it was Emerson, not Montgomery, who actually placed the call.

Montgomery testified that when he left with Emerson, the drum of his truck was still turning but that when he returned it was no longer turning. The importance of this is the fact that concrete, if not continued to be mixed, will set and obviously cause problems in attempting to get it out of the mixer, becoming useless to any customer who wishes to use it. Montgomery attempted to get the drum turning again but was unsuccessful, and the entire load of concrete had to be dumped.

At or about 4:30 or 5 p.m., a small wrecker arrived, but was inadequate to handle the large ready-mix truck. Approximately 1 hour later a second wrecker arrived. Finally, after engaging the use of three wreckers, Montgomery freed his truck and moved it back down the hill. Montgomery returned the truck to Respondent's garage about 9 p.m. At that time, he talked to Darrell Richardson and told him what had happened. He was then told to wash out the truck and go home.

According to the testimony of Roy Holley, whom I credit, Montgomery's failure to properly deliver the concrete cost Holley about $500 to $600 for workmen who were standing around waiting for the concrete to be poured, and also the amount for half the load of the concrete.[4] Holley further stated that he did not recall whether the drum of the truck was turning when Montgomery left to call the wrecker, but he did indicate that there was no necessity for Montgomery to leave his truck. On the Saturday following the incident, Holley went to Respondent to complain about Montgomery. He told Darrell Richardson and Charlie Smerker that Montgomery was argumentative and was just not capable of handling the truck. Holley also testified that he was familar with Montgomery from other jobs, and that in fact he had complained to Respondent about Montgomery's driving and inability to place the truck where he wanted the concrete poured on several prior occasions.

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[4] Respondent paid for the other half, plus the fees for three wreckers.

There was similar testimony that several contractors made similar complaints about Montgomery. Paul Harris, a foundation contractor, testified credibly that he also had complained about Montgomery's driving on December 5, with respect to an incident which occurred earlier in the day. Montgomery had delivered concrete to one of his jobsites and in the process, because of his failure to follow Harris' instructions, had run over some of his forms and, in fact, had jeopardized Harris' safety by driving too fast. He stated that he told Respondent that he did not want Montgomery delivering concrete to any of his jobs.

Hershal Webb, a general contractor who has been doing business with Respondent for about 15 years, stated that he also had complained about Montgomery to Charlie Smerker. He said that although Montgomery eventually completed a job, he always argued with Webb about how the job should be done. As an example, Webb stated that on one job Montgomery did not want to back between two houses, although there was a 14-foot passageway, and wanted the contractor to wheel barrels of concrete from the truck to the site of the pour. This, of course, would make quite a bit of additional work for the contractor. I credit Webb that he did complain on a number of occasions about Montgomery and that he had asked that Montgomery not be sent to his jobs.

Contractor Tom Phelps testified that on one occasion Montgomery disregarded his instruction and made too tight a turn around the corner of a foundation. The rear wheels of Montgomery's truck hung over the edge of the excavation and caved in parts of the bank while two workers were below. This resulted in a very low quality concrete pour and substantial extra expense to Phelps, since he had to use his own equipment to keep the truck from falling into the foundation while several of his men stood around unable to work. As a result, Phelps told Respondent that he did not want Montgomery back on any of his jobs.

Robert Smerker testified that the Monday after December 5, 1980, incident at the Sugar Creek job, he and his brother Charlie visited the site to determine how bad it was since they had to deliver some additional concrete there. He testified that they drove their pickup truck up the hill with no difficulty. At that time he talked to Emerson, who said he could not understand why Montgomery had problems, that the conditions were not that bad, and that Montgomery could not drive. In fact, both Holly, the foundation contractor, and Emerson, the general contractor, testified that on the following Wednesday a number of loads of concrete were delivered without incident to the jobsite. They did concede that because of a heavy rain on Sunday, they did not attempt to have any concrete delivered until Wednesday, until both the foundation and the road had dried out. Bob Smerker then testified that after visiting the jobsite on Monday morning, he and his brother Charlie decided to terminate Montgomery. In sum, in addition to Holly and Emerson, who were involved in the December 5 incident in which Montgomery's truck got stuck, there were three other contractors who expressed the views that Montgomery was a poor driver, some of whom had requested he not be sent to their jobsites. Thus, Respondent had legitimate grounds for discharging Montgomery, which included numerous customer complaints and a poor driving record.

Summary and Conclusions

The overwhelming weight of credible evidence establishes that Terry Montgomery was at best a marginal employee. It appeared that he had had more than his share of problems handling Respondent's equipment and that he was involved in one burned out engine and at another point, a broken crankshaft which resulted in a very expensive repair job. Nor does there appear to be any doubt that Montgomery's driving ability, while perhaps acceptable under a normal driving circumstance, did not measure up to acceptable standards as far as backing up ready-mix trucks and handling the trucks in difficult situations. On December 5, alone, Montgomery was involved in three incidents, a situation which raises considerable questions about his driving ability. He had backed into another truck on the plant's premises, although he admittedly caused no damage. On the same day, he had backed over some forms in attempting to deliver his concrete on the jobsite. The third and final incident was his getting his truck stuck in the Sugar Creek job at which Holley and Emerson were working. I conclude and find that there were legitimate customer complaints about Montgomery's driving, and that in several incidences he had caused contractors trouble and money and endangered employees because of his poor driving.

It seems clear that Montgomery had alienated a number of customers, some of whom were regular customers. As Bob Smerker testified, he informed Montgomery at one point that there was no place he could send him anymore because nobody wanted him on the jobsites. While I take that to be some exaggeration, there is little doubt that Montgomery's driving ability was not acceptable to Respondent's customers. Furthermore, there are a number of other employees involved with the Union, including Don Carter, the union steward, who filed a number of grievances and apparently had not been discriminated against. Whatever friction may have existed between Montgomery and Respondent due to Montgomery's filing of grievances, I find that the motivating cause of Montgomery's discharge was based on legitimate grounds, namely, customer complaints and Montgomery's poor driving ability. Accordingly, I find insufficient evidence to support the allegations that Montgomery was terminated either because of his union or concerted activities, or because he filed a workmen's compensation claim. Therefore, I recommend that the complaint in this respect be dismissed.

CONCLUSIONS OF LAW

1. Respondent Arnold Ready Mix Corporation is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Local 30, Industrial and Miscellaneous Workers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Charles Smerker on or about October 3, 1980, threatened employees with reprisals, including bad work assignments and bad references if they continued to file grievances against Respondent. Such conduct is violative of Section 8(a)(1) of the Act.

4. Respondent did not violate Section 8(a)(1) of the Act in any other manner.

5. The discharge of Terry Montgomery, on December 10, 1980, was not discriminatorily motivated, and Respondent did not violate Section 8(a)(3) or (1) of the Act.

6. The aforesaid practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to cease and desist from its unlawful practice. I further recommend that Respondent be ordered to post an appropriate notice and take affirmative action in order to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby recommend the issuance of the following:

ORDER[5]

The Respondent, Arnold Ready Mix Corporation, Imperial, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully threatening employees with reprisals for filing grievances against Respondent in violation of Section 8(a)(1) of the Act.

(b) In any like or related manner unlawfully interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The National Labor Relations Act, gives you, as employees, certain rights:

To engage in self-organization
To form, join, or help a union
To bargain collectiveley through a representative of your own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all of these things.

WE WILL NOT unlawfully threaten employees with reprisals for filing grievances against us.

WE WILL NOT in any like or related manner unlawfully interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ARNOLD READY MIX CORPORATION

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Townsend and Bottum, Inc. ***and*** **Paul Vander Ploeg**

Local 70, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ***and*** **Paul Vander Ploeg. Cases 7-CA-17861 and 17-CB-4744**

November 12, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On May 28, 1981, Administrative Law Judge Thomas D. Johnston issued the attached Decision in this proceeding. Thereafter, Respondent Employer and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge to the extent consistent herewith.

The Administrative Law Judge found, and we agree, that Respondent Townsend and Bottum, Inc., violated Section 8(a)(3) and (1) of the Act by laying off a number of employees because of their nonmembership in Local 70, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (hereinafter Respondent Union), and in order to give preference to members of Respondent Union. However, the Administrative Law Judge further found that the evidence was insufficient to establish that Respondent Union, in violation of Section 8(b)(1)(A) and (2), failed or refused to register certain laid-off employees on its referral lists and refer them for employment because they were not members. In this regard, he found that signing the lists was a prerequisite for referral by Respondent Union. He further found that, since the alleged discriminatees had merely requested Respondent Union's business manager, Otis Fahl, to send them out to other jobs when work was available and had not asked to sign the lists, Respondent Union's failure to place them on these lists did not violate the Act. For the reasons set forth below, we find that signing the out-of-work lists was not a requirement at the time the alleged discriminatees requested work and that, under the circumstances, their request to be sent out when work was available was tantamount to a request to be placed on the referral lists. We further find that Respondent failed to place them on the lists because they were not members and, accordingly, such failure or refusal to do so violated Section 8(b)(1)(A) and (2) of the Act.

Briefly, Respondent Union's business manager, Fahl, testified that the Union maintained out-of-work lists which were used for referrals. Those employees who were placed on the lists were generally given priority according to the date their names were registered. He testified that, although it had been the practice prior to his taking over as business manager in January 1980[2] to place only members of Respondent Union on the lists, he would have, upon request, placed anyone on the lists regardless of their nonmembership in Respondent Union. He stated, however, that he had never received such a request from a nonmember. With respect to the procedure member-employees followed in order to be placed on the lists, Fahl testified that, prior to May 1980 "[a] man would either call or come in and report that he was unemployed and I would put his name on the list." However, as of May, he began the practice of having employees sign the lists themselves.

According to the testimony credited by the Administrative Law Judge, shortly after their layoff on February 8, employees Paul Vander Ploeg, Pat Sorenson, Harvey Cummings, and Robert Knowles met with Fahl.[3] They told Fahl that they had been laid off and inquired as to the availability of work. Fahl responded that there was none at present and the employees asked if they could go to work again "when you need help." According to Fahl, he told them "yes, if the occasion came up and we could use them I would certainly put them to work because they had done us a good job." At the hearing Fahl explained that he did not put their names on any of the out-of-work lists[4] because they did not ask him to and "I don't solicit names for the out of work list." Thereafter, employees whose names were placed on the lists on dates subsequent

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[1] Respondent Employer has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] All dates refer to 1980 unless otherwise indicated.

[3] The record is unclear as to whether Knowles was with the other three employees when they spoke with Fahl. However, Fahl testified that he was and that he was told the same thing as the other employees. The Administrative Law Judge credited Fahl's testimony with respect to this meeting and implicitly found that Knowles was present.

[4] There were several lists, which essentially grouped employees on the basis of skills; e.g., plumbers, pipefitters, etc.

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to the above meeting were referred out for reemployment at Respondent Employer.[5]

The foregoing evidence clearly reveals that, contrary to the Administrative Law Judge's finding, there was no requirement that out-of-work employees personally sign the out-of-work lists at the time the four employees were laid off and contacted Respondent Union. As Business Manager Fahl testified, such a procedure was not instituted until sometime in May, 3 months after Vander Ploeg, Sorenson, Cummings, and Knowles reported that they had been laid off and wanted work. Whether their request to Fahl was sufficient to constitute a request to be placed on the out-of-work lists must be viewed in this light.

As noted above, Fahl testified that, prior to May, an out-of-work employee "would either call or come in and report that he was unemployed and I would put his name on the list." The four alleged discriminatees did precisely that, and we find that their conduct in reporting their layoff and indicating their availability for work was sufficient to entitle them to be placed on the out-of-work lists.[6]

With respect to Respondent Union's justification for not doing so, we reject its explanation that its failure to register these employees was only because they did not specifically request it. Rather, the evidence indicates that this failure was motivated by the employees' lack of membership in Respondent Union. Business Manager Fahl's testimony reveals that unemployed members were not required to make such a specific request. They needed only to notify the Union of their status, by telephone or otherwise, without resort to a recitation of any "magic words." In addition, Fahl clearly misled these nonmembers when he told them he would refer them when work was available, knowing that referrals were made on the basis of priority on the out-of-work lists. Finally, we note that, by Fahl's own admission, placement on the lists had been limited to Respondent Union's members, ostensibly until he took over as business manager in January, approximately 1 month before the incident at issue. Although he testified that he would have placed nonmembers on the list but that no one had ever requested it, the evidence set forth above belies this assertion.[7] On the contrary, we find that Respondent Union, through its agent Otis Fahl, disregarded the requests for referral by Vander Ploeg, Sorenson, Cummings, and Knowles and failed or refused to register them on its out-of-work lists and refer them for employment. We further find that their request was disregarded because they were not members of Respondent Union. Accordingly, we conclude that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act[8] and that the aforesaid are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that Respondent Union has engaged in an unfair labor practice in violation of Section 8(b)(1)(A) and (2) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. We shall order that Respondent Union notify in writing Townsend and Bottum, Inc., and other employers with whom it had or now has exclusive referral agreements, with copies to Paul Vander Ploeg, Robert Knowles, Pat Sorenson, and Harvey Cummings, that it has no objection to their employment, and that it will not refuse to register any of these individuals, or any other job applicant, through its hiring hall procedures because he lacks membership in Local 70. We shall further order that Respondent Union make the above-named individuals whole for any loss of earnings suffered by reason of its unlawful conduct. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*,[9] with interest thereon computed in the manner set forth in *Florida Steel Corporation*.[10]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

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[5] There was some dispute as to whether the alleged discriminatees were qualified for these positions. We shall leave this determination to compliance since, in any event, a finding of a violation does not turn on whether work was available at the time. See, e.g., *Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO (Hancock-Northwest, J. V.)*, 247 NLRB 1250 (1980).

[6] We note that there is no indication in the record that the employees even knew of the existence of these lists and Respondent Union did not appear to have been anxious to apprise them of its referral procedure.

[7] There is no allegation of discrimination occurring either prior to or after the February incident at issue. However, the fact that Respondent Union maintained "members only" out-of-work lists in the past and, despite the ostensible change in its policy barely 1 month before the incident involved herein, has never placed a nonmember on these lists is very relevant and probative of its motivation in failing to register the employees here. Indeed, Respondent Union's past practice, its misleading statements to Vander Ploeg and the others concerning its willingness to refer them for work, and the absence of a single instance in which a nonmember was placed on these lists indicate that in failing to register these nonmembers it was continuing its past practice of maintaining "members only" out-of-work lists.

[8] See, e.g., *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (California Trucking Association)*, 188 NLRB 305 (1971).

[9] 90 NLRB 289 (1950).

[10] 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on backpay in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

A. Respondent Townsend and Bottum, Inc., Ann Arbor, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off or in any other manner discriminating against any employee in regard to hire or tenure of employment or any term or condition of employment because of their nonmembership in Local 70, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, or any other labor organization, or in order to give preference to the members of said labor organizations except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to Kelly Rose, Ralph Landolf, Giles Buteau, Craig Whitlow, Dennis Thornley, Harry Sample, Jessie Wilkins, Terry Whitman, Thomas J. Slifko, William L. Slifko, LeRoy Krieger, Ken Huizinga, Larry Patton, Mike Hubbard, Donald Ferrell, Arthur Ashby, John Ashby, Paul Sniff, Ray Schrier, Charles Dunn, Thomas Crawford, Richard Warren, Bernard Collins, Charles Bowhan, Larry Schaub, Craig Beckwith, Paul Veldman, Dave Hammerstrom, Robert Davis II, Walter Roung, Paul Vander Ploeg, Robert Knowles, Harvey Cummings, Fred Sliter, Pat Sorenson, Robert A. McCarthy, Kevin Rogler, Richard Sharp, Ken Bryon, Murray Cohen, Jerry Lucas, Charles Vass, George Steinmetz, Joseph Pielesnik, Robert Howe, Joseph Broniecki, Vincent Reynolds, George Pellerin, John Higginbotham, Lewis Smith, James Daughtery, Juan Barrios, and Lawrence Roberts to their former positions or, if those positions no longer exist, then to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make each of them whole for any loss of pay and other compensation they may have suffered by reason of the discrimination against them in the manner set forth in that section of the Administrative Law Judge's Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Ann Arbor, Michigan, facility and at the jobsite, if it is still performing work there, copies of the attached notice marked "Appendix A."[11] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent Employer's authorized representative, shall be posted by Respondent Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent Employer has taken to comply herewith.

B. Respondent Local 70, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, Grand Rapids, Michigan, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing and refusing to register on its referral lists and refer for employment Paul Vander Ploeg, Robert Knowles, Pat Sorenson, Harvey Cummings, or any other applicant, because of nonmembership in Local 70, or any other union.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole Paul Vander Ploeg, Robert Knowles, Pat Sorenson, and Harvey Cummings for any loss of pay they may have suffered because of the discrimination against them in the manner set forth in the section of this Decision entitled "Amended Remedy."

(b) Notify in writing Townsend and Bottum, Inc., and other employers with whom it had or now has exclusive referral agreements, with copies to the above-named individuals, that it has no objection to their employment, and that it will not refuse to register any of these individuals, or any other job applicant, through its hiring hall procedures because he lacks membership in Local 70.

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[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records pertaining to employment through its hiring halls, and all other records necessary and useful in determining the amount of backpay due.

(d) Post at its business office, hiring halls, and meeting places copies of the attached notice marked "Appendix B."[12] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent Union's official representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT lay off or in any other manner discriminate against employees in regard to hire or tenure of employment or any term or condition of employment because of their nonmembership in Local 70, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, or any other labor organization, or in order to give preference to their members except to the extent such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Kelly Rose, Ralph Landolf, Giles Buteau, Craig Whitlow, Dennis Thornley, Harry Sample, Jessie Wilkins, Terry Whitman, Thomas J. Slifko, William L. Slifko, LeRoy Krieger, Ken Huizinga, Larry Patton, Mike Hubbard, Donald Ferrell, Arthur Ashby, John Ashby, Paul Sniff, Ray Schrier, Charles Dunn, Thomas Crawford, Richard Warren, Bernard Collins, Charles Bowhan, Larry Schaub, Craig Beckwith, Paul Veldman, Dave Hammerstrom, Robert Davis II, Walter Roung, Paul Vander Ploeg, Robert Knowles, Harvey Cummings, Fred Sliter, Pat Sorenson, Robert A. McCarthy, Kevin Rogler, Richard Sharp, Ken Bryon, Murray Cohen, Jerry Lucas, Charles Vass, George Steinmetz, Joseph Pielesnik, Robert Howe, Joseph Broniecki, Vincent Reynolds, George Pellerin, John Higginbotham, Lewis Smith, James Daughtery, Juan Barrios, and Lawrence Roberts to their former jobs or, if those jobs no longer exist, then to substantially equivalent jobs without prejudice to their seniority and other rights and privileges, and WE WILL make each of them whole for any loss of pay or other compensation he may have suffered by reason of our discrimination against him, with interest.

TOWNSEND AND BOTTUM, INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

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[12] See fn. 11, *supra*.

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT fail or refuse to register on our referral list or refer for employment Paul Vander Ploeg, Robert Knowles, Pat Sorenson, Harvey Cummings, or any other applicant, because of nonmembership in Local 70, or any other union.

WE WILL not in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Paul Vander Ploeg, Robert Knowles, Pat Sorenson, and Harvey Cummings whole for any loss of earnings suffered as a result of the discrimination against them, with interest.

WE WILL notify Townsend and Bottum, Inc., and other employers with whom we had or may have exclusive referral agreements, in writing, with copies to the above-named individuals, that we have no objection to their employment, and that we will not refuse to register or refer these individuals, or any other job applicant, through our hiring hall procedures because he lacks membership in Local 70.

LOCAL 70, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPE FITTING
INDUSTRY OF THE UNITED STATES
AND CANADA, AFL-CIO

DECISION

STATEMENT OF THE CASE

THOMAS D. JOHNSTON, Administrative Law Judge: These consolidated cases were heard in Grand Rapids, Michigan, on December 18 and 19, 1980,[1] and January 12, 1981, pursuant to a charge filed on June 6 by Paul Vander Ploeg, an individual, against Townsend and Bottum, Inc. (herein referred to as Respondent Company), in Case 7-CA-17861, and amended charge[2] filed on June 6 by Ploeg against Local 70, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (herein referred to as Respondent Union) in Case 7-CB-4744, and an amended consolidated complaint issued on July 31 in both cases.

The amended consolidated complaint, which was further amended at the hearing, alleges that Respondent Company violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein referred to as the Act), by laying off welding and pipefitting employees[3] on or about January 18, 22, 23, 25, 28, 29, and 30 and February 1, 4, 6, 7, 8, 14, and 15 at its West Olive jobsite because of their nonmembership in Respondent Union and in order to give preference to members of Respondent Union.

The amended consolidated complaint also alleges that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by advising employees at the West Olive jobsite that union members were being given preference over nonmembers in admission to Respondent Company's sponsored training classes; by causing Respondent Company to deny permission to attend Respondent Company's sponsored training classes to nonmember employees[4] at the West Olive jobsite and to give preference to members of Respondent Union, thereby causing Respondent Company to discriminate against employees because of their nonmembership in Respondent Union; by dening Ploeg access to study materials for Respondent Union's journeymen's examination because of his nonmembership in Respondent Union; and by refusing to refer Ploeg and other nonmembers[5] to jobs with Respondent Company or to put them on an out-of-work list because of their nonmembership in Respondent Union, thereby causing such employees not to be rehired by Respondent Company and thereby causing Respondent Company to discriminate against employees because of their nonmembership in Respondent Union.[6]

Respondent Company, in its answer dated August 8, denies having violated the Act.

Respondent Union, in its answer dated August 8 to the amended consolidated complaint, which also included the adoption of its original answer dated June 24 to a complaint issued against it, denies having violated the Act.

The issues involved are whether Respondent Company violated Section 8(a)(1) and (3) of the Act by discriminatorily laying off[7] the discriminatees because of their nonmembership in Respondent Union and in order to give preference to Respondent Union's members; and whether Respondent Union violated Section 8(b)(1)(A) and (2) of the Act as alleged by making unlawful statements to employees, by discriminating against Ploeg by denying him access to study materials for its Journeymen's examination, by discriminatorily causing Respondent Company to deny Ploeg permission to attend its sponsored training classes, and by discriminatorily refusing to refer Ploeg, Sorenson, Cummings, and Knowles to jobs with Respondent Company or to put them on an out-of-work list, thereby causing Respondent Company to discriminate against them because of their nonmembership in Respondent Union.

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[1] All dates referred to are in 1980 unless otherwise stated.

[2] The original charge was filed on April 8.

[3] The names of these laid-off employees (herein referred to as the discriminatees) are contained in the General Counsel's response to a more definite statement.

[4] The General Counsel defined "nonmember employees" as used here to mean only Ploeg.

[5] The "nonmembers" referred to here and as defined by the General Counsel were Pat Sorenson, Harvey Cummings, and Robert Knowles.

[6] Certain other allegations contained in the amended consolidated complaint alleging that Respondent Union violated Sec. 8(b)(1)(A) and (2) of the Act were disposed of either through an informal settlement agreement containing a nonadmission clause or by withdrawal of such allegations.

[7] The layoffs themselves, as opposed to the selection of those employees to be laid off, were not alleged to be discriminatory.

Upon the entire record in this case, and from my observations of the witnesses and after due consideration of the briefs filed by the parties, I hereby make the following:[8]

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT COMPANY

Respondent Company, a Michigan corporation with its principal office and place of business located in Ann Arbor, Michigan, is engaged in the construction business at various projects in the State of Michigan, including a project located in West Olive, Michigan, where it is the general contractor on the construction of a power plant for Consumers Power Company.

During calendar year 1979, a representative period, Respondent Company, in the course of its operations, received gross revenues in excess of $500,000, and purchased and received goods and materials valued in excess of $50,000 which were delivered to it at its West Olive, Michigan, job directly from points located outside the State of Michigan.

Respondent Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 70, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent Company was engaged as the general contractor on the construction of a power plant located in West Olive, Michigan, for the Consumers Power Company (herein referred to as the jobsite). Robert Shilande, who had previously served as piping superintendent, was its project superintendent.[9] Its employees working on the jobsite were represented by Respondent Union with which it had collective-bargaining agreements applicable to the jobsite covering said employees.

Included among the employees employed on the jobsite and represented by Respondent Union were members of Respondent Union; members, sometimes referred to as "travelers," of other local unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (herein referred to as the International), from both the United States and Canada; and nonunion employees, also referred to as "permit" or "white ticket" employees.

Otis Fahl has been the business manager of Respondent Union since about January 10 and succeeded Chester Krupiczewicz, who is now deceased. Robert Ferris served as Respondent Union's main steward on the jobsite from January 1, 1978, until July 1980.

B. *The Exclusive Referral System*

The collective-bargaining agreements between Respondent Company and Respondent Union covering work on the jobsite contain referral and hiring procedures. Under these provisions Respondent Union is required to maintain out-of-work lists for the categories of plumbers, fitters, welders, refrigeration mechanics, and apprentices. Respondent Company is required to advise Respondent Union's business manager of the number of applicants needed, and Respondent Union is then required to refer them in the chronological order they registered on the out-of-work lists. Respondent Company may reject applicants for certain valid reasons, and has the right to recall any former employee who is collecting unemployment against its account and to select from anywhere on the lists members for service work only. The agreements further provide that if, upon request, Respondent Union is unable within 48 hours to supply journeymen, including journeymen with special skills, Respondent Company may secure journeymen from any other source. The 48-hour period (Saturdays, Sundays, and holidays excepted) shall began at 8 a.m. of the day following the day on which the request is made.

Several nonunion employees, presented as witnesses by the General Counsel, who worked on the jobsite as welders or pipefitters, including Craig Beckwith, Knowles, Cummings, Ploeg, Kenneth Huizinga, David Hammerstrom, and Sorenson, all credibly testified, without denial, that before being hired by Respondent Company they were required to have referral slips from Respondent Union. Cummings, Ploeg, Hammerstrom, and Sorenson had all contacted Respondent Company initially about being hired after seeing advertisements placed by it for employees, but before being hired they were instructed by Respondent Company's representatives, including Welding Coordinator John Keenan, to go to Respondent Union for referral slips, which they did.

Respondent Company's project superintendent, Shilander, as well as Respondent Union's business manager, Fahl, and its steward, Ferris, acknowledged that before being hired by Respondent Company to work on the jobsite all employees were required to, and did, have referral slips from Respondent Union. This included members of Respondent Union, travelers from other locals of the International, including those in Canada, and nonunion employees. These referral slips were issued by Respondent Union's business manager and given to Steward Ferris by the employees upon their arrival at the jobsite.

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[8] Unless otherwise indicated, the findings herein are based on the pleadings, admissions, stipulations, and undisputed evidence contained in the record, which I credit.

[9] Shilander was a supervisor under the Act.

C. *The Discriminatory Layoffs by Respondent Company*

There were approximately 387 employees employed by Respondent Company at the jobsite during January as reflected by its monthly earnings register. Business Manager Fahl estimated that in January and February there were approximately 80 members of Respondent Union employed on the jobsite.

Respondent Company's records prepared or kept by it dealing with layoffs, which listed the union status of those employees laid off, reflect that beginning on January 18 and continuing through February 15 a total of 153 unit employees who had been performing work as pipefitters or welders were laid off from work at the jobsite.

On January 18 those employees laid off were Kelley Rose, Marcel Trudeaux, Garry L. Parks, John R. McCormick, Edward Rogers, Richard Brougham, Ronald Gionet, Wade Westline, Hazen Hollis, R. Roy, Raymond Legault, Mato Brkic, John Y. Coulombe, E. Huot, Daniel T. Gallagher, Ludwig Diermeier, Richard Bibeau, Pierre Marcotte, Rejean Desilets, John W. Dempsey, Paul Mongrain, Gillis LaBlanc, Pierre Bibeau, Jacques Durand, Pierre Durand, John R. Massey, John Newman, Henry Hay, Claude Doyon, Christopher H. Keane, Gilles LeFebvre, Richard Murchie, James Gallacher, Paul J. Peloquin, Marcel DeLongue Epee, Jacques Pepin, John McGloin, Gary Landry, Charles Beer, Damien Paulin, Willfied Belair, Benoit Gelinas, Gerard Chainey, George W. Westline, Phillip Menard, George Auspitz, Mavius Dube, Alain Dumais, Jean L. Theroux, Alain Jutras, Yuan Godan, Roger Dompierre, Dennis Belisle, and Guy Patenaude. With the exception of Kelley Rose, who was a member of Local 798, all of the other employees laid off on January 18 were from Canada and various Canadian locals.

On January 23 the only employee laid off was Ralph Landolf, who was a member of Local 2.

On January 25 those employees laid off were Giles Buteau, Marcel Lemire, Renald Filion, Richard Fournier, Jean Duval, Michel Caya, Craig Whitlow, Robert Lussier, Albert Landry, and Donald E. Stanley. Except for Giles Buteau and Craig Whitlow, who were members of Locals 617 and 190, respectively, all of the remaining employees laid off on January 25 were from Canada and various Canadian locals.

On January 28 those employees laid off were Dennis Thornley, Harry Sample, Jessie Wilkins, Luc Gautier, and Craig Whitlow.[10] Luc Gautier was from Canada and a Canadian local while Dennis Thornley and Harry Sample belonged to Local 798. Jessie Wilkins was a member of Local 640 and Craig Whitlow was a member of Local 190.

On January 29 those employees laid off were Thomas J. Slifko, LeRoy Krieger, Terry Whitman, and William L. Slifko.

Terry Whitman was a member of Local 158 whereas both Slifkos belonged to Local 27 and LeRoy Krieger was a member of Local 513.

Those employees laid off on February 1 were Paul Sniff, Ken Huizinga, Larry Patton, Mike Hubbard, Rene Allard, Donald Pinard, Gerard Dionne, Kenneth de Cropper, John Goba, Normand LaFlamme, Dennis Herbert, Rejean Savoie, Steve Dayah, Charles E. Dunn, David Billedeau, Patrick Russell, Douglas Stewart, Thomas A. Crawford, Jean P. Jutras, Ray Schrier, Ken Bursey, Jim Young, Len Sullivan, Raymond Chasse, Donald Ferrell, Stan Colton, Avmand Allard, C. J. Chapman, Gabriel Savard, Richard A. Warren, Bernard Collins, Arthur Ashby, John Ashby, Raymond Dillon, Paul A. McAree, Angelo Cannata, Roger LaLancette, Cecil Fobert, Raymond Roussel, Yvon Dion, Michel Boudreau, Dennis Thornley,[11] Charles H. Bowhan, and Larry Schaub. All of the employees were laid off on February 1, from Canada and various Canadian locals except for certain employees who were either nonunion or members of other locals. Those nonunion employees were Ken Huizinga, Larry Patton, Mike Hubbard, Donald Ferrell, and Arthur and John Ashby. The members of other locals were Paul Sniff and Ray Schrier from Local 154, Charles Dunn from Local 102, Thomas Crawford from Local 460, Richard Warren from Local 313, Bernard Collins from Local 671, Dennis Thornley from Local 798, and Charles Bowhan and Larry Schaub from Local 669.

Those employees laid off on February 8 were Craig Beckwith, Kevin J. Rogler, Paul Veldman, Dave Hammerstrom, Murray Cohen, Robert Davis II, Jerry Lucas, Walter Roung, Richard Sharp, Charles Vass, George Steinmetz, Paul Ploeg, Robert Knowles, Joseph Pielesnik, Robert Howe, Harvey Cummings, Fred Sliter, Pat Sorenson, Robert A. McCarthy, Joseph Broniecki, George Pellerin, John Higginbotham, Juan Barrios, Louis A. Smith, Vincent C. Reynolds, Ken Byron, and James E. Daugherty.

The employees laid off from work on February 8 were either nonunion employees or members of other locals. The nonunion employees were Craig Beckwith, Paul Veldman, Dave Hammerstrom, Robert Davis II, Walter Roung, Paul Ploeg, Robert Knowles, Harvey Cummings, Fred Sliter, and Pat Sorenson. The records do not show the status of Robert A. McCarthy; however, he was not a member of Respondent Union. Insofar as the remaining employees are concerned, Kevin Rogler, Richard Sharp, and Ken Byron were members of Local 638, Murray Cohen was a member of Local 629, Jerry Lucas was a member of Local 387, Charles Vass was a member of Local 111, George Steinmetz was a member of Local 50, Joseph Pielesnik and Robert Howe were members of Local 154, Joseph Broniecki and Vincent Reynolds were members of Local 1, George Pellerin was a member of Local 144, John Higginbotham was a member of Local 195, Lewis Smith was a member of Local 821, James Daugherty was a member of Local 211, and Juan Barrios was a member of Local 391.

On February 14 the only employee laid off was Lawrence Roberts, who was a member of Local 821.

On February 15 those employees laid off were Robert Carroll, George Coleson, John W. May, James Vanders Heuvel, Kevin Pratt, M. O'Hara, and E. O'Hara. Three of these employees, namely, George Coleson, M. O'Hara, and E. O'Hara, were members of Respondent Union. Robert Carroll belonged to Local 449 and James Heuvel to Local 190. Neither John May nor Kevin Pratt were union members.

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[10] Whitlow, as previously noted, was included in the January 25 layoff.

[11] Thornley, as previously noted, was included in the January 28 layoff.

Project Superintendent Shilander testified that these layoffs resulted from a gearing down of Respondent Company's operations on the jobsite and that he made the decision on each layoff. This was accomplished by his first determining the number and classifications of employees to be included in each layoff, whereupon the general foremen along with the foremen then submitted to him lists of names of employees they themselves selected to be laid off for his approval. He then reviewed each of the lists to see whether they were fair, whether there would be any problems with upcoming vacations, and that the layoffs did not include specific areas like hot welders. Those factors, which Shilander stated were to be considered in selecting the employees for layoff and about which he had previously instructed his foremen in meetings, included absenteeism, productivity, expertise in their field, classifications required for upcoming work, and sometimes areas of work.

Shilander acknowledged that he did not review the qualifications of each individual selected for layoff or compare them to those employees retained but only looked to see whether there were any glaring inequities concerning whether the names should be included on the lists. According to him, on these particular layoffs he did not see any problems with letting the layoffs go through the way they were requested, stating he trusted the decisions of the general foremen and foremen. Shilander also acknowledged that no records were kept of the reasons for laying off the employees.

None of the general foremen or foremen who selected the names of the employees to be laid off testified concerning the reasons they selected those employees whose names they submitted to Shilander.

Shilander denied that he was ever pressured by Respondent Union concerning how to make the layoffs, although he stated that former Business Manager Krupiczewicz, about October 1979, had informed him he wanted him to take a hard look at Respondent Union's members before he laid them off and that Business Manager Fahl, after taking office, had indicated he did not want any of the arrangements previously made with Krupiczewicz changed.

Robert Knowles, who was one of the discriminatees employed on the jobsite who was laid off from work on February 8, credibly testified without denial that in December 1979 or January 1980, upon asking Respondent Company's foreman, Mike Duffy,[12] under whom he worked, if he knew the order of layoff that would be coming up or if he would be laid off since the job was slowing down, Duffy replied that he thought it would be subjourneymen,[13] then the Canadians, and then the permit hands or white tickets in that order.

Knowles, Ploeg, Huizinga, Hammerstrom, and Sorenson all credibly testified without denial that at the time they were laid off on February 8, except for Huizinga, who was laid off on February 1, the jobs they were working on had not been completed and there was still work to be performed.

Respondent Company's records reflect that prior to the layoffs in issue here Respondent Company, in December and early January, also laid off from work approximately 59 employees[14] who had been performing work as welders, pipefitters, and subjourneymen pipefitters on the jobsite. Six of those employees were members of Respondent Union, while the rest of them were either nonunion employees or members of other locals, including 20 Canadians from various Canadian locals.

Following the layoffs in issue here Respondent Company, during the period beginning February 18 and continuing through April 4, laid off approximately 119 additional employees.[15] Thirty-seven of those employees were members of Respondent Union, while 6 of them were nonunion employees and the remaining employees were members of other locals.

Shilander's undisputed testimony, which I credit, establishes that all of the Canadians employed on the jobsite were working under visas for which Respondent Company had applied. Those visas, which were originally good for 1 year, expired about Thanksgiving 1979, but at the request of Respondent Company they had been extended for an additional 3 months and would have expired about the end of February. No further extensions of the visas were requested. All of the Canadians had been laid off by about the first part of February and Shilander explained that it was because their visas were to expire.

Both Shilander and Ferris testified at the time of the hearing that the only employees still working on the jobsite were members of Respondent Union.

Shilander and Ferris estimated that by about the end of February or March all of the nonunion employees working on the jobsite had been laid off work. Ferris also estimated that from about May until September there were approximately 90 employees still employed on the jobsite who, with the exception of a few travelers from Michigan locals, were members of Respondent Union. According to Ferris, the number of employees on the construction crew had dropped to approximately 25 in December.

D. *Respondent Union's Alleged Conduct Concerning Welding Training Classes*

Respondent Company sponsors welding training classes for its employees employed at the jobsite. Based on the undisputed testimony of Respondent Union's steward, Ferris, which I credit, those employees interested in attending such classes submit their applications to him, which he in turn gives to Respondent Company's welding coordinator, Keenan. Keenan alone then selects the applicants to attend the welding training classes and notifies Ferris to have those employees selected to report to class. Respondent Union does not participate in the selection process.

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[12] Although Knowles described Duffy as being a general foreman, he was not among those listed by Shilander, and Stewart Ferris described him as being a foreman.

[13] According to Ferris, subjourneymen earn 60 percent of the journeyman's rate of pay and they are not members of Respondent Union.

[14] The layoffs of these employees were not alleged to be discriminatory.

[15] The layoffs of these employees were not alleged to be discriminatory.

Ploeg testified that in the spring of 1979 he asked Ferris whether there were any openings in the welding class. When Ferris informed him there were not any openings he asked if he could be put on a waiting list, whereupon Ferris told him there was no list. Upon asking whether he could get in at a later date, Ferris informed him that union personnel were given the first opportunity to get into the class.

Ploeg further testified that in the fall of 1979, which he subsequently defined to mean August 1979, he again asked Ferris, in the presence of Assistant Steward Jerry Patton,[16] about the possibility of getting into the welding class, but was told that it was full. Upon asking again if he could get in at a later date, Ferris informed him that he could not because union members were given the first opportunity to get into the class.

Ferris denied making such statements attributed to him by Ploeg or ever refusing to take applications for the classes. He further stated that he had received applications from nonunion employees, including Ploeg,[17] Knowles, and Cummings, which he then turned over to Welding Coordinator Keenan. According to Ferris' undisputed testimony, he observed Knowles attending welding classes about February or March 1979. Cummings acknowledged that in the spring or summer of 1979 he had filled out an application for welding school which he gave to Ferris. Although he was not accepted, he acknowledged that he never pushed it.

I credit the testimony of Ferris over that of Ploeg, whom I discredit, and find that Ferris did not inform Ploeg or other employees that union members were being given preference over nonmembers in admission to the welding training classes as alleged.[18] Apart from my observation of the witnesses in discrediting Ploeg, his testimony was both contradictory and contrary to that of other witnesses presented by the General Counsel.

E. *Respondent Union's Alleged Denial Of Study Materials To Ploeg*

Ploeg testified that, about the first week in March during a telephone conversation he initiated with Business Manager Fahl, he asked Fahl about the possibility of getting in Respondent Union as an apprentice or subjourneyman, whereupon Fahl informed him that he would have to have 4 years of experience and would have to take some kind of test. Upon asking Fahl if he could get material for the test, Fahl informed him that he could not unless he was in some way affiliated with the Union or was referred or accepted as an apprentice.

Fahl denied making such statements to Ploeg. He further denied that there was any such study materials in existence, and no evidence was proffered to establish that any such materials ever actually existed.

I credit Fahl rather than Ploeg, whom I have previously discredited.

F. *Respondent Union's Alleged Refusal To Refer Employees*

Ploeg, Sorenson, Cummings, and Knowles all worked as journeymen at the jobsite performing welding or pipefitting work from 1978 until their layoffs on February 8.

Respondent Union's records and the undisputed testimony of Fahl establish that Respondent Union maintains separate out-of-work lists for plumbers, pipefitters, welders, and apprentices, which is also required by the collective-bargaining agreements covering work on the jobsite. Employees are referred to jobs in the order their names appear on each list except for those exceptions contained in the collective-bargaining agreements such as when an employee is drawing unemployment benefits from Respondent Company. Initially, Fahl at the request of the employees who were out of work, would list their names on these out-of-work lists. However, about May the practice was changed whereby the employees themselves would sign these lists.

Fahl denied that employees had to be members of Respondent Union to have their names placed on the out-of-work lists. However, he admitted making a statement in an affidavit given to a Board agent as follows: "If there is a work shortage we keep an unemployed list and you have to be a member of the local to be put on that list. Fahl's explanation for making such a statement was that it was in response to a question about what the past practices of the Local had been as far as maintaining an out-of-work list. According to him, since taking over as business manager in January, he had never experienced anyone other than members coming in and wanting to be placed on the list so the only ones who had been on the list would have been members of Respondent Union.

Knowles testified that on the day of his layoff, February 8, he went to Respondent Union's hall and talked to Fahl. During the conversation, he asked Fahl if he would send him out on a job in the future when they had work, whereupon Fahl informed him that he would. Knowles stated he believed that he also asked Fahl if there would be a signup list or a list for nonmembers and Fahl told him no. Upon asking Fahl if he would refer him to other business agents since he was not a member of Respondent Union and could not get a travel card, and if Fahl would let him know about other jobs, Fahl informed him that he would and for him to keep in touch.

Knowles acknowledged that he did not ask to sign an out-of-work list or for Fahl to put his name on such list.

Fahl, while stating that he had several discussions with Knowles about admission to Respondent Union's apprenticeship program, denied having any discussions with him about putting his name on an out-of-work list or that Knowles asked to be placed on a list.

I credit the testimony of Fahl rather than that of Knowles, whom I discredit. Besides my observation of the witnesses in discrediting Knowles, he expressed uncertainty in his own testimony about what actually transpired.

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[16] Patton did not testify.

[17] Ploeg did not deny submitting an application to Ferris.

[18] The statements Ploeg alleges Ferris made to him also occurred more than 6 months prior to the filing of the charge against Respondent Union in the instant case, and Sec. 10(b) of the Act would preclude finding a violation even if such statements were credited.

On February 11, Ploeg, Sorenson, and Cummings, who had all been laid off from work on February 8, had a conversation with Fahl at Respondent Union's hall. Ploeg, who stated he had heard about the out-of-work list from members of Respondent Union, testified he asked Fahl about being put on a work list. Fahl informed all three he would put them on the work list, but told them that he would not refer any men out anymore as white ticket or permit men and that the only way he would refer men to other jobs would be as subjourneymen; and he also said that their chance of getting employment at that time was slim because he had people laid off or out of work and he would have them hired out before he would hire out a nonunion member. Upon asking Fahl about being referred out to another local or area other than Local 70's area as he did with his union members, Fahl replied he could not do that. Before leaving, Ploeg again asked Fahl whether they would be put on the out-of-work list and Fahl replied that they would. Ploeg acknowledged that he never asked Fahl if he could sign the out-of-work list.

Neither Sorenson nor Cummings, called as witnesses by the General Counsel, corroborated Ploeg's testimony, and in fact Sorenson contradicted it. All Cummings recalled that was said was that they asked if there was any work in the area or if Fahl knew of any work in Michigan where they needed hands, whereupon Fahl told them that at that time he had men on the bench and there was no work in the area. While Sorenson initially stated that they asked Fahl if he would keep them in mind for future reference for a job and asked if there was some kind of list, he subsequently stated that he did not remember himself or anyone in the group asking to have his name put on a referral list or anyone else in the group saying anything about a list and denied that Fahl said anything about it.

Fahl denied that anyone asked to be put on the out-of-work list or referred to such list. According to him, they asked if he would send them out on other jobs when he got additional work and he told them that he would because they had done a good job.

I credit the testimony of Fahl concerning this conversation rather than that of Ploeg, Sorenson, and Cummings. Besides my observation of the witnesses in discrediting them, they contradicted each other's testimony concerning what transpired and Ploeg has been discredited previously.

Fahl explained at the hearing that he did not place their names on the out-of-work list because they did not ask him to and that he did not solicit names for such list.

Ploeg further testified that following this conversation he had two telephone conversations with Fahl. The first occurred on February 18 at which time he called Fahl and asked whether the laid-off employees were on the work list, whereupon Fahl informed him that they were. Pursuant to his inquiry about the availability of work Fahl told him that he had men out of work and did not have any work for them. The last conversation occurred the first week in March when he called Fahl and asked if there was work available, whereupon Fahl informed him that there was nothing he could do for him at least until summer or later.

Fahl credibly denied having such conversations with Ploeg.

Respondent Union's out-of-work lists for pipefitters and welders reflect that after February 11 it had referred employees to Respondent Company for work on the jobsite, including jobs other than those designated as maintenance work. For example, in May or June, M. O'Hara, K. Pratt, and J. Knowles were referred as welders and, in May, P. Shaffer was referred as a pipefitter. These employees were all members of Respondent Union.

Respondent Union's records as well as the testimony of Fahl reflect that the names of Ploeg, Sorenson, Cummings, and Knowles were not placed on the out-of-work lists maintained by Respondent Union and they were not thereafter referred by it to jobs with Respondent Company.

Although Fahl denied referring anyone to Respondent Company after January within the classifications or skills of Ploeg, Sorenson, Cummings, or Knowles, Fahl also denied knowing what categories they were in, except that two of them were certified welders, and, according to him, the capabilities of the employees are determined at the jobsite by Respondent Company.

G. *Analysis and Conclusions*

The General Counsel asserts that Respondent Company violated Section 8(a)(1) and (3) of the Act by discriminatorily laying the discriminatees off from work because of their nonmembership in Respondent Union and to give preference to Respondent Union's members; and that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by making unlawful statements to employees, discriminating against Ploeg by denying him access to study materials for its journeymen's examination and causing Respondent Company to deny Ploeg permission to attend its sponsored training classes, and discriminatorily refusing to refer Ploeg, Sorenson, Cummings, and Knowles to jobs with Respondent Company or to put them on an out-of-work list causing Respondent Company not to rehire them and to discriminate against them because of their nonmembership in Respondent Union.

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act. Section 8(a)(3) of the Act provides in pertinent part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Section 8(b)(1)(A) of the Act prohibits a union from restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act. Section 8(b)(2) of the Act prohibits a union from causing or attempting to cause an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act.

The first issue discussed is whether Respondent Company violated the Act as alleged by discriminatorily laying off the discriminatees.

The fact that layoffs may be economically justified is no defense if the selection of those employees laid off is for discriminatory reasons. See *N.L.R.B.* v. *Bedford-Nugent Corporation*, 379 F.2d 528, 529 (7th Cir. 1967), and *N.L.R.B.* v. *Denna Products, Co.*, 195 F.2d 330, 335 (7th Cir. 1952), cert. denied 344 U.S. 827. Direct evidence of discriminatory motivation is not necessary to support a finding of discrimination and such intent may be inferred from the record as a whole. *Heath International, Inc.*, 196 NLRB 318 (1972). Further, where motivation for discharge is at issue, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected activity by employees was a motivating factor in an employer's decision to discharge, and the employer then has the burden of showing that the employees would have been discharged absent that protected activity. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

The findings *supra*, establish that on January 18, 23, 25, 28, and 29 and February 1, 8, 14, and 15 Respondent Company laid off a total of 153 unit employees who had been performing construction work at the jobsite, including the discriminatees. Except for 3 members of Respondent Union who were included in the February 15 layoff, the remaining 150 employees laid off were either nonunion employees or members of other locals of the International from the United States and Canada. During December 1979 or January 1980, Respondent Company's foreman, Duffy, who like other foremen and general foremen who would have been involved in making the selections for layoff, indicated to discriminatee Robert Knowles, who was laid off on February 8, that the subjourneymen, Canadians, and nonunion employees would be laid off first. This is consistent with what actually occurred during each of these layoffs except for the February 15 layoff when three members of Respondent Union were included among the seven employees laid off from work on that occasion.

Although Respondent Company's project superintendent, Shilander, approved the names of the employees to be included in these layoffs, his own testimony reflects that the general foremen and foremen upon whose judgment he relied actually selected those employees who were then laid off. Not only did these general foremen and foremen not testify concerning their specific reasons for selecting the employees to be laid off, but the evidence fails to establish what those reasons were. Further, it does not appear plausible that had the general foremen and foremen applied the criteria as instructed by Shilander in selecting employees for layoff that only members of Respondent Union would have, as here, been retained, especially in view of the large number of employees laid off. Moreover, the evidence further shows that Respondent Company not only had records reflecting the union membership status of its employees employed at the jobsite, but some of Shilander's own lists of those employees to be laid off indicated whether they were Canadians or nonunion employees. However, Shilander also possessed knowledge at the time of the layoffs that the visas of the Canadians employed on the jobsite were about to expire, and he explained this was why the Canadians had been laid off.

Having found that, during the eight layoffs beginning January 18 and continuing through February 14, a total of 146 employees comprised solely of nonunion employees or members of other locals of the International from the United States and Canada were laid off from work at the jobsite while no members of Respondent Union were included in these layoffs; that during this period Foreman Duffy stated that nonunion employees and Canadians would be laid off first; that the pattern of these layoffs was consistent with Duffy's statements; and that some of Project Superintendent Shilander's own layoff lists reflect the union status of the employees selected, I am persuaded, and I so find, contrary to Respondent Company's position as expressed in its brief, that the General Counsel has established a *prima facie* showing that the motivating factor in Respondent Company's decision to lay these employees off was because of their nonmembership in Respondent Union and in order to give preference to members of Respondent Union. Respondent Company, having proferred no evidence to establish the specific reasons these employees, with the exception of the Canadians, were selected for layoff, failed to meet its burden of showing that these employees, except for the Canadians, would have been laid off from work absent their nonmembership in Respondent Union or absent a desire to give preference to Respondent Union's members. Insofar as the Canadians are concerned, however, since their visas were expiring and would have required them to be laid off anyway, which Shilander explained was the reason they were no longer employed on the jobsite, I find that Respondent Company has met its burden by showing that it would have taken the same action against the Canadians by laying them off in the absence of their nonmembership in Respondent Union or in the absence of a desire to give preference to members of Respondent Union. With respect to the February 15 layoff, since only seven employees were involved and unlike the other layoffs it included members (three) of Respondent Union, I am persuaded and find that the General Counsel has failed to establish a *prima facie* showing that the selection of the employees in this layoff was discriminatorily motivated.

Therefore, I find for those reasons expressed *supra* that Respondent Company violated Section 8(a)(3) and (1) of the Act by discriminatorily laying off Kelley Rose on January 18 ; Ralph Landolf on January 23; Giles Buteau and Craig Whitlow on January 25; Dennis Thornley, Harry Sample, Jessie Wilkins, and Craig Whitlow on January 28; Terry Whitman, Thomas J. Slifko, William L. Slifko, and LeRoy Krieger on January 29; Ken Huizinga, Larry Patton, Mike Hubbard, Donald Ferrell, Arthur Ashby, John Ashby, Paul Sniff, Ray Schrier, Charles Dunn, Thomas Crawford, Richard Warren, Bernard Collins, Dennis Thornley, Charles Bowhan, and Larry Schaub on February 1; Craig Beckwith, Paul Veldman, Dave Hammerstrom, Robert Davis II, Walter Roung, Paul Ploeg, Robert Knowles, Harvey Cummings, Fred Sliter, Pat Sorenson, Robert A. McCarthy, Kevin Rogler, Richard Sharp, Ken Bryon, Murray Cohen, Jerry Lucas, Charles Vass, George Steinmetz, Joseph Pielesnik, Robert Howe, Joseph Broniecki, Vincent

Reynold, George Pellerin, John Higginbotham, Lewis Smith, James Daugherty, and Juan Barrios on February 8; and Lawrence Roberts on February 14 because of their nonmembership in Respondent Union and in order to give preference to members of Respondent Union.

I further find for the reasons indicated, *supra*, that Respondent Company did not violate Section 8(a)(3) and (1) of the Act by laying off the remaining discriminatees who were either Canadians from Canadian locals or were included in the February 15 layoff; namely, Marcel Trudeaux, Garry L. Parks, John R. McCormick, Edward Rogers, Richard Brougham, Ronald Gionet, Wade Westline, Hazen Hollis, R. Roy, Raymond Legault, Mato Brkic, John Y. Coulombe, E. Huot, Daniel T. Gallagher, Ludwig Diermeier, Richard Bibeau, Pierre Marcotte, Rejean Desilets, John W. Dempsey, Paul Mongrain, Gillis LaBlanc, Pierre Bibeau, Jacques Durand, Pierre Durand, John R. Massey, John Newman, Henry Hay, Claude Doyon, Christopher H. Keane, Gilles LeFebvre, Richard Murchie, James Gallacher, Paul J. Peloquin, Marcel DeLongue Epee, Jacques Pepin, John McGloin, Gary Landry, Charles Beer, Damien Paulin, Willfied Belair, Benoit Gelinas, Gerard Chainey, George W. Westline, Phillip Menard, George Auspitz, Mavius Dube, Alain Dumais, Jean L. Theroux, Alain Jutras, Yuan Godan, Roger Dompierre, Dennis Belisle, Guy Patenaude, Marcel Lemire, Renald Filion, Richard Fournier, Jean Duval, Michel Caya, Robert Lussier, Albert Landry, Donald E. Stanley, Luc Guatier, Rene Allard, Donald Pinard, Gerard Dionne, Kenneth de Cropper, John Goba, Normand LaFlamme, Dennis Herbert, Rejean Savoir, Steve Dayah, David Billedeau, Patrick Russell, Douglas Stewart, Jean P. Jutras, Ken Bursey, Jim Young, Len Sullivan, Raymond Chasse, Stan Colton, Avmand Allard, C. J. Chapman, Gabriel Savard, Raymond Dillon, Paul A. McAree, Angelo Cannata, Roger LaLancette, Cecil Fobert, Raymond Roussel, Yvon Dion, Michel Boudreau, Robert Carroll, George Coleson, John W. May, James Vanders Heuvel, Kevin Pratt, M. O'Hara, and E. O'Hara.

The next issues to be resolved are whether Respondent Union violated the Act by causing Respondent Company to deny Ploeg permission to attend its welding training classes and whether it denied Ploeg access to study materials for its journeymen's examination.

The evidence, *supra*, establishes that Respondent Union's steward, Ferris, did not inform Ploeg or other employees that union members were being given preference over nonmembers in admission to Respondent Company's welding training classes. Having so found, and since the evidence further establishes that Respondent Company alone determines which applicants will be accepted for its welding training classes, the evidence fails to establish that steward Ferris caused Respondent Company to deny Ploeg permission to attend such classes and to give preference to members of Respondent Union as alleged. With respect to the journeymen's examination, the findings establish that Business Manager Fahl did not inform Ploeg that he could not get materials for the test unless he was in some way affiliated with the Union or was referred or accepted as an apprentice. For this reason, and in view of Fahl's uncontradicted denial and the absence of any evidence to the contrary that any such study material actually ever existed, I find that Fahl did not deny Ploeg access to study materials for Respondent Union journeymen's examination because of his nonmembership in Respondent Union as alleged.

The remaining issue to be resolved is whether Respondent Union violated the Act by refusing to refer Ploeg, Sorenson, Cummings, and Robert Knowles to jobs with Respondent Company or to put them on an out-of-work list, thereby causing Respondent Company not to rehire them and to discriminate against them because of their nonmembership in Respondent Union.

The evidence, *supra*, establishes that in order to work for Respondent Company at the jobsite employees were required to have referrals from Respondent Union. Such requirement clearly establishes that there was in existence at all times material herein an exclusive referral system between Respondent Union and Respondent Company covering work on the jobsite. The fact that Respondent Company had the right to reject applicants for certain valid reasons, that it could recall former employees who were collecting unemployment against its account, that it could select applicants from anywhere on the out-of-work lists for service work only, and that it could secure journeymen from any source if after 48 hours Respondent Union was unable to fulfill its requests for journeymen does not detract from finding this to be an exclusive referral system.

Under Section 8(b)(2) of the Act when a union prevents an employee from being hired, thereby demonstrating its influence over the employee and its power to affect his livelihood, there is a presumption that the effect of such action is to encourage union membership on the part of all employees who have perceived that exercise of power; however, such presumption may be rebutted where facts show that the action taken by the union was necessary to the effective performance of its function of representing its constituency. *International Union of Operating Engineers, Local 18, AFL-CIO (William F. Murphy)*, 204 NLRB 681 (1973), enforcement denied 555 F.2d 552 (6th Cir. 1977).

An employee's request for employment must be considered in a lawful nondiscriminatory manner and is not dependent upon the availability of a job when such application is made. *Master Stevedores Association of Texas, Houston Maritime Association, Inc., and their Employers-Members*, 156 NLRB 1032, 1034 (1966).

The evidence, *supra*, establishes that in early February following the layoffs of Robert Knowles, Ploeg, Sorenson, and Cummings, who had been employed by Respondent Company at the jobsite, their names were neither placed on Respondent Union's out-of-work lists, nor were they referred to jobs by Respondent Union although other employees in the same job classifications were subsequently referred by Respondent Union to the jobsite for employment with Respondent Company. These employees referred had signed the out-of-work lists after Ploeg, Sorenson, Cummings, and Knowles had contacted Respondent Union.

However, the credited testimony of Business Manager Fahl establishes, as admitted by both Ploeg and Robert

Knowles and undenied by Cummings and Sorenson, that they did not ask Fahl to sign the out-of-work lists, which is a requirement before employees can be referred by Respondent Union. Rather, all Fahl was asked was if he would send them out to other jobs when he got additional work, whereupon he told them that he would. Under these circumstances, I find that, the evidence is insufficient to establish that Respondent Union unlawfully refused to refer Ploeg, Sorenson, Robert Knowles, and Cummings or to place their names on the out-of-work lists, and that Respondent Union did not violate Section 8(b)(1)(A) and (2) of the Act as alleged.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent Company set forth in section III, above, occurring in connection with Respondent Company's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Townsend and Bottum, Inc., is an employer engaged in commerce withhin the meaning of Section 2(6) and (7) of the Act.

2. Local 70, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily laying off Kelley Rose on January 18, 1980; Ralph Landolf on January 23, 1980; Giles Buteau and Craig Whitlow on January 25, 1980; Dennis Thornley, Harry Sample, Jessie Wilkins, and Craig Whitlow on January 28, 1980; Terry Whitman, Thomas J. Slifko, William L. Slifko, and LeRoy Krieger on January 29, 1980; Ken Huizinga, Larry Patton, Mike Hubbard, Donald Ferrell, Arthur Ashby, John Ashby, Paul Sniff, Ray Schrier, Charles Dunn, Thomas Crawford, Richard Warren, Bernard Collins, Dennis Thornley, Charles Bowhan, and Larry Schaub on February 1, 1980; Craig Beckwith, Paul Veldman, Dave Hammerstrom, Robert Davis II, Walter Roung, Paul Ploeg, Robert Knowles, Harvey Cummings, Fred Sliter, Pat Sorenson, Robert A. McCarthy, Kevin Rogler, Richard Sharp, Ken Bryon, Murray Cohen, Jerry Lucas, Charles Vass, George Steinmetz, Joseph Pielesnik, Robert Howe, Joseph Broniecki, Vincent Reynolds, George Pellerin, John Higginbotham, Lewis Smith, James Daugherty, and Juan Barrios on February 8, 1980; and Lawrence Robert on February 14, 1980, because of their nonmembership in Respondent Union and in order to give preference to members of Respondent Union, Respondent Company has violated Section 8(a)(3) and (1) of the Act.

4. Respondent Union did not violate Section 8(b)(1)(A) and (2) of the Act as alleged.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Company has engaged in certain unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

Accordingly, Respondent Company shall be ordered to offer immediate and full reinstatement to Kelley Rose, who was discriminatorily laid off on January 18, 1980; to Ralph Landolf, who was discriminatorily laid off on January 23, 1980; to Giles Buteau and Craig Whitlow, who were discriminatorily laid off on January 25, 1980; to Dennis Thornley, Harry Sample, Jessie Wilkins, and Craig Whitlow who were discriminatorily laid off on January 28, 1980; to Terry Whitman, Thomas J. Slifko, William L. Slifko, and LeRoy Krieger, who were discriminatorily laid off on January 29, 1980; to Ken Huizinga, Larry Patton, Mike Hubbard, Donald Ferrell, Arthur Ashby, John Ashby, Paul Sniff, Ray Schrier, Charles Dunn, Thomas Crawford, Richard Warren, Bernard Collins, Dennis Thornley, Charles Bowhan, and Larry Schaub, who were discriminatorily laid off on February 1, 1980; to Craig Beckwith, Paul Veldman, Dave Hammerstrom, Robert Davis II, Walter Roung, Paul Ploeg, Robert Knowles, Harvey Cummings, Fred Sliter, Pat Sorenson, Robert A. McCarthy, Kevin Rogler, Richard Sharp, Ken Bryon, Murray Cohen, Jerry Lucas, Charles Vass, George Steinmetz, Joseph Pielesnik, Robert Howe, Joseph Broniecki, Vincent Reynolds, George Pellerin, John Higginbotham, Lewis Smith, James Daughtery, and Juan Barrios, who were discriminatorily laid off on February 8; and to Lawrence Roberts, who was discriminatorily laid off on February 14, 1980, to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges.[19] It shall be ordered to make them whole for any loss of earnings and other compensation they may have suffered by reason of the discrimination against them in their employment herein found by laying them off on the dates indicated. Backpay shall be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[20]

[Recommended Order omitted from publication]

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[19] This reinstatement order shall not prejudice Respondent Company's right at the compliance stage to establish whether these employees would have since been laid off from work for nondiscriminatory reasons as a result of completion of work on the jobsite.

[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Columbus Products Company, a Division of White-Westinghouse Corporation *and* International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 746. Case 9-CA-13258

November 12, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 30, 1980, Administrative Law Judge James T. Youngblood issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, dissenting:

The Administrative Law Judge found that Respondent, Columbus Products Company, did not violate Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with certain information which the Union requested to process grievances. I disagree and would reverse his findings.

The essential facts are not in dispute.

On November 16, 1978,[2] line two of the refrigeration assembly in Respondent's appliance manufacturing plant malfunctioned. Production on line two halted and those employees who worked on that line were temporarily unable to work. The regular lunch hour of the line two employees was from 11 until 11:30 a.m. Due to the malfunction, however, Respondent advanced the lunch hour by a half hour, that is, from 10:30 until 11 a.m. This change was resisted by the employees and the Union.

Respondent's supervisors observed two union stewards, Tom Fultz and Don Parkinson, who worked on line two, passing among the employees and speaking with each employee individually. Thereafter, most employees refused to change their lunch hours as Respondent's supervisors requested. Respondent stated that many employees verbally volunteered to their supervisors that Parkinson and Fultz had told them not to change their lunch hour. As a result of their refusal to follow supervisory instructions, the employees who refused to take an earlier lunch break were suspended for a day and a half. Respondent suspended Parkinson and Fultz for 5 days each on grounds that they fomented insubordination among the hourly employees.

Pursuant to the collective-bargaining agreement then in effect between the parties,[3] the Union filed grievances on behalf of the two stewards. During the grievance procedure the Union requested the names of employees who had volunteered information about Parkinson and Fultz. Respondent refused to divulge the employees' names, but it gave the Union the substance of their comments to the supervisors. On December 11, the Union also re-

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[1] Our dissenting colleague correctly states the rule requiring an employer to provide information which is of probable or potential relevance to the proper performance of the duties of a collective-bargaining representative. However, the rule is not *per se*, and in each case the Board must determine whether the requested information is relevant, and if relevant, whether it is sufficiently important or needed to invoke a statutory obligation of the other party to produce it. *Tool and Die Makers' Lodge No. 78, IAM, AFL-CIO (Square D Company, Milwaukee Plant)*, 224 NLRB 111 (1976).

We find, in agreement with the Administrative Law Judge, that the information here requested is not of such significance or necessity to warrant a finding that the refusal to provide it violates the Act. As emphasized by the Administrative Law Judge, Respondent informed the Union of the substance of the employees' statements pertaining to the conduct which is the subject of the grievance; Respondent assured the Union that it would not call as witnesses any of the employees who gave statements or make any reference to their statements in the grievance proceeding; and the Union did in fact interview every employee involved in the incident of alleged misconduct. In these circumstances, all relevant and needed information has been rendered and we fail to see how the furnishing of the names of employees can enable the Union to represent employees more effectively. See *American Standard, Inc.*, 203 NLRB 1132 (1973). In this connection, the dissent's reliance on *Transport of New Jersey*, 233 NLRB 694 (1977), is misplaced. There, the subject of the grievance was the determination that a bus driver was at fault for a traffic accident. The union requested the names and addresses of passenger witnesses to the accident, even though the employer stated that its determination was based solely on the driver's, version and the physical circumstances. Clearly, the witnesses version of the accident would aid the union in evaluating the physical evidence and the driver's testimony. Further, the requested information was necessary because the union had no other way of knowing who the passengers were and was unable to interview them without securing their names from the employer. None of these considerations are present in the instant case. The Union knows which employees were involved in the incident and has already conducted interviews with them. Receiving the names of employees who gave statements to Respondent, therefore, adds nothing to the Union's ability to evaluate the grievance or intelligently pursue it.

[2] All dates herein are in late 1978 or early 1979, unless otherwise indicated.

[3] The collective-bargaining agreement was effective from October 18, 1976, through March 15, 1980.

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quested the names of the employees who were instructed or encouraged by Parkinson and Fultz to disobey orders from Respondent's supervisors. Respondent refused to furnish the information on grounds that it was unnecessary. Respondent also asserted, as an additional ground for denying both requests, that the Union would harass and retaliate against the employees should their names be revealed.[4]

On January 4, Respondent, by letter, informed the Union that it did not intend to call any of the employees as witnesses during the grievance and arbitration procedure, but that it would rely solely on the testimony of its supervisory personnel. The Union interviewed every employee on line two and obtained from them statements that they had not received encouragement to refuse to change their lunch hour from either Parkinson or Fultz.

The Administrative Law Judge observed that there was a duty imposed on an employer to provide the bargaining representative, upon request, information which is relevant and necessary in order that the representative may intelligently execute its statutory obligations to the employees whom it represents. However, he concluded, without citing any authority, that the Union was able to gather all relevant and necessary information it needed regarding the incident without forcing Respondent to disclose the names of the employees in question. In so finding, he emphasized that in response to the Union's request for employees' names Respondent gave the Union the substance of the comments made by those employees who talked with management after talking with the stewards. He further noted that, not only did the Union have access to all the information it needed, it had in fact interviewed all the employees involved in the incident. Finally, the Administrative Law Judge concluded that, since the Union had access to all information regarding the incident, Respondent was under no duty to furnish the names of employees whom it did not intend to call as witnesses merely because the Union claimed relevance. Accordingly, he dismissed the 8(a)(5) charges against Respondent.

The General Counsel contends that Supreme Court and Board precedent require a violation finding because Respondent refused the Union's request for information which was necessary and relevant to enable the Union to fulfill its duty to process the grievances and fairly represent the unit employees. I find merit in this contention.

The Board and the courts have applied a liberal discovery standard in determining whether a bargaining representative is entitled to requested information.[5] Thus, the Board has held that an employer has an obligation, as part of its duty to bargain in good faith, to provide information needed by a bargaining representative for the proper performance of its duties. It has further held that while an employer has no obligation to provide information which is plainly irrelevant to any dispute concerning the bargaining unit, it must supply information which is of even probable or potential relevance.[6] The rationale underlying this liberal discovery policy is to enable the bargaining agent to have sufficient information to evaluate the merits of an employee's claim.[7]

The information here requested by the Union meets the Board's standard of necessity and relevance. The Union requested two things in furtherance of the grievance, the names of all employees who had volunteered information about Parkinson and Fultz, and the names of those employees who were instructed or encouraged by Parkinson and Fultz to disobey Respondent's order to take an early lunch hour. Respondent refused to furnish any employees' names, but it did give the Union the substance of their comments. The record is unclear on this point, but presumably the "comments" referred to all the statements of those employees who volunteered information. Respondent has not, however, provided the Union the names of those employees whom Parkinson and Fultz told not to take the early lunch.

In similar circumstances the Board has held that an employer has a duty to furnish the names of witnesses to an incident for which an employee was disciplined, *Transport of New Jersey*, 233 NLRB 694 (1977). In that case a bus operator grieved the employer's determination that he was at fault in an accident. The union requested names and addresses of passenger witnesses to the accident. There, as here, the employer contended the information was not relevant because its determination of fault was not based upon any information from the witnesses whose identity the union sought, but instead was grounded solely on the operator's version of the accident and the physical circumstances. The Board rejected the employer's argument, finding that the names of the witnesses and the information which might be obtained from them was relevant to the issues raised by the grievance and were necessary to enable the union to intelligently process the grievance.

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[4] Respondent did not offer any direct evidence to support its contention that the Union would harass the employees were their names to be revealed.

[5] See, e.g., *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432 (1967).

[6] *Los Angeles Chapter, Sheet Metal and Air Conditioning Contractors National Association, Inc., et al.*, 246 NLRB 886 (1979).

[7] *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. at 438.

The same considerations apply here. Clearly the names of the employees who gave Respondent information about the two union stewards as well as the names of the employees who allegedly were instructed by the stewards to disobey orders are relevant to the issues raised by the grievance. Further, these employees may provide valuable firsthand information, which the Union does not now have, which could aid the Union in its evaluation of the merits of the grievance or which the Union could employ to rebut Respondent's case. That Respondent does not intend to rely on or refer to this information during the arbitration hearing does not detract from the importance of this information to the Union. Nor is the importance of the information diminished by the interviews already conducted by the Union with all the unit employees. Simply knowing the names of employees who allegedly either saw the stewards encouraging others to insubordination or were themselves so encouraged would give the Union a sense of the strength of Respondent's case and better enable it to evaluate the merits of its position and would enable the Union to verify such "second-hand" information or supplement it, if appropriate. This is particularly so where, as here, the employee responses to the Union's inquiries were at odds with the information the Union received from Respondent to the effect that employees advised their supervisors that the two stewards had instructed or encouraged them to disobey the early lunch hour order. It follows then that the names of the employees who volunteered this information are both relevant and necessary. Providing this information will facilitate the disposition of the grievance, which in turn will conserve the resources of the Board.

Respondent nevertheless argues that surrender of the information to the Union will expose the named employees to retaliation from the Union. In support of this position, it cites *Anheuser-Busch, Inc.*[8] In that case the Board held that an employer's refusal to furnish witnesses' statements was not a violation of Section 8(a)(5) of the Act because disclosure of the statements could lead to the intimidation of employees and the reluctance to give statements. The instant case is distinguishable in that the Union is not requesting witnesses' statements, thus there is no question of disclosing specific information given in confidence.[9] Further, the evil the Board sought to prevent in *Anheuser-Busch*—retaliation against employees who gave statements—is purely speculative in this case. Although Respondent contends that the Union will retaliate against these employees if their names are revealed, it cites no direct evidence to support its assertion. Moreover, Respondent stated that it did not intend to call employee witnesses. Hence, there can be no concern that the Union might attempt to force witnesses to change their testimony. I am therefore not persuaded that there is a substantial basis for Respondent's claimed fears of retaliation and harassment if the names are revealed.

Accordingly, I would find, for the foregoing reasons, that Respondent's refusal to furnish the Union with the information it requested violated Section 8(a)(5) and (1) of the Act.

DECISION

STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge: The complaint which issued on January 17, 1979, alleges that since on or about December 11, 1978, the International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC, and its Local 746 (herein the Union), requested Columbus Products Company, A Division of White-Westinghouse Corporation (herein Columbus or Respondent) to furnish the names of employees who allegedly were instructed and/or encouraged by employees Fultz and Parkinson to disobey orders from Respondent supervisors and since that date Respondent has refused to bargain collectively in good faith with the Union by failing and refusing to supply the Union with the information requested in violation of Section 8(a)(5) and (1) of the Act. Respondent filed an answer to the complaint admitting the service of the charge, jurisdiction of the Board, that Respondent is an employer as defined in the Act, and that the Union is a labor organization as alleged in the complaint, but denied the commission of any unfair labor practices. This matter was heard before me at Columbus, Ohio, on August 6, 1979. Respondent, the Charging Party, and the General Counsel filed post-hearing briefs which have been duly considered.

Upon the entire record, and from my observations of the witnesses and their demeanor, and after due consideration of the briefs filed by the parties, I hereby make the following:

FINDINGS AND CONCLUSIONS

A. *The Facts*

The facts in this case are not in dispute. Respondent and the Union executed a collective-bargaining agreement effective from October 18, 1976, to March 15, 1980.[1]

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[8] 237 NLRB 982 (1978).

[9] Indeed, *Anheuser-Busch* recognized an employer's duty to furnish a union, upon request, the names, rather than the statements of employee witnesses to an incident for which an employee was disciplined. 237 NLRB at 948, fn. 5.

[1] The appropriate unit as set forth in the complaint and admitted by the answer covers:

Continued

On November 16, 1978, mechanical problems arose on line two of the refrigeration assembly in Respondent's plant. As the line was shut down, employees were unable to work and this created a situation in which management decided to advance the normal lunch period by one-half hour. Thus, the normal lunch period was from 11 until 11:30 a.m. Respondent proposed to advance the lunch period by one-half hour making it from 10:30 to 11 a.m., thereby utilizing some of the downtime on the line. This change affected approximately 90 hourly employees on this line. There was resistance by the employees and the Union, and most employees refused to change their lunch period as instructed by management supervisors. Two union stewards, Parkinson and Fultz, were regularly assigned to work on a portion of line two. They were also affected by the shutdown. On the occasion of the lunch hour change, management employees allegedly observed these two stewards passing among the line two employees and talking to each employee. It appears that thereafter the hourly employees refused supervisory instructions to take an early lunch.

According to management, many of the employees volunteered verbally to their supervisors that stewards Parkinson and Fultz had told them not to change their lunch period. As indicated earlier, many of the hourly rated employees refused to change their lunch period as instructed by the supervisors. As a result of this many of the hourly employees received a disciplinary suspension of 1-1/2 days. Because management felt that part of the refusal by the employees to change their lunch period was the result of the encouragement to insubordination by stewards Parkinson and Fultz, the stewards were each given a 5-day disciplinary suspension. On December 4, 1978, grievances on their behalf were filed by the Union.

During the course of the grievance procedure the Union requested the names of all employees who had volunteered information about Parkinson and Fultz. The Company refused to furnish these employees' names but did divulge the substance of their comments. On December 11, the Union requested Respondent to furnish it with the names of employees who allegedly were instructed or encouraged by employees Fultz and Parkinson to disobey orders from Respondent's supervisors, contending the information is relevant and necessary to represent the employees in the bargaining unit, including the processing of their grievances. As indicated, Respondent refused to furnish the information contending it is not necessary and that the Union would retaliate and harass the employees.

During the grievance proceedings, and by letter dated January 4, 1979, and at the hearing, Respondent made it known to the Union that it did not intend to call any of the employees as witnesses during the grievance and arbitration procedure and that whatever testimony would be put on to establish that the employees had been informed by Parkinson and Fultz not to take the early lunch hour would be established by Respondent's supervisory personnel. Thus, Respondent made it clear that it did not intend to call any of the employees as witnesses and therefore Respondent had no need for their names. Additionally, Respondent asserts that the Union interviewed all of the employees on line two and obtained nothing from them with regard to any statements made to supervisors that the stewards told them not to change lunch hours. Respondent argues that because the employees are available to the Union and the Union can call as many witnesses as it deems necessary, it is not relevant to the Union's case in the grievance procedure for Respondent to divulge the names of the witnesses that it interrogated concerning the stewards who had informed them not to take the early lunch hour.

B. *Conclusions*

It is well settled that the Act imposes upon an employer the duty to furnish the Union, upon request, information relevant and necessary to enable it to intelligently carry out its statutory obligations as the employee's exclusive bargaining representative, and, under the standard of relevancy as applied by the Board and the courts, it is sufficient that the Union's request for information be supported by showing probable or potential relevance.

It is important to understand here that the Union did not request the substance of the employees' statement relating to the conduct of Parkinson and Fultz. It sought only the names of employees who allegedly were instructed by Parkinson and Fultz to disobey orders from Respondent's supervisors. Here Respondent had informed the Union that it was not going to call any of the employees who had given statements against the stewards as witnesses in the grievance and/or arbitration proceeding. It informed the Union that it would rely only upon its own supervisors' testimony. Additionally, Respondent informed the Union of the substance of the employees' statements pertaining to the conduct of Parkinson and Fultz. Moreover, the Union had in fact interviewed every employee involved on line two and had obtained from them a statement that they had not received any encouragement to insubordination from either steward Parkinson or steward Fultz.

It appears to me that in the instant case the Union was able to gather all the information it needed regarding the incident and was in full possession of all relevant and necessary information. The Union also had access to all information it needed to process the grievance through arbitration without forcing Respondent to disclose the names of witnesses.

While I agree that Respondent cannot determine what information it wishes to provide the collective-bargaining representative of its employees in its duty to fairly represent these employees, I also agree that Respondent does not have to provide the Union with information it does not need to process a grievance through arbitration. Thus, where the Union has access to all the information regarding the incident involved it is my conclusion that Respondent is under no duty to furnish the names of witnesses to the Union merely because it claims relevance. In the instant case, Respondent's representatives have disclosed to the Union the substance of the employees'

All production employees, all tool room (Tool Department) employees, and all maintenance employees, including the zone maintenance men, but excluding all power house employees, all office and clerical employees, professional employees, guards and all supervisors as defined in the Act.

statements made pertaining to the conduct of Parkinson and Fultz. All relevant information has been tendered. In my opinion it can serve no useful purpose to reveal the names of persons who not only will not be witnesses but will not even be referred to by name in the arbitration proceedings. Additionally, the Union has admitted that it interviewed each person involved in the incident and obtained their own information without regard to the names of the witnesses which might be called by Respondent.

Therefore, it is my view as the Union has access to all of the information it needs to process the grievance through arbitration it is not incumbent upon Respondent to disclose the names of witnesses which it specifically has indicated it does not intend to call in the arbitration proceedings. Therefore, it is my conclusion that the complaint herein shall be dismissed in its entirety. Having found that Respondent is not engaged in the violation of the Act as alleged in the complaint, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not as alleged in the complaint refuse to bargain collectively with the Union as the collective-bargaining representative of Respondent's employees within the meaning of Section 8(a)(5) and (1) of the Act.

On the basis of the foregoing findings and conclusions, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[2]

The complaint is hereby dismissed in its entirety.

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[2] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provdied in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Chesapeake and Potomac Telephone Company *and* Communications Workers of America, AFL-CIO. Case 5-CA-11932

November 21, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 10, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] the General Counsel filed cross-exceptions and a brief in response to Respondent's exceptions, and the Charging Party Union filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Chesapeake and Potomac Telephone Company, Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge found that an early 1979 letter from the Union to Respondent stated that the Union did not engage in prearbitration discovery. However, no such statement appears in the letter. This apparently inadvertent error does not affect our decision.

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard by me in Washington, D.C., on January 26-27, 1981. Based on an unfair labor practice charge filed on February 15, 1980, by Communications Workers of America, AFL-CIO (the Union), a complaint issued on July 3, 1980, alleging that Respondent Chesapeake and Potomac Telephone Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*, by refusing to furnish to the Union certain information concerning pending arbitration. Respondent denied that it violated the Act in any manner and set forth numerous affirmative defenses including, *inter alia*, the untimely filing of the charge under Section 10(b) of the Act, and the past practice, waiver, estoppel, and the burden of complying with the Union's request.

Upon consideration of the entire record in this proceeding,[1] including my observation of the demeanor of the witnesses, and the briefs submitted by the General Counsel, Respondent, and the Union, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

I find, as Respondent admits, that it is a New York corporation engaged in the installation and maintenance of communications services at its Washington, D.C., location. During the 12 months preceding the issuance of the complaint, a representative period, Respondent had gross revenues in excess of $1 million and purchased and received from points located outside the District of Columbia goods and services valued in excess of $50,000. I conclude, as Respondent admits, that it is an employer engaged in commerce and in operations affecting commerce as defined in Section 2(2), (6), and (7) of the Act.

I further find and conclude, as Respondent admits, that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act. At all times material herein, Respondent has recognized the Union as the exclusive collective-bargaining representative of its employees in a unit appropriate for collective bargaining consisting of all nonsupervisory and nonconfidential employees employed in various job classifications by Respondent at its Washington, D.C., Virginia, West Virginia, and Maryland facilities. The agreement in effect at the times pertinent to this proceeding contained a detailed three-step procedure, followed by arbitration, for the resolution of employees' grievances.[2]

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In late 1978,[3] employee Dennis Henson was suspended for 2 days for his use of an "improper tone of voice" when speaking with one of Respondent's customers. Henson grieved his suspension and, following the failure of Henson's immediate supervisor to remove the suspen-

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[1] Certain errors in the transcript are hereby noted and corrected.

[2] Only the Union has the right to file grievances, and only certain grievances may be arbitrated.

[3] Despite the fact that this proceeding was exhaustively litigated, there does not appear in the record the date when the underlying alleged discipline occurred. Nonetheless, the parties, in their equally exhaustive briefs, have stated that the discipline took place in or about the time indicated, which I have accepted as fact.

sion, the grievance was appealed to the second step. There, and on or about December 19, 1978, Michael M. Agnew, the executive vice president of the Union's Local 2336, pressed Henson's claim and, during discussion with Edison, a representative of Respondent, requested various documents. He was permitted to examine (but not allowed a copy of)[4] all documents pertaining to Respondent's actions, both positive and negative, concerning Henson; and Edison read to him (Agnew was not allowed to read it himself) the policy guide that Respondent used to discipline Henson. Agnew asked whether Respondent's records showed that any other employee had been suspended for the same offense. Edison replied that she did not know of any and would not supply a list of names of such employees in any event. The second-step conference ended without agreement on the underlying grievance.

At the third-step conference held on February 13, 1979, Charles Sangmeister, a union staff representative, was the Union's chief spokesman. During the course of the meeting, because Respondent's representative stated that it was standard policy to suspend emoloyees for using an improper tone of voice, even for the first time, Sangmeister asked Respondent's supervisors to produce Respondent's policies showing that employees guilty for the first time of usinq an improper tone of voice had to be suspended and for the names of those employees who had been similarly suspended. Respondent's representative stated that he did not have the names of persons disciplined and would not produce them if he had.

On February 14, 1979, the Union filed its demand for arbitration, there being a time limit of 2 weeks to do so after the parties failed to agree in the third step. At that point, as has been customary in the handling of these disputes, the Union's attorney assumed control of the grievance. In reviewing the files, Attorney Michael A. Murphy realized that his information was insufficient to permit him to make a judgment as to whether to arbitrate Henson's grievance, settle it, or withdraw it. Because he failed to receive a favorable response to his request of Respondent for information, he issued on October 10, 1979, two subpenas, signed by the designated impartial and union arbitrators,[5] one requiring Respondent to produce, prior to the arbitration, the "name of each employee fired, suspended, or given a final warning solely for an improper tone of voice toward a customer during the last five years." On October 11, 1979, Respondent's legal department responded that it would "not honor such a request since we view it as pre-arbitration discovery. As you well know, it has never been our practice to engage in such discovery prior to an arbitration hearing."

The arbitration hearing was scheduled, delayed, and postponed, from time to time, on request of the Union, which in December 1979 sought unsuccessfully to enforce its subpena in the United States District Court for the District of Columbia. After the district court dismissed the Union's complaint, the Union filed the unfair labor practice charge which initiated this proceeding; rescheduled the arbitration for hearing on September 4, 1980; still later, on June 9, 1980, renewed its request of Respondent for the same material; and finally refused to hold the arbitration hearing pending the disposition of the instant proceeding.

B. *Credibility*

There is one factual finding *supra*, which deserves some discussion, that is, whether in the second and third steps, union representatives requested documents pertaining to the discipline of other employees for the offense of which Henson was accused. Despite the testimony of Agnew and Sangmeister, Respondent claims that the Union's minutes of the grievance meetings show no such demand for information. Respondent's minutes also contain no such reference.

Respondent contends, therefore, that the testimony was fabricated. Its argument is not without some appeal, especially because the Union did not immediately file an unfair labor practice charge against Respondent. However, Respondent's argument might have been persuasive had one of Respondent's eight representatives at the two grievance meetings testified in supoort of Respondent's position. However, not one of them testified at the hearing. No excuse for their nonappearance was presented, and I infer from their absence that they would not have supported Respondent's present contentions. *Golden State Bottling Co., Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento* v. *N.L.R.B.*, 414 U.S. 168, 174 (1973); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)* [*Gyrodyne Co. of America*], 459 F.2d 1329, 1335–39 (D.C. Cir. 1972); *Fred Stark and Jamaica 201 St. Corp., Inc. and Jamaica 202 St. Corp., Inc.*, 213 NLRB 209, 214 (1974), enfd. 525 F.2d 422, 431 (2d Cir. 1975), cert. denied 424 U.S. 967 (1976). Because the minutes were neither verbatim nor recorded by professional note takers, because of the possibility that the discussions at the time of the requests by Agnew and Sangmeister were proceeding so rapidly that no scrivener was able to record the requests, and because of my conclusion that the testimony of Agnew and Sangmeister was not so improbable or unreliable that it should be discredited, I find that the demands for the information were, in fact, made as they related.[6]

C. *Discussion*

N.L.R.B. v. *Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court held that the duty to bargain in good faith includes the obligation of an employer to disclose to its employees' collective-bargaining representative such material as is relevant and reasonably necessary to permit the representative to administer the terms and provisions of the agreement. See also *Trustees of Boston University*, 210 NLRB 330, 333 (1974); *Montogmery Ward & Co., Incorporated*, 234 NLRB 588, 589 (1978). In *Acme*, the material was requested to permit the representative to determine *whether* to pursue a grievance to arbitration, and Respondent would be hard pressed to argue that, if such were the purpose of the demand herein and this proceeding arose prior to the Union's demand for arbitration, it would not be obliged to submit to the Union such material as it had.

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[4] See *Communications Workers of America, AFL–CIO, Local 1051* v. *N.L.R.B.*, 644 F.2d 923 (1st Cir. 1981).

[5] The arbitration provision provides for a tripartite arbitration panel; one arbitrator chosen by the Union; one, by Respondent; and the third, by the two parties' designated arbitrators.

[6] Respondent contends that grievances were always held "open" awaiting review of information not supplied by Respondent to the Union. That is accurate to a point, that is, when Respondent agreed to supply the requested information, which it has not done in the instant proceeding. That Sangmeister, when given documents by Respondent relating to the Henson grievance after arbitration had been filed for, did not protest Respondent's failure to produce the names of other employees similarly disciplined is not persuasive. Sangmeister had already been advised that his request would not be honored.

But Respondent's complaint, in essence, is that once arbitration was requested by the Union, the Union was no longer deciding whether the grievance was meritorious. Rather, it had already made that determination and was now seeking to use its demand to prove its case—that is, the Union's request is actually one for prearbitration discovery, which Respondent contends is permitted neither by law nor by logic nor by public policy. Prior decisions, however, do not support Respondent's claim. It has been held numerous times that the duty to supply information extends to a request for material to prepare a grievance for arbitration. *The Fafnir Bearing Company*, 146 NLRB 1582, 1586 (1964), enfd. 362 F.2d 716, 721 (2d Cir. 1966); *St. Joseph's Hospital (Our Lady of Providence Unit)*, 233 NLRB 1116, 1119 (1977); *Designcraft Jewel Industries, Inc.*, 254 NLRB 791 (1981); *The Kroger Company*, 226 NLRB 512 (1976); *Fawcett Printing Corporation*, 201 NLRB 964, 972-973 (1973); *Metropolitan Life Insurance Company*, 150 NLRB 1478, 1485-86 (1965); *Cook Paint & Varnish Co.* v. *N.L.R.B.*, 648 F.2d 712, 712-716 (D.C. Cir. 1981).[7]

So many of the arguments made by Respondent are answered in one or more of these decisions that it is really unnecessary to proceed through the list of Respondent's claims. Suffice it to say, the list of the Union's grievance was that Henson, even if he did use an improper tone of voice, should not have been suspended for 2 days, because no other employee had been similarly disciplined, and that Henson's offense warranted at most a warning under Respondent's policy of progressive discipline.[8] Thus, whether other employees had not been suspended for a similar offense became critical to the Union. If the material requested by the Union had been produced prior to the Union's demand for arbitration, such documents may have supported the Union's claim of disparate treatment and could have been submitted to the arbitrator. In essence, any request by an employee's representative for information prior to the arbitration demand constitutes prearbitration discovery, albeit that the request is also motivated by the representative's desire to determine whether to proceed to arbitration.

The Union's requests for the same information after filing for arbitration attempt to fulfill the very same functions, enabling the Union to "decide what role it will seek to play," *Florida Steel Corporation* v. *N.L.R.B.*, 601 F.2d 125, 128 (4th Cir. 1979); that is, whether arbitration is worthwhile if the Union cannot prove its claim of disparity. If it cannot, testified Union Attorney Murphy, the grievance might well have been withdrawn, as other of the Union's grievances have been withdrawn within several weeks of the scheduled arbitration hearing. Respondent argues that making it supply the requested material would destroy the ease and informality of arbitration proceedings, would unnecessarily delay the arbitration hearing, and would wrongly inject the Board into the arbitration process, in which it has no expertise. However, these contentions have essentially been answered by the Supreme Court in *Acme Industrial Co.*, 355 U.S. at 438-489, as follows:

> Far from intruding upon the preserve of the arbitrator, [the production of the requested documents herein would be] in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through arbitration without providing the opportunity to evaluate the merits of the claim.

"Arbitration," as used in the above quotation, means the "arbitration hearing." Until the hearing commences, the arbitrator's sole function is to schedule a time and date for the hearing. It is the hearing which the Supreme Court believed might be avoided by the exchange of information so that those grievances which had no merit might be withdrawn. Accordingly, I conclude that, unless Respondent's affirmative defenses are meritorious, Respondent has violated Section 8(a)(5) and (1) of the Act by failing to comply with the Union's request for information.

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[7] Both of the decisions on which Respondent places principal reliance are distinguishable. In *Tool & Die Makers' Lodge 78, IAM [Square D. Company], 224 NLRB 111 (1976), the Board dismissed the 8(b)(3) complaint because there had been no showing that the requested documents were relevant. In Sinclair Refining Company*, 145 NLRB 732 (1963), the complaint that the employer had refused to produce documents prior to arbitration was dismissed as moot since the arbitration had already been held and the employer produced the requested documents at the arbitration. The Board noted, nonetheless, that the employer had not met its bargaining obligations when it refused the union's request which was relevant to the union's responsibility "in policing or administering a contract, or adjusting a grievance . . . " (*Id.* at 733.)

[8] Respondent's personnel department guide G-805 (guide) provides that there are four distinct types of disciplinary measures of ascending degrees of severity: (1) reprimands; (2) warnings; (3) suspensions; and (4) dismissals. It is recommended, but not required, that discipline must follow that order and that, generally, employees should be suspended only after reprimand and warnings have been tried to no avail. Further, supervisors are advised that the discipline they mete out should be impartial, take into consideration all the facts and circumstances of the case, and "be consistent with the penalties assigned for similar behavior situations in the past. Data on previous, similar cases can be obtained from the Personnel Department-Labor Relations Staff." The fact that Respondent contends herein that its discipline of Henson did not follow a "cookie cutter" approach, but was based solely on the facts of Henson's offense is not to the point. *Transport of New Jersey*, 233 NLRB 694 (1977). The requested information was necessary to the union's case.

D. *Respondent's Defenses*

1. Past practice

Respondent contends that the past practice under its agreements with the Union mandates a finding that the complaint herein be dismissed. It cites a 1953 arbitration award, in which an arbitrator disposed of the Union's motion for Respondent's production of documents in advance of the hearing by noting that he had no right, prior to the opening of the hearing before him, to require such production; but he did require the production of certain requested material at the hearing which is the procedure which Respondent claims is the only proper course of action herein. Respondent further contends that it has never permitted prearbitration discovery, has not allowed for depositions of witnesses (although there does not appear from the record that the Union ever requested depositions), and has consistently rejected the Union's attempts to obtain interrogatories (no examples were given). Specifically, Respondent points to (1) a November 20, 1978, request by the Union for information concerning a grievance involving employees Lamp and Bragg, which request was rejected by Respondent on November 21, 1978; and (2) a union letter in early 1979 stating that it did not exchange witnesses' lists or engage in prearbitration discovery.[9]

The General Counsel and the Union rely, however, on Respondent's practice, at least from 1971, of supplying personnel files to the Union for its inspection (and sometimes copies thereof), a practice which since 1974 has been incorporated in the collective-bargaining agreements. Further, they note that, in four grievance proceedings, copies of documents other than personnel files have been supplied by Respondent. In 1973, in a grievance involving employee Critchfield, who was terminated as a result of making personal telephone calls from customers' telephones, Respondent's investiqation after the Union had requested arbitration revealed additional violations by the employee. It consulted with the Union's counsel, who had thought that the employee's offense had been his first, and it turned over the new material to union counsel, as a result of which the grievance was withdrawn from arbitration. In early 1979, in a grievance involving employee Shacreaw, who was terminated because she could not perform her work resulting from an on-the-job injury (according to the Union) or from a preexisting ailment (according to Respondent), the Union demanded, and Respondent supplied, a copy of Shacreaw's medical files. In that same grievance proceeding, Respondent also requested various documents from the Union and, when the Union did not comply, filed an unfair labor practice charge alleging that the Union violated Section 8(b)(3) of the Act by failing to supply "information relevant and necessary to [Respondent's] . . . preparations for the arbitration." In mid-1979, the Union demanded, and Respondent complied therewith, a copy of certain training material that employee Herbert had used in instructing other employees so that the Union could prove that she was entitled to a management differential. In November 1979, Respondent made available to the Union's attorney, prior to the scheduled arbitration, the personnel and medical files of Denise Thompson, so that "the parties can reach an understanding as to whether or not this will actually be heard."

Respondent contends generally that the production of material to the Union's attorneys has been merely a matter of "professional courtesy," but no explanation has been given why "professional courtesy" cannot constitute a past practice. If, in fact, counsel for Respondent and the Union have been regularly exchanging material, a practice which Respondent concedes in its orief was engaged in "in order to save time at the beginning of the hearing," that is as much of a practice affecting the rights of employees covered by the collective-bargaining agreement as any other practices concerning terms and conditions of employment.

Specifically, Respondent takes issue with the General Counsel's and the Union's contentions concerning Critchfield and Shacreaw.[10] As to the former, Respondent explains that the material consisted of after-acquired documents which had not heen discussed with Respondent during the three-step grievance procedure and that it felt it was necessary to disclose the material to the Union to avoid a claim of surprise. Curiously, it also argues in its brief that it supplied the information to the Union to persuade it to withdraw the grievance, a result which happily was accomplished. The upshot of Respondent's argument, therefore, is that it will supply information when it feels that it will lead to the avoidance of an arbitration hearing, but it will not comply with a union request, even though the Union's object may be the same.[11] Further, I find no logical distinction in the fact that the material turned over in the Critchfield grievance was acquired after the Union had filed for arbitration. The fact remains that Respondent furnished the material while a grievance was pending arbitration.

I similarly reject Respondent's contention regarding Shacreaw, as to whom it claims that Virginia law required it to exchange medical records regarding a workmen's compensation claim. Murphy testified that Shacreaw's compensation claim had heen disposed of and whatever state requirement had existed was no longer applicable.[12] Respondent's defense that there was a past practice forbidding the exchange of information after arbitration had been filed for must be rejected; it appears that the past practice was quite to the contrary.[13] Furthermore, Respondent's alleged reliance on the 1953 arbitration award is misplaced. The arbitrator there did not decide when the Union was entitled to obtain the requested documents, but whether the Union was entitled to them. Indeed, he stated that he was entitled to rule on the question only when the arbitration hearing formally commenced. The actual past practice of the parties is more persuasive than the almost 30-year-old award.

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[9] Respondent's assistant vice president for personnel, Albert Sears, testified that Respondent has never honored any written request by the Union for records prior to an arbitration hearing. I discredit his testimony for two reasons: first, because there is documentary testimony to the contrary; second, because of the thoroughness of the presentation of Respondent's case, I am persuaded that all written evidence of past practice was submitted at the hearing, and there is no more.

[10] Respondent's compliance with the Union's requests in the Herbert and Thompson grievances is unexplained.

[11] In the Thompson grievance, Respondent's attorney suggested that he would continue to supply information to the Union in advance of the hearing "in order to facilitate the Union's preparation for an arbitration hearing [which procedures] . . . will obviate the need to involve arbitrators in pre-hearing matters."

[12] Respondent's brief also argues that "under established Bell System and C & P policy, employees are entitled to a release of their medical information upon signing the proper authorization form." Respondent's brief cites no page references, and I find no record support for this assertion.

2. Waiver

Respondent's position with respect to the Shacreaw grievance is also relevant to its claim of waiver, because, with respect to Shacreaw, Respondent's labor relations general counsel, Dworski, testified to "our contract was superseded by state law and we had a duty in fact to give the medical file to Shacreaw."[14] Why that duty was not waived, as Respondent contends in this proceeding, because the collective-bargaining agreement provides for the supply to the Union only of personnel records and for the conduct of arbitration hearings in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association (AAA rules), is wholly unexplained. I conclude that the Act and the decisions of the Board and the courts interpreting the Act are at least as worthy of yielding to as is the Virginia statute, and that the Act was specifically incorporated in the agreement, by operation of the agreement itself.

In any event, assuming that Dworski's explanation of the Shacreaw incident was not definitive, Board law is clear that any waiver of the riqhts granted by the Act must be clear and unequivocal.[15] *Westinghouse Electric Corporation, 239 NLRB 106, 110 (1978), enfd. as modified 648 F.2d 18 (D.C. Cir. 1980); California Portland Cement Company*, 101 NLRB 1436, 1438–39 (1952); *Hekman Furniture Company*, 101 NLRB 631 (1952), enfd. 207 F.2d 561 (6th Cir. 1953). See also *Florida Steel Corp.* v. *N.L.R.B., supra* at 129–130; *Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F.2d 746, 751 (6th Cir. 1963); *Communications Workers, Local 1051* v. *N.L.R.B., supra*. I cannot find such a waiver herein. Although the procedural rights in the conduct of the arbitration hearing may be governed by the AAA rules, there is nothing therein which abolishes the rights for the production of material which the Union may find necessary to decide whether to pursue a grievance to arbitration. Nor does the inclusion of the Union's right to obtain copies of employees' personnel records exclude the Union's right to obtain other information necessary to make a judgment whether to proceed to arbitration. *California Portland Cement Company, supra; Globe-Union, Inc.*, 233 NLRB 1458, 1460 (1977). Indeed, the impact of the AAA rules upon the rights of the Union to receive documents prior to an arbitration hearing was never discussed by the parties to the collective-bargaining agreement. Finally, Respondent's attempt in the Shacreaw grievance to obtain material from the Union prior to the arbitration, its filing of an unfair labor practice charge when the Union did not comply with its request, and its November 1979 letter to the Union in connection with the Thompson grievance that it would continue to afford the Union complete access to all relevant documents to facilitate the Union's preparation for arbitration hearings belie Respondent's argument that it thought that it was the written understanding of the parties to the collective agreement that the right to obtain material had been waived.[16]

3. Collateral estoppel

The Union's proceeding in the United States District Court does not have any binding collateral estoppel effect on the instant dispute. Read in the best light for Respondent, the court's decision held only that there was no right under the United States Uniform Arbitration Act to require the production of documents prior to the arbitration hearing. It is not clear, however, that this holding was anything more than dicta, because the court noted that it had no *in personam* jurisdiction because of the Union's failure to serve a summons, as required by rule 4 of the Federal Rules of Civil Procedure. In no event can the court's decision be read as a finding that the Act does not permit the production of the supenaed material. That was neither relied on by the Union, nor raised by Respondent, nor adjudicated by the Court,[17] which has no jurisdiction under the Act to make a binding determination that Section 8(a)(5) has or has not been violated.[18]

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[13] There is no evidence that the Union ever turned over material to Respondent; rather, the record indicates that the Union always refused to do so. Whether this is equitable, or what the effects of the Union's actions are, I withhold judgment because the matter is not before me. It should be restated that the right of grievances and arbitration is a unilateral one. Only the Union may grieve, and only as to specific matters. Only the Union is concerned with the ultimate decision of whether to process a grievance to arbitration.

[14] Art. 15 of the applicable collective-bargaining agreement provides in part as follows:

> Should any Federal or State law or the final determination of any court of competent jurisdiction or any proclamation or order having the force of law at any time affect the provisions of this Agreement, such provision shall be construed as having been changed to the extent necessary to conform to such law or decision.

[15] This assumes, *arguendo*, that the Union's right to information to enable it to fulfill its duties as a collective-bargaining representative may be waived. See *N.L.R.B.* v. *Magnavox Company of Tennessee*, 415 U.S. 322, 325 (1974).

[16] Respondent argues that, by reason of its past practice, the Union's right to information has also been waived. I have previously found that the past practice has been that Respondent has supplied such information. In any event, a waiver by virtue of past practice must be equally "clear and unmistakable." *Native Textiles*, 246 NLRB 228 (1979). Respondent also arques that the Union made no attempt, after the 1953 arbitration award, to change the arbitration clause of the collective-bargaining agreement, thus demonstrating that the award barred, and the Union understood that it barred, prearbitration discovery. Even if the Union had attempted to change the arbitral provision, and had been unsuccessful, Board law still would have found no waiver. *The Proctor & Gamble Manufacturing Company*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979); *The Timken Roller Bearing Company*, 138 NLRB 15, 16 (1962).

[17] Collateral estoppel applies only to "situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding." *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 597–598 (1948).

[18] In support of its position, Respondent cited *N.L.R.B.* v. *Walter E. Heyman, d/b/a Stanwood Thriftmart*, 541 F.2d 796 (9th Cir. 1976), for the proposition that "the grant of jurisdiction under Section 301 gives the district courts the powers necessary to enforce judgments and makes those judgments binding through the doctrines of *res judicata* and collat-

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4. Bad faith

Nor may it fairly be said that the Union exhibited bad faith, as claimed by Respondent. It is true that, in one instance, the Union applied to the impartial arbitrator, *ex parte*, for a postponement of the arbitration hearing and that the Union attempted to delay the holding of the hearing until it was satisfied that it had a reasonable case to present. But that has no bearing on whether the Union was sincere in its efforts to obtain material which it believed relevant to prove Henson's claim that his suspension constituted disparate discipline, a claim which Respondent contends is made by the Union in 80 percent of the arbitration hearings and which appears, on the basis of this record, to be a relevant and material consideration for disposition by the arbitration panel.[19] Moreover, there are a number of expenses which the Union sought to avoid and which would appear to justify the Union's actions if it could not prove disparity—the expenses of the arbitration, the hearing room, attorney's fees, and the witnesses, not the least of whom was Henson, who at the time of the hearing was employed in California. *The Fafnir Bearing Company*, 146 NLRB at 1587.

I am persuaded that the Union desired to represent Henson and to pursue his grievance, if a reasonable claim could be made. I find no bad faith on its part.

5. Section 10(b)

Respondent claims that the Union's charges were untimely under Section 10(b) of the Act because the alleged violation arose in December 1978, at the second-step grievance meeting or, at the latest, on February 13, 1979, at the third-step grievance meeting; and the charge was filed more than a year later. However, within the 6 months prior to the charge, the Union had served its subpena request[20] for the same documents that it sought before, albeit for an additional reason. In the grievance step meetings, it requested the material in order to decide whether to pursue the grievance to arbitration. The object of the subpena request was the same *and* was to prepare for the arbitration if the information supplied by Respondent supported the Union's claim. The violation of Section 8(a)(5) and (1) found herein is a continuing violation, because Respondent has refused to bargain; that is, it has refused to give to the Union the documents necessary for the Union to make a judgment whether to proceed to the formal arbitration hearing and to prepare for that arbitration. Board law holds that each request for information and each denial by Respondent constitute a separate and independent violation of the Act. *Ocean Systems, Inc.*, 227 NLRB 1593, 1594, fn. 5 (1977). Respondent's refusal to comply with the subpena request, standing alone, and without reference to any other refusal, was a denial to the Union of information necessary to enable it to decide whether to proceed to and prepare for the arbitration hearing. See *N.L.R.B.* v. *Preston H. Haskell Company*, 616 F.2d 136, 140–142 (5th Cir. 1980).

The Board's theory of "continuing violations" has been upheld by many circuit courts of appeals. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO* v. *N.L.R.B.*, 363 F.2d 702, 706–707 (D.C. Cir. 1966); *N.L.R.B.* v. *Joseph T. Strong, d/b/a Strong Roofing and Insulating Co.*, 386 F.2d 929, 930–931 (9th Cir. 1967), reversed on other grounds 393 U.S. 357 (1969); *J. Ray McDermott & Co., Inc.* v. *N.L.R.B.*, 571 F.2d 850, 858 (5th Cir. 1978); *N.L.R.B.* v. *Basic Wire Products, Inc.*, 516 F.2d 261, 267–268 (6th Cir. 1975). But its support has been far from universal. *N.L.R.B.* v. *Serv-All Co.*, 491 F.2d 1273, 1275 (10th Cir. 1974); *N.L.R.B.* v. *McCready and Sons, Inc.*, 482 F.2d 872, 875 (6th Cir. 1973); *N.L.R.B.* v. *Field & Sons, Inc.*, 462 F.2d 748, 750–755 (1st Cir. 1972); (rationale questioned in *McCready*); *General Marine Transport Corporation* v. *N.L.R.B.*, 619 F.2d 180, 186–188 (2d Cir. 1980). It is clear that, until this conflict is resolved by the Supreme Court, I must apply Board law and dismiss the instant defense. *Capitol Foods, Inc. d/b/a Schulte's IGA Foodliner*, 241 NLRB 855, 856 (1979).

6. Burden

Dworski testified that he was advised by his legal staff that compliance with the Union's demand would require going through the personnel records of all employees involved with customer handling to determine whether anyone had ever been disciplined for an offense similar to that which Henson had been accused of. He stated that there is no listing or central record of such offenses and that warnings might not show in files in any event, because oral final warnings are not necessarily recorded.

On the other hand, Respondent has a policy, in line with its progressive discipline standard, that if a supervisor desires to determine the type of disciplinary action required for a particular infraction, the supervisor is to call Respondent's labor relations department, which will advise it of the type of disciplinary action that has been administered in the past based on records the department keeps for similar instances. Respondent's guide requires that all warnings be recorded in detail. Further, in the third-step grievance procedure, Respondent's representative advised the Union that Respondent always gave a 2-day suspension for the offense Henson was accused of. And, just a week before the hearing herein, Sangmeister represented the Union in yet another grievance meeting where the issue presented was a suspension for a first offense. Respondent's representatives stated that they checked with the labor relations department and ascertained that other employees had been suspended for similar offenses. Finally, Dworski admitted that Respondent maintains a summary of discipline, with broad categories of dismissals and suspensions. There are, therefore, suffi-

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eral estoppel in such forums as the NLRB." The court there made clear, however, at 800, that: "Were the Board to have found unfair labor practices extrinsic to the collective bargaining agreement . . . the Board would properly be operating solely within its own jurisdictional authority," and no *res judicata* effect need apply.

[19] This finding is made solely for the purposes of this proceeding. The panel, if the Henson case is finally arbitrated, has full latitude to dispose of the disparity issue, which the panel may find is irrelevant.

[20] Respondent takes no issue with the fact that the request for documents was made by subpena, rather than in any other manner, noting that "there is no legitimate distinction" in the manner of making the request and that, in the words of Respondent's brief, "A rose by any other name is still a rose."

cient indicia that there are such records which may be easily gathered by Respondent.

I am not persuaded that the search for the records will be as difficult as Dworski contended. First, I find that his principal concern was with the general doctrine of prearbitration discovery and not with the burden thereof. Indeed, he related that it was not particularly the Union's demand for 5 years of records which primarily concerned him. It was the principle of discovery which was troublesome, and a demand for any shorter period of time would have been equally offensive. Second, his testimony concerning what was in Respondent's files was general, vague, secondhand, and contradictory, in that he also testified that Respondent also maintained a general discipline summary, which he *thought* did not include warnings, but contained broad categories of dismissals and suspensions. My impression is that, with the care exhibited in the hearing of this proceeding, Respondent possesses and maintains more easily accessible records than Dworski was willing to admit, especially in light of Respondent's documented policy. Third, this impression is further supported by Dworski's letter, dated July 25, 1980, in which he complained to the impartial arbitrator of the Union's request, noting, in part, that "some of [the information] is simply not available to" Respondent, which indicates that other of the information is available, without undue burden.

Finally, I reject Respondent's claim that the Union, by making inquires of its members and leaving messages on its telephone, may obtain the same information that Respondent is withholding. The Board has held that the union may not be subjected "to a burdensome procedure of obtaining desired information where the employer has the information available in a more convenient form." *The Kroger Company*, 226 NLRB at 513; *Pacific Telephone and Telegraph Company*, 246 NLRB 327 (1979); *N.L.R.B.* v. *Borden, Inc.*, 600 F.2d 313, 318 (1st Cir. 1979).

7. Other defenses

During the course of the hearing, Respondent raised other defenses which, by reason of their absence from its brief, have apparently been abandoned. Because Respondent is not restricted from pursuing these defenses, should exceptions be filed to this Decision, I note that I am singularly unpersuaded that, merely because the Union filed for arbitration the Henson grievance, the controversy lost its character as a grievance. There are too many references to "grievance" in the article of the agreement concerning arbitration to hold otherwise (i.e., "In any grievance arbitrated," "grievances which are arbitrable," and "The decision of the umpire will resolve the grievance"). Respondent knows this is so; for, when it filed an unfair labor practice charge against the Union in the Shacreaw matter, it complained that the documents it sought were "relevant and necessary to the Company's processing of the grievance and its preparations for the arbitration."

Respondent also impliedly contended that article 6 of the agreement, requiring Respondent to furnish monthly certain information pertaining to employees' names, addresses, job classifications, wages, and dues deductions, restricted the Union's right to other information. Notwithstanding that this defense was not specifically raised in Respondent's answer, it is clear that this information related to the Union's administration of its internal affairs and had nothing to do with either grievance matters or with documents which the Act requires to be furnished. Furthermore, this article was never referred to by Respondent in limiting the Union's right to information. In the Denise Thompson grievance proceeding, Respondent stated that it would review the Union's request for information utilizing the standards of the Act. In settling an 8(a)(5) charge arising out of Respondent's failure to supply copies of documents requested by the Union, Respondent agreed to furnish such documents "when such information is relevant to a pending grievance"—without any reference to article 6. Finally, Respondent's principal negotiator testified that the only provision of the agreement which had a bearing on the Union's right to information prior to an arbitration hearing was that concerning the AAA rules. I conclude that Respondent's contention has no merit.

CONCLUSIONS OF LAW

By virtue of the foregoing, I conclude that Respondent, by not furnishing the requested material, violated Section 8(a)(5) and (1) of the Act. Respondent's activities set forth in this section II, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom. I shall also recommend that Respondent, upon request, furnish the Union with a list of the names of each employee fired, suspended, or given a final warning solely for using an improper tone of voice toward a customer during the last 5 years. In this regard, the Union contends that all it is looking for is the same kind of information that Respondent would show to its own supervisor who was attempting to decide what kind of discipline should be imposed on an employee such as Henson. It is not the intention of this Decision to require Respondent to search through thousands of files. On the other hand, Respondent should make reasonable efforts to comply with the Union's request and, if there is still a claim of burden, attempt to reach some accommodation with the Union so that information is supplied. If there is still further dispute, that may be resolved in the compliance stage of this proceeding. *Food Employer Council, Inc., et al.*, 197 NLRB 651 (1972).

The Union has requested the imposition of costs and attorney's fees, under *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), and *Hecks, Inc.*, 215 NLRB 765 (1974). I find that Respondent's claims are not so frivolous and lacking in merit as to warrant this relief. Finally, the

Union also requests that the recommended Order should direct Respondent to furnish copies of all relevant information requested concerning the processing of a grievance at any stage of the grievance and arbitration process. This requested relief *in haec verba* is obviously too broad and may well impinge upon the jurisdiction of the arbitrator at the actual hearing.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, Chesapeake and Potomac Telephone Company, Washington, D.C., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Communications Workers of America, AFL-CIO by refusing to furnish it with information that it requests which is relevant and reasonably necessary to the processing and evaluation of grievances and preparing them for arbitration.

(b) In any like or related manner engaging in conduct in derogation of its statutory duty to bargain in good faith with the Union, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Furnish the Union with a list of the names of each employee fired, suspended, or given a final warning solely for using an improper tone of voice toward a customer during the 5 years preceding and inclusive of October 10, 1979.

(b) Post at its Washington, D.C., facility copies of the attached notice marked "Appendix."[22] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Communications Workers of America, AFL-CIO, by refusing to furnish it with information that it requests which is relevant and reasonably necessary to the processing and evaluation of grievances and preparing them for arbitration.

WE WILL NOT in any like or related manner engage in conduct in derogation of our statutory duty to bargain in good faith with the Union, and in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL furnish the Union with a list of the names of each of our employees fired, suspended, or given a final warning solely for using an improper tone of voice toward a customer during the 5 years preceding and inclusive of October 10, 1979.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY

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[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Caffe Giovanni, Inc. d/b/a Giovanni's *and* Local 28, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO *and* Gail E. Wetzel *and* Joseph C. Krivan. Cases 32-CA-2000, 32-CA-2234, and 32-CA-2284

November 13, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 4, 1981, Administrative Law Judge Burton Litvack issued the attached Decision in this proceeding. Thereafter, Joseph C. Krivan, a Charging Party, filed exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Caffe Giovanni, Inc. d/b/a Giovanni's, Berkeley, California, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT interrogate our employees concerning their union membership, activities, and desires and the union membership, activities, and desires of their fellow employees.

WE WILL NOT promise our employees economic and other benefits in order to dissuade them from joining or assisting a union.

WE WILL NOT threaten retaliation, deportation, or other unspecified reprisals against our employees to dissuade them from joining or assisting a union.

WE WILL NOT solicit grievances from employees and promise possible favorable resolution of them in order to induce them to refrain from joining or assisting a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

CAFFE GIOVANNI, INC. D/B/A GIOVANNI'S

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge: This case was heard before me in Oakland, California, on May 28, 29, and 30 and June 3, 1980, pursuant to an amended consolidated complaint in Cases 32-CA-2000, 32-CA-2234, and 32-CA-2284, issued by the Regional Director for Region 32 of the National Labor Relations Board, on April 16, 1980, pursuant to an original and first amended charge in Case 32-CA-2000, filed by Local 28, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, on August 3 and September 6, 1979, respectively; a charge in Case 32-CA-2234, filed by Gail E. Wetzel, an individual, on November 1, 1979; and a charge in Case 32-CA-2284, filed by Joseph C. Krivan, an individual, on November 20, 1979. The amended consolidated complaint alleges, in substance, that Caffe Giovanni, Inc. d/b/a Giovanni's, herein called Respondent, violated Section 8(a)(4), (3), and (1) of the National Labor Relations Act, herein called the Act, by discharging employees Krivan and Erich Frisch and by assigning Krivan to less desirable work stations and Section 8(a)(1) of the

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[1] Charging Party Joseph C. Krivan has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Act by interrogating employees as to their union membership, activities, and sympathies and the union membership, activities, and sympathies of their fellow employees; by threatening reprisals against employees because of their union activities; by offering a raise and permanent employment to an individual in order to weaken his support for the Union; by soliciting grievances and suggesting their favorable resolution in order to cause employees to abandon their support for the Union; by telling employees that it will pay for an outside arbitrator if employees agreed to the formation of an in-house union and abandoned support for the Union; by threatening employees with a warning letter; by offering to change the work schedules of employees in order to induce them to abandon support for the Union; by threatening unspecified harms if the Union was victorious in a representation election; and by condoning a pattern of employee harassment and denigration of union adherents. Respondent filed an answer, denying the commission of any unfair labor practices. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Extensive briefs were filed by counsel for the General Counsel and by Respondent, and both have been carefully considered. Upon the entire record in the case, and from my observation of the demeanor of the witnesses, and having carefully considered the post-hearing briefs of the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, maintains an office and principal place of business in Berkeley, California, where it is engaged in the ownership and operation of a restaurant and bar. During the 12-month period immediately preceding the issuance of the amended consolidated complaint, Respondent, in the normal course and conduct of its business operations, derived gross revenues in excess of $500,000 and purchased and received goods or services valued in excess of $5,000, which goods or services originated outside the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. Whether from on or about August 15, 1979,[1] until September 1, 1979, Respondent assigned employee Joseph Krivan to less desirable work stations in violation of Section 8(a)(4), (3), and (1) of the Act?

2. Whether on or about September 1, Respondent discharged or caused the termination of Krivan in violation of Section 8(a)(4), (3), and (1) of the Act?

3. Whether on or about September 5, Respondent discharged employee Erich Frisch in violation of Section 8(a)(3) and (1) of the Act?

4. Whether from on or about July 8 until on or about September 5, Respondent engaged in the following acts and conduct violative of Section 8(a)(1) of the Act:

(a) Interrogating employees about their union membership, sympathies, and activities and the union membership, sympathies, and activities of their fellow employees?

(b) Threatening reprisals against employees because they engaged in union activities?

(c) Offering employees financial, employment, and other inducements in order to weaken support for the Union?

(d) Threatening a raid and potential deporting by the Immigration and Naturalization Service if employees vote for the Union?

(e) Soliciting grievances and promising their favorable resolution in order to cause employees to abandon support for the Union?

(f) Promising to pay for the services of an outside arbitrator if employees consented to the establishing of an in-house union in lieu of support for the Union?

(g) Threatening to give employees warning letters because of their union activities?

(h) Offering to change employee work schedules in order to induce them to abandon support for the Union?

(i) Condoning a pattern of general harassment and denigration of union adherents?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Events preceding August 15, 1979

Respondent is a corporation engaged in the operation of an Italian-style restaurant and bar in Berkeley, California. John Schipani owns all the outstanding shares of stock in the corporation and his wife, Anna Schipani, is a vice president and is on the board of directors. Both individuals are at the restaurant several times a week and, according to Anna, "While I'm there I help out and do what I can." Howard Pitter is the general manager of the restaurant and normally works during the evening shift. Pat Roberts is the manager during the day shift. Apparently, Pitter is responsible for the overall operations of the restaurant; however, during her shift, Roberts has authority to hire and fire and to direct the work. As part of his duties, Pitter prepares the daily work schedule for the employees, including the waiters. There are two head waiters at the restaurant—Chan Chaikow and George Loung. Chaikow testified that along with waiting on tables, he is responsible for assigning the waiters to the various work stations—or sections—in the restaurant each day,[2] ensuring that proper service is accorded to the restaurant customers, assigning breaktimes to the waiters, and checking that the waiters are performing the side work—i.e., stocking the salad bar—that goes along with the work station to which they are assigned.[3]

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[1] Unless otherwise stated, all dates herein are in 1979.

[2] The work station assignments are made in conjunction with the waiters' work schedules. For example, if a waiter is scheduled to work on a particular night from 6 p.m. until 1 a.m., Chaikow will assign that individual to a work station which requires the waiter in that section to work until closing time—1 a.m.

The record discloses that the restaurant is approximately 90 feet deep and 40 to 45 feet in width. Entering the front of the facility, an open kitchen area is to the right and the cocktail lounge and bar is to the left. Continuing down the left side of the restaurant, between the bar and the main wait station is a raised area, called the "sidewalk," on which eight dinner tables are located. Opposite this area is a wine arbor. Continuing through the restaurant, one enters into the main body of the dining area. On the right side is a fireplace with dinner tables arranged around it. At the rear of the dining room is an area, called the "boathouse," containing 9 or 10 tables. Also located in the back area are two restrooms and another wait station. The central dining area has been artificially divided by Respondent into six waiter stations—with responsibility for an approximately equal number of tables of varying sizes. The corners are designated as sections A and D (on the left side) and B and E (on the right side). The center tables are divided into center right and center left. In the normal waiter configuration, one waiter is assigned to each station. The record further discloses that the facility has a second floor wherein the restaurant office and an employee lounge are situated.

The record reveals that union discussions amongst the restaurant employees commenced in late June as an alternative for solving perceived work problems. Eventually, waiters Joseph Krivan[4] and Bernard Cacho contacted the Union and arranged a meeting. Thereafter, the two waiters met with business agent Roger Cardenas outside another Berkeley restaurant. Cacho and Krivan related the employee problems, and Cardenas explained organizing procedures to them. Either then or at a subsequent meeting, Cardenas gave authorization—or pledge—cards to Krivan and Cacho and explained their use. During the next 2-week period, the two employees distributed and collected signed authorization cards from the waiters, cooks, and other employees. According to Krivan, he personally distributed and collected 12 signed cards during breaks at the restaurant or after work. Cacho and Krivan returned the signed cards to the Union, and on July 9, based upon the authorization cards, the Union filed a representation petition with Region 32 to represent certain of Respondent's employees, including the waiters and the cooks.

While there is no direct evidence that Respondent was aware of the activities of either Krivan or Cacho, the record establishes that Respondent was indeed aware of the incipient union organizing campaign prior to the filing of the election petition. Thus, Howard Pitter vaguely recalled that on the day before the Union notified Respondent of its representation status, he spoke to employee Peter Paccone,[5] who "asked me if I knew anything about unions . . . ." From this conversation, Pitter admittedly knew that some sort of union movement among the employees was ongoing. Further, Erich Frisch, who had been hired by Pitter on July 5 as a replacement for a vacationing cook, testified that on July 7 at approximately 4:30 p.m., Pitter called him into his office and asked, "Did you know that somebody's trying to bring a union into the house? Or have you heard any talk about the Union?" Frisch replied that he had heard some talk about it, and Pitter responded, "Well, somebody's trying to bring the union into the house." Later, after informing Frisch that union benefits were not as good as those paid by Respondent, Pitter said that he believed a waiter was trying to "make 500 easy bucks" by bringing in the Union and that something would happen to the "Mexicans in the dish room" if the Union came in.[6] Pitter denied the conversation. However, as between Pitter and Frisch, I generally credit the testimony of Frisch whose demeanor while testifying was, for the most part, that of an honest and candid witness.

The record further establishes that subsequent to the filing of the aforementioned representation petition, Pitter and Anna Schipani immediately embarked upon a course of conduct designed to uncover the identities of the primary union adherents and to quell the nascent campaign. Thus, Bernard Cacho testified that on July 10, 1 day after the filing of the petition, he overheard a conversation between Anna Schipani and a busboy-dishwasher, named Carlos ————, in the employee lounge. According to Cacho, the conversation lasted between 5 and 10 minutes, and "she asked Carlos if he knew anything about the union. He said not really. . . . and she said she would like to know who started it." After evading an answer for a few moments, Carlos mentioned employee Bill Francisco and a bartender named Mario ————. Anna ended the conversation by saying, ". . . don't you know if the union comes in here, the immigration is soon to follow. They'll take all the illegals away." Anna Schipani recalled a meeting among herself, Carlos and three or four other employees in the dishroom "after I heard that there was . . . cards being distributed or signed. . . ." While denying that Cacho was even present, that she asked who started the Union, or that she threatened a possible immigration raid, Anna testified, "I wanted to know if there was a problem with the people in the dishroom. . . . If they felt they weren't being paid enough or if they wanted more or expected more. . . . the thing I wanted to tell them was that they had to understand what they were getting involved in with the union. . . . If you had a union come into the restaurant, did these boys have to have green cards. . . ." As between Cacho and Anna Schipani, I credit the testimony of Cacho, who, unlike the latter, has no interest in the results of this proceeding and impressed me, for the most part, as being a forthright and credible witness.

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[3] The complaint alleges and Respondent admits that John and Anna Schipani and Howard Pitter are supervisors within the meaning of Sec. 2(11) of the Act. It is not alleged that Chaikow is either a supervisor or an agent of Respondent.

[4] Krivan had been employed by Respondent as a waiter since October 1977.

[5] Peter Paccone is a college student who works as a cook for Respondent. He earns $4.75 per hour and is one of the lowest paid cooks. Paccone placed this conversation as occurring prior to the filing of the election petition and shortly after being asked by Krivan if he would support the Union. I was impressed by Paccone's demeanor while testifying and shall credit him herein.

[6] The record discloses that Respondent employs many individuals of Spanish descent as busboys and kitchen help and that several may have been in this country illegally.

Joseph Krivan testified that on July 11 he overheard a conversation between Pitter and a waiter, Jose Cruz, in the back of the dining room. As Krivan approached, "Howard was asking Jose if he had signed any pledge cards, and Jose denied it. . . . Howard then asked him if he had seen any pledge cards. Jose said no. Then Howard asked him did he know that the Union was trying to get into the restaurant?" Jose gave a vague reply, and "Howard asked him how did he feel about that?" Again, Jose gave a noncommittal response, and Pitter asked, "if there's an election, how do you think you'll vote?" After Cruz obligingly replied that he would probably vote "no," Pitter said, "'Well, if you have any gripes or complaints, let me know about them.'" That night or the next day, according to Krivan, he overheard a similar conversation between Pitter and waiter Pow Purgsaphakorn, at the main wait station. "I heard Howard asking Pow if he had signed a pledge card? Pow responded, 'No.'" Pitter then asked Pow if he had heard that the Union was organizing the restaurant. Pow again denied knowledge, and Pitter persistently asked how Pow felt about it. Pow replied that he did not support the campaign. Pitter then ended the conversation, asking if Pow had any complaints or problems and if so, to let him know about them.

Howard Pitter denied both the occurrence and the substance of the aforementioned conversations. According to Pitter, he never initiated any conversations with employees about the Union. Rather, he averred that he made himself available to "employees that wanted to know more about it. . . . I knew what my legal limitations were about . . . and I had the book . . . the green book, the book of Local 28's bylaws, wages, different specific things and I made that available to anyone. . . ." I note herein that Pitter and Krivan conflict in many testimonial aspects. I was not particularly impressed with the demeanor of either witness, believing that each was more than capable of fabricating responses in order to buttress his respective position. Accordingly, where they conflict, I have credited that testimony[7] which best harmonizes with the surrounding circumstances and which is internally consistent and not inconsistent with the testimony of others. Concerning the above conversations, inasmuch as the conduct of Pitter is consistent with his earlier credited interrogation of Frisch and as Anna Schipani engaged in similar conduct, I credit Krivan as to Pitter's conversations with Cruz and Purgsaphakorn.

One day in the last week of July, Krivan[8] and Cacho spoke to Day and Manager Pat Roberts, complaining about alleged harassment of employees by Pitter and seeking Roberts' help in arranging a meeting with John Schipani, who, they were aware, was scheduled to leave for a European vacation shortly thereafter. During their conversation, Roberts gave to the waiters a document, which purportedly was a copy of a financial report on the Union and which was in the files of the Department of Labor. The meeting ended with Roberts promising to contact Schipani. Later that day or the next day, Cacho and Krivan met with John Schipani at approximately 2 p.m. in the main dining room, and they spoke for approximately 30 minutes. According to Krivan, they told Schipani that "we were very concerned at the harassment . . . of the employees, and that we wanted an end to it; that we were concerned of anyone being fired while he was gone, at which point . . . we'd put up a picketline." Krivan named Pitter as the source of the harassment, detailing the latter's alleged interrogation of the employees regarding the Union. Schipani replied "that he didn't want to stand in the way of what a majority of employees wanted, but he didn't want a union there." At that point, Krivan referred to the Union's financial statement and expressed concerns about the Union "that perhaps they might not be able to support us . . . but we would still fight [and] . . . we wanted a fair expression of viewpoints so we could have the election, and may the best man win. John felt that was—well, he didn't disagree with that. He said while he was gone that if anything happened, to refer to Pat Roberts. She would be acting on his behalf to cool any kind of situations from exploding. However, Mr. Schipani did emphasize that he didn't want a union there; perhaps we might be interested in something like a house union or some kind of employees' grievance committee that would have an outside arbitrator to be paid by him to settle affairs that couldn't be settled between the two parties, instead of the union. I said I wasn't in a position to negotiate that kind of an offer; but I would certainly communicate it to the other employees." The meeting ended at that point.

During his testimony, Bernard Cacho gave a similar—but more complete—version of this conversation. According to Cacho, he and Krivan began the meeting by expressing doubts about the viability of the Union "but that [the Union] was who we started with and we had to stick with them." Schipani replied that local business friends told him that "the union, wasn't such a hot thing. . . ." Cacho replied that it would not be a good thing for Schipani but might be good for the waiters. Schipani replied that the Union would not help the employees and, at that point, raised the subject of an in-house union. "He said, I've had what they call an in house union . . . and it seems to work better for everybody involved." Schipani mentioned as an incentive that ". . . if we paid dues within our own in-house union, then the money would . . . stay within Giovanni's. . . ." Schipani added that he "would even be willing to pay for an outside arbitrator to come in and work out the differences and settle the matter and then we could have this in-house union. . . ." Krivan and Cacho agreed that what Schipani mentioned was a possibility but that since the employees had signed authorization cards for the Union, it was their decision whether or not to continue supporting the Union. Next, Krivan and Cacho raised the matter of Pitter's campaign conduct. Cacho said that he wanted such activities stopped, for Pitter's conduct was merely exacerbating an already tense situation. Schipani replied, "if anyone gets a hair up his ass, just go to Pat, she's my direct line and you talk to her and any problems you have, bring to her."

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[7] The crediting of portions of witnesses' testimonies is required under the circumstances of this case and does not require rejection of their entire testimonies. *Carolina Canners, Inc.*, 213 NLRB 37 (1974). "Nothing is more common than to believe some and not all of what a witness says." *Edwards Transportation Company*, 187 NLRB 3, 4 (1970), enfd. 437 F.2d 502 (5th Cir. 1971).

[8] Krivan made no real effort to hide his role as a strong union adherent. Thus, on July 16, he posted campaign literature on the employee bulletin board and on July 25 he posted a notice, advising employees of a union meeting at his home. Moreover, Pitter admitted, "It was common knowledge that John and Bernard were organizing a union."

Schipani testified that Roberts telephoned him on the morning of the day on which he was scheduled to fly to Monte Carlo and that without any idea why Krivan and Cacho wanted to speak to him, he postponed his flight reservations to meet with them. According to Schipani, the entire conversation lasted just 10 minutes, with Cacho doing most of the talking. He was very apologetic about starting the union, or trying to get a union in there. . . . they found out that Local 28 was not what they wanted, and they were just going to drop the whole thing. Cacho then told Schipani to go on vacation and don't worry "because there won't be a union." Schipani denied that anything was mentioned regarding the interrogation or harassment of employees and stated that Cacho initially raised the subject of other unions, including a possible in-house union. On the latter point, Schipani told the waiters that an in-house union, Avanti Popolo, had once represented Respondent's employees and that the former's collective-bargaining agreement with Respondent included an arbitration procedure.[9] Schipani concluded by advising Krivan and Cacho to speak to older employees as to how the in-house union operated.

I find Schipani's account of his conversation with Krivan and Cacho rather incredible, believing it extremely unlikely that Krivan and Cacho, both of whom had expended much effort in organizing and directing the union campaign, would abruptly renounce the Union—and, in effect, their efforts—to the restaurant owner or that Schipani would postpone a pending European vacation for an employee meeting about which he knew nothing. Accordingly, I credit Cacho's more complete account of this incident, as materially corroborated by Krivan.

Also in the last week of July, as predicted by Pitter and Anna Schipani, the Immigration and Naturalization Service conducted a raid on the restaurant, and two employees were taken away for possible deportation. According to Krivan, at approximately 11:30 p.m. on the day he and Cacho met with Schipani, Pitter approached him at his work station,[10] accused him of telling employees that Respondent was responsible for the raid, and stated that he was investigating the matter. Thereafter, the events of that evening are basically uncontroverted. Thus, 20 minutes later, Krivan observed all the Spanish-speaking busboys and kitchen help assembling in the boathouse area for a meeting with Pitter. Inasmuch as he did not speak Spanish but Cacho did and as he believed the meeting concerned the aforementioned raid, Krivan immediately left his area, used a pay telephone near the restrooms,[11] and called Cacho who was off work that night. Because Krivan did not know the subject matter of the meeting, Cacho asked to speak to Sergio, one of the restaurant busboys. Thereupon, Krivan walked over to the boathouse and, after initially failing, managed to communicate to Sergio that Sergio was wanted on the telephone. After Sergio picked up the receiver, Krivan resumed his waiter duties.

Meanwhile, Pitter, who intended to inform the Spanish workers that "we were sorry that something like this [had] happened," began the meeting by telling the assembled employees, through an employee-interpreter, that the meeting had nothing to do with the Union. At that point, Krivan interrupted the meeting by gesturing to and telling Sergio about the telephone call. While the latter was gone, Pitter said nothing to the employees but upon Sergio's return told the group how sorry he was that two of them had been taken away by the Immigration Service. Before he could say anything more, Cacho, whose residence is nearby the restaurant, came into the boathouse area and sat down in back of the assembled employees. Pitter looked at Cacho, told him the meeting would last only a few minutes, and asked him to wait outside. Cacho replied that he wanted to stay, hear what was said, and interpret if necessary. They then began to argue, with Pitter demanding that Cacho leave the area and Cacho refusing. Finally, with neither one conceding, Pitter threatened to call the police but abruptly changed his mind and just dismissed the meeting.[12] Cacho then walked away, and as Pitter passed by, Cacho either called him "a pig," as admitted by Cacho, or "asshole," as contended by Pitter.

The next afternoon, Krivan and Cacho spoke to Pat Roberts in the dining room and explained their version of the previous evening's events. At approximately 2 p.m., Pitter came downstairs from his office and gave to Krivan and Cacho disciplinary letters concerning the night before. The letter to Krivan accused him of generally disrupting the restaurant and stated that the letter would be placed in his personnel file; Cacho's letter stated that he was being suspended from work for a week "because of disruptive activities or disruptive behavior . . . and that . . . [if repeated] . . . I would be fired.[13] After reading the letters, Krivan and Cacho demanded that Pitter be more specific as to what exactly the waiters did to warrant discipline. Pitter agreed to do so, said that the new letters would be available that night, and went upstairs to his office. Shortly thereafter, Cacho and Krivan left the restaurant.[14]

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[9] In 1970, the Board conducted a representation election involving Respondent, the Union and an employee labor organization, Avanti Popolo. The latter received a majority of the votes and ultimately negotiated a collective-bargaining agreement with Respondent. The record is unclear as to the demise of Avanti Popolo.

[10] That night, Krivan was working in sec. E, which is the waiter station at the right rear of the main dining room.

[11] Krivan reluctantly admitted that he was aware of a work rule prohibiting use of this telephone by employees. Krivan also denied that he was away from his work station while he telephoned Cacho. According to him, "the entire restaurant is my station. . . ."

[12] As he observed Cacho pass through the dining room and into the boathouse, Krivan walked over to the edge of the boathouse area, which is adjacent to section E, and stood watching. Krivan testified that he was able to keep his entire area in view and that just one table was occupied at the time. As to what he was doing while watching the boathouse confrontation, Krivan stated, "I was working," but he could not recall what he was doing—other than watching.

[13] Pitter maintained that he felt "intimidated" by the conduct of Krivan and Cacho the previous night and that they had been "trying to make something out that wasn't really anything." Further, Pitter attributed their conduct to believing that he was going to speak about the Union.

At approximately 7:30 p.m., Krivan and Cacho returned to the restaurant and met with Pitter in the dining room. The subject matter of this meeting is in dispute. According to Krivan, he began by asking Pitter for the revised warning letter, and Pitter responded that he had changed his mind and would forget the incident "out of the goodness of his heart." Not willing to let the matter rest, Krivan replied that what had occurred was a matter of employee rights and that Respondent had committed an unfair labor practice by calling a general employee meeting without giving the Union a chance to respond. Pitter repeated that he wanted to forget the entire incident and had decided to destroy the warnings. Krivan responded, stating that he was upset with the way Pitter was harassing and interrogating employees. Pitter did not answer that accusation but again responded that it would be a good idea to forget the entire matter. Refusing to do so, Krivan replied that the incident was a matter of employee rights and that he would not just forget what happened. The meeting ended with Krivan and Pitter agreeing "to let things cool down" and with Pitter agreeing to place a note in Krivan's file regarding what had transpired.[15]

According to Cacho, Pitter began stating that he would not discipline either Krivan or Cacho for the incident. Cacho said that he felt there was no reason for the letters, and Pitter responded that whatever the reason, he just wanted to forget the incident and to "sit down and work on the real problems and . . . what grievances we had. . . . we could resolve and come to some amenable ends." They then discussed a waiter, named Steve, regarding an assignment problem, and the conversation ended.

Pitter's recollection of this conversation was rather brief but more corroborative of that of Krivan than the testimony of Cacho. Thus, according to Pitter, "I told them I had thought about it and I had decided not to go ahead and give them the letters and, you know, can't we just . . . work together." Pitter did recall that the meeting ended amicably. Because Krivan and Cacho conflict, I do not credit Cacho's testimony that Pitter offered to adjust any problems or grievances; however, because his testimony was more complete about what apparently was a lengthy conversation, I credit Krivan's version of the meeting, specifically noting his rather belligerent attitude.

Krivan next testified during direct examination that on Sunday, August 12, he observed Pitter arrive at the restaurant at approximately 5 p.m. and, with his small, red schedule book, proceed "to ask all the employees for changes in their schedules." When asked to specify to which employees he overheard Pitter speaking, Krivan named three cooks—Dave Catlett, Carl Datz, and Peter Paccone—and two waiters—Don Jackson and one other. Finally, Krivan averred that the above had never before been done by Pitter.[16] During cross-examination, Krivan's testimony became inconsistent. Thus, when asked to repeat exactly what he overheard Pitter saying to the above-named individuals, Krivan admitted that "I didn't hear Howard say anything directly to anyone there" and that all he observed was Pitter approaching a number of employees, carrying the red schedule book. Later, Krivan testified that he observed Pitter walking throughout the kitchen, dining room, and main wait station, approaching "everyone in the kitchen and several wait people," and that he knew what Pitter asked each employee based upon reports to him. Further during cross-examination, Krivan reverted back to his original testimony saying, "I believe I did overhear [Pitter] asking one or two people about the changes in the schedule." Specifically as to Dave Catlett, Krivan suddenly recalled that Pitter asked whether he wanted any changes and that Catlett replied, not right then. The subject matter was dropped on cross-examination after Krivan claimed that he could recall none of the other conversations. Remarkably, however, on redirect examination, Krivan was able to remember two other employees to whom Pitter spoke regarding schedule changes and that to each, Karl Moeslieu, a kitchen aide, and Jose Cruz, Pitter asked if he wanted any schedule changes. Pitter specifically denied the aforementioned conduct and, based upon Krivan's utterly contradictory testimony, I credit the denial. Accordingly, I shall recommend that paragraph 6(m) of the amended consolidated complaint, which concerns the aforementioned alleged conduct, be dismissed.

As a result of the Union's petition, a representation election was scheduled for August 15. According to Cacho, he had a conversation with Anna Schipani at approximately 7 p.m. near the cashier's stand on the night before the election. Anna, who had never spoken to Cacho at length before, called him over and asked, "what do you think of the union . . . [and] I replied don't you know all Mexicans are union members. She said . . . if the union wins, I wouldn't want to be you. . . . Johnny's a nice guy and he really looks after his employees. He's such a good guy that I know if the union wins, God's going to get you in some way or another." Cacho, who took her comments "sort of in jest," responded in a flippant manner, "and she said, no I mean it. . . . I don't understand why you're doing this to him. I said, doing what? And she goes, this whole union thing." The conversation continued with Anna saying that she did not understand why Cacho, who had been employed for just a year and a half, would try to bring in a union. Cacho replied that if the employees believed her husband was "such a great guy," they would not vote for the Union. The meeting concluded with Anna reiterating "that if the union came in or even if Giovanni's lost or won by a slight margin, she wouldn't want to be in my shoes. . . ." The conversation ended on that note.

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[14] Cacho testified that after he returned to his apartment, Pat Roberts telephoned and said that Pitter had decided against giving them warning letters and just wanted to discuss the issues with them that night.

[15] The note reads as follows: "Joe Krivan has had no letters of disciplinary action, and his file contains only employee related information."

[16] According to Krivan, in the past employees were never consulted about their hours; rather, employees were scheduled according to need. As to changes, waiters could ask for a change in writing and Respondent, in its discretion, could act thereon.

Anna Schipani admitted having such a conversation. Thus, she testified that she spoke first, calling Cacho a nice guy and asking, "How did you get involved in this?" Cacho responded that all Mexicans are union people. Anna then asked Cacho for his age; he replied that he was 24 years old and asked why she wanted to know. Anna responded that Cacho did not know what he was doing, that her husband had been in the restaurant business his entire life, and that the Union was a Hitler-like organization, which was only interested in taking over the restaurant. Then she asked why the employees had not gone to her husband first if there were problems. Finally, while denying warning that she did not want to be in Cacho's shoes if the Union won, Anna admitted saying, "It isn't fair to John and God is going to punish you, Bernard." As between Anna Schipani and Cacho, as previously mentioned, I found the latter to be a more candid and truthful witness and, therefore, I credit his version of the aforementioned conversation.

2. The alleged postelection harassment

The election was held as scheduled, with an apparent majority of employees voting against representation by the Union.[17] On August 22, the Union filed objections to the election with Region 32 and, when Respondent received a copy of said objections, Pitter immediately posted the document on the employee bulletin board. According to Krivan, he asked several employees if they would cooperate in the Board's investigation of the objections. He did this in the restaurant, and he also gave an affidavit regarding Respondent's preelection conduct. While Krivan testified that these activities were confidential, Pitter admitted that he believed the sources for the alleged objectionable conduct were Krivan and Cacho.

The amended consolidated complaint alleges that subsequent to the election, Respondent commenced a pattern of unlawful discrimination by assigning Krivan to less desirable work stations than he had previously been assigned. Echoing this allegation, Krivan asserts, "I was scheduled to a number of smaller sections than I had been accustomed to working." The record evidence is as follows. Krivan testified that some waiter stations are larger or otherwise more desirable than others and that these include sections A, B, D and the boathouse. He further identified the smaller, less desirable sections as E, C, and the sidewalk—if more than one person is waiting on tables. Regarding the more desirable sections, Krivan stated that Respondent's policy was to place the better waiters on "stronger sections because you need those people to take up the maximum volume of tables you're going to be having if it's going to be a busy night." As to those sections which he felt were slower and less desirable, Krivan bluntly testified that these "are the crap sections because you get stuck with all sorts of side work to do. You have less tables. Everybody knows that you are stuck when you get that kind of a section."

Krivan testified that assignments to the various waiter stations are made on a rotating basis. Notwithstanding this system, he asserted that since the spring of 1979 he had regularly been assigned to the larger, faster moving waiter stations[18] but that after the election, "every shift I worked, I was at a less active section." In Krivan's opinion, the less active sections had fewer tables and were not being seated as often by the restaurant hosts. Further, he testified that he began noticing that waiters, who ordinarily did not work in sections A, B, D, and the boathouse because of inexperience or ability, were working in those sections in place of himself and Cacho, who also should have been regularly assigned to those sections. As the situation became increasingly intolerable after the filing of the objections, Krivan allegedly complained to Pitter on the Wednesday following said filing—August 29. "I objected to the sections I was working. I said, 'I'm being assigned to the smaller sections. Why?' He had no answer to that." Also, according to Krivan, he complained to Chaikow on several occasions that day and on the following Friday, August 31; however, nothing was done to correct the situation.[19]

Cacho, who began working for Respondent in February 1978, testified that when he was first employed, he was normally assigned to the least-liked waiter stations—sidewalk, when more than one waiter, and E—but that as he gained experience and expertise, he began receiving assignments to the better sections—A, B, D, and the boathouse.[20] According to Cacho, this trend did not continue after the election; rather a reversal occurred, with Cacho again receiving mostly sidewalk, E, and C waiter assignments. Upset at the situation. Cacho assertedly complained once or twice a week to Chaikow, asking him why he was receiving such assignments. The latter merely responded that Cacho should not be so paranoid and that his assignments had nothing to do with the Union.

Regarding waiter assignments, head waiter Chaikow testified that he is solely responsible for such assignments, that these are prepared on a weekly basis on the Tuesday of the preceding week, and that Pitter neither plays any role in the assignment process nor orders or requests changes—unless a particular individual is sick and cannot work. As to his method of assigning waiters to particular sections, Chaikow testified that he keys the sections to the weekly work schedules which are prepared by Pitter. Thus, waiters normally work on certain days of a week, and for each day of work, Pitter assigns a shift (lunch or dinner) and the hours (5 p.m. until midnight, 6 p.m. until 1 a.m., etc.). According to Chaikow, "[P]eople who were going to be scheduled to leave early would be scheduled in the center and sidewalk sections. The people who are closing will be scheduled in . . . A, D, B, and E. They'll be staying till closing."[21] Essentially, then, Chaikow assigns the sections around the waiters' work schedules, choosing particular sections for particular waiters "on a rotating basis." On this latter point, Chaikow testified that he divides waiter assignments into what he termed "section weeks." Each week begins with the waiter's first shift in any particular week; section assignments are rotated within that week so that the waiter does not receive the same station on any two nights or days (but the same section may be given for separate lunch and dinner shifts); and assignments in 1 week have no relation to assignments in any other week.

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[17] Krivan was the Union's observer during the election.

[18] According to Krivan, he had a conversation with Pitter in April or early May in which the latter told Krivan that he was a "strong waiter" and that on weekends he would be needed in larger sections "to help turn over the tables. . . ."

[19] On cross-examination, Krivan contradicted himseif, stating that he complained to Chaikow on just two occasions after August 22. On the first occasion, Chaikow said he would do something; on the second occasion, Chaikow apologized, saying he could do nothing about Krivan's problems. Later during cross-examination, Krivan reversed himself again, testifying that I "complained to Chaikow several times after the 22nd."

[20] Corroborating Krivan, Cacho stated that most waiters did not like the center sections or E because of the amount of sidewalk involved, the size and composition of groups seated in those sections, and because customers just did not like those seating locations.

Regarding Krivan's work assignments from August 15 through September 1, the record establishes that he worked three separate weekly periods—August 17 through 19; August 22, 24, 25, and 26; and August 29 through September 1. While Krivan asserted that on "every shift" during this time period he worked the slower, less desirable sections (E, C, and sidewalk), the record does not support this contention. Rather, according to Chaikow's uncontroverted assignment records for this period, Krivan worked at the following stations:

Date	*Assignment*	*Shift Hours*
August 17	B	12—5
August 18	B	12—2
August 18	E	6—1
August 19	B	4—12
August 22	Cter Left	6—12
August 24	D	12—5
August 25	C	12—2
August 25	D	6—1
August 26	E	4—12
August 29	E	12—2
August 29	B	6—12
August 31	B	12—5
Sept. 1	D	12—2
Sept. 1	E	6—1

The most striking aspect of this chart is, of course, the number of times Krivan worked in sections B and D—sections which he and Cacho considered to be among the more desirable waiter stations. Also, one of his assignments to section D was the dinner shift on August 25. Of paramount significance is the fact that this date was a Saturday, which is the busiest night of the week in the restaurant and the night during which waiters earn the most tips. On his part, Chaikow's testimony was logical and lucid as to the various factors he considered in making the above-described assignments to Krivan. For example, the former testified that on September 1 he could have assigned either Krivan or Cacho to work in sections D and E and ultimately decided to assign section D to Cacho inasmuch as the latter was scheduled to start earlier and as the left side was normally seated first.[22] Moreover, as proof that Chaikow did, in fact, follow a rotation system in assigning sections is his notebook of assignments. Analysis thereof discloses that all waiters who were assigned to sections A, B, D, and the boathouse also worked in the undesirable sections—C and E. Finally, with regard to section A, Krivan maintains, and the record corroborates, that he was not assigned to that section after August 15. However, the record also discloses that he was not assigned to this section at any time from August 1 through August 15, a period during which no discriminatory pattern of job assignments is alleged. As to section A assignments in general, Chaikow credibly testified that it was Respondent's policy to only assign that section to head waiters or those with the most seniority and skill "because they have to perform a lot more work than anybody else."[23] Further, and specifically contradicting Krivan, Chaikow testified that Krivan was never assigned to section A during 1979 because he did not like to remain in the restaurant when there were no more occupied tables. Krivan did not deny this testimony.

Despite the above evidence to the contrary, Krivan asserted, as proof of his poor station assignments, that his tip income dramatically decreased—"It was about $20 or $30 an evening less." Explaining his statement, Krivan testified, "The amount of business varies each evening, and each weekend and each day. In different sections you are going to generally make less money, is what I mean. Just because E on one night might be more money than an E on another day doesn't mean that I didn't lose money. It's relative to what everybody else made in the restaurant in terms of how much business we had that day." However, the only evidence, which was offered to support Krivan's claim of reduced tips—his own daily diary of 1979 tip income—does not substantiate his testimony. Rather, comparison of his post-August 15 tip income with comparable 1979 workweeks establishes that his tips after August 15 were, at least, equal to, if not slightly higher than, other periods. Thus, while Krivan believed that he began receiving discriminatory assignments after August 22, his tips for 4 workdays during the week of August 22 totaled $200. In contrast, during 4 days of work in each of the weeks listed below Krivan earned tips as follows:

Week of	Tips (total)
6/28/79	$181
7/5/79	$166
7/12/79	$203

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[21] Chaikow testified that waiters, who are scheduled to leave prior to closing, normally are given the centers or the sidewalk. While people may be seated in the center after the waiter has departed, said customers are picked up by the corner waiters.

[22] Examination of Cacho's work stations after August 15 also reveals several assignments to sections D and B. In particular, I note that on Sunday, August 26, Cacho worked in section B during the dinner shift and, of course, that he worked section D on the night of September 1, a Saturday.

[23] The section A job duties included keeping the main wait station stocked with all necessary supplies and staying until closing even if no tables were occupied.

7/19/79	$212
7/26/79	$180
8/1/79	$182
8/15/79	$143

When confronted with these figures at the hearing, Krivan averred that he would have earned more during the week of August 22 if he had been assigned to strong areas.[24] What seems closer to reality—and the truth—is head waiter Chaikow's denial that tip income is dependent upon section assignment; rather, "it depends upon the individual's ability."

As another example of Respondent's unlawful conduct after—and as a result of—the filing of the objections, the amended consolidated complaint alleges that Respondent "condoned" a pattern of general harassment and denigration by employees of union adherents—namely, Krivan and Cacho. Krivan testified that, after the filing of the objections to the August 15 election, he began encountering problems with placing and receiving his food and drink orders. While not alleging instigation by Respondent in either instance, Krivan further testified that Pitter was aware of his problems, did nothing, and, in fact, may have encouraged said conduct by an overtly hostile attitude toward Krivan. As to his food orders, Krivan asserted that these were being prepared improperly, often delayed, and occasionally not prepared at all. As a result, according to Krivan, he faced hostility from his customers who often had to wait abnormally long periods for their food, or received incorrect orders, or would be forced to eat cold food. To protect himself, Krivan began specifying on the customers' checks what problems he encountered in serving them.

Krivan further testified that he was not reticent about complaining to the kitchen personnel about his difficulties, with most of his complaints directed to Peter Paccone, who, according to Krivan, worked at the order window, controlled the order tickets, and coordinated all food leaving the kitchen. Krivan states that over one 3- or 4-night period, he made 20 separate order complaints to Paccone and that the latter gave him no adequate response—"He would smile." On one occasion—August 28 or 29—with a customer waiting longer than normal for a steak order, Krivan complained directly to Pitter. The latter immediately went to the kitchen and instructed Paccone to cook Krivan's order. On another occasion, however, Krivan allegedly complained to Pitter about not receiving pasta orders; Pitter, according to Krivan, was "unresponsive." As to the reason for his problems with Paccone, Krivan contended that the former "was very vocal about his opposition" to the Union. During cross-examination, while reiterating that he complained to Paccone at least 20 times, Krivan recanted his earlier testimony that these were made over a 3- to 4-day period; rather, they were spread over two weekends. Also, Krivan admitted being extremely critical of Pitter's early job performance.

Cacho corroborated Krivan as to food problems, testifying that he often picked up orders with the food improperly prepared or with wrong side orders. As did Krivan, Cacho blamed most of these problems on Peter Paccone "because it seemed that he had a lot to do with the areas where the problems occurred." Cacho further testified that he complained to Pitter about his problems, showing him the customer checks or the badly prepared food. According to Cacho, Pitter would respond that cooks "are human, they make mistakes."

During his testimony, Peter Paccone did not deny—and, in fact, candidly admitted—that the above problems may have occurred. Thus, he testified that he had just been hired in late June and that, although hired as a saute cook, he had never previously done such work and encountered many performance problems. As a result, waiters, including Krivan, were constantly complaining about orders being delayed or misread and food being improperly prepared. While denying intentionally refusing to cook or sabotaging orders, Paccone admitted arguing with Krivan over food orders, losing orders in sauce pots, and being counseled by Pitter regarding his job performance.

Besides food order problems, Krivan asserted that he experienced difficulty having his bar orders filled after August 22. According to Krivan, the main source of these problems was bartender Eddie Dupont. Krivan testified that after the objections were filed and posted on the bulletin board, his customer drink orders would be returned half full, frozen, watery, or not filled at all and that these problems occurred "all the evenings I worked" after August 22. While not complaining to Pitter, Krivan allegedly did complain to Chaikow and Dupont with regard to his bar order problems. While, according to Krivan, Dupont made no response, Chaikow did speak to Dupont; however, the situation did not change. Finally, as to both his food and drink problems, Krivan admitted that on all occasions he eventually received the correct order "after a long period of time elapsed."

According to Cacho, he also experienced trouble with bartender Dupont. Contrary to Krivan, however, Cacho's problems with Dupont, which problems primarily concerned the latter regularly placing Cacho's bar orders behind those of other waiters, began prior to the election and originally were a joke between the two of them. Cacho further testified that Dupont once admitted to him that Cacho's union activities were the source of the friction between them. Dupont was not called as a witness by Respondent; consequently Krivan's and Cacho's bar order problems are uncontroverted.

As a last instance of alleged condoned conduct, Krivan asserted that unknown individuals wrote graffiti over union-related literature which he posted on the employee bulletin board and that someone inserted the epithet "asshole" across his work schedule for the week of

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[24] Cacho also asserted that *his* tip income suffered from the allegedly poor assignments. However, he contradicted Krivan as to the nature of the problem. While the latter argued, with no supporting evidence, that the scope of the discrimination could only be established by comparing his tip income to that of other waiters on any evening after August 22, Cacho would establish the discrimination by comparing his pre- and post-election tip totals. "[The discrimination] cut it down. It cut my tips down and my take home pay . . . close to 50-percent." Cacho later contradicted himself during cross-examination regarding this 50-percent figure, admitting it may be closer to 30 percent. Finally, as did Krivan, Cacho reverted to the unsupported contention that other waiters "were making substantially more than me."

August 27. Regarding the latter incident, Krivan testified that he first became aware of the defilement of his schedule on Tuesday, August 28; that he spoke to Pat Roberts about the problem the next day; that the latter promised to correct the matter; that Respondent's "solution" was to place a small piece of cardboard over the word; that anyone could peer under the cardboard strip and observe what was written on the schedule; and that the matter was not finally resolved until a new schedule was posted 4 days later. Regarding this incident, Pitter testified that as soon as he noticed Krivan's schedule covered by a piece of schedule paper and what was written, he tore it down, and "I made a new schedule."

As to the food and drink problems of both Krivan and Cacho and other alleged harassment, the General Counsel does not contend that either Peter Paccone or Eddie Dupont acted as agents of Respondent. Rather, it is contended that "employees would not have been so brazen in their harassment of Krivan and Cacho if such action was not being tacitly, and in some cases, overtly encouraged by Respondent." In support, counsel for the General Counsel offered testimony from Krivan that, on August 29, Pitter approached him and said, "You are taking this too far. You ought to see a doctor." Krivan next testified that on September 1, shortly after he reported for work that night, he walked past Pitter on his way into the kitchen. Pitter, who did not see Krivan approaching, was softly singing "Joe must go, Joe must go." According to Krivan, cooks, who apparently were listening, saw him approaching and began laughing. During cross-examination, Krivan identified the cooks as Datz and Holbert; however, in a pretrial affidavit, he identified one of the cooks as Paccone rather than Holbert. Pitter denied the incident. As between Pitter and Krivan and as there is no corroborative testimony, I credit the denial of Pitter that the incident ever occurred. Finally, Krivan testified that, also on September 1, he overheard Pitter speaking to employee Karen Ohme by the bar. As he approached, Ohme said, "It makes me sick that he's still making money." Pitter agreed, and Krivan cleared his throat as he passed by. In a pretrial affidavit, Krivan stated that this incident occurred on August 29 and, during cross-examination, Krivan admitted that Ohme did not mention Krivan by name, that he walked up behind Ohme, and that "she was making the comment before she saw me . . . ." Pitter failed to deny either the August 29 incident or the latter conversation.

During his testimony, Howard Pitter specifically denied knowledge of either Krivan's or Cacho's alleged food and drink problems or that he ever instructed Paccone or Dupont to engage in their attributed conduct.[25] However, the record does disclose that Pitter was acutely aware of overt employee hostility toward Krivan and Cacho after the August 15 election. Thus, while denying knowledge of specific acts other than the "asshole" epithet on Krivan's work schedule,[26] Pitter admitted that he sensed "in the air" after the election that employees were not as friendly toward Krivan and Cacho as before and overheard conversations to that effect; that employee resentment of them manifested itself in the "cold shoulder" treatment; and that he believed the sources of this attitude were Krivan's and Cacho's strong support of the Union and its loss of the election. The record further discloses that while aware of the friction, Pitter made absolutely no effort to stop it. Thus, he admitted, "There's not much you can do about a cold treatment." Also, while admitting that the problem concerned him, Pitter believed "everything would blow over." Finally, Pitter disavowed any sharing of, or support for, employee hostility toward Krivan or Cacho, averring that he, at all times, maintained a "professional attitude" toward the two union adherents.

3. The discharge of Joseph Krivan

Krivan's last day of work was Saturday, September 1. He was scheduled to work from 6 p.m. until closing and was assigned by Chaikow to work at section E. Krivan testified that he took his normal lunch break from 9 until 9:30 p.m. and that at approximately 11:50 p.m. Chaikow "cued"[27] him for his second break.[28] At the time, Krivan had two unfinished tables, and he walked over to the wine press to total the checks.[29] While doing so, he spoke to Cacho, and as they conversed, Peter Paccone approached Cacho from behind and poured spaghetti sauce down Cacho's back.[30] Cacho immediately walked over to the main wait station with Paccone in pursuit, picked up a soup ladle, dropped it, and just left the restaurant.

According to Krivan, the incident upset him. Thereafter, he returned to his work station and was taking excess bread back to the kitchen when the cashier yelled that he had a telephone call. Cacho was the caller, and he cautioned Krivan to just forget the above incident. However, as he was returning to section E, Krivan passed Chaikow and informed the latter that he was not sure he would work any more that day because he had had enough for the evening. Chaikow told Krivan to keep him informed so that he could assign someone else to section E.[31] At that point and inasmuch as his section was then empty, according to Krivan, he wandered over to the main wait station. A minute later Chaikow approached and informed Krivan that two tables had just been seated in his section and asked if Krivan would wait on them. The latter replied, "I don't know what I'm going to do. I think I want to leave and I think I want a break. But I had enough for the evening. So [Chaikow] said okay and walked away."[32] Immediately thereafter, Pitter approached Krivan and said, "'You've got two tables in your section. Are you going to wait on them?' Again I said, 'I had enough for the evening. I don't know what I'm going to do. I think I want a break. I don't know what I'm going to do.'" Pitter then stepped away, looked over toward section E, walked back to Krivan, and said, "Well, if you don't want to wait on the tables, you quit." Krivan denied that he was quitting and reiterated that he did not know what he was going to do but that he was not quitting. Pitter responded that Krivan had indeed "quit," took the latter's timecard, signed it, and ordered Krivan to "get lost." Pitter then walked away. Denying that any waiters approached and pleaded with him to stay and wait on his tables, Krivan remained at the restaurant for at least half an hour before leaving. Just before doing so, Pitter walked over to him, asked why he was still there, and ordered him to leave. Krivan responded that he had not quit; Pitter replied that he had; and, according to Krivan, he thereupon left the restaurant.

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[25] Pitter credibly testified that waiter complaints about wrongly prepared food orders are commonplace in the restaurant.

[26] Pitter did not specifically deny that Krivan complained to him about problems with his food orders.

[27] In Respondent's system, "cueing" signifies that a waiter is to start preparing to take a break.

[28] Waiters normally are given two breaks during a shift—an unpaid half hour lunch break and a paid 15-minute break later in the shift.

[29] Krivan testified that the restaurant was "kind of emptying out" but that there were a few customers remaining.

[30] There is no dispute about this specific incident. The record discloses that earlier that evening Cacho and Paccone had some sort of an altercation near the kitchen.

[31] There were 11 waiters assigned to work that night with everyone scheduled to leave at midnight except Krivan, Cacho, Chaikow, Dave Jackson, and Pow Purgsaphakorn. Thus, after Cacho left, there were only three regular waiters to serve the entire facility. Pitter testified, "It was busy for four waiters. I mean not super busy . . . but busy for four waiters. I needed four waiters on."

The record establishes that Krivan has given contrary accounts of the events of that evening. Thus, in a pretrial affidavit dated November 14, Krivan stated that it was Pitter who first notified him that two new tables had been seated in section E, but in an affidavit dated November 19 and at the hearing, he identified Chaikow as that individual. Also in the November 19 affidavit, Krivan placed Pitter "a little ways behind" Chaikow when the latter spoke to him for the second time that night; however, during direct examination Krivan said nothing about Pitter's presence, leaving the impression that the latter was nowhere nearby. Finally, in the November 19 affidavit, Krivan quoted Pitter as asking "Was I leaving," while he failed to mention this question during his testimony.

Chaikow testified that after Cacho left that night, the restaurant was less than half full (16-17 active tables) but that just three waiters—besides himself—remained on duty. He further testified that he became aware that two new tables had been seated in Krivan's area but that the latter was not servicing them. Chaikow located Krivan near the wine arbor and instructed him to wait on the tables. Krivan replied, "I don't feel like staying. I'm not sure if I'm staying." Chaikow reminded Krivan that he was scheduled until 1 a.m. but Krivan again refused to wait on the tables. Chaikow then asked if Krivan was quitting, and after the latter said no, Chaikow went to find Pitter.

Finding Pitter, Chaikow told him what had just occurred and asked Pitter to speak to Krivan about waiting on the two new tables in his section. Thereafter, while he overheard nothing, Chaikow observed the following sequence of events: Pitter spoke to Krivan; waiters Dave Jackson and Pow Purgsaphakorn next spoke to Krivan; and Pitter again spoke to him. Chaikow concluded, denying that he cued Krivan for a second break that night.

Howard Pitter testified that he first became aware of any problem in the dining room when Peter Paccone entered his office and informed Pitter about the Cacho incident. Pitter immediately went downstairs and was standing near the kitchen when Chaikow approached, reporting that "[Krivan] says . . . he's probably going to be leaving." Thereupon, Pitter looked into the section E area, observed two new parties who apparently were awaiting service, and went looking for Krivan. Finding him near the main wait station, Pitter told Krivan that there were two new tables in his section, but Krivan replied, "I'm not going to take them. I'm leaving. I've had it for tonight, I'm leaving." Pitter asked what Krivan meant and said, "Don't be silly. You've got orders to take. We're short to begin with. . . . please take the orders."

Krivan failed to either move or make any sort of response. Leaving him, Pitter walked over to waiter Dave Jackson and, according to Pitter, asked him to persuade Krivan not to leave. Jackson agreed, and Pitter waited 5 minutes to determine if Jackson could succeed. However, after speaking to Jackson, Krivan remained standing at the wait station. Pitter then walked over, again requested that Krivan wait on the new tables in his section, and warned that if Krivan just stood there, he (Pitter) would clock Krivan out just as if he stopped work and quit. Krivan replied that he was leaving but was not quitting. Thereupon, Pitter signed Krivan out.

Careful analysis of the testimony concerning the events of September 1 convinces me that the corroborative versions of Pitter and Chaikow are more logical and consistent with the surrounding circumstances. Thus, I do not believe that Chaikow would have so readily—if one credits Krivan's testimony—permitted Krivan to leave when only three waiters were available to serve the entire restaurant for, at least, an hour more. Also, I note that Krivan gave contradictory accounts of what occurred that night. Accordingly, I credit Pitter and Chaikow as to the events of Saturday night, September 1.

Evidently in an effort to establish that he had not quit the previous night, Krivan reported for work on September 2 at his normal starting time. While he was speaking to headwaiter George Loung, Pitter came over and asked what Krivan was doing there and, after Krivan indicated that he was ready for work, told Krivan that the latter had quit and demanded he leave the restaurant. A verbal altercation ensued, finally ending when Pitter forced Krivan out the door.

4. The termination of Erich Frisch

Erich Frisch was first hired by Respondent in March 1978 as a saute chef and worked through December of that year. On a Saturday Frisch felt ill and telephoned the restaurant. A hostess answered the telephone and, according to Frisch, told him that no managers were on duty. Frisch asked her to leave a message for Pitter that he was ill and would not work that day. The next day when he reported for work, Frisch noticed that his timecard was missing. He asked Pitter why and the latter responded that Frisch had "quit yesterday." When Frisch protested and explained what he had done, Pitter responded that Frisch should have spoken to a manager.[33] For the next 6 months Frisch was unemployed, then, in June 1979, Frisch unexpectedly met Pitter at another Berkeley restaurant and inquired about working on a summer vacation relief basis. Pitter said he would think about it and subsequently telephoned Frisch at the end of the month. Pitter explained that a cook, named Tang, was going on vacation and said he could offer Frisch work on a temporary basis until August 2. Frisch accepted, and Pitter said, "Just kind of watch your step." Pitter told Frisch to start on July 6 and set his wage rate at $5.75 per hour.

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[32] Krivan had no knowledge whether, in fact, new tables had just been seated in his section.

Frisch started working again as a cook on July 6. On that same day, Krivan gave him an authorization card; Frisch immediately signed and returned the card to Krivan. The next day, as described above, Pitter interrogated Frisch as to possible union activities at the restaurant. On July 10, the day following the filing of the petition, Pitter again asked Frisch to come into his office. They were alone, and Pitter said that as soon as Tang returned from vacation, another cook, Roy Chuck, was scheduled to go. Pitter continued, saying that he wanted Frisch to cover for Chuck while the latter was away "and he asked me if I wanted to stay on permanently, and said he thought he could work a raise for me, get a raise to $6.50 or $7.00 or $7.50 an hour." Frisch responded that it seemed good to him and told Pitter that he had received job offers from four other restaurants after he completed his summer relief work for Respondent.[34] Pitter ended the conversation, stating that he had "to talk to his lawyers about the raise because of all the union b—s—t that was going on." Frisch responded that he would contact those other restaurants and refuse their respective job offers.

In early August, Frisch sought to obtain a loan from Wells Fargo Bank. Pursuant thereto, on August 10, he spoke to Pitter in the latter's office. Frisch handed him a "Verification of Present Employment" form, explained its purpose, and asked Pitter to complete it. Pitter responded that he would read it "and see what I can do." Subsequently, Pitter did so and returned the document to Frisch the next day. In the space therein marked "Probability of Continued Employment," Pitter wrote "POSITIVE." According to Frisch, he and Pitter again spoke regarding a raise on the last Friday in August. They spoke at approximately 6 p.m. in the back of the kitchen, and Pitter said, "We've decided to cut out the [Sunday buffet]. . . . By the way, you have a raise to $6.25 an hour." Frisch thanked Pitter, and the conversation ended.

Frisch testified that on Sunday, September 2, his shift was scheduled to conclude at 5 p.m. At approximately 4:30 p.m., Frisch observed Krivan enter the restaurant, heard the latter and Pitter shouting at each other, and ultimately observed Pitter force Krivan out the front door of the restaurant. A few minutes later, Frisch observed police officers enter and speak to Pitter and George Loung. By that point his shift had ended, and Frisch walked outside. On the sidewalk in front of the restaurant, Frisch observed Krivan, Cacho, Cacho's girlfriend Leslie, and four or five others carrying signs and walking in front of the restaurant entrance. The signs read "Honk if you're with us" and "Giovanni's unfair to labor." Frisch approached Krivan and asked him what had happened inside the restaurant. Several of the pickets then asked Frisch to join them but he refused, saying that he did not wish to become involved and that he wanted to remain neutral. At that point, Leslie, Cacho's girlfriend, asked him to hold her sign while she left to buy something. Frisch agreed, and she leaned the picket sign against his leg. Just then, Anna Schipani's brother Mark opened the front door, saw Frisch standing with the picket sign against his knee, turned around and said to someone inside the restaurant, "Hey, Erich's picketing." According to Frisch, "A few seconds later [Pitter] peeked out the door and saw me, and just kind of shook his head."[35] Deciding that Respondent would obviously conclude that he was a union adherent, Frisch joined in the picketing for the remainder of the evening.

Frisch worked the next 2 days without incident. Notwithstanding that September 5 was his day off and inasmuch as it was payday, Frisch went to the restaurant with Krivan and Cacho to obtain his paycheck. Eddie Dupont was handing out the checks but did not have a check for Frisch. Anna Schipani's sister told Frisch that she would get Pitter, and a few moments later the latter came downstairs from his office. Pitter handed Frisch his regular paycheck, a check for the previous 2 days, and 2 free dinner passes and said, "Roy is back. Vacation time is up. We don't need you anymore."[36] Pitter turned and started back upstairs. Frisch asked the former to wait, but Pitter responded, "I don't have time for you right now. I'm interviewing somebody upstairs."[37]

Contrary to Frisch, Respondent denies that it ever intended to hire Frisch on a permanent basis in 1979. Rather, it is asserted that Frisch was a particularly sloppy and hazardous cook and that, aware of Frisch's deficiencies, Pitter intended to employ him until the two cooks, Tang and Roy Chuck, completed their vacations. Further, Respondent denies any knowledge that Frisch engaged in picketing after 5 p.m. on September 2. In support, Pitter testified that, during his employment in 1978, Frisch was sloppy and careless in his work and would not readily take orders.[38] Kirke Byers, one of Respondent's head cooks, testified that while he worked alongside Frisch in 1978, he observed the latter to be overbearing, unclean, dangerous, and a hazard to other employees while frying foods because of a propensity to splatter grease and, thus, cause burns. Despite this rather negative assessment of Frisch's performance, Byers could recall only a single instance of hazardous cooking—in which Frisch was cooking with too high a flame and while tossing food into the air, splattered grease onto two nearby cooks. Finally, contrast Byers' testimony with that of John Schipani, who admitted that he observed Frisch's work enough to form a conclusion:

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[33] According to Pitter, Frisch's conduct was violative of Respondent's call-in policy—that employees must communicate directly with a manager with regard to absences. Pitter admitted treating Frisch's termination as a quit "because he had the choice to come to work and he didn't come to work and did not call."

[34] Regarding these job offers, Frisch credibly testified that he received them soon after he agreed to work for Respondent during the summer. Three of the restaurants were in Berkeley—Martino's, The Good Earth, and International Cafe—and the other, Washoe Zephyr, is located in Reno, Nevada.

[35] In his pretrial affidavit, while stating that Pitter peered out at him while he picketed, Frisch failed to mention that Pitter shook his head in a negative manner. Frisch attempted to explain this discrepancy, citing his nervous state at the time of the affidavit. However, he admitted having made other substantive changes in the affidavit before signing it.

[36] Frisch admitted that neither check reflected the raise allegedly promised by Pitter. Moreover, there is no evidence that Frisch was replaced by any other cook.

[37] Frisch testified that in August he saw an advertisement in the Sunday San Francisco Examiner/Chronicle by Respondent for various categories of employees, including cooks.

> JUDGE LITVACK: Well, Mr. Schipani, did you ever see Frisch's performance in the kitchen? Did you ever observe him working?
>
> THE WITNESS: Yes.
>
> Q. What type of cook was he?. . .
>
> A. I'd say he was talented.
>
> * * * * *
>
> Q. What do you mean by a talented cook?
>
> A. I'd say he has a feel for working in a restaurant. . . . He basically has the feel for cooking, but he's just about the sloppiest person you could ever see in the kitchen.
>
> * * * * *
>
> Q. All right. Well, did you think he was dangerous to other employees in the manner and method by which he [would] saute food?
>
> A. No.

While not disputing the circumstances surrounding Frisch's rehiring in June 1979, Pitter contends that he did so because "I felt like I'd help him out." and that he would not have hired him but for Frisch's ability to cook saute. Pitter further asserts that there was no question but that Frisch was rehired solely as a summer replacement. Thus, according to both Byers and Pitter, the former informed Pitter that he would not assent to rehiring Frisch unless it was understood that such was only upon a temporary basis. In these circumstances, Pitter denied ever offering either permanent employment or a raise to Frisch during the summer of 1979. However, Pitter did recall a conversation in early August with Frisch during which the latter inquired about both permanent employment and a raise. According to Pitter, he evaded the questions by saying he would have to check with others. With regard to Frisch's performance during the summer, Pitter averred that he was "still old Erich," with the same type of complaints as in 1978. Despite this, Pitter admitted that in his aforementioned August conversation with Frisch, "I said, you're doing fine." Asked to explain, Pitter stated that he meant Frisch was doing better but was still below average. Finally, while admitting his answer on the Wells Fargo Bank loan document, Pitter testified that he was merely trying "to help Erich out . . . to help him get a loan." Pitter further testified that he had completed such documents in the past. Asked whether he had ever lied on such a document, Pitter responded, "I don't know. I could have."

As to Frisch's picketing, Pitter testified that he was unaware of Frisch's union adherence until he observed Frisch picketing on the day *after* he was terminated—September 6. As to the events of September 2, while freely admitting that he looked outside that evening and observed Krivan and others picketing, Pitter staunchly denied observing or even hearing from others that Frisch was also picketing the restaurant. While never waivering in this testimony, Pitter admitted that the picketing that night was an "upsetting factor"; that employees would peer outside at the picketing periodically throughout the evening; that the entire restaurant staff was worried and even scared by the picketing; that the picketing was a big thing; and that the restaurant had never before been picketed during his tenure there. Finally, Pitter testified that Frisch's termination had nothing whatsoever to do with the Union; rather, "Vacations were over."

B. *Analysis*

1. Joseph Krivan

The amended consolidated complaint alleges, and counsel for the General Counsel argues in his post-hearing brief, that subsequent to the August 15 representation election, which the Union lost, and objections to the conduct thereof, Respondent, directly and indirectly through condonation and encouragement of employee conduct, embarked upon a pattern and practice of unlawful discrimination, in violation of Section 8(a)(4), (3), and (1) of the Act, against employee Krivan, one of the two main union supporters, which campaign culminated in his discharge on September 1. More specifically, it is alleged that Krivan and Bernard Cacho were the only avowed union adherents among Respondent's employees; that General Manager Howard Pitter harbored unlawful animus toward Krivan and Cacho; that prior to the election, Pitter and Anna Schipani had engaged in a blatantly unlawful campaign to defeat the Union; that subsequent to the election, Respondent retaliated against Krivan and Cacho by consistently assigning them to less active—and financially unrewarding—waiter stations; that Pitter condoned and encouraged employee harassment of Krivan and Cacho because of their strong union support; that Pitter, bent upon retaliation against Krivan, precipitously terminated the latter for his "momentary indecision" about continuing to work after the Paccone-Cacho incident on September 1; and that, in the alternative, Krivan's alleged "quit" was, in reality, a "constructive discharge" based on the intolerable and onerous working conditions created by Respondent. Contrary to counsel for the General Counsel, Respondent contends that there exists no record evidence to warrant the conclusion or inference that Respondent either discriminatorily assigned Krivan to poor waiter stations as a result of his union activities and the filing of objections to the August 15 election or indirectly condoned employee harassment of Krivan, that Krivan refused to work and, indeed, quit work on September 1, that Respondent's working conditions did not justify such action, and that, if terminated, Krivan was terminated as a result of his refusal to work.

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[38] To Pitter, Frisch was merely a "below average" cook.

At the outset, I agree with the contention of counsel for the General Counsel that Krivan, rather than quitting Respondent's employ on September 1, was terminated by Howard Pitter. The record supports—and, indeed, warrants—the conclusion that Pitter rather loosely utilized the term "quit" to place the onus for the result of precipitating conduct squarely on the employee rather than on Respondent. Thus, in December 1978 what obviously was the termination of employee Erich Frisch for having violated Respondent's absence policy was treated by Pitter as a quit apparently because Frisch had a choice of reporting or not reporting for work. Likewise, if Krivan refused to work on the night of September 1, he was discharged for that reason, he did not quit merely because he had a "choice" of working or not working. Moreover, while Krivan may have engaged in conduct warranting discharge, it can hardly be said that his conduct that night evidenced any intent by Krivan to sever his employment relationship with Respondent. Accordingly, while Respondent may not have specifically stated that Krivan was discharged, the record does warrant that conclusion. *Sentry Investigation Corp.*, 249 NLRB 926 (1980).

The primary question herein concerns Respondent's motivation in discharging Krivan—was Restaurant Manager Pitter bent upon revenge after the election for Krivan's acknowledged union adherence and for the subsequent filing of objections to the election? Analysis of the arguments of counsel for the General Counsel establishes the close linkage of Respondent's alleged conduct in assigning Krivan to less desirable work stations, in condoning blatant employee harassment of him, and in ultimately discharging him. The main point of said arguments is, of course, that each of the above acts evidences Respondent's—and Pitter's—unlawful animus toward Krivan. However, to accept this contention, one must also acknowledge the converse as true—that if the assigning of Krivan to less desirable work stations and the condoning of employee harassment did not occur or were not unlawfully motivated, then it cannot be said that the discharge of Krivan was Respondent's ultimate act of retaliation for his union and other protected concerted activities.

Analysis of the record, pertaining to the allegation of the amended consolidated complaint that Respondent discriminatorily assigned Krivan to less desirable work locations after August 15 because of his union activities, reveals that the only supporting evidence for said allegation are the assertions of Krivan and Cacho that such was, indeed, the case. There is not one scintilla of corroborative evidence in the record. Rather, the opposite appears to be true. Thus, headwaiter Chaikow's daily assignment diary for the month of August 1979 was unchallenged and uncontroverted by counsel for the General Counsel and clearly establishes that, contrary to the assertions of Krivan and Cacho, they were often assigned to the more desirable waiter stations—sections B and D—after August 15 and that said assignments were, even on weekends, the most lucrative time of the week. Moreover, while both employees contended that their respective tips were drastically reduced as a result of Respondent's conduct, analysis of Krivan's own tip records discloses that his tips for the week of August 22 were equal to, if not greater than, comparable weeks during calendar year 1979. Further, I specifically credit the logical and plausible testimony of Chaikow as to his method of assigning work stations in general and as to his rationale for the section assignments to Krivan and Cacho after August 15 in particular—rationale which is completely devoid of any unlawful motivation. Attempting to place the unsupported testimony of Krivan and that of Cacho in the best light possible, counsel for the General Counsel argues that neither the documentary evidence nor Chaikow's otherwise plausible testimony reflects or takes into consideration such assignment factors as the number of waiters working on any given night, the locations of other waiters, and the obvious "pecking order" of work locations and seating preferences. However, whatever merit there may be to utilizing these factors, the fact remains that the General Counsel just has not established that Krivan and Cacho were regularly assigned to more onerous or less desirable work stations after August 15, nothwithstanding Respondent's motivation or even that either suffered reduced tip income after that date. Accordingly, there has been no discriminatory conduct in that regard, and I shall recommend that paragraph 7(a) of the amended consolidated complaint be dismissed.

As to Respondent's condonation of employee harassment of Krivan and Cacho because of their union activities, the record establishes that the only specific acts of harassment involved are the problems of Krivan and Cacho in obtaining proper and prompt food-and-drink orders; the placing of graffiti upon Union-related literature, which was posted by Krivan; and the writing of the epithet "asshole" on Krivan's work schedule. As to their food order problems, both Krivan and Cacho point to Peter Paccone as the source and allege as the latter's motivation his vehement antiunion attitude. While denying any sort of deliberate sabotage of food orders, Paccone candidly admitted that, because of his inexperience in performing such work, he caused and was the source of many food order problems in the summer of 1979; that food orders were often lost or wrongly prepared; that many waiters, including Krivan, complained to him about his work; and that Howard Pitter also spoke to him about his performance. As between Krivan and Paccone, I credit the testimony of the latter as being more reliable. Moreover, there is no evidence that Pitter either instigated or condoned Paccone's behavior. Rather, even Krivan admitted that, after complaining to Pitter about Paccone on one occasion, Pitter walked into the kitchen and spoke to the cook. Finally, given the fact that he had just recently been hired, it is hardly conceivable that Paccone could have been as much in control over the kitchen affairs as contended by Krivan and Cacho.

Concerning their alleged bar order problems, Krivan and Cacho testified that the source of these was bartender Eddie Dupont, and Cacho asserted that Dupont's motivation was his (Cacho's) union activities. Respondent did not call Dupont as a witness; accordingly, the testimony of Krivan and Cacho is uncontroverted in this regard and credited. However, while Dupont may have unduly harassed the two union adherents, remaining unresolved is Respondent's knowledge and alleged condonation of this conduct. Initially, I note that there is no evidence that Howard Pitter was aware of Dupont's activities, and I credit his denial in this regard. Further, Krivan testified that what complaints he did register with regard to Dupont were made to Dupont himself, who did not respond, and to Chaikow, who, admitted Krivan, did speak to Dupont on the former's behalf. As to Cacho, he could not recall having complained to management about Dupont. Thus, there is simply no record evidence that Respondent condoned, encouraged, or even was aware of the conduct of Dupont toward Krivan and Cacho.

Krivan next asserted that unknown persons wrote graffiti over union-related information, which he posted on the employee bulletin board, and that someone inserted the word "asshole" on his work schedule. There is no evidence that Respondent was aware of the former; as to the latter, I credit the testimony of Pitter that he removed the schedule from the wall after he noticed Krivan's schedule and the piece of cardboard thereon, covering the epithet.

Counsel for the General Counsel next argues that through its "words and actions," Respondent transmitted a signal to nonunion employees that harassment of Krivan and Cacho would be tolerated and that employees would not have been so brazen in their conduct if it was not "tacitly" or "overtly encouraged" by Respondent. At the outset, I note that while counsel for the General Counsel speaks of a "whole panoply of anti-union conduct" by Respondent's employees against Krivan and Cacho, the record discloses only the conduct of Eddie Dupont, the writing of graffiti on union-related literature, and the word "asshole" on Krivan's schedule—of which Respondent was aware of just the latter. Nevertheless, counsel for the General Counsel points to the testimony of Howard Pitter and asserts that it is vague and contradictory with regard to knowledge of acts of harassment against Krivan and Cacho. I agree; however, the burden is on the General Counsel to establish Respondent's knowledge of specific acts of employee antiunion harassment. Other than Pitter's admitted knowledge of the "asshole" epithet, there is no such record evidence. Therefore, Pitter's testimony, that while he was aware of employee hostility toward Krivan and Cacho and believed its genesis was the union campaign and election result, the only apparent, to him, manifestation of this hostility was the overt "cold shoulder" treatment given to them, stands uncontroverted on the record and is credited. In support of its arguments, counsel for the General Counsel cites *Becton-Dickinson Company*, 189 NLRB 787 (1971), wherein the Board concluded that an employer knowingly acquiesced in and condoned antiunion harassment of union adherents by antiunion employees and held such to be violative of Sec. 8(a)(1) of the Act. However, close analysis of that decision reveals that employees informed supervisors of the specific nature of each antiunion act and that supervisors specifically advised that the employer would do nothing. Herein, as discussed above, no such knowledge or condonation can be attributed to Respondent.[39]

Finally, I have specifically discredited Krivan's assertion that he overheard Pitter singing "Joe must go, Joe must go" before other employees. Also, I note that while Pitter's alleged conversation with employee Karen Ohme, during which she said, "It makes me sick that he's still earning money," and he agreed, was uncontroverted, its meaning is ambiguous, Krivan's name was not mentioned, and Ohme was utterly unaware of Krivan's presence. Thus, while it is alleged that Respondent transmitted a signal to antiunion employees[40] that harassment of Krivan and Cacho would be tolerated, the record just does not permit such an inference to be drawn, and I will not do so. Further, it might be argued that Respondent was under some sort of duty or obligation to "put a stop" to employee hostility toward Krivan and Cacho and that, by admittedly not doing so, Respondent acted negligently and "condoned" said conduct and, therefore, violated the Act. However, given the state of the record, I fail to see how Respondent could be said to have condoned acts about which it was unaware. Also, I do not believe that acts of omission, in such circumstances, constitute a violation of the Act. Moreover, to have investigated the source and extent of its employees' antiunion hostility may have caused Respondent to commit the identical type of interrogation alleged to be unlawful herein—a result certainly not in accord with the purposes and policies of the Act. Accordingly, I shall recommend that paragraph 6(p) of the amended consolidated complaint be dismissed.

As to Krivan's discharge, it is my conclusion that such was not the direct result of, or the ultimate act in, any sort of campaign of retaliation by Respondent against Krivan for the latter's union activities. Based on my above analysis, I do not believe that the record would support any finding that such a campaign was ever undertaken by Respondent. However, such is not to say that the General Counsel has not arguably sustained its burden of proof under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980)—that it must "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor'" in Respondent's discharge decision. Thus, Pitter admitted that he was aware that Krivan was one of the two leading union adherents and that he believed Krivan was responsible for the evidence upon which the Union's election objections were based. Also, Pitter did not deny having commented to Krivan on August 29, "You are taking this too far. You ought to see a doctor."

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[39] In *Champagne Color, Inc.*, 234 NLRB 82 (1978), the Board found a violation of Sec. 8(a)(1) of the Act when a supervisor *knowingly* permitted an antiunion employee to harass a union adherent about a union and did nothing to stop it. Again, I note that a major factor in the Board's decision was the supervisor's knowledge of the content of the altercation—that it involved the union. As stated above, there is no evidence herein that Respondent was even aware of the alleged harassment.

Counsel for the General Counsel may argue that the Paccone-Cacho incident was similar in tone and effect to the incident in *Champagne Color* and, therefore, demonstrates that Respondent encouraged such conduct. However, there is nothing to indicate that any management officials observed the incident, that the incident concerned the Union, or that management believed it related to any antiunion harassment of Cacho.

[40] According to Krivan, he and Ohme, a relief waitress, had been friendly prior to the election; however, on the morning of the election, Ohme became rather distraught over the holding of the voting and blamed the entire matter on Krivan.

While I believe that a *prima facie* showing of unlawful motivation may have been made, I also believe that Respondent effectively met its burden, demonstrating "that the same action would have taken place even in the absence of the protected conduct." At the outset, I have credited the versions of what occurred at approximately midnight, September 1, as testified to by Pitter and Chaikow. Analysis thereof convinces me, contrary to the contention of counsel for the General Counsel, that Krivan, rather than exhibiting "momentary indecision about working" after the Paccone-Cacho incident, consciously determined to leave the restaurant and not work any longer that night, adhering to said decision even though unwaited-upon customers had been seated in his section and despite repeated entreaties—and instructions—from Chaikow, Pitter, and fellow waiters to remain at work and service the seated customers. That it could hardly be said that Krivan was, in any way, indecisive about refusing to work is clear from his own words—after telling Chaikow that he did not feel like staying and was thinking of leaving, Krivan told Pitter, "*I'm not going to* [*wait on the customers*]*. I'm leaving. I've had it for tonight, I'm leaving.*"

Having concluded that Krivan did, indeed, refuse to work when ordered to do so, the question remains—was his presence necessary to Respondent's operations that night. The record is clear that, when Cacho abruptly departed slightly before midnight, the restaurant was approximately half full (at least 17 tables) and that it would be open for 1 more hour. Moreover, other than headwaiter Chaikow, Respondent had scheduled four waiters to work until closing time—Krivan, Cacho, Dave Jackson, and Pow Purgsaphakorn. After Cacho left and Krivan was discharged, just two waiters remained to cover the entire dining room until, at least, 1 a.m. Minimizing the situation, counsel for the General Counsel asserts the two newly seated parties in Krivan's section were not being given unsatisfactory service; however, such is a too restrictive focus. Rather, I believe that, faced with the above-described situation for the remainder of the dinner shift, Respondent justifiably could conclude—as it did—that it required Krivan to work the remainder of his shift and that as an experienced waiter Krivan must also have realized the necessity of his presence—whatever his state of mind at midnight.[41] Accordingly, I think that Respondent has established a valid, persuasive economic justification for the discharge of Krivan whatever the latter's protected activities and that he would have been terminated in any event. *B. N. Beard Company*, 248 NLRB 198, fn. 5 (1980); *J. P. Stevens & Co., Inc.*, 243 NLRB 10 (1979); *Computed Time Corporation*, 228 NLRB 1243, 1250 (1977). Finally, assuming *arguendo* that evidence existed of discrimination against Krivan in the assigning of work stations and of Respondent's condonation of employee harassment of him, I still would find that Krivan's discharge was motivated by his own insubordination on the night of September 1. *Jupiter 8, Inc.*, 242 NLRB 1093 (1979); *Marsh Furniture Company, Inc.*, 230 NLRB 580 (1977).

Counsel for the General Counsel makes two other arguments against said findings. Initially, he asks why Respondent did not seek to determine Krivan's reason for refusing to work. Without regard to the relevancy of such an inquiry, I believe the conclusion is warranted that both Chaikow and Pitter undoubtedly assumed that Cacho's leaving was the cause of Krivan's conduct. In any event, the *fact* of his refusal rather than the reason behind it is the important consideration. Next, it is argued that Respondent imposed the "ultimate" penalty of termination rather than some lesser discipline and that such clearly reveals Respondent's true motivation—Krivan's union activities. However, it is gainsaid "while the discipline may seem extreme, it does not follow that the ascribed reason for the discharge is pretextual." *J. Ray McDermott & Co., Inc.*, 233 NLRB 946, 952 (1977).

Based upon the above, and the record as a whole, I do not believe that counsel for the General Counsel has established by a preponderance of the evidence that Joseph Krivan was terminated by Respondent either because of his union activities or because he participated in the investigation of objections to the August 15 election and shall, therefore, recommend that these allegations of the amended consolidated complaint be dismissed.

2. Erich Frisch

Counsel for the General Counsel argues that, having offered permanent employment and a raise to him, Respondent discharged Erich Frisch only when Pitter became aware of his picketing activities on September 2 and, thus, because of Frisch's support for the Union. In so arguing, counsel for the General Counsel also contends that Respondent spuriously asserted that it had no knowledge of Frisch's picketing and that Frisch was not a permanent employee. On the other hand, Respondent argues that it had no knowledge of Frisch's support for the Union or picketing activities,[42] that, based upon his prior poor job performance, Frisch was hired—and continued to work—as a temporary replacement, and that he was discharged at the conclusion of the summer vacation period.

At the outset, I have previously concluded that, for the most part, Erich Frisch seemed to be a highly credible witness, and as between Frisch and Respondent's witnesses concerning the events of June through September 1979, with certain exceptions, I credit the testimony of Frisch. His version of the events of that period must be contrasted with aspects of Respondent's defense which seemed to be wholly illogical and hopelessly contrived. Thus, head cook Byers' description of Frisch's "hazardous" job performance was itself rather incredible, but when compared to the later, unwitting testimony of John Schipani, it appeared to be utterly exaggerated—if not fabricated. Likewise, Pitter's denial of knowledge that Frisch picketed outside the restaurant entrance on September 2 appears to be less than candid. Initially, I credit the latter's testimony[43] that he did engage in picketing that night and that Howard Pitter peered outside and observed his activities. Pitter admitted having observed the picketing and further admitted that the incident was an "upsetting factor," that the picketing caused great concern among the employees, and that the restaurant had never previously been picketed. In these circumstances, I believe that Pitter must have been aware that Frisch was picketing that night—especially since Frisch was the only employee-picket that night.

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[41] Notwithstanding that he may have been "upset" over the Paccone-Cacho incident, one should not over-dramatize what occurred. Thus, other than the obvious damage to his clothing, Cacho was not physically injured, there was no shouting, no evidence that customers observed what happened, or that the restaurant operations were, in any way, disrupted. Further, nothing whatsoever happened to Krivan, and Cacho himself called and implored Krivan to forget the incident.

[42] There can be no doubt that Frisch engaged in protected concerted activities when he picketed outside the restaurant after the conclusion of his shift on September 2. *Edir, Inc. d/b/a Wolfie's*, 159 NLRB 687, 694 (1966).

Concerning the validity of Respondent's central defense—that Frisch was simply terminated at the conclusion of the summer vacation period as had been understood when he was hired, counsel for the General Counsel points to my aforesaid conclusions and argues that the "total weight" of the evidence, therefore, supports a finding that Frisch, in reality, was discharged because Respondent believed he had joined with Krivan and Cacho as a union adherent. However, in his post-hearing brief, counsel for the General Counsel recognized the underlying problem with his theory—that Frisch himself admitted that he had been hired by Respondent on a temporary summer relief basis. The core issue, then, is whether Frisch's status was ever converted to that of a permanent employee. Put another way, was he ever genuinely offered permanent employment by Respondent? Initially, I credit the testimony of Frisch that he was called into the restaurant office by Pitter on July 10 and that the latter uttered the words: "And he asked me if I wanted to stay on permanently, and he said he thought he could work a raise for me, get a raise to $6.50 or $7.00 or $7.50 an hour." The inquiry, however, does not end here. Rather, Pitter's intent in uttering these words is the determining factor—was he stating a genuine offer of employment, or was Pitter cleverly offering an inducement to a newly hired employee to forgo any support for the nascent union movement? If the latter is true, then it cannot be conclusively established that Frisch was a permanent employee, and his discharge on September 5 would have occurred in the ordinary course of events. Analysis of the record as a whole convinces me that at no time did Pitter intend to offer to Frisch permanent employment.

Initially, Frisch himself testified that he was hired on a summer vacation relief basis and that Pitter warned him to watch his step. I think that the inference is warranted that Pitter would never have made the latter statement if there had existed no problems with Frisch's prior job performance. Next, the timing of Pitter's July 10 offer is important. Thus, I note that this conversation occurred a scant 5 days after Frisch began working (hardly a sufficient period during which properly to evaluate Frisch's job performance), just 3 days after Pitter interrogated him as to his knowledge of the union campaign, and 1 day after the filing of the election petition, and that Pitter's offer was stated immediately after he asked Frisch also to work through Roy Chuck's vacation. It is highly unlikely that any sort of offer of permanent employment could genuinely have been intended in these circumstances.[44] Rather, given Pitter's penchant for similar conduct during this time period, the conclusion is warranted and, indeed, inescapable that Pitter was attempting to dissuade a hopefully gullible individual from supporting the Union.[45]

Counsel for the General Counsel asserts that Pitter's answer on Frisch's loan application document is proof to the contrary. However, Pitter's reply was simply the ambiguous word "POSITIVE." Moreover, Pitter's explanation, that he was trying to help Frisch obtain the loan, is not implausible and, indeed, a likely one. Also, I specifically discredit Frisch's testimony regarding Pitter's offer of a raise in late August. I do so, noting that no such raise ever appeared in a paycheck to Frisch. Further, Frisch's discharge occurred exactly as originally scheduled by Pitter during the July 10 conversation, coinciding precisely with the return of Roy Chuck from vacation. Finally, there exists no record evidence that any replacement for Frisch was hired subsequent to his discharge and no record evidence, other than the timing, of any unlawful animus toward Frisch.

In short, the above-stated factors, and the record as a whole, convince me that Frisch was discharged in the normal course of his temporary employment and that while Pitter's July 10 offer of permanent employment and a raise to Frisch may have constituted an unlawful inducement to forgo supporting the Union, such was not intended as a genuine offer. Accordingly, notwithstanding the obviously overly zealous and, in part, fabricated nature of Respondent's defense and despite the timing of the discharge and Pitter's knowledge of Frisch's activities on September 2, I do not believe that the General Counsel has met its burden of proof to establish that Erich Frisch was terminated by Respondent because of his union activities and I shall, therefore, recommend that this allegation of the amended consolidated complaint be dismissed.

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[43] While crediting Frisch that Pitter looked outside and saw him picketing, I specifically do not credit his testimony that Pitter also shook his head from side to side in a negative manner. Thus, I note that in his pretrial affidavit, given 4 days after the incident, Frisch did not mention the foregoing. It is gainsaid that one's memory is fresher immediately after an event than 8 months later. *Flatiron Paving Company d/b/a Flatiron Materials Company*, 250 NLRB 554 (1980).

[44] In particular, why would Pitter offer permanent employment immediately after asking Frisch to work through Roy Chuck's vacation? Would he not, if a genuine offer was intended, have just offered permanent employment and not mentioned Chuck. I think the answer is obvious and believe Pitter was not serious. It is most unfortunate that Frisch believed Pitter and, accordingly, rejected other job offers.

[45] Counsel for the General Counsel points to Pitter's comment, regarding Frisch's job performance during the summer, that he was "doing fine" and asserts that such accurately portrays the latter's work. I view the statement in a different light, believing Pitter was attempting merely to satisfy Frisch while evading any specific response.

3. The alleged 8(a)(1) conduct

The amended consolidated complaint alleges several independent violations of Section 8(a)(1) of the Act. Considering the incidents in chronological order, it is first alleged that, during his July 7 conversation with Frisch, Pitter interrogated him regarding the union activities at the restaurant and threatened reprisals against the "Mexicans" because of their support for the Union. I have previously credited Frisch on this conversation and, other than a denial, Pitter offered no explanation for his conduct. I, therefore, find that Pitter violated Section 8(a)(1) of the Act by the aforementioned conduct. *Big Three Industries*, 252 NLRB 963 (1980); *B. E. & K., Inc.*, 252 NLRB 256 (1980); *Ben Franklin Division of City Products Corporation*, 251 NLRB 1512 (1980). Further, it is alleged that, during his July 10 conversation with Frisch, Pitter offered the former a raise and permanent employment in order to induce him not to support the Union. As previously stated, I credit Frisch as to this conversation. Further, while I do not believe that Pitter was transmitting a genuine offer of permanent employment, I do believe that his intent was to attempt to dissuade Frisch from supporting the Union. Accordingly, I believe Pitter's conduct was blatantly violative of Section 8(a)(1) of the Act. *Wm. Chalson & Co., Inc.*, 252 NLRB 25 (1980); *Chester Valley, Inc.*, 251 NLRB 1435 (1980).

It is next alleged that during her July 10 conversation with employee Carlos, Anna Schipani interrogated him about the Union and threatened action by the Immigration and Naturalization Service against employees because of their union activities. I have credited Bernard Cacho as to this incident over the version of Schipani. Accordingly, I find that Anna Schipani's statements were violative of Section 8(a)(1) of the Act. *Big Three Industries, supra; B. E. & K., Inc., supra.*

Next, the record establishes that during a July 11 conversation with employee Jose Cruz, Pitter interrogated him about the Union and solicited any "gripes or complaints" which the employee had. Likewise, the record further establishes that on the same day, or the next day, Pitter had a similar conversation with waiter Pow Purgsaphakorn during which Pitter asked the employee if he signed an authorization card and requested that Purgsaphakorn advise him of any complaints or problems which the employee might have. While denied by Pitter, I have credited the testimony of Joseph Krivan as to these incidents. Such conduct is, of course, violative of Section 8(a)(1) of the Act. *Ben Franklin Division of City Products Corporation, supra.*[46]

It is next alleged that, during his conversation with employees Krivan and Cacho in the last week of July, John Schipani told them that he would pay for an arbitrator if the employees agreed to the establishment of an in-house union—in order to induce them to forgo their support for the Union. I have credited Cacho as to this conversation. He testified that, after disparaging the Union, Schipani raised the subject of an in-house union and offered to pay for the services of an outside arbitrator, who would settle the differences between Respondent and its employees. I find that such a promise of benefits is violative of Section 8(a)(1) of the Act. *Chester Valley, Inc., supra.*

The next two allegations of the amended consolidated complaint concern Pitter's conduct the day after Cacho interrupted and allegedly interfered with the meeting between Pitter and the Spanish-speaking employees in the boathouse. It is uncontroverted that, while Pitter first issued warning letters to Krivan and Cacho regarding the previous night, he later rescinded the warnings and, attempting to ameliorate relations with Krivan, placed a note in the latter's personnel file, specifying the absence of disciplinary material therein. In fact, the record establishes that Krivan himself persisted in arguing about the warning even while Pitter insisted that he would forget the entire incident.

As to the warnings themselves, I do not believe the record supports a conclusion that these were related to the union activities of Krivan and Cacho. Initially, while the warnings may not have been well thought out or perhaps were an overreaction to the conduct of the two union adherents, such does not make them violative of Section 8(a)(1). Further, the simple fact is that neither Krivan nor Cacho had any legitimate business interjecting themselves into Pitter's meeting with the Spanish-speaking employees. Neither was invited to attend or had any Section 7 right to be present. Moreover, if Pitter intended to threaten the employees with further Immigration Service harassment because of the Union—as speculated about by counsel for the General Counsel—or if either union supporter objected to what Pitter said, Cacho and Krivan possessed ample opportunity to communicate with the employees at a later time.[47] Accordingly, I do not believe that the rescinded warnings were based upon union considerations and shall recommend that paragraph 6(k) of the amended consolidated complaint be dismissed. Finally, inasmuch as I have credited Krivan's version of the nighttime conversation with Pitter and as the former failed to mention anything regarding the solicitation of grievances by Pitter, I shall also recommend the dismissal of paragraph 6(l).

It is next alleged that, during her conversation with Cacho on the night before the election, Anna Schipani interrogated Cacho as to his union activities and threatened him with unspecified harm if the Union was victorious in the election. I have previously credited Cacho's version of this incident but also note that Schipani's own version of the conversation closely corroborates Cacho. Further, while, given their nature, Cacho may have taken her remarks in jest, I do think that Anna Schipani was quite sincere, meant what she said, and understood the seriousness of her comments. Therefore, I find that Schipani's conduct interfered with, coerced, and restrained Cacho in the exercise of his Section 7 rights and, thus, was violative of Section 8(a)(1) of the Act. *Big Three Industries, supra; B. E. & K., Inc., supra; Ben Franklin Division of City Products Corporation, supra.*

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[46] Regarding the solicitation of grievances, it is gainsaid that the essence of the violation is not the solicitation itself, but rather the inference that the employer will correct the problems. This promise is implicit in the solicitation and need not be expressly stated. *Ben Franklin Division of City Products Corporation, supra*; *Madison Plant Mechanical Drives Division, Reliance Electric Company, Madison Plant Mechanical Drives Division*, 191 NLRB 44 (1971).

[47] Arguing that Pitter intended once again to threaten the Spanish-speaking employees with deportation or other action, counsel for the General Counsel asks why else would Pitter preface his remarks by stating that the meeting had nothing to do with the Union? The answer, of course, is obvious—to assure the assembled employees that the meeting, indeed, did not concern the Union.

THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their union membership, activities, and desires and the union membership, activities, and desires of their fellow employees; by promising its employees economic and other benefits in order to dissuade them from joining or assisting the Union; by threatening retaliation, deportation, or other unspecified reprisals against employees to dissuade them from joining or assisting the Union; and by soliciting grievances from employees and promising possible favorable resolution of them in order to induce them to refrain from joining or assisting the Union, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them under Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

4. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not engaged in any unfair labor practices not specifically found herein.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby make the following recommended:

ORDER[48]

The Respondent, Caffe Giovanni, Inc. d/b/a Giovanni's, Berkeley, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their union membership, activities, and desires and the union membership, activities, and desires of their fellow employees.

(b) Promising its employees economic and other benefits in order to dissuade them from joining or assisting the Union.

(c) Threatening retaliation, deportation, or other, unspecified reprisals against employees to dissuade them from joining or assisting the Union.

(d) Soliciting grievances from employees and promising possible favorable resolution thereof in order to induce them to refrain from joining or assisting the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its Berkeley, California, restaurant copies of the attached notice marked "Appendix."[49] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed in all other respects.

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[48] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[49] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Bartenders, Waiters, Waitresses, Cooks & Hotel Employees Union Local 332, AFL-CIO (Ogden Food Service Corporation) *and* Anita Podhrasky. Case 14-CB-5238

November 13, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 18, 1981, Administrative Law Judge Lawrence W. Cullen issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision[1] in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Bartenders, Waiters, Waitresses, Cooks & Hotel Employees Union Local 332, AFL-CIO, Caseyville, Illinois, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT cause or attempt to cause Ogden Food Service Corporation to discriminate against Anita Podhrasky or any other employee in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any other manner restrain or coerce employees of the above-named Employer in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL make whole Anita Podhrasky for any loss of earnings and benefits she may have suffered because of our discrimination against her, plus interest.

WE WILL notify Ogden Food Service Corporation, in writing, with a copy thereof furnished to Anita Podhrasky, that we are no longer requesting or contending that Podhrasky's job seniority be reduced.

BARTENDERS, WAITERS, WAITRESSES, COOKS & HOTEL EMPLOYEES UNION LOCAL 332, AFL-CIO

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard in St. Louis, Missouri, on June 8, 1981.[1] The charge was filed by the Charging Party on December 4, 1980, and the complaint issued on April 13, 1981. Respondent's answer was received on May 5, 1981. The primary issue presented is whether Bartenders, Waiters, Waitresses, Cooks & Hotel Employees Union Local 332, AFL-CIO (hereinafter referred to as Respondent or the Union), unlawfully caused or attempted to cause a reduction in Charging Party Anita Podhrasky's job seniority and scheduled hours of work with her employer, Ogden Food Service Corporation, in violation of Section 8(b)(1)(A) of the National Labor Relations Act, as amended (hereinafter the Act), and caused or attempted to cause the employer to discriminate against Anita Podhrasky in violation of Section 8(a)(3) of the Act, and thereby violated Section 8(b)(2) of the Act.

Upon the entire record including observations of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Ogden Food Service Corporation (hereinafter the Employer), an Illinois corporation, is engaged in the retail food sales service business and maintains a place of busi-

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[1] In the next-to-last paragraph of the "Analysis" part of the Administrative Law Judge's Decision, he inadvertently stated that a seniority list was compiled by the waitresses in September 1979, whereas the record establishes, and the Administrative Law Judge correctly found earlier in his Decision, that this list was compiled in September 1980.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

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[1] All dates are in 1980, unless otherwise stated.

ness at Fairmont Park Race Track in Fairmont City, Illinois, as well as other places of business in several States. The complaint alleges, and Respondent stipulated at the hearing, that during the 12-month period ending March 31, 1981, which period is representative of the Employer's operation during all times material hereto, the Employer, in the course and conduct of its business operations, received gross revenues of $500,000 and purchased goods valued in excess of $50,000 which were transported and delivered to its place of business in Collinsville, Illinois, directly from points located outside the State of Illinois. On the basis of the foregoing stipulation, I find that the Employer is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, Respondent admits, and I find that Respondent is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

The complaint as amended at the hearing alleges, Respondent stipulated, and I find that at all times material herein Respondent has been the exclusive representative for purposes of collective bargaining of the employees in the unit set forth in article III of the collective-bargaining agreements between Respondent and the Employer, in effect for the periods from January 1, 1978, through December 31, 1980, and from January 1, 1981, through December 31, 1983, as modified by the collective-bargaining history and practice of Respondent and the Employer. It was further stipulated that the unit described in article III of the collective-bargaining agreement constitutes an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Charging Party Anita Podhrasky has been employed as a waitress by the Employer at the Fairmont Park Race Track since 1971. Her normal work schedule is 4 to 5 days a week. She has worked at the Fairmont Park Race Track and been a member of the Union since 1965. She testified that her membership has been continuous during this period. In late October 1980 Podhrasky was requested by Barbara Maksudian Coleman (the secretary and business agent of Respondent) to stand for election as sergeant-at-arms of the Union Local.[2] Podhrasky agreed to do so and was nominated in October. Subsequently, there was another nomination on November 24 and Podhrasky was nominated for the position of secretary and business agent to run against Coleman in an election scheduled for December 1. Podhrasky accepted the nomination and withdrew from her nomination as sergeant-at-arms.

Podhrasky testified that 2 days after the nomination, November 26, she received a telephone call from Coleman who informed her that she, Podhrasky, had been suspended from the Union during 1977 and 1978 as a result of nonpayment of dues and that her seniority would be reduced as a result, and she would share the same seniority as Toni Jackson, another waitress. Podhrasky testified that she became upset, told Coleman the matter had been straightened out and that she would appeal it, and that Coleman told her to do whatever she was big enough to do. Podhrasky described the conversation as "very heated" and stated that it lasted approximately 45 minutes. Podhrasky was scheduled to work the following workweek commencing December 2. When she called in for her schedule, she was told to work only 2 days. When she went in to work on Friday she noticed that 2 days had been marked off her schedule. The following workweek commencing Tuesday, December 9, her work schedule was reduced to 3 days. However, early in the following week she received a telephone call from the Employer's lawyer who told her that they had found an error in her seniority and she would be restored to her regular workweek schedule of 4 to 5 days per week.

Coleman had been appointed business agent of the Union in June 1980. Podhrasky testified that in June or July 1980 a discussion arose between Podhrasky and Coleman as to whether Podhrasky had been suspended from the Union in 1977 and 1978 for nonpayment of dues. Podhrasky testified that "the records showed at the Union hall that I was suspended from the Union in 1977 and 1978 . . . ." Podhrasky testified that she told Coleman that she was off work on maternity leave and she had asked the Union's president, Michael Carhalis, for a sick status and he indicated there was none but she should not worry about it and he would "take care of it" after she came back and he, Carhalis, initialed her union book at the time. Podhrasky testified that she showed Coleman the book in June or July 1980.

The General Counsel also called Lew Apolon, the Employer's general manager at Fairmont Park Race Track who has overall responsibility for the work schedules of the waitresses. Apolon testified that approximately November 29, Coleman came into his office and informed him that there was a break in Podhrasky's seniority in 1977 or 1978 as there had been a lapse in her union dues payment and there was a termination in Podhrasky's file. Apolon told Coleman that the payment of union dues would have no effect on his decision, but that since Dining Room Manager Richard Salanardi's records also showed Podhrasky's seniority date was in 1978 he "would go along because Salanardi was in agreement with her [Coleman]." Apolon testified that he did not consider the union dues status of Coleman but only considered her employment status. Apolon thereupon reduced Podhrasky's seniority until an investigation was made. Apolon testified that Coleman was attempting to clarify the Union's seniority list which was in conflict with the Employer and that the Union was utilizing union seniority whereas he followed the Employer's seniority list based on job seniority.

The significance of the seniority is that a reduction in employment seniority may entail a reduction in the work hours of a waitress during slack periods. In fact, that occurred in this instance for a period of 2 weeks. On investigation, Apolon discovered that the alleged termination of Podhrasky was actually a leave of absence for maternity, whereupon Apolon restored Podhrasky's original service date.

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[2] The complaint alleges, the answer of Respondent admits, and I find that at all times material herein Coleman was a business agent of Respondent and an agent of Respondent acting on its behalf, within the meaning of Sec. 2(13) of the Act.

According to Coleman, the Union was preparing for negotiations of a new contract with the Employer in the fall of 1980, and seniority was a matter of concern. Coleman testified that in September she met in the dining room with the waitresses on a Saturday evening, and gave them a typed list of the 24 waitresses listed in accordance with length of service on the job. This list showed Podhrasky as number 17 in seniority. The employees themselves penned in numbers beside the names on the list (Resp. Exh. 2) according to seniority. Coleman testified that the only question was whether waitresses Toni Jackson and Mona Hirsch were higher in seniority than Podhrasky. Podhrasky was not informed of the meeting and did not attend. Coleman explained that the waitresses are usually all present on a Saturday night and she thought it would be the best night to present the matter. Jackson and Hirsch contended they had greater seniority than Podhrasky. Hirsch has the number 14 placed beside her name and the number 15 is placed beside Jackson's name; 16 is placed beside Podhrasky's name on the list. Coleman testified that she did not herself dictate the order and that the list was an attempt to list seniority on the job and was not based on union seniority. Coleman testified that a reduction in work was imminent and the waitresses were concerned about it, and desired that seniority dates be resolved. Coleman testified that Jackson and the other waitress, Hirsch, were concerned about the seniority question and wanted it resolved. The Employer's dining room manager, Salanardi, informed her that Podhrasky's seniority should be 1978 as Podhrasky had worked on another job and lost her seniority.

Coleman testified that she went to see Apolon on November 24 to get the matter "straightened out" but did not ask him to take any action. Coleman testified that she did not have a discussion with Podhrasky in July 1980 about Podhrasky's maternity leave. Coleman testified that she talked with Podhrasky before her discussion with Apolon and informed her that the "records" showed she was suspended from the Union in 1978 and that Salanardi had informed Coleman that Podhrasky had worked another job in that period and that Podhrasky was going to see Apolon to get the matter settled.[3]

Analysis

As stated above, the General Counsel alleges that Respondent violated Section 8(b)(1)(A) and (2) of the Act by causing the Employer to reduce the number of days which the Charging Party was assigned to work. Section 8(b)(1)(A) of the Act provides that it is an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 8(b)(2) of the Act provides that it is an unfair labor practice for a labor organization or its agents *to cause or attempt to cause* an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act. In *Krambo Food Stores, Incorporated*, 106 NLRB 870 (1953), the Board found that the union had violated Section 8(b)(1)(A) and (2) of the Act when it caused the employer to withhold vacation pay from certain of its members because of their failure to pay back dues to the union. The Board stated (at 877):

> It is clear that in Section 8(a)(3) and 8(b)(2) of the Act the Congress barred discriminatory treatment of employees based upon union membership because such treatment might discourage or encourage union affiliation—a matter which the Congress determined should in general be left to the employees' own uncoerced judgment. Except for the proviso to Section 8(a)(3), this prohibition was complete and all-inclusive and applied to all forms of discrimination and all employees, whether union members or not. In the proviso, which in effect is repeated in Section 8(b)(2), Congress permitted one exception to this all-inclusive ban, namely, employers and unions under certain circumstances were allowed to require that employees join or maintain their membership in a union as a condition of employment. Nothing in the Act or its legislative history persuades us that the union-shop provisos to Section 8(a)(3) and 8(b)(2) were designed to give employers and unions a license to use various discriminatory devices, short of discharge, to coerce an employee to join the union while still holding over his head the alternate threat of discharge which the statute sanctions.

In *Pittsburg Press Company*, 241 NLRB 666 (1979), the Board upheld the administrative law judge's finding that the union had violated Section 8(b)(1)(A) and (2) of the Act by causing the discharge of one of its members for failure to pay a union fine and by requesting the removal of his name from the work schedule. The only lawful recourse available to a union for nonpayment of periodic dues and initiation fees by an employee is to request that the employer discharge the employee. The union may not cause or attempt to cause the employer to impose any different or lesser sanction on the employee for the employee's nonpayment of union dues.

In the instant case, I find that Respondent by its business agent, Coleman, attempted to cause the Employer to discriminate against Podhrasky by reducing her seniority for nonpayment of union dues. Initially, I found Podhrasky to be a credible witness. She testified that there had been a prior question concerning her union status (seniority) by reason of her failure to pay union dues during a period of pregnancy when she was on leave from the Employer. I credit her testimony that she discussed this matter with Coleman in June or July 1980. I do not credit Coleman's testimony that she was merely attempting to resolve a longstanding seniority dispute between the waitresses when she initiated a meeting with Apolon in November. Coleman's testimony did not impress me as credible in view of her own testimony that the list was initially prepared (in the absence of Podhrasky) in September and Podhrasky's testimony that in

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[3] The foregoing is a composite of the testimony in the case which is credited except to the extent that specific credibility determinations are hereinafter made.

June or July she had apprised Coleman of the question of her union seniority as a result of pregnancy, and in view of Apolon's testimony that Coleman was seeking a reduction in Podhrasky's seniority by reason of Podhrasky's lower union seniority (resulting from a period of nonpayment of dues) as well as by reason of Podhrasky's alleged prior termination of her job with the Employer. Podhrasky testified that the date of the union meeting at which she was nominated to run for business manager against Coleman was November 24 and that Coleman called her 2 days later (November 26) and told Podhrasky in a "heated" discussion that she was going to discuss Podhrasky's seniority with Apolon. Apolon testified that his meeting with Coleman occurred on November 29. Coleman testified that the meeting occurred on November 24, which she testified was the same day as the date of the nomination. I credit Podhrasky's testimony that the date of the nomination was November 24 and that Coleman called her 2 days later on November 26 to discuss Podhrasky's loss of seniority as a result of her nonpayment of dues in 1977 and 1978. I also credit Apolon's testimony that the meeting between Coleman and himself took place on November 29. This sequence of events appears logical. Moreover, I was impressed by Podhrasky's positive recall of the dates whereas Coleman's testimony to the effect that these events took place on November 24 was less than clear. Coleman answered in the affirmative in response to three leading questions by her counsel on direct examination which questions incorporated the date of November 24 as the date of her meeting with Apolon. However, she was unable to recall the date of the nomination night on further direct examination by her counsel, as follows:

> Q. When you went to talk to Mr. Apolon on the 24th, did you know that she was going to run against you for a union office?
>
> A. I have to recall the nomination night. I don't remember.
>
> Q. Was the nomination night the first you knew about it?
>
> A. Yes.
>
> Q. Was that, in fact, on that day, after you had been into the office?
>
> A. On or about that time.

Apolon's testimony that he met with Coleman on November 29 was also in response to a leading question on direct examination by the General Counsel and was also less than positive. However, I find that his recall of the date of their meeting was more positive than that of Coleman. November 29, as testified to by Apolon, appears logical as the actual date of the meeting between Coleman and Apolon, given the sequence of the November 24 nomination night as testified to by Podhrasky and as clarified by counsel for Respondent, and given Podhrasky's testimony that Coleman called her 2 days later on November 26 and told Podhrasky that she, Coleman, was going to discuss the matter with Apolon. Moreover, the General Counsel's Exhibit 2(a) shows the workweek commencing on Tuesday, December 2, 1980, as the first workweek wherein Podhrasky's workdays were reduced.

Under the above circumstances, I find that Respondent, by and through the actions of Business Agent Coleman, was attempting to cause the Employer to reduce Podhrasky's job seniority with the Employer as a result of Podhrasky's nonpayment of dues during 1977 and 1978. Further, although Coleman testified that she did not tell Apolon "to cut" it was known to her that a reduction in job seniority could entail a reduction in workdays, particularly in view of the upcoming anticipated yearend slow period and the concern of the other waitresses about seniority to which Coleman testified. Moreover, although Apolon testified that he rejected Coleman's attempt to utilize union seniority as opposed to job seniority, he agreed to "go along" with Coleman's insistence that Podhrasky's seniority should be reduced pending his own investigation of the Employer's records. The result of Coleman's attempt to seek a reduction in Podhrasky's job seniority was the actual reduction of Podhrasky's job seniority for a period of 2 weeks during which time she suffered a loss of workdays as a result. Accordingly, I find, by the preponderance of the credible evidence, that Respondent violated Section 8(b)(1)(A) and (2) of the Act by its actions as set out above by reason of attempting to cause the Employer to reduce Podhrasky's job seniority because of her nonpayment of union dues.

I also find, based on the credited testimony and evidence as set out above, that Coleman had knowledge that Podhrasky was to run against her for union office and that her actions in moving to seek to have the Employer reduce Podhrasky's job seniority were motivated by Podhrasky's having accepted the nomination to run against Coleman for union office. I find that under the circumstances the discriminatory motive of Coleman in pursuing Podhrasky's reduction of job seniority may properly be inferred. See *Irwin County Electric Membership Cooperative*, 247 NLRB 1357 (1980). Coleman made no move to seek a reduction in Podhrasky's job seniority until November 26, 2 days after the nomination of Podhrasky to oppose Coleman for union office although Coleman had been apprised in June or July 1980 by Podhrasky of Podhrasky's maternity leave in 1977 and 1978 and although the seniority list was made up by the waitresses in September 1979. I also find, by the preponderance of the credible evidence, that Respondent violated Section 8(b)(1)(A) and (2) of the Act by reason of its discrimination against Podhrasky by causing the Employer to reduce her job seniority.

See *Local 138, International Union of Operating Engineers, AFL-CIO (Building Contractors' Association, Inc.)*, 233 NLRB 267 (1978), wherein the administrative law judge found that the union sought to punish a member for his criticism of the union president by reducing his industry seniority, and thereby impaired the member's opportunity for job referral with the consequent infliction of economic harm on the member in violation of Section 8(b)(1)(A) and (2) of the Act. In this case the administrative law judge rejected the union's defense that the reduction of the discriminatee's seniority was initiated by complaining members. The administrative law judge also found that the union had not obtained any information until 10 months after it reduced the discriminatee's seniority. The administrative law judge also noted that it was not until the discriminatee raised his complaint in 1975 that the union took action regarding his seniority status which had been resolved 2 years previously. See also *Local Lodge Number 5, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Regor Construction Company, Inc.)*, 249 NLRB 840 (1980), and *Fruin-Colnon Corporation* v. *N.L.R.B.*, 571 F.2d 1017 (8th Cir. 1978), enfg. 227 NLRB 59 (1976).

CONCLUSIONS OF LAW

1. Respondent Bartenders, Waiters, Waitresses, Cooks & Hotel Employees Union Local 332, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Ogden Food Service Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. By attempting to cause the Employer to reduce the job seniority of Charging Party Anita Podhrasky because of her nonpayment of dues in 1977 and 1978, the Respondent Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. By attempting to and by causing the Employer to reduce the job seniority of Charging Party Anita Podhrasky because she engaged in activities protected by Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.[4]

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since I have found that Respondent Union unlawfully caused the Employer to reduce the job seniority of Charging Party Anita Podhrasky, I shall recommend that Respondent Union be ordered to notify the Employer, in writing, with a copy thereof to be furnished to Anita Podhrasky, that it is no longer requesting that Podhrasky's job seniority be reduced.[5]

I shall further recommend that Respondent Union be ordered to make Anita Podhrasky whole for any loss of earnings and benefits she may have suffered as a result of the discrimination against her with interest computed thereon in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[6] I shall also recommend that Respondent Union be required to post the appropriate informational notice to its members in appropriate places in its offices and meeting halls.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Bartenders, Waiters, Waitresses, Cooks & Hotel Employees Local Union 332, AFL-CIO, Caseyville, Illinois, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Ogden Food Service Corporation to discriminate against Anita Podhrasky or any other employee in violation of Section 8(a)(3) and (1) of the Act.

(b) In any other manner restraining or coercing employees of Ogden Food Service Corporation in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Notify the Employer, in writing, with a copy thereof to be furnished to Anita Podhrasky, that it is no longer requesting or contending that Podhrasky's job seniority be reduced.

(b) Make whole Anita Podhrasky for any loss of earnings and benefits suffered by her as a result of her reduction in seniority in December 1980, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Post in its offices and meeting halls copies of the attached notice marked "Appendix A" on forms provided by the Regional Director for Region 14, after being duly signed by an official representative of Respondent Union. Said notices shall be posted immediately upon receipt thereof, and be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Respondent Union and its agents shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.[8]

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[4] Although the General Counsel did not argue in his brief that Business Agent Coleman's actions in seeking the reduction of Podhrasky's seniority were motivated by an unlawful discriminatory purpose, he asserted this position at the hearing and this issue is addressed by Respondent Union in its brief. I find the facts give rise to a finding of a violation on this ground also. The complaint adequately encompasses a violation on this basis and the evidence adduced at the hearing proves a violation on this basis. I find this issue to have been fully litigated. See *Carbonex Coal Company*, 248 NLRB 779 (1980).

[5] Anita Podhrasky's job seniority was restored to her by the Employer in December 1980.

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

Rebel Coal Company, Inc. *and* **United Mine Workers of America and Van G. Cope.** Cases 9-CA-15236 and 9-CA-16336

November 13, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 11, 1981, Administrative Law Judge Richard H. Beddow, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to modify his remedy,[1] and to adopt his recommended Order,[2] as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Rebel Coal Company, Inc., Auxier, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs accordingly:

"(a) Reopen and reestablish its auto repair shop operation."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

> WE WILL NOT threaten our employees with loss of employment, or lay off employees, or otherwise discriminate against them, because of their activities in pursuit of union affiliation for purposes of collective-bargaining representation.
>
> WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.
>
> WE WILL reopen and reestablish our auto repair shop operation.
>
> WE WILL offer immediate and full reinstatement to Glen Allen, Mickey Lawson, Gary Ferguson, Robert Sturgill, Sam Amos, Eric Picklesimer, and Van G. Cope to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole, with interest, for any losses they may have suffered as a result of the discrimination against them.

REBEL COAL COMPANY, INC.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge: This matter was heard before me in Prestonsburg, Kentucky, on March 12, 1981. The proceeding is based on a charge filed April 24, 1980, by the United Mine Workers of America, and a charge filed individually on January 19, 1981, by Van G. Cope. The General Counsel's complaint alleges that Respondent Rebel Coal Company, Inc. (herein called Respondent), Auxier, Kentucky, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act), through statements of supervisors and by its actions of closing an automotive repair shop and laying off certain employees.

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[1] See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

[2] Inasmuch as we have found that Respondent violated the Act by laying off employees through the discriminatory closing of its "auto" repair shop, we will require Respondent to reopen and reestablish the repair shop operation in order to restore the *status quo ante* existing prior to its commission of unfair labor practices. As noted by the Administrative Law Judge, while the record contains general testimony indicating that Respondent has experienced some overall financial difficulties, the record is devoid of evidence showing the actual financial condition of the "auto" repair shop operation at the time of its closing or its anticipated costs based on actual operating practices. We have long held that restoration of the *status quo ante* following an unfair labor practice is *prima facie* appropriate and that the burden rests with Respondent to demonstrate that it is not appropriate. *N. C. Coastal Motor Lines, Inc.*, 219 NLRB 1009 (1975), enfd. 542 F.2d 637 (4th Cir. 1976). Since the record provides no basis to conclude that a normal *status quo ante* remedy would be unduly burdensome or endanger Respondent's continued viability, we find that such a remedy is appropriate herein. Accordingly, we have modified the Administrative Law Judge's recommended Order and will require Respondent to reopen and reestablish its "auto" repair shop operation. Cf. *Capitol Chrysler-Plymouth of Montgomery*, 242 NLRB 1274 (1979).

[3] In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

259 NLRB No. 33

Briefs were filed on or before April 16, 1981, by the General Counsel and Respondent. Upon a review of the entire record in this case and from my observations of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent's answer admits that it is a West Virginia corporation with an office and place of business at Auxier, Kentucky, where it is engaged primarily in the mining of coal and that during a representative 12-month period it purchased and received at its Auxier facility goods and materials valued in excess of $50,000 directly from points outside the State of Kentucky. At all times material herein, Respondent is and has been an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Respondent also admits in its answer that the United Mine Workers of America (herin called the Union) is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent operates a coal mine in the Prestonsburg and Paintsville, Kentucky, area. Prior to March 29, 1980, it operated an auto repair shop near Paintsville for the maintenance and repair of vehicles (primarily nondiesel powered), used in connection with its coal business. It also had another location known as the "farm" near Paintsville, where it repaired vehicles, primarily diesel powered, and which location served as a reporting area for employees who perform over-the-road truck driving work. The involved repair employees and drivers at these locations were not represented by the Union. However, Respondent's other production and maintenance employees were represented by the Union and covered by the National Bituminous Coal Wage Agreement of 1978.

Early in 1980, the United Mine Workers of America was contacted by certain nonunion employees of Respondent. The Union was of the opinion that the auto shop and farm operations and employees were not covered by the existing contract. Consequently, representatives of the Union met with employees Sam Amos and Doug Daniels, who signed cards for the Union and who were given additional authorization cards to be signed by the remainder of the approximate eight nonunion employees in the auto shop and four employees at the farm. The following day 12 signed authorization cards were returned, representing all of Respondent's nonunion employees in the auto shop and farm locations.

The Auto Shop

On February 21, 1980, the union representatives met with Odell Rogers, Respondent's president, and two or three supervisors, and advised him of the authorization cards. Rogers asked if the Union expected Respondent to sign the national contract and was told that the Union was willing to negotiate a contract that was tailored to the employees of Respondent's operation. Rogers replied by stating that ". . . before I'll sign a contract for those people, I'll shut the place down and farm the work out." At that point, a representative of the local coal association advised Rogers not to say anything further. At some point Rogers also said it would be cheaper to close the shop down. The Union advised Rogers of the employee's rights and that it would closely monitor the situation and the meeting ended.[1]

On March 10, the Union filed a petition to represent Respondent's employees at the auto shop and farm operatons. Shortly thereafter, Brad Walls, who ran the auto shop, was told by Respondent's superintendent, Charles Williams, that Respondent was "going to have to start farming work out, because they were going to be shutting the shop down on account of the Union." Walls also testified that during the previous summer Rogers told Walls to fire a new employee who had remarked about poor working conditions and something about the Union. Rogers said he did not want to hear any more about the Union and that he would close the auto shop before he let it go union.

On a Saturday morning, March 29, Respondent closed its auto shop operations. Two or three employees were at work when Williams and another of Respondent's officials, Terry McGaffee, arrived at the auto shop and Williams placed a sign which said "no work until further notice" on the windshield of the truck on which the employees were installing an engine. One of the employees asked whether they were fired or laid off. Williams responded that he really did not know. Later, Williams told him that he was laid off until further notice and, in response to a further question, that Respondent would prepare some layoff slips. The employees were not given any specific reason as to why they were being laid off; however, during the next week, the employees were given layoff slips which stated that they were being laid off for economic reasons. The employees were given their layoff slips by Williams, who did not otherwise explain the economic reasons for their layoff. Approximately 2 weeks after the layoff of the auto shop employees, laid-off employee Eric Picklesimer spoke with Dale Mosley, supervisor at the farm, at Respondent's office. Mosley told Picklesimer that the employees "shouldn't have done it," and that they "messed things up by what we had done."

The Farm

Van Cope was a truck driver and part-time mechanic who worked at the "farm." He along with other employees had signed authorization cards with the Union in January 1980. After Respondent had learned that the employees had signed cards for the Union, Supervisor Mosley asked the employees why they did not discuss the matter with him and Williams to try to work something out. Sometime in April 1980, Cope had a conversation with Mosley in the presence of other employees who worked at the farm. The employees were concerned about what might happen to their jobs in view of the recent auto shop layoff and their pending representation election. Cope acted as the spokesman for the group and began the conversation by asking Mosley what would happen to the employees at the farm. Mosley replied by saying that he had been told that the employees would all get their "DCM papers as soon as your name's been voted yes." It was understood that "DCM" stood for "Don't Come Back Monday." Cope persisted by asking Mosley if the employees were going to be fired, and Mosley responded that they would not be fired but would be shut down. Cope continued the conversation by asking Mosley if that was what happened at the auto shop. Mosley replied that he was not going to say that the Union did not have anything to do with it, but that a woman had been threatening a lawsuit against Respondent concerning trespassing or something. On a subsequent occasion, Cope discussed the Union with Mosley at which time he told Mosley he was in favor of the Union so that the employees could get the money and benefits that they deserved.

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[1] The Charging Parties' testimony in this respect was not rebutted and Rogers was not called as a witness by Respondent.

An election was conducted on July 31, 1980. Three farm employees, James Pennington, David Griffith, and Cope, voted ballots which were known to be for the Union because of challenges to the other ballots.

Cope worked from Friday, Au9ust 22, until approximately 4 a.m. Saturday morning, driving a piece of equipment from one of Respondent's mines to another. Around 11 a.m. Saturday he went to the office to get his paycheck. Mosley gave Cope his paycheck with an attached layoff slip that stated that he would be terminated and placed on temporary layoff until further notice due to a reduction in the work force. Cope reacted angrily and made a statement about being worked all day and night before being laid off. In response, Mosley stated that Cope did not have to worry about the matter because he would never work there again. One other employee, Griffith, also was laid off on Auqust 23. However, Griffith was recalled about 2 or 3 weeks later. After his recall, Griffith performed work which Cope had performed. Employee Pennington, who performed the same type of work, was not laid off on August 23 even though he had less seniority with Respondent than Cope. Cope was never recalled.

Respondent's economic information

Respondent's financial vice president, Roy Debo, presented the Company's recent financial background which in 1979 was described as "unbelievable" due to a lack of records and a lack of fundamental financial organization. At that time, when Debo first joined the Company, Rebel was composed of 10 to 12 operating companies and a financial analysis revealed that: ". . . they were all losing money very, very rapidly."

In the fall of 1979, Debo closed the Company's West Virginia auto shop as well as a deep mine operation and one of its strip mine operations. Also, 15 percent of the Company's vehicles were eliminated over a 6-month period and the Company was put on a cash operating basis. During October 1979, an oral recommendation was made that the auto shop at Prestonsburg be closed; however, the owners apparently chose not to do so and instead, during December 1979, moved the facilities several miles to Paintsville. Although it was confronted with a $750,000 delinquent tax lien by the Internal Revenue Service, a number of lawsuits by creditors, and some equipment repossession, Respondent was able to obtain some refinancing and restructuring of its financial affairs. During the first 8 months of 1980, Rebel and its subsidiaries laid off employees as follows: 16 in January, 6 in February, 10 in March, 35 in May, 12 in June, and 133 in August.

In early February 1980, Jim Hoskins, the company accountant, was requested to analyze the cost of continuing to operate the Paintsville auto shop as opposed to contracting the work out to independent businesses. A written report purportedly was submitted in late February.[2] It concluded that a cost savings of approximately $58,000 a year could be obtained by closing the auto shop and contracting the repair work to outside sources. According to Hoskins, this savings would be further increased by savings on insurance, and overhead in addition to utilities, telephone, and rent. The study assumed weekly union wages for 480 hours (eight workers at 40 regular hours, $10.50 an hour, and 20 overtime hours $15.75 an hour, plus union benefit cost) compared to 400 hours a week for outside sources at $18.50 an hour. No analysis was made of actual auto shop cost nor was any recognition made of the fact that the employees were not paid union wages and in fact were paid on straight salary for a 6-day workweek which regularly exceeded 60 hours a week with no additional compensation for hours worked beyond 40 hours a week or 8 hours a day.

Discussion

Upon a review of the briefs and the entire record, I am satisfied that the evidence presented by the General Counsel has established by a preponderance of the evidence that Respondent has engaged in unfair labor practices in violating Section 8(a)(1) and (3) of the Act.

Respondent, through its president, expressed intentions to avoid collective-bargaining obligations to its repair shop employees by the threatened closing of the auto shop facilities. Respondent knew of the union interest of the involved employees and Respondent's supervisors knew of and expressed the Company's union animus regarding the repair shop employees. There is no real dispute regarding the factuality of the statements made by Respondent's officials, and, when such statements are read in the context of the prounion interest and activities of the auto shop employees, the conclusion properly may be reached that the statements constituted threats of job loss designed to influence the votes and union activities of the employees. Accordingly, I conclude that Respondent has violated Section 8(a)(1) as alleged.

Respondent's principal defense is directed at the 8(a)(3) allegation. This defense is based on a claim that the closing of the auto shop and resulting layoff of employees was due to economic necessity, uninfluenced by any union animus. Although Respondent has supplied general testimony indicating that the Company (including its component operations) had financial difficulties in 1979, there is no specific showing of the actual financial condition of the Company or of the auto shop operation. Respondent did present a theoretical analysis of operation at union wage levels; however, no attempt was made to show actual or computed cost based on the facilities' actual operating practices. The use of union scale for the theoretical calculation was not called for in light of the Union's expression of willingness to negotiate a contract separate from the National Bituminous Coal Wage Agreement. Moreover, the study was not completed until after the union petition had been filed and after Respondent clearly was aware of the employees' union interest. I conclude that Respondent's cost analysis actually is indicative of a predisposition regarding unionization of the auto shop; that the analysis was made because of the union campaign; and that the resulting conclusions drawn by the Respondent are not reliable or believable indications that would support Respondent's assertions that the auto shop operations were closed due to economic necessity.

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[2] The report, Resp. Exh. 2, is undated.

The record otherwise shows that Respondent felt economically justified in moving the repair shop and keeping it in operation as long as it could continue to pay its employees a flat salary for a regular 60-hour plus workweek. And, despite Respondent's recognition of the Union for its mining production and maintenance workers, the record otherwise shows that it held an antiunion attitude regarding its repair shop operations during the general period of time prior to the closing of the auto shop.[3] The record persuasively shows that Respondent would have kept the auto shop in operation as long as it could have continued nonunion operations and that the reason for closing was to avoid collective bargaining with the Union which might result in anticipated higher cost of operation. Under these circumstances, I conclude that there existed specific union animus which was the motivating factor for the closing of the auto repair shop and the resulting layoff of the involved employees; that Respondent has not shown good cause for the closing of the auto repair shop; and that the employees would not have been discharged, despite possible overall company financial problems, except for their prounion activities. Accordingly, I further conclude that Respondent violated Section 8(a)(3) as alleged.

With respect to the discharge of employee Cope, I conclude that Cope was known by his supervisor, Mosley, to be a union advocate at least since April 1980 and that Cope acted as spokesman for the "farm" employees at such time. Cope was laid off without warning after a period of heavy work, only 3 weeks after his July 1980 vote in favor of union representation. A less senior employee was not laid off and another employee was laid off but recalled 3 weeks later to perform work Cope had performed. Although both of these other employees also had voted for the Union, they had not been active spokesmen.

Respondent asserts that Cope's layoff was for economic reasons and that it was consistent with a large number of other layoffs during the same general time period; however, Cope was treated differently than the other employees who shared a similar background, and the main distinguishing factor was his outspokenness on behalf of the Union.[4] Respondent, through remarks made to Cope by his supervisor and as otherwise indicated above, is shown to have held negative feeling regarding union representation for its nonunion operations. Accordingly, I conclude that the predominant reasons for Cope's layoff (and lack of recall) were his union sympathies and activities and I conclude that Respondent violated Section 8(a)(3) as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to close the auto repair shop before it would sign a union contract and by telling employees at the farm location that they would, in effect, be fired if they voted for the Union in the scheduled election, Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights and engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By laying off employees Glen Allen, Mickey Lawson, Gary Ferguson, Robert Sturgill, Sam Amos, Eric Picklesimer, and Van G. Cope because of their activities in support of the Union, Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having concluded that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action as set forth below to effectuate the purposes and policies of the Act.

Under circumstances involving the unlawful shutdown of a specific operation and termination of the personnel therein, it may be considered to be desirable that a respondent be required to restore the *status quo ante*. The remedy can be an order requiring the reopening of a facility as well as making employees whole for any loss of earnings or other benefits. See *Capitol Chrysler-Plymouth of Montgomery*, 242 NLRB 1274 (1979). Here it is considered necessary to require that Respondent offer immediate and full reinstatement to Glen Allen, Mickey Lawson, Gary Ferguson, Robert Sturgill, Sam Amos, Eric Picklesimer, and Van G. Cope to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, and make them whole for any losses they may have suffered as a result of the discrimination against them in accordance with the method set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

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[3] This attitude also was apparent early in 1979 at a point in time prior to the Respondent's financial vice president's recommendation that the shop be closed.

[4] On cross-examination of Cope, questions were asked regarding certain accidents; however, there is no evidence to indicate that any cause existed for termination because of these occurrences or that they in fact played any part in the termination. No complaints were made about his work and he was given a pay increase a few weeks before his discharge.

Based upon the entire record, findings of fact, conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order:

ORDER[5]

The Respondent, Rebel Coal Company, Inc., Auxier, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of future employment if they pursue union affiliation for purposes of collective-bargaining representation.

(b) Laying off employees or otherwise discriminating against them because of their actions in pursuing union affiliation for purposes of collective- bargaining representation.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Glen Allen, Mickey Lawson, Gary Ferguson, Robert Sturgill, Sam Amos, Eric Picklesimer, and Van G. Cope immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges previously enjoyed, and to make them whole for any loss of earnings they may have suffered as a result of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Auxier, Kentucky, and "farm" facilities, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Parker Hannifin Corporation *and* United Steelworkers of America, AFL-CIO-CLC. Case 10-CA-15175

November 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 14, 1980, Administrative Law Judge Irwin H. Socoloff issued the attached Decision in this proceeding. Thereafter, the General Counsel filed limited exceptions and a supporting brief, the Charging Party filed a statement adopting the position of the General Counsel, and Respondent filed a brief in answer to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, briefs, and the statement of position and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Parker Hannifin Corporation, Huntsville, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

MEMBER JENKINS, dissenting:

I agree with the majority that Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities and by threatening an employee with discharge if he cooperated with a Board investigation. Contrary to my colleagues, however, I believe that Respondent's reasons for issuing a written warning to employee Barbara Blanchard and for discharging her were pretextual, and that Respondent discriminated against Blanchard because of her union activities, in violation of Section 8(a)(1) and (3) of the Act.

The Administrative Law Judge found, and I agree, that the General Counsel established a *prima facie* case that Blanchard's discharge was unlawful. The background facts are as follows.

An election was held at Respondent's Huntsville, Alabama, plant on September 12, 1979.[1] The Union[2] lost the election, but did not file objections, and the Regional Director for Region 10 issued a Certification of Results of the Election in that case.

Barbara Blanchard was a leading union adherent during the election campaign, and Respondent knew of this leadership role. Blanchard arranged and attended union meetings, distributed and collected authorization cards, and wore union paraphernalia during the election campaign.[3] Indeed, Respondent interrogated Blanchard concerning her union activities. Supervisor Carter questioned her about how many signed authorization cards the Union had obtained, and why she wanted a union in the plant. Blanchard testified that Carter interrogated her every few days until the date of the election. It was this testimony of Blanchard's that the Administrative Law Judge credited as "crisp, detailed and convincing," and based on it he found Respondent unlawfully interrogated Blanchard as alleged.

Respondent did not terminate Blanchard until after the September election. On October 13, Plant Manager Still gave Blanchard a "final warning notice," which stated that "any further instances like this will result in termination." The "further instances" mentioned in the notice referred to an attachment, which recited two separate events, on October 11 and 12, respectively, when Supervisor Thomas observed Blanchard at employee Bishop's machine, and requested her to return to her work area. The attachment also noted that, although in her two previous performance reviews Blanchard had been warned about spending too much time away from her work station, her supervisor was still required to remind her to remain at her work station.[4] Almost 2 weeks later, on October 25, Supervisor Carter told Blanchard on three separate occasions to leave Bishop's machine and said to her, "Let's go." Blanchard remained for a moment to continue the conversation, at which time Carter told her she was terminated. Carter made a report of the incident, which he gave to Still who then met with Blanchard and Carter, and discharged Blanchard for continually staying away from her machine.

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[1] All dates are in 1979 unless otherwise indicated.

[2] United Steelworkers of America, AFL-CIO-CLC.

[3] Respondent suggests that Blanchard's union leanings were confusing because, near the end of the campaign, she wore "vote no" buttons. However, Blanchard continued to wear prounion stickers and buttons, even while wearing the "vote no" buttons.

[4] The two incidents mentioned in the final warning notice were reported by Thomas, who was not Blanchard's usual supervisor. The "previous reviews" noted in the warning will be discussed below.

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These facts show, as the Administrative Law Judge found, that Respondent knew of Blanchard's activities and harbored union animus which was particularly directed toward Blanchard through Respondent's repeated interrogations of her. These findings notwithstanding, the Administrative Law Judge concluded that Respondent rebutted the General Counsel's *prima facie* case by showing that Blanchard was not discharged for union activity, but because of her refusal to stay at her post and her defiance of supervisory orders to return to work. In so doing the Administrative Law Judge found no evidence of disparate treatment or pretextual reasoning for the warning or her discharge. Analysis of the relevant facts leads me to the conclusion that the Administrative Law Judge incorrectly decided this issue.

Blanchard worked for Respondent from January 1977 until her discharge at the end of October 1979. She worked under Jack Pruitt in the chucker department as a machine operator until April 1979, when she became an automatic bar machine operator under Carter's supervision. It was in April that Blanchard contacted the Union and shortly thereafter in May that Carter began interrogating her on a regular basis. The evidence reflects that Blanchard was generally a good employee, save for one deficiency. Thus, in various performance reviews in 1978 and 1979, Blanchard's supervisors noted that she needed to stay in her work area more. However, these reviews also indicate that if Blanchard's "problem" was longstanding, it was also long tolerated. Pruitt verbally warned Blanchard when she was in the chucker department about being away from her machine. Carter also warned her when she became an employee in the automatic department. And both supervisors spoke to her on other occasions to remind her to return to her machine. Yet *no* discipline was ever instituted against her. Indeed, Respondent had a very liberal policy on breaks; whatever the rule Respondent had on the issue, the practice was for employees to take frequent breaks as long as they were of short duration; i.e., 5 or 10 minutes. Furthermore, there was never any discipline imposed on any employee for breaking any company rule on breaks or other matters. Indeed, the only warning notices besides the one issued to Blanchard also were issued in October 1979. Both of these were for employees in the chucker department and indicated "production" as the problem area. Each employee had been warned on August 24 about production and staying at his machine on that date, and the two notices issued thereafter indicated the same problem existed and, if there were no improvement, "disciplinary action will be taken." These notices contrast sharply with Blanchard's "final warning" notice, which checked off "personal conduct" and "indifference," not "production" as the problem, and which was labeled a "final" warning notice.[5]

Blanchard was singled out in more ways than one. Thus, although Blanchard was timed by Thomas to see how long she remained away from her station, no other employee had ever been timed.[6] Further, Blanchard was not the only employee to report back to her position after lunch on the date of discharge. The Administrative Law Judge himself found that at least five or six employees were still away from their work station some 7 minutes after the break bell had rung. Yet not one other employee was warned or otherwise disciplined for such absence.

These facts clearly indicate that Respondent has seized on these October incidents as a pretext to rid itself of an outspoken union adherent. Its long tolerance of Blanchard's behavior prior to the union campaign[7] and its disparate treatment of Blanchard indicate that its proffered reasons for issuing the warning and for discharging Blanchard were not the real ones. In addition, Respondent's union animus can hardly be overlooked. Respondent interrogated Blanchard about her union activities and the sympathies of other employees. Particularly telling is Respondent's naked threat to employee Howard, whom Blanchard had requested to give a statement to the Board, that he would be discharged if he cooperated with the Board's investigation. Respondent's knowledge of Blanchard's union activities, and the above course of conduct, establishes the General Counsel's *prima facie* case. As demonstrated, Respondent's defense is clearly pretextual. Accordingly, I would find that Respondent violated Section 8(a)(3) and (1) of the Act.

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[5] It should be noted these three notices are the *only* ones issued by Respondent from September 1978 to October 1979. A termination notice was issued to an employee in October 1978, but this was for a probationary employee who had been previously terminated and rehired. He was discharged for being away from his work station and producing 1,760 scrap parts. This situation is quite different from that of Blanchard.

[6] Pruitt stated that he had trouble in his department in February 1979 with employees' being away from their machines too long. He stated that he told them to stay closer to their machines, but there is no indication that employees received warnings or that they were timed. Carter also testified that he had ordered employees to return to their jobs, and that only Blanchard gave him arguments.

[7] *East Towne Chrysler Motors, Inc.*, 238 NLRB 1379 (1978).

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon a charge filed on October 31, 1979, by United Steelworkers of America, AFL-CIO-CLC, herein called the Union, against Parker Hannifin Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 10, issued a complaint dated December 10, 1979, alleging violations by Respondent of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, hearing was held before me in Huntsville, Alabama, on June 2 and 5, 1980, at which the General Counsel and Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record[1] in this case and from my observations of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation, has an office and place of business in Huntsville, Alabama, where it is engaged in the manufacture and sale of steel fittings. During the year ending December 31, 1978, a representative period, Respondent, in the course and conduct of its business operations, sold and shipped from its Huntsville, Alabama, facility finished products valued in excess of $50,000 directly to customers located outside the State of Alabama. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

On July 18, 1979, the Union filed a petition with the Board, seeking an election among Respondent's Huntsville, Alabama, plant employees (Case 10-RC-11835). Thereafter, the Board, on September 13, 1979, conducted an election which was lost by the Union by a vote of 230-to-84. Postelection objections were not filed and, accordingly, on September 21, the Regional Director for Region 10 issued a Certification of Results in that case.

Some 6 weeks after the election, on October 25, 1979, Respondent discharged employee Barbara Blanchard, one of the principal supporters of the Union during the preelection period. In this proceeding, the General Counsel contends that Blanchard was fired because of her union activities, which were well known to Respondent, in violation of Section 8(a)(3) of the Act. Respondent asserts that it discharged Blanchard solely because of her proclivity to leave her work area for lengthy periods of time and her defiance of the instructions of her supervisors to return to work. Also at issue is whether Respondent violated Section 8(a)(1) of the Act by interrogating Blanchard concerning her union membership, activities, and desires and the union membership, activities, and desires of her fellow employees; threatening Blanchard that it would move its facility if the employees opted for union representation and threatening employee Stanley Howard that he would be discharged if he cooperated with the Board's investigation of the Blanchard discharge. The General Counsel further contends, and Respondent denies that when, on October 13, 1979, Respondent issued a written warning notice to Blanchard, some 12 days before her discharge, it did so for unlawful antiunion reasons.

B. *Facts*[2] *and Conclusions*

1. The 8(a)(1) allegations

Barbara Blanchard was employed by Respondent from January 1977 to October 1979 when, as noted, she was discharged. Until March 1979, she worked as a machine operator in the chucker department under the supervision of Jack Pruitt. Thereafter, Blanchard performed as a machine operator in Respondent's automatic department where Billy Carter served as her supervisor.[3]

In April 1979, Blanchard and her brother contacted a representative of the Union and they scheduled employee meetings. During the course of the ensuing representation campaign, Blanchard attended union meetings and distributed authorization cards to her fellow employees. In all, she collected 50 to 100 signed cards. At work, she wore some six or seven union buttons, for a period of months, on her shirt and attached to her purse. She also wore a Steelworkers bumper sticker across her rear.[4]

Blanchard testified that, early in May 1979, Carter asked her how many signed cards she had obtained. He further inquired as to why she wanted a union in the plant. According to Blanchard, Carter, thereafter, and until the election, asked her those same questions every few days. Carter, in his testimony, denied that he ever questioned Blanchard with respect to her union activities or desires.

According to Blanchard's further testimony, in early October, following the election, she visited General Manager Don Gerosa to protest the contents of her most recent employee review. When Gerosa refused to discuss that matter before first speaking to her supervisor, Blanchard stated that that was one reason a union was needed in the plant, so that employees who had complaints would be heard. At that point, Blanchard testified, Gerosa stated "something to the effect of, 'I've been wanting to talk to you about why you've been wanting a union in here.'" After further discussion, "He went on to remind me of the large plot of land down in Jacksonville, Alabama, that Parker-Hannifin had just bought and was building a plant on and told me it was three times the size of the place that we have here in Huntsville, and finally ended by saying that Parker-Hannifin in Huntsville wouldn't ever become union." Gerosa, in his testimony, confirmed the fact of the foregoing meeting with Blanchard but denied making the remarks attributed to him by Blanchard. Thus, he testified that he did not ask Blanchard why she supported the Union or stated or implied that the Huntsville plant would be moved if the Union gained representation rights. Gerosa explained that construction of the new Jacksonville plant had begun in the fall of 1978 and completed by August 1979, when that plant became operational. Further, according to Gerosa's uncontradicted testimony, during that entire period, and during the election campaign itself, he repeatedly assured the unit employees that, while certain equipment would be moved from Huntsville to Jacksonville, not a single job would be lost at Huntsville.

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[1] Respondent's post-hearing motion to amend, in certain respects, the transcript of proceedings, is hereby granted.

[2] The factfindings contained herein are based on a composite of the documentary and testimonial evidence presented at the hearing. Where necessary to do so in order to resolve specific testimonial conflict, credibility resolutions have been set forth *supra*.

[3] The complaint alleges, and the answer admits, that Pruitt, Carter, and Respondent's general manager, Don Gerosa, were, at all times material herein, supervisors within the meaning of Sec. 2(11) of the Act.

[4] For the final 2 weeks of the campaign, in addition to the union insignia, Blanchard wore a "Vote No" button.

Employee Stanley Howard testified that on November 8 he informed Supervisor Pruitt that Blanchard had requested that he, Howard, provide a statement to the National Labor Relations Board. Howard asked Pruitt if he thought it would be wise to do so. According to Howard, Pruitt stated "that if it was him, he wouldn't volunteer any information. He'd wait until I got subpoenaed because I'd get fired." Pruitt's version of the conversation was quite different. He testified that, when Howard first approached him about the matter, he told the employee that he, Pruitt, could not get involved in it. Pruitt then sought guidance from Gerosa and he testified that 10 minutes after his first conversation with Howard he approached the employee and told him that if he, Howard, volunteered to sign a statement chances were he "might have to go to court." Pruitt denied issuing a threat to Howard but, rather, claimed that he told him that it was "up to him to do what he wanted."

As Blanchard, Howard, Carter, Pruitt, and Gerosa all appeared to me to be testifying in a truthful manner, I am unable to resolve the foregoing conflicts in testimony by resort to demeanor findings. Blanchard's testimony concerning the alleged interrogations by Carter was crisp, detailed, and convincing and I credit it over the general denial of Carter. On the other hand, Blanchard testified in much more vague fashion concerning her meeting with Gerosa. In light of Gerosa's uncontradicted explanation of the context of the conversation, his denial that, during this postelection meeting, he stated or implied that the plant would be moved has the ring of truth. I likewise credit his testimony denying that he questioned Blanchard concerning her reasons for having supported the Union. Finally, I credit Howard, an apparently disinterested witness, with respect to his testimony concerning the November 8 incident. Thus, I find Howard's version of that event clearer and more convincing than the vaguer narration of Pruitt.

Based on the foregoing, I find that Respondent, by its supervisor, Carter, violated Section 8(a)(1) of the Act by interrogating Blanchard concerning her union activities and sympathies and those of her fellow employees. Respondent further violated that section of the Act by threatening employee Howard, through Supervisor Pruitt, with discharge if he cooperated with a Board investigation.

2. The Blanchard discharge

In light of Blanchard's activities on behalf of the Union, as detailed, *infra*; Carter's repeated interrogations of her concerning those activities and the testimony of several of Respondent's officials that they knew, during the course of the campaign, that Blanchard was a leading union adherent, I conclude that the General Counsel has established a *prima facie* case of unlawful discharge under the Act. However, as I am entirely persuaded by the evidence offered by Respondent in defense, as set forth below, that Blanchard was discharged for job related, and not union related, reasons, I further conclude that her firing was not violative of the statute.

Respondent permits its machine operators to take work breaks as they wish, for purposes of visiting the bathroom, the soda and candy machines, or to say "hello" to another worker. Several of Respondent's witnesses testified that the employees have been instructed to limit such breaks to a duration of 5 minutes. Blanchard herself described the time limitation as "a reasonable period" and "maybe about five minutes." Yet, numerous employee and supervisory witnesses in this case testified that, not only did Blanchard take many more breaks than the other employees but that those breaks often lasted for periods of 30 minutes and longer. Employee Curtis Blackwell, who frequently was required to oversee Blanchard's machines while she was "on break," credibly testified that "there's been days where she was gone four hours out of eight." Thus, in the months preceeding the discharge, Blackwell complained to his supervisor, Billy Carter, that he, Blackwell, was spending so much time keeping watch over Blanchard's machines, while she was away "on break," that he did not have time to adequately perform his own duties.[5]

Performance reviews of Blanchard for the years 1978 and 1979, issued by her supervisors, uniformly contained a notation that the employee was not spending sufficient time in her work area. Early in 1979, while she still worked in the chucker department, Blanchard received a verbal warning from her then supervisor, Pruitt, for failure to stay at her machine. In the spring of that year, after transferring to the automatic department, she received a verbal warning from Supervisor Carter for being out of her work area for long periods of time. In addition, according to the credited testimony of Pruitt and Carter, they found it necessary frequently to speak to Blanchard concerning her proclivity to stay away from her work area and to instruct her to return to her job duties. Carter further testified that Blanchard often refused to accept such directives. Blanchard, in her testimony, conceded that there were occasions when she would not, when so instructed, return to her work station, but would, instead, "ask to finish my business."

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[5] Although machines in the automatic department are not hand-fed, the presence of the operators is essential as they are required to check the finished products for defective parts. If the machine is running such parts, the operator must sharpen the tools or make other adjustments. Operators must also watch the machines to prevent damage to same as they may, among other things, catch on fire.

Carter credibly testified that in the months preceding her discharge Blanchard exhibited a heightened tendency to remain away from her job duties. Thus, in September, Carter had to speak to Blanchard as many as two or three times in a day about this subject. That month, he gave her another verbal warning for the same offense. Employee Mark Bishop, a machine operator in the chucker department, testified that, during this period, Blanchard would visit him, at his work station four or five times per night, and stay for periods of up to 20 minutes, or until instructed by a supervisor to return to her machine. This practice continued until the night she was discharged.

On October 13, Blanchard received a "final warning notice" from Plant Manager Jack Stall after Stall was informed, by substitute Supervisor James Thomas, that Blanchard was staying away from her work station, at Bishop's machine, thus causing employee Blackwell to spend his time performing her job functions. On October 25, during the first half of the shift, Carter instructed Blanchard on three separate occasions to leave Bishop's machine and return to her work area. Immediately after the lunchbreak, when Carter, for the fourth time that day, found Blanchard at Bishop's machine, he approached her and said, "let's go." She, nonetheless, continued her conversation with Bishop, at which point, Carter told her that she was terminated.[6] The supervisor made notes of the occurrences of that day and delivered same to Stall. At 10 p.m. that night, Stall met with Blanchard and Carter, read to Blanchard the notes that Carter had prepared, and discharged the employee for continually staying away from her machine.

In light of the above, I conclude that the General Counsel's *prima facie* case has been rebutted and that Blanchard was warned, and then discharged not because of her union activities, but because, as Stall testified, of her consistent refusal to stay at her work area and do her job and her defiance of the instructions of her supervisors to return to work.[7] Contrary to the contentions of the General Counsel, the record does not contain evidence showing that Blanchard was treated differently than other, similarly situated, employees. Nor does the nature of Blanchard's dereliction, or the manner in which Respondent chose to deal with same, suggest that it was merely seized upon as a pretext. The discharge was, thus, not violative of the Act.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent Parker Hannifin Corporation is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating an employee concerning her union membership, activities, and desires, and the union membership, activities, and desires of other employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By threatening to discharge an employee if he cooperated with a Board investigation, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not otherwise violated the Act, as alleged in the complaint.

Upon the foregoing findings of fact, and conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Parker Hannifin Corporation, Huntsville, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their union membership, activities, and desires, and the union membership, activities, and desires of other employees.

(b) Threatening to discharge employees if they cooperate with a Board investigation.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act to engage in concerted activities for their mutual aid and protection, or to refrain from such activity.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

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[6] At that time, about 7 minutes after the bell had rung, signifying the end of the lunchbreak, some five or six employees had not yet returned to their work stations.

[7] In reaching this conclusion, I do not credit Blanchard's assertion that, after receiving her final warning notice, she "tightened up considerably" on her practice of leaving her work area, prompting Carter to tell her that she had made improvement.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Post at its facility located in Huntsville, Alabama, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their union membership, activities, or desires, or the union membership, activities, or desires of other employees.

WE WILL NOT threaten to discharge our employees if they cooperate with a Board investigation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

PARKER HANNIFIN CORPORATION

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Bricklayers and Masons Union, Local No. 2, International Union Bricklayers and Allied Craftsmen, AFL-CIO *and* Jerome Ferretti, and MacFarlane & Hays Co. Case 7-CB-4726

November 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 1, 1981, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Bricklayers and Masons Union, Local No. 2, International Union Bricklayers and Allied Craftsmen, AFL-CIO, Farmington, Michigan, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 1(b):

"(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act."

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[1] In par. 1(b) of his recommended Order, the Administrative Law Judge used the broad injunctive language "in any other manner." Respondent herein has neither demonstrated a proclivity to violate the Act, nor engaged in conduct so widespread as to demonstrate a general disregard for the employees' fundamental statutory rights. Thus, in our opinion the broad injunctive language is not appropriate, and we have modified the recommended Order accordingly. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Member Jenkins would compute the interest due on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was heard pursuant to due notice on October 29, 1980, in Detroit, Michigan.

The charge was filed on March 19, 1980. The complaint in this matter was issued on May 2, 1980. The issues concern whether Respondent violated Section 8(b)(1)(A) and (2) of the Act by causing or attempting to cause MacFarlane & Hays Co. to terminate the employment of Jerome Ferretti because he was not a journeyman member of the Union.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel and Respondent and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

The facts herein are based on the pleadings and admissions therein.

MacFarlane & Hays Co. is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan.

At all times material herein, MacFarlane & Hays Co. has maintained its principal office and place of business at 25155 Haggerty Road, Farmington, Michigan, herein called the Farmington place of business. MacFarlane & Hays Co. is, and has been at all times material herein, engaged in general construction business at various jobsites throughout the United States.

During a 1-year representative period, MacFarlane & Hays Co., in the course and conduct of its business operations, performed services valued in excess of $500,000 of which services valued in excess of $50,000 were performed in and for various enterprises located in States other than the State of Michigan.

As conceded by Respondent and based on the foregoing, it is concluded and found that MacFarlane & Hays Co. is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED[1]

Bricklayers and Masons Union, Local No. 2, International Union Bricklayers and Allied Craftsmen, AFL-CIO, herein called Respondent, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

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[1] The facts are based on the pleadings and admissions therein.

III. THE UNFAIR LABOR PRACTICES

A. *Preliminary Issues and Agency Status*[2]

At all times material herein, Joseph Chadwick, president,[3] and Dennis Bouchard, steward, have been and are now agents of Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act.

The General Counsel alleges and Respondent denies that Donald LeMarbe, the apprentice coordinator for the Joint Apprenticeship Committee, a committee set up by contractual agreement between the Detroit Mason Contractors' Association and other associations and the Union, is an agent for Respondent Local 2. Neither the General Counsel's brief nor Respondent's brief address the issue of Respondent Local 2's responsibility for acts of Donald LeMarbe. Nor did the evidence presented appear to squarely touch the elements of such issue.

As I view the overall facts, it is not really necessary to determine if LeMarbe is an agent of Respondent Local 2. The facts reveal that President Chadwick's views as to the usage of apprentices on firebrick work were well known. Respondent Local 2's actions as regards Ferretti's employment on firebrick work on March 12-14, 1980, was of such a nature that it would be reasonably foreseen that LeMarbe would be contacted and respond as he did. As indicated later, herein, the overall facts clearly reveal that Respondent Local 2, by Chadwick and Bouchard, attempted to cause and caused the termination of Ferretti by MacFarlane & Hays Co.

I do not find that the facts establish that LeMarbe is an agent of Respondent Local 2. The facts reveal that the Joint Apprenticeship Committee is composed of *trustees* of equal number from employers and the Union and that the apprenticeship coordinator is employed by said committee. His responsibilities, duties, and directions flow from the "Bricklayers' Apprenticeship Committee Standards" and from such trustees. This would not constitute him as an agent for Respondent Local 2. I note that LeMarbe, in his testimony, indicated that he construed that his assignment of or permitting of apprentices to work in the geographical jurisdiction of a local was based on consideration of prerogatives of the local's business agent and that such agents were in effect his bosses. This may indicate that LeMarbe considered himself in effect bound by the views of the Local's business agent. It does not establish that said Local had made him an agent. Accordingly, the allegation that LeMarbe was an agent of Respondent Local 2 is recommended to be dismissed.

B. *The Union-Employer Relationship*[4]

During the time relevant to this proceeding there existed a collective-bargaining agreement negotiated by the Detroit Mason Contractors' Association on behalf of its members with the Metropolitan Detroit Bricklayers District Council, International Union of Bricklayers and Allied Craftsmen, AFL-CIO. Such agreement was effective under its terms from July 1, 1977, to May 31, 1980. The above council was referred to as the Union and was composed of Locals 2, 26, 29, and 35 of said referred to International union.

Briefly summarized, said agreement provided in effect that the Association was to keep the Union advised of its membership and of the location and addresses of its member-employers. Said agreement provided that foremen would be responsible for the hiring and firing of bricklayers; that there would be a steward selected by the Union and on each job that such steward would be a member of the local union having geographic jurisdiction over the jobsite, and that such steward have the duty to enforce the terms of the agreement.

The agreement provided that:

> Section 2. In the employment of workmen to perform the various classifications of labor covered by this Agreement, the Employer shall give preference to those workmen who have previously worked for him within the geographic area of the Union, those who have either completed or are currently part of an approved apprenticeship training program, those who possess equivalent ability and are competent workmen, and those who have been previously employed in the Metropolitan Area for a period in excess of two years as brick masons.
>
> Section 3. The Employer agrees to notify the Union before starting any job within the geographic jurisdiction of the Union. All opportunities for employment shall be referred to the local having jurisdiction.

The agreement also provided that it would be administered by the Union's constituent locals and that neither the Union nor its locals would hinder any employer in transferring employees from job to job within the metropolitan area.

Further, the agreement provided for implementation of an apprentice program, for contributions thereto, for a reduced pay scale for apprentices, that the employers be permitted to employ as many apprentices as the Joint Apprenticeship Committee determines, and that the employer shall employ one apprentice for each 10 journeymen bricklayers on his payroll unless there were no apprentices indentured to the Joint Apprenticeship Committee unemployed, or unless there were no apprentices unemployed.

The apprenticeship program, binding upon the employers by the above agreement, was based on a further agreement referred to as "Bricklayers' Apprenticeship Committee Standards." Thus, the joint apprenticeship committee consisted of five members each from the "Association" and from the "Union." Said standards further set forth that the committee and the apprentice coordinator had certain duties, including the following:

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[2] The facts are based on the pleadings and admissions therein, unless otherwise indicated.

[3] The facts establish that Chadwick is also business manager of Bricklayers and Masons Union, Local No. 2, International Union Bricklayers and Allied Craftsmen, AFL-CIO (herein sometimes called Respondent Local 2).

[4] The facts relating to the union-employer relationship and to the events of March 12-14, 1980, are based on a composite of exhibits, stipulations, and credited testimony of all witnesses. Where testimony of any witness is inconsistent with the facts found, it is discredited as specifically indicated or upon a consideration of logical consistency of all of the facts.

ARTICLE III

Duties of the Committee and the Apprentice Coordinator

> To survey and determine the need for bricklaying and stone masonry apprentices in the Detroit Metropolitan Area, along with potential and existing employment opportunities affording on-the-job training opportunities, as well as need for school training facilities, with a view to practical correlation of these factors.
>
> To establish training objectives with respect to both in-school and on-the-job training of bricklaying and stonemasonry apprentices; and to develop and maintain a school curriculum, and to scrutinize instructional processes on the job and in the school in such a way as to determine that established training objectives are realized.
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> * * * * *
>
> To place apprentices under agreement to a contractor and to the Committee and to supervise the employment and on-the-job training of bricklaying and stonemasonry apprentices in order to insure that they are afforded reasonably continuous employment and such diversity of work in the various phases of the trade as may be possible.
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> * * * * *

The 1977-80 collective-bargaining agreement *supra*, contained a listing of employers who were members of the Detroit Mason Contractors' Association. Such listing revealed that Monte Costella & Co. was a member of said Association. Such listing does not reveal MacFarlane & Hays Co. to be a member of the Detroit Mason Contractors' Association. Considering statements by counsel at the hearing relating to the introduction into evidence of the collective-bargaining agreement, the sense of testimony of Brewer, superintendent for MacFarlane & Hays Co., as regards conversations with President Chadwick of Local 2, and the positions taken by the parties in their respective briefs, it appears to be without dispute and clear that at least MacFarlane & Hays Co. had agreed, impliedly or otherwise, to operate in the Detroit area in accordance with such agreement.

C. *The Constitution; "Runaway Apprentice"*

The constitution of the International Union of Bricklayers and Allied Craftsmen, AFL-CIO, had the following provision:

ARTICLE V

> F. An apprentice shall serve his complete term of apprenticeship as provided by the Joint Committee. Any apprentice who leaves employment covered by the terms of any affiliate's collective bargaining agreement without the approval of the Joint Committee, or violates the rules and regulations established by the Joint Committee, shall be subject to discipline by the Local Union, pursuant to the Code of Trials and Appeals promulgated under Article XVI, Section E. If any apprentice refuses to return to work for an employer as assigned or approved by the Joint Committee and accepts employment in any other job or work classification covered in any affiliate's agreement, his Local Union shall forward his name to the International Union on its Monthly Report form and he shall be listed on the IU's records as a "Runaway Apprentice."

Chadwick, Respondent Local 2's president, testified credibly to the effect that the constitution for Local 2 contained a similar provision relating to "Runaway Apprentice."

D. *Implementation of the Apprentice Program*

Donald LeMarbe credibly testified that he served as apprentice coordinator for the Detroit Metropolitan Joint Apprenticeship Committee and Training Program. His credited testimony and the facts as a whole reveal that he implemented said program, excepting as indicated later herein, in accordance with the guidelines of the "Bricklayers' Apprenticeship Committee Standards." Thus, agreements were made whereby certain employers sponsored apprentices, and the apprentices were indentured to said employers. In addition to supervising and checking on the training of apprentices, LeMarbe had the duty to secure new sponsors if needed or to aid in *securing* employment on a temporary basis for apprentices if the sponsoring employer was temporarily out of work for the apprentices. It is noted that the sponsoring letter approved by the apprentice committee for a bricklayer apprentice (to be completed by sponsoring company) sets forth in such letter a statement whereby said sponsoring company asserted, "If we should run out of work, we will notify your committee at once, and request he be placed with another contractor temporarily."

As indicated, LeMarbe generally carried out his duties in accordance with the guidelines of the "Bricklayers' Apprenticeship Committee Standards." The exception to such standards appears to lie in the fact that he construed that the business agents for the several locals had prerogatives. President Chadwick of Local 2 apparently had been a business agent in the past. LeMarbe, in his testimony, revealed that he construed Chadwick to have prerogatives. Despite the fact that LeMarbe construed that the business agents or President Chadwick had prerogatives concerning the apprentice program, Respondent Local 2, by President Chadwick, was the only local union which asserted such prerogatives.

Respondent Local 2's or President Chadwick's prerogative may be said to have been as follows: Apprentices could not work on firebrick unless working for their sponsoring employer. In such regard, it is clear that Chadwick, acting for Local 2, despite his status as a trustee on the joint apprenticeship committee, disregarded the guidelines set forth for said apprentice training program.[5]

E. *Jerome Ferretti's Background, Employment, and Termination*

This proceeding involves the issue of whether Respondent Local 2 attempted to cause or caused the termination of Jerome Ferretti, an apprentice bricklayer, by MacFarlane & Hays Co. on March 12 and 14, 1980.

Jerome Ferretti is the son of Emmit Ferretti, the business agent for Local 35, International Union of Bricklayers and Allied Craftsmen, AFL-CIO, one of the four locals composing the Metropolitan Detroit Bricklayers District Council, International Union of Bricklayers and Allied Craftsmen, AFL-CIO. As noted, Respondent Local 2 is also one of the four locals composing such Council.

Jerome Ferretti, in the spring of 1979, had worked as a laborer for MacFarlane & Hays Co. At such time Sam Brewer, who later became a superintendent for MacFarlane & Hays Co., was working as a bricklayer. Brewer was a member of Local 35, International Union of Bricklayers and Allied Craftsmen, AFL-CIO.

It appears that Jerome Ferretti was either a member of or became a member of Local 35, International Union of Bricklayers and Allied Craftsmen, AFL-CIO, in August or September 1979. In any event, Jerome Ferretti filed an application with Local 35 to become an apprentice, later was interviewed by members of or the committee composing the Detroit Metropolitan Masonry J.A.T.C. Bricklayers' Apprenticeship Committee and was accepted as an apprentice for training.

Thus, on or about September 18, 1979, Jerome Ferretti commenced an apprenticeship as a bricklayer. Around such time, Jerome Ferretti signed an apprenticeship agreement with the Detroit Metropolitan Masonry J.A.T.C. Bricklayers' Apprenticeship Committee. It further appears that Jerome Ferretti commenced working at such time for Monte Costella & Co., a member of the Detroit Mason Contractors' Association. On September 24, 1979, Paul VilleMonte, vice president of Monte Costella & Co., executed a letter, approved by the referred to Joint Apprenticeship Committee, reflecting that said employer was sponsoring Jerome Ferretti as an apprentice and that his starting date as an apprentice was on September 18, 1979.

Jerome Ferretti worked for Monte Costella & Co. from around September 18, 1979, until around or sometime in January 1980. At such time around or in January 1980, Monte Costella & Co. laid Jerome Ferretti off from work. Said employer indicated to Ferretti that it would probably call him back to work later but to find other employment in the meantime if he could.

It is noted that at some point of time between September 18, 1979, and January 1980, Monte Costella & Co. performed work and employed Jerome Ferretti within the geographical jurisdiction of Local 2. Consistent with Local 2's and Chadwick's policy that an apprentice could work for a sponsoring employer, no problems ensued with Local 2.

At some point of time in January 1980 Jerome Ferretti telephoned Sam Brewer and asked if there were any work for bricklayers.[6] The record does not reveal whether or not Brewer made a reply or what such reply was if made. In January 1980, Brewer was a bricklayer and not a supervisor. He may or may not have known of an oncoming job to be performed by MacFarlane & Hays Co. at the Ford Rouge plant or of his oncoming status as superintendent on such oncoming job.

In any event, in February 1980, apparently around February 15, 1980, MacFarlane & Hays Co. made Brewer a superintendent, over bricklayers, for a job at the Ford Rouge plant. This job may be described as a "firebrick" job (concerning a furnace).

Around March 12, 1980, MacFarlane & Hays Co.[7] had 15 to 20 journeymen bricklayers assigned to work at the Ford Rouge plant. Michael DeBerry, a member of Local 2, was the bricklayer foreman. Dennis Bouchard, a member of Local 2, was the steward on the MacFarlane Ford Rouge plant job.

All of the 15 to 20 journeymen bricklayers had previously been employed by MacFarlane; three-fourths of such bricklayers were members of Local 2. The rest were members of Local 35. Most of the journeymen bricklayers worked on a steady basis for MacFarlane. After the MacFarlane Ford Rouge plant job had been reported to the Union and Bouchard appointed as steward by the Union and hired, other employees had been hired by MacFarlane by usage of telephone calls.

After Bouchard had been appointed steward, Foreman DeBerry had told him the day before he hired bricklayers that he was doing so.

On March 12, 1980, before 8:30 a.m., MacFarlane needed to hire some more bricklayers.[8] At such time Superintendent Brewer discussed such need with Foreman DeBerry. Brewer apparently remembered Jerome Ferretti's inquiry about work and suggested to Foreman DeBerry that he hire Ferretti because he had formerly worked as a laborer for MacFarlane. Foreman DeBerry agreed to hire Ferretti. Superintendent Brewer telephoned Emmit Ferretti, Jerome's father and business agent for Local 35. Brewer inquired as to whether Jerome Ferretti was still unemployed. Emmit Ferretti told Brewer that Jerome Ferretti was still unemployed, that Brewer should check with LeMarbe of the joint apprenticeship committee.

On March 12, 1980, around 8:30 a.m., Superintendent Brewer telephoned LeMarbe, apprentice coordinator for the joint apprenticeship committee. Brewer explained that Jerome Ferretti had worked as a laborer for MacFarlane, was unemployed, and that MacFarlane would like to hire Jerome Ferretti. LeMarbe agreed that MacFarlane could hire Jerome Ferretti with the understanding that when his sponsoring employer called him back to work that he would be released to return to such employer.

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[5] As later found, Respondent Local 2 violated Sec. 8(b)(1)(A) and (2) by attempting to cause and causing the termination of employment of apprentice Ferretti. If Local 2's disregard of the guidelines of the apprentice program jeopardizes the governmental sanction of said program, it is believed that compliance with the remedial order provided in this case will be sufficient to correct the cause for such jeopardy.

[6] At some point of time, either in the spring of 1979 or around August 1979, Brewer had learned of Jerome Ferretti's intentions to become a bricklayer apprentice and had promised to help him if he could.

[7] MacFarlane & Hays Co. sometimes hereinafter simply referred to as MacFarlane.

[8] The job involved consisted of "firebrick" work.

Thereafter, Foreman DeBerry telephoned Jerome Ferretti, hired him, and told him to report to work. Following this, Jerome Ferretti reported to work on March 12, 1980, around 10 a.m., at the MacFarlane Ford Rouge plant jobsite. Ferretti reported to work as an apprentice bricklayer.

It is noted that steward Bouchard credibly testified that the foreman told him the day before when bricklayers were going to be hired. His testimony and the overall evidence do not indicate that the foreman told him of the names of the bricklayers who were going to be hired. A composite of all of the credited testimony reveals that Respondent hired bricklayers, notified the steward that bricklayers were being hired, and Bouchard checked out the individuals when hired.

On March 12, 1980, around 10 a.m., Bouchard saw Jerome Ferretti appear on the MacFarlane Ford Rouge plant job with Superintendent Brewer and Foreman DeBerry. Bouchard saw Jerome Ferretti go into the furnace room. Bouchard then followed Ferretti into the furnace room. Bouchard introduced himself to Jerome Ferretti and told him that he was the steward on the job. During the conversation it is clear that Jerome Ferretti also told Bouchard his name. Bouchard asked Ferretti to accompany him to the shanty so that he could get him signed up. At the shanty, Bouchard asked Ferretti to show him his union book. Ferretti told Bouchard that he did not have his book with him. Bouchard asked Ferretti if he were an apprentice and Bouchard said he was. Bouchard asked Ferretti how long he had been in the trade and learned that Ferretti had been in the (bricklayers) trade for 6 months. Bouchard also ascertained that Ferretti was a member of Local 35.[9] Bouchard knew that Emmit Ferretti was the business agent for Local 35 and recognized the name.

Bouchard told Jerome Ferretti that he had to call Chadwick, president and business manager of Local 2, that he wanted to make sure that it was all right for him to work on the job. At the time Bouchard was not sure that apprentices would be allowed to work on the job, a firebrick job, because he knew that Chadwick had a policy of not wanting apprentices working on firebrick unless they had a couple of years in the trade.

At this time Bouchard telephoned Local 2's office, spoke to Business Agent James McNeilly and asked if Jerry Ferretti, the apprentice, could work on the MacFarlane Ford Rouge plant (firebrick) job. McNeilly said that he would check, left the telephone briefly, returned, and stated, "We don't want any apprentices working on fire brick."

Bouchard told Jerome Ferretti that he could not allow the employer to hire him, that he would have to go home, that "We weren't gonna put any apprentices on the job." Ferretti appeared disappointed, and Bouchard apologized to him for what had transpired.

Bouchard then spoke to Superintendent Brewer. Bouchard told Brewer in effect that there could not be any apprentices on the job. Bouchard also told Foreman DeBerry that there could not be any apprentices on firebrick because the Union was not putting apprentices on firebrick at the present time who had less than 2-1/2 years in the trade. Bouchard also told DeBerry that Ferretti was entitled to 2 hours' "show up time." Apparently Bouchard returned to Ferretti and told him about his "show up" time. At such point in time Jerome Ferretti left the jobsite.

On March 12, 1980, shortly after Bouchard had telephoned Local 2's office and inquired as to whether Jerome Ferretti, the apprentice, could be employed on the Ford Rouge plant job, President Chadwick telephoned Francis Costella of Monte Costella & Co. Chadwick asked why Jerome Ferretti was not working. Costella told Chadwick that Jerome Ferretti had been temporarily laid off. Chadwick asked Costella, as a favor, to call Ferretti back to work. Costella told Chadwick that he would do so as soon as he could.[10]

On March 12, 1980, Chadwick also contacted Robert Conway, chairman of the District Council, and told him that Jerome Ferretti was on the MacFarlane Ford Rouge plant job, that Ferretti was an apprentice sponsored by Monte Costella, and that Local 2 did not intend to let him work on the job. Chadwick asked Conway to call MacFarlane and tell them that if they wanted to sponsor an apprentice bricklayer that he (Chadwick) would be willing to have the apprentice committee take the apprentice who had been out of work the longest and have such apprentice responsored by MacFarlane, and, if so, let MacFarlane employ such apprentice.

DeBerry credibly testified to the effect that either he telephoned Chadwick or Chadwick telephoned him sometime after 11:30 a.m. In such conversation Chadwick told DeBerry that he wanted to clarify that if the employer wanted apprentices that it had to go through proper channels, that there were apprentices who had been off from work longer than Ferretti.

DeBerry's testimony was of such a nature that it did not appear to reliably reveal the conversation between him and Chadwick in total effect. Considering the totality of the facts and consistency thereof, I find it proper to infer that Chadwick conveyed the same message to DeBerry as he conveyed to Conway for relation to MacFarlane.

On March 12, 1980, around 5 to 5:30 p.m., Superintendent Brewer telephoned Jerome Ferretti and asked Ferretti why he had left the jobsite. Jerome Ferretti told Brewer that he had done so because he had been advised by union steward Bouchard to leave. Brewer told Ferretti that there must be some misunderstanding, that he was going to call Ferretti's father, the business agent for the local[11] Brewer belonged to and make sure that he was abiding by union regulations. Brewer then telephoned Emmit Ferretti and explained what had occurred. Emmit Ferretti told Brewer that he was justified in having Jerome Ferretti on the job.

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[9] All of the locals referred to herein are locals of the same International and a part of the Bricklayers District Council previously referred to.

[10] Apparently referring to when work picked up.

[11] Local 35.

On March 13, 1980, Jerome Ferretti reported to work at 8 a.m. at the MacFarlane Ford Rouge plant jobsite. Ferretti worked the entire shift on March 13, 1980.

Apparently on March 13, 1980, shortly after 8 a.m., steward Bouchard saw Jerome Ferretti at the Ford Rouge plant jobsite. Bouchard went to the office, spoke to Superintendent Brewer, and asked why Ferretti was back on the job. Brewer told Bouchard that he had telephoned Ferretti's father and cleared the matter with him. Bouchard told Superintendent Brewer that he had to call Chadwick to make sure that everything was all right. Bouchard telephoned Local 2's office and spoke to President Chadwick. Bouchard asked if it were all right for "the apprentice" to come on the job, and if the matter was all straightened out. Chadwick told Bouchard to let him talk to Superintendent Brewer. Bouchard turned the telephone over to Brewer. Bouchard heard at least one end of the conversation between Brewer and Chadwick. Bouchard believed that everything was straightened out, that Jerome Ferretti could go to work. Bouchard returned to his duties. Ferretti either continued to work in the furnace or returned to work in the furnace.

The conversation between Chadwick and Brewer was to the following effect. President Chadwick told Brewer that Jerome Ferretti could not work on the job because of "the agreement that apprentices with less than one year experience in the trade could not work on a fire brick job." Brewer told Chadwick that he had never heard of such an agreement. President Chadwick told Brewer that he would shut the job down if the apprentice was not removed. During the conversation Brewer told Chadwick that he had received permission from LeMarbe (apprentice coordinator on the Joint Apprenticeship Committee) to hire Ferretti.

At some point of time on March 13, 1980, Conway, the District Council chairman, reported back to Chadwick that MacFarlane did not want to sponsor an apprentice.

On March 14, 1980, Jerome Ferretti again reported to work at the MacFarlane Ford Rouge plant job at 8 a.m. He worked thereafter without incident until around 1 p.m.

Around 1 p.m., President Chadwick telephoned Superintendent Brewer and informed of MacFarlane. Chadwick asked Brewer again if he were going to remove the apprentice from the jobsite. Brewer told Chadwick that he had no reason to dismiss the man (Jerome Ferretti). Brewer told Chadwick that if he (Chadwick) wanted him off the job, he (Chadwick) would have to remove him. Chadwick told Brewer that he was going to call the bricklayers off the job. Brewer told Chadwick that he (Chadwick) knew more about union business than he did, that if this was what he thought was right, he should do it. Chadwick then asked to speak to steward Bouchard. Brewer made arrangements for Bouchard to use the telephone.

When Bouchard spoke on the telephone, the party that he spoke to first was Business Agent McNeilly. McNeilly told Bouchard that there was no way that apprentices were supposed to work on the Ford Rouge plant job. Bouchard then spoke to Chadwick. Chadwick told Bouchard that he had spoken to Monte Costella, that Jerome Ferretti was sponsored by Monte Costella, that Ferretti was going to go back to work with Monte Costella, and that, as far as he was concerned, Jerome Ferretti was a runaway apprentice and that any journeyman that worked with Ferretti was subject to disciplinary action. Bouchard asked if he should pull the men off the job. Chadwick stated that he did not want the men working with Ferretti because they were subject to fine because, as far as he was concerned, Ferretti was a runaway apprentice and was not in the Union. After the telephone call concluded, Bouchard told Brewer that Chadwick had told him to call the bricklayers off the job. Bouchard returned to the furnace where the bricklayers were working and indicated to each that he wanted them to get their tools and go to the bricklayers shanty. The bricklayers did so.

In the shanty Bouchard told the bricklayers that Jerome Ferretti was a runaway apprentice and that his dues were not paid up, that the bricklayers were not to work with him on the job. Chapman, a bricklayer, asked Bouchard who said this, and Bouchard replied that this was what President Chadwick had told him. Chapman asked Ferretti if he had a card. Ferretti said that he had his dues paid up and showed a receipt to such effect. Bouchard remarked that this was fine but that he was still a runaway apprentice in the eyes of Chadwick.

Following the above, Jerome Ferretti and Bouchard went to Superintendent Brewer's office. Brewer telephoned LeMarbe.[12] Brewer asked LeMarbe if anything could be done. LeMarbe in effect told Brewer that Jerome Ferretti would have to leave the jobsite, that he would take responsibility for Ferretti's leaving,[13] and that if anything came of this problem that "they" could have his job. Brewer told LeMarbe that he would remove Jerome Ferretti from the job and that he hoped that this would not harm Ferretti's future as a bricklayer apprentice. Apparently, Jerome Ferretti asked to speak to LeMarbe on the telephone at that time and was allowed to do so. LeMarbe told Jerome Ferretti that there was nothing that could be done on his part, that the unions had to work it out. LeMarbe told Jerome Ferretti that the best thing he could do was to leave the jobsite.

Jerome Ferretti then telephoned President Chadwick at Local 2's office. Ferretti asked if there were anything that could be done to clear the matter up. Chadwick told Jerome Ferretti that there was nothing to be cleared up, that no apprentice was going to work firebrick in his area because he had too many men out of work in his local.

Following the above, MacFarlane & Hays Co. prepared Jerome Ferretti's pay, gave him his check, and thereby in effect terminated him. Ferretti then left the jobsite. The bricklayers then went back to work.

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[12] Brewer testified to the effect that he received a telephone call from LeMarbe. Ferretti testified that Brewer telephoned LeMarbe. Bouchard testified that he thought a telephone call was made to LeMarbe. Although a close question exists and a different finding would not affect the overall results, considering the logical consistency of facts, I credit Ferretti's testimony that Brewer made the telephone call to LeMarbe. I discredit testimony inconsistent with the facts found.

[13] Apparently referring to problems with either Chadwick or Emmit Ferretti. It is clear that LeMarbe viewed himself in the middle of a possible conflict between two union leaders.

F. *Miscellaneous*

In addition to the foregoing facts, evidence was adduced to reveal that apprentices had a different status as members in the Union than did journeymen, that apprentices were allowed to vote with respect to establishment of dues but not as to the election of officers.

Chadwick also credibly testified to the effect that he did not consider that firebrick work was the type of work for an apprentice to learn how to be a bricklayer. I do not credit, however, his testimony to the effect that his refusal to allow apprentices to perform firebrick work for nonsponsoring employers was based on his belief that such work was not valuable as learning type work. It is obvious that on many occasions apprentices simply need to work as a matter of economic survival. Further. Chadwick's attitude as to allowing an apprentice to do firebrick work for a sponsoring employer and not as to nonsponsoring employers is somewhat inconsistent as regards the academic idea of learning.[14]

The facts reveal that Respondent Local 2 prohibited apprentices, even those who were members of Local 2 or related to officials or agents of Local 2, from working on "fire brick" jobs for employers who were not the sponsors of the apprentices.

The facts clearly reveal that either journeymen or apprentices can perform "fire brick" work and that Local 2's actions by Chadwick were not motivated because of lack of skill or ability by apprentices to perform firebrick work.

G. *Contentions and Conclusions*

The General Counsel contends that Respondent, by Chadwick, attempted to cause and did cause the discriminatory removal from employment of Jerome Ferretti by MacFarlane & Hays Co., that Respondent's motivation for such action was based on a consideration of Ferretti's membership status and upon arbitrary and capricious reasons, and that such conduct was violative of Section 8(b)(1)(A) and (2) of the Act. Respondent contends that its actions were not based on consideration of Ferretti's lack of status in Local 2, arbitrary and capricious reasons.

Considering all of the facts, I find merit in the General Counsel's contentions that Respondent attempted to cause and did cause the discriminatory removal of Ferretti from employment on March 12 and 14, 1980. The facts overwhelmingly reveal that Respondent Local 2, by statements by Chadwick and by statements by Bouchard, attempted to cause and did cause the removal of Jerome Ferretti from employment by MacFarlane & Hays Co. on March 12, 1980, and by statements by Chadwick on March 13, 1980, attempted to cause the removal of Jerome Ferretti from employment by MacFarlane & Hays Co., and by statements by Chadwick and Bouchard, and by action by Bouchard directed to bricklayers on the job, attempted to cause and did cause the removal from employment of Jerome Ferretti by MacFarlane & Hays Co. on March 14, 1980. The facts are overwhelming that Respondent Local 2's actions were because Jerome Ferretti had the status of an apprentice member rather than the status of a journeyman member of the Union, and that the said difference in membership status in the Union had no realistic bearing on the ability of Ferretti to perform the work, firebrick work, to which he was assigned. It is clear that Respondent Local 2, by Chadwick (because of his desire to prevent apprentices being hired or used for firebrick work, excepting for sponsoring employers), placed Jerome Ferretti into a status of member out of favor with the Union and one for which other members were told that they were subject to charges and potential fines if they worked with such member. Respondent Local 2 accomplished this by Chadwick's designating Jerome Ferretti as a runaway apprentice member within the meaning of the Union's constitution. It is clear from a reading of the relevant constitutional provisions, the collective-bargaining agreement, and the evidence relating to the apprentice program that Jerome Ferretti was not a runaway apprentice member. Respondent Local 2's actions, by Chadwick, of designating Jerome Ferretti as a runaway apprentice clearly constituted arbitrary and capricious conduct. It is not necessary to reach such determination however. The overall facts clearly reveal that Respondent's actions were based on discriminatory considerations that Jerome Ferretti lacked good-standing status in the Union as compared to good-standing status of journeymen members.[15] By such conduct Respondent Local 2 clearly attempted to cause and did cause the removal of Jerome Ferretti from employment on March 12 and 14, 1980, and did attempt to cause his removal on March 13, 1980. Such conduct is clearly violative of Section 8(b)(1)(A) and (2) of the Act. It is so concluded and found.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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[14] In any event, it is not really necessary to determine whether Chadwick was motivated in his attitude toward use of apprentices because he sought to further work opportunities for those who could vote for his reelection, or because he believed apprentices should only work on meaningful learning jobs. The ultimate facts reveal that Chadwick *construed* that *Ferretti* was a "runaway" apprentice, construed that such "runaway apprentice" was a person out of favor with the Union, characterized Ferretti as such, and caused the bricklayers to cease working with Ferretti because of this "out of favor" union status.

[15] I am not persuaded that the evidence is sufficient to reveal that Chadwick was motivated in his attitude toward apprentices by the fact that they could not vote in elections concerning officers. Rather, I am persuaded he simply wanted full-time journeymen members to be employed, and if there were a conflict that journeymen members should prevail over apprentice members.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent caused MacFarlane & Hays Co. to discharge Jerome Ferretti, in violation of Section 8(b)(1)(A) and (2) of the Act, the recommended Order will provide that Respondent will notify MacFarlane & Hays Co. and Jerome Ferretti that it no longer objects to Jerome Ferretti's employment with the employer. Second, Respondent will be required to affirmatively request MacFarlane & Hays Co. to employ Jerome Ferretti. Finally, Respondent will be required to make Jerome Ferretti whole[16] for all losses of wages and benefits suffered by him as a result of its discrimination against him until he is either employed by MacFarlane & Hays Co. in his former or substantially equivalent position or until he obtains substantially equivalent employment elsewhere.

Because of the character of the unfair labor practices herein found, the recommenced Order will provide that Respondent cease and desist from in any other manner restraining and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. MacFarlane & Hays Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Bricklayers and Masons Union, Local No. 2, International Union Bricklayers and Allied Craftsmen, AFL-CIO, Respondent, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By causing or attempting to cause MacFarlane & Hays Co. to terminate the employment of Jerome Ferretti, Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

The Respondent, Bricklayers and Masons Union, Local No. 2, International Union Bricklayers and Allied Craftsmen, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause MacFarlane & Hays Co. to discriminate against employees in regard to hire or tenure of employment, or any term or condition of employment because of their union status or protected concerted activities.

(b) In any other manner restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Make Jerome Ferretti whole for any loss of wages and benefits suffered by reason of the discrimination against him on March 12, 1980, and from the date of his discharge to the date of his reemployment by MacFarlane & Hays Co. to his former or substantially equivalent job or to the date he secures substantially equivalent employment with some other employer, less his net earnings during this period. The loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest on the backpay due computed in accordance with Board policy set out in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

(b) Notify MacFarlane & Hays Co. and Jerome Ferretti that it no longer objects to the employment of Jerome Ferretti by MacFarlane & Hays Co., and that it requests that said Company employ Jerome Ferretti.

(c) Post at Respondent's business offices copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[16] Respondent will make Ferretti whole for any loss of earnings within the meaning and in accord with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), except as specifically modified by the wording of such recommended Order. Specifically, Ferretti's loss of work on March 12, 1980, and loss of work on and after March 14, 1980, is included in the period of discrimination for which he is to be made whole. The fact that he later returned to work as an apprentice for Monte Costella is a matter for consideration in compliance.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT cause or attempt to cause MacFarlane & Hays Co. to discriminate against Jerome Ferretti or any other employee in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees of MacFarlane & Hays Co. in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL notify MacFarlane & Hays Co. and Jerome Ferretti that we do not object to the employment of Jerome Ferretti by MacFarlane & Hays Co., and that we request that Jerome Ferretti be employed.

WE WILL make Jerome Ferretti whole, with interest, for any loss of wages and benefits suffered by reason of the discrimination against him on March 12, 1980, and from the date of his discharge to the date of his reinstatement by MacFarlane & Hays Co. to his former or substantially equivalent job or to the date that he secures employment with some other employer substantially equal to that which he formerly had with MacFarlane & Hays Co.

BRICKLAYERS AND MASONS UNION, LOCAL
NO. 2, INTERNATIONAL UNION BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO

Aunt Millie's Sauces, Inc. and Aunt Millie's Sauces Division of Specialty Brands, Inc. *and* United Food and Commercial Workers Union, Local 464A, United Food and Commercial Workers International Union, AFL-CIO, CLC, Petitioner. Case 2-RC-18899

November 16, 1981

DECISION ON REVIEW AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS FANNING, JENKINS AND ZIMMERMAN

On May 7, 1981,[1] the Acting Regional Director for Region 2 issued his Supplemental Decision and Direction of Second Election in the above-entitled proceeding, in which he sustained Petitioner's Objections 1 and 3, set aside the election held on March 4,[2] and directed a second election. Thereafter, pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review in which it contended that a substantial question of law or policy is raised because of the absence of, or a departure from, officially reported Board precedent.

By mailgram dated June 10, the National Labor Relations Board granted the Employer's request for review[3] and stayed a second election pending decision on review. Neither party submitted a brief on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with regard to the issues under review and makes the following findings:

On January 12, Specialty Brands, Inc., agreed to purchase Aunt Millie's Sauces, Inc. On February 13, these companies entered into a contract of sale, with closing set for February 27, less than a week before the March 4 election in this proceeding. On February 17, Specialty Brands advised the Aunt Millie's employees of the pending sale, gave each employee a formal written offer of employment with Specialty Brands, and advised these employees that they would be given wages and benefits in accordance with the standards and job classifications established and utilized by Specialty Brands throughout its corporatewide operations. On March 2, Aunt Millie's Sauces Division of Specialty Brands, Inc., commenced operation with the new—and generally better—wages and benefits in effect.

In sustaining Objection 1,[4] the Acting Regional Director found that Specialty Brands had interfered with the free exercise of employee voting rights when, on February 17, 2 weeks before the election, it announced to employees of Aunt Millie's its proposed wage and benefits package as the terms under which it sought their application for employment. The Acting Regional Director found that Specialty Brands had failed to provide a valid business reason for announcing the new wage and benefits package when it did and that such failure made it "reasonable to assume that the announcement was timed to influence the employees in their choice of bargaining representative." The Employer contends that its conduct was not objectionable under well-established Board precedent, noting that the purpose of the wage and benefit changes announced at the time of the offers of employment was to bring the Aunt Millie's employees into line with the wages and benefits in effect at Specialty Brands' facilities everywhere else; that similar offers were made to nonunit employees; that the offers were in no way excessive; that the Union was not mentioned at the time the offers were made; and that the offers were implemented at the outset of Specialty Brands' takeover as part of a more general overhaul of Aunt Millie's entire business. We find merit in the Employer's contentions and agree that it is unreasonable to presume that the announcement of wage and benefit changes, which was clearly timed to the Employer's takeover schedule and conditioned upon acceptance of the Employer's offer of employment, was intended to influence the employees in their choice of bargaining representative.

Contrary to the Acting Regional Director, we find that there was a valid business reason for the initial terms of employment which the Employer selected here. Thus, the facts before us clearly show that the Employer's announced plan to conform wages and benefits at its Aunt Millie's facility with the existing arrangements at its other operations is consistent with normal business practices. This conclusion is further buttressed by the Employer having scheduled implementation of the wage and benefit adjustments in strict accordance

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[1] All dates are in 1981, unless otherwise stated.

[2] The tally of ballots showed that, of approximately 31 eligible voters, 32 ballots were cast, of which 12 were for, and 16 against, Petitioner and 4 ballots were challenged. The challenges were insufficient in number to affect the results of the election.

[3] In granting review, the Board implicitly denied Employer's alternative request for a hearing on the Employer's purpose in making the wage offer discussed below.

[4] Objection 1 alleged: "During the critical period, the employer on numerous occasions unlawfully promised wage increases, implying that if the Union was voted in there would be no raise, or for the purpose of discouraging employees from voting for Petitioner."

with its purchase time table; and, although that implementation occurred 2 days prior to the election, there is no evidence that such implementation was for any unlawful purpose. Indeed, there was no mention of the Union or of the pending election at the time the initial terms of employment were announced. Nor was there any evidence that the Employer was influenced in its action by the pendency of the question concerning representation, or that the Employer acted in any way inconsistent with usual practices during the acquisition of Aunt Millie's.[5] Accordingly, we overrule Objection 1.[6]

In sustaining Objection 3,[7] the Acting Regional Director considered the comments of Specialty Brands' executive, Bob Mech, who had described the collective-bargaining process and admittedly used the phrase "bargaining starts from scratch," in the general context of the above-discussed February 17 announcement of future benefits. As we have overruled Objection 1, we have eliminated the basis upon which the Acting Regional Director concluded that the phrase as used here carried with it the seed of a threat. Moreover, the Employer's election bulletin correctly stated the law as to "The Facts About Collective Bargaining." Accordingly, we overrule Objection 3.[8] As we have overruled Petitioner's objections and, since Petitioner did not receive a majority of the valid votes, we shall certify the results of the election held on March 4.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for United Food and Commercial Workers Union, Local 464A, United Food and Commercial Workers International Union, AFL-CIO, CLC, and that said labor organization is not the exclusive representative of all the employees in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

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[5] See, generally, *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 294–295 (1972), where the Supreme Court held that a successor employer is privileged, in the absence of a plan to retain all of the employees in a represented unit, to establish the initial terms and conditions of employment unilaterally. A successor employer, under no obligation to any representative of its predecessor's employees, has no lesser rights. See also *Essex International, Inc.*, 216 NLRB 575, 576 (1975), and *Norfollk Carolina Telephone Company*, 234 NLRB 1235, 1236 (1978), for a discussion of the legal implications of a grant of benefits during the critical period.

[6] In view of our holding herein, we find it unnecessary to consider the other issues presented in the request for review.

[7] Objection 3 alleged: "During the critical period, the employer unlawfully threatened to withhold benefits for the purpose of coercing and discouraging employees from voting for Petitioner."

[8] Cf. *Taylor-Dunn Manufacturing Company*, 252 NLRB 799, 800 (1980); *Coach and Equipment Sales Corp.*, 228 NLRB 440, 440–441 (1977), in which the Board found "bargaining from scratch" language violative of Sec. 8(a)(1) of the Act, but recognized that such statements are not unlawful when other communications make it clear that any reductions in wages or benefits will occur only as a result of the normal give-and- take of negotiations.

Montgomery Ward & Co., Incorporated *and* Teamsters, Chauffeurs, Warehousemen and Helpers Local No. 542 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 21-RC-16651

November 16, 1981

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 25, 1981, the Regional Director for Region 21 issued a Decision and Direction of Election in the above-entitled proceeding in which he found appropriate a unit of various warehouse and other clerical employees[1] at the Employer's Big Ticket Distribution Center located in El Cajon, California. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's decision on the ground, *inter alia*, that he departed from officially reported precedent by excluding the sales and maintenance employees from the unit sought.

By telegraphic order dated April 23, 1981, the request for review was granted.[2] Neither party submitted a brief on review, but the Petitioner filed a brief in opposition to the Employer's request for review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in this case, including the brief in opposition to the request for review, and makes the following findings:

The Employer is an Illinois corporation engaged in the business of the retail sale of general merchandise throughout the United States. Employer's Big Ticket Distribution Center, involved herein, is comprised of a warehouse area, a repair service center, and a credit service department. Additionally, the facility contains two bargain sales areas, a furniture repair area, and personnel and merchandise offices.

The Petitioner currently represents the general warehousemen and merchandise prep warehouse employees at the distribution center. These employees, who perform traditional warehouse functions, are supervised by the warehouse manager. In the instant proceeding, the Petitioner sought a unit of all warehouse clerical employees. Included among the employees sought by the Petitioner are unit stock control clerks who take calls from the Employer's four San Diego stores serviced by the distribution center, and who record all merchandise in the distribution center on stock status cards. Additionally, they write purchase orders on merchandise shipped out of the distribution center and handle delivery sales checks. The invoice records clerk maintains the Employer's book inventory and is responsible for registering freight and damage claims as well as invoices. The trucking and delivery clericals enter sales check information on trip sheets for merchandise delivery to customers. The merchandise prep clerical takes calls from customers requesting the repair of merchandise and schedules merchandise repair by the outside prep employee. The PBX operators handle all incoming calls to the distribution center. All the employees sought by the Petitioner report to the warehouse manager.

The Employer, contrary to the Petitioner, would have included in the unit all of the remaining warehouse operations employees who report to the warehouse manager, including the two personnel office employees, the four salespersons, and the two maintenance employees. The Regional Director included the personnel office clericals but, as indicated, excluded the salespersons and maintenance employees.[3]

The unit found by the Regional Director is comprised of various classifications of employees performing clerical and other support functions related to warehouse operations. The Regional Director's exclusion of the salespersons and maintenance employees was based on his finding that they lacked a community of interest with the other unrepresented warehouse employees. We disagree.

The salespersons are inside rather than outside salespersons. They report to the warehouse manager and are physically located in the two bargain sales areas of the distribution center where discontinued or damaged merchandise is sold at retail. Sales checks generated by the salespersons necessarily flow to clerical personnel included in the unit. Further, if a customer requests delivery, the salespersons will take the sales check to the deliv-

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[1] The unit was described as: All warehouse clerical employees, including all truck and delivery clericals, PBX operators, unit stock office clericals, merchandise preparation clericals, invoice records clericals, personnel office clericals and lead clericals employed by the Employer at its facility located at 1166 Fesler Street, El Cajon, California, excluding all other employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

[2] In accordance with normal procedure, the directed election was held and the ballots were impounded, pending decision on review.

[3] The parties agreed to exclude two merchandisers who purchase merchandise for the warehouse.

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ery clerical to schedule the delivery. The salespersons are paid on a commission basis but otherwise share the same benefits as unit employees.

The two maintenance employees perform their cleaning functions in the warehouse facilities after the center is closed. They, too, report to the warehouse manager and receive common benefits with other unrepresented warehouse employees. Although the maintenance employees lack contact with others included in the unit, they perform a maintenance function at the warehouse facility.

The unit found appropriate by the Regional Director is, as indicated, a mixed group of warehouse clericals and some office clericals. To exclude the salespersons and maintenance employees from the mixed unit comprised essentially of the other remaining warehouse operations employees would unduly fragmentize the work complement and, in these circumstances, be unwarranted.[4]

Accordingly, we find that the salespersons and maintenance employees share a sufficient community of interest with the other included employees that they should be included in the voting group hereinafter described.

As the Petitioner presently represents the traditional warehouse employees, and no other labor organization seeks to separately represent the various clerical, sales, and maintenance employees here involved who essentially constitute the remaining unrepresented warehouse operations personnel, this group of employees may be represented only as part of the existing unit after a self-determination election.[5] Therefore, the election directed by the Regional Director is hereby vacated and we shall direct a self-determination election herein in the voting group described below to determine whether such employees wish to be included as part of the existing unit represented by the Petitioner:

> All warehouse clerical employees, including all truck and delivery clericals, PBX operators, unit stock control clericals, invoice records clerks, merchandise preparation clericals, personnel office clericals, lead clericals, salespersons, and maintenance employees employed by the Employer in its warehouse operation at its facility located at 1166 Felser Street, El Cajon, California, excluding all other employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

If a majority of employees in the above voting group vote for the Petitioner, they will be taken to have indicated their desire to constitute part of the existing unit currently represented by the Petitioner, and the Regional Director shall issue a certification of results to that effect.[6]

Direction of Election omitted from publication.]

MEMBER JENKINS, dissenting:

Unlike the majority, I believe the Regional Director was correct in finding appropriate a unit consisting of the unrepresented clerical employees at the Employer's El Cajon, California, warehouse. The majority characterizes the unit as a "mixed group of warehouse clericals and some office clericals." However, there is no showing that the PBX operators and the personnel office clericals, those most traditionally classified as office clericals, have an essentially different community of interest from the other clericals. In fact, the parties stipulated to the inclusion of the PBX operators, and there is no exception to the Regional Director's finding that the personnel office clericals share a substantial community of interests with the other clerical employees. The Regional Director's uncontested finding is that the personnel office clericals "work the same basic hours as do the employees in the stipulated classifications, and are likewise paid an hourly wage, use the same type of clerical skills in the performance of their duties, and come into frequent daily contact with the included employees during the course of their work." Therefore, the majority's characterization of the unit as "mixed" promises more significance than it can deliver.

Presumably, the majority finds the other clericals—truck and delivery clericals, unit stock office clericals, merchandise preparation clericals, and invoice records clericals—to be plant clericals. However, their functions, as well as their skills (as found by the Regional Director), are compatible with those of office clericals. See, e.g., *Nuturn Corp.*, 235 NLRB 1139 (1978). In the absence of a distinct difference between them, there is no valid basis on which to deny the existence of a sufficient separated community of interest among *all* the warehouse clerical employees to warrant such a grouping as an appropriate bargaining unit. Cf. *Wickes Furniture, a Division of the Wickes Corporation*, 255 NLRB 545 (1981) ("will-call" clericals and office clerical employees excluded from a unit of warehouse employees because of separate community of interest). See also my dissenting opinion in *Gustave Fischer, Inc.*, 256 NLRB 1069 (1981).[7]

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[4] Although the Board does not normally include office clericals in a unit of warehouse clericals, no review of the Regional Director's action in this regard was sought. Rather, review was limited to the exclusion of salesmen and janitors from the unit. In these circumstances, we conclude that the unit presented to us is, in effect, a residual warehouse unit in which it would be improper to exclude any segment or classification.

[5] *Lorillard, a Division of Lowes Theatres, Incorported*, 219 NLRB 590 (1975).

[6] [*Excelsior* footnote omitted from publication.]

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[7] Because I find that all the warehouse clerical employees have a separate community of interest, I find *Lorillard, a Division of Lowes Theatres, Inc.*, 219 NLRB 590, to be inapplicable and would direct a standard election, not a self-determination election. Inasmuch as the majority has constructed a voting group that, unlike the unit found appropriate by the Regional Director, is truly heterogeneous, I have some doubt of *Lorillard's* applicability even if the majority is correct in finding the Regional Director's unit inappropriate.

Technical Careers Institutes, Inc. *and* **District 65, affiliated with United Automobile, Aerospace and Agricultural Implement Workers of America. Case 2-CA-17112**

November 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 28, 1981, Administrative Law Judge Robert M. Schwarzbart issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Technical Careers Institutes, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain with District 65, affiliated with United Automobile, Aerospace and Agricultural Implement Workers of America, by unilaterally altering terms and conditions of employment of the employees in the bargaining unit, set forth below, for which this Union is the exclusive bargaining representative.

WE WILL NOT threaten to discharge our employees if they work for, or support, the above-named Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, bargain in good faith with the above-named labor organization as the exclusive representative of our employees in the appropriate bargaining unit described below, with respect to hours of work, lunchbreaks, and other terms and conditions of employment, and embody any understanding reached in a written, signed agreement. The appropriate bargaining unit is:

> All full-time and regular part-time office clerical employees employed by Technical Careers Institutes, Inc., at 320 West 31st Street, New York, New York, but excluding all other employees, teachers, maintenance and custodial employees, technical employees, managerial employees, confidential employees, head bookkeeper, guards, and supervisors as defined in the Act.

WE WILL rescind the unilateral changes made in February 1980 regarding the length of the workweek, the workday, and the daily lunchbreak, and WE WILL make our employees

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge failed to address that portion of the complaint which alleges that Respondent's unilateral increase in the length of the workday and the workweek and its unilateral change of working conditions by reducing the daily lunchbreak period were additionally violative of Sec. 8(a)(3) and (1) of the Act. We specifically do not pass on this issue since the General Counsel has not excepted to the Administrative Law Judge's failure to discuss it.

[3] Member Jenkins would provide interest on the backpay awards due to Respondent's unlawful increase in the length of the workday and the workweek and its unlawful reduction of the daily lunchbreak period in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

259 NLRB No. 42

whole, with interest, for any losses sustained as a result of such changes.

TECHNICAL CAREERS INSTITUTES, INC.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge: This case was heard in New York, New York, on October 22-24 and November 20-21, 1980,[1] upon a complaint issued on May 22, based on a charge filed on March 3 by District 65, affiliated with United Automobile, Aerospace and Agricultural Implement Workers of America, herein called the Union. The complaint alleges that Technical Careers Institutes, Inc., herein called the Respondent, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein called the Act, by unilaterally increasing the number of hours employees are required to work each day and week, and by unilaterally reducing the length of the lunch period, without bargaining on these matters with the Union as the certified bargaining representative of the Respondent's office clerical employees. The Respondent, in answering the complaint, denied committing any unfair labor practices.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, which have been carefully considered, were filed by the General Counsel and the Respondent.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation located in New York, New York, is engaged in the operation of a private technical school. The Respondent, in the conduct of its operations, annually derives gross revenues in excess of $1 million, and annually purchases and receives at its facility goods and materials valued in excess of $50,000 directly from points outside the State of New York.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

The electronics technology school presently operated by the Respondent was founded in 1909 as the Marconi Institute, which was engaged in training telegraphers. In or about 1920, the school was taken over by the Radio Corporation of America, when its name was changed to R.C.A. Institute, Inc. The school then offered training in various engineering disciplines relating to radio and telegraphy. In 1972, the school became accredited to offer degree courses in engineering technology. R.C.A continued to operate the school until May 1974 when it was purchased in equal shares by a group of 30 faculty members headed by Samuel Steinman, who thereafter operated the Respondent under its present name and entity.[2]

The Union, at the time of the hearing, had represented the Respondent's teachers and technicians for about 3-1/2 years, and the Respondent's maintenance employees since January or February 1978. In addition, the Union was certified on January 28, 1980, in Case 2-RC-18576 as the bargaining representative for the Respondent's office clerical employees in yet a third unit. The office clerical unit is the only one relevant in this proceeding.[3]

Employees in the office clerical unit work in the school's administrative department which consists generally of the bursar's office, the registrar's office, the admissions office, the financial aide office, the accounting office, and the academic office. In accordance with the parties' stipulation, I find that the following individuals who at various times headed these offices were or are supervisors and agents of the Respondent within the meaning of Section 2(11) of the Act and that they held or are holding the positions set forth after their names: Bruno M. Suria, financial aid officer,[4] and Calvin T. Watlington, his successor in that position; Vincent Bruno, administrator of student services and registrar; Richard Carapezzi, consecutively bursar and accountant; Robert Gonzalez and John LiCausi, successively bursars; Salvatore Adelfio and Rodrique de los Reyes, consecutively treasurer-controllers; Walter Arizzni, vice president for marketing; Thomas Smithsi, associate dean of the preparatory department; George Leelike, manager of personnel relations; Richard Bader, dean of administration; Woodrow Hsu, dean of the day school; Martin Tucker, administrator of admissions; Michael Conlin, academics coordinator; and Roy Lewis, associate dean of the preparatory department. In addition, Nathaniel Buch was director of the Respondent's school from 1974 until his departure in November 1979.[5]

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[1] All dates hereinafter are in 1980 unless stated to be otherwise.

[2] Steinman, who had joined the R.C.A. faculty in 1957, became president and chief executive officer of the Respondent in May 1974. He has continued in this position, except for a 2-year period from May 1977 to May 1979, and was in this office when the events considered herein occurred.

[3] Since certification the undisputed appropriate unit for bargaining has been:

> All full-time and regular part-time office clerical employees employed by the Respondent at 320 West 31st Street, New York, New York, but excluding all other employees, teachers, maintenance and custodial employees, technical employees, managerial employees, confidential employees, head bookkeeper, guards, and supervisors as defined in the Act.

[4] The disputed unit placement of Rosa Suria, assistant financial aid, officer, will be discussed below.

[5] In stipulating that the above-named individuals are or were supervisors while in the indicated positions, the Respondent contended that only Steinman had authority to hire or discharge employees. However, the Respondent did agree that the others could assign work independently, a criterion for supervisory status under Sec. 2(11) of the Act.

B. *The Facts*

The General Counsel and the Union contend that, about 2-1/2 weeks after the Union was certified as the bargaining representative for the Respondent's office clerical employees, the Respondent unilaterally, without notice to or consultation with the Union, increased the number of weekly hours its office clerical employees were required to work from 35 to 39, requiring that employees arrive earlier and leave work later. At the same time, the Respondent shortened the daily lunch period from 1 hour to 37 minutes. The General Counsel argues that this was done both to punish employees for selecting the Union and to improve the Respondent's position at the bargaining table.

The Respondent, in turn, largely relying on timesheets prepared and signed by employees since 1974, contends that the 39-hour workweek had always been in effect, and that such scheduling had been started by R.C.A. and continued by the Respondent to date. Accordingly, as there had been no change in hours, the Union's certification had not prompted an unlawful reaction by the Respondent.

The General Counsel counterargues that, while the Respondent's business records as presented might appear to support the Respondent's position that its office clerical employees had long worked a 39-hour workweek, these records do not accurately describe the work hours and practices in effect before mid-February when, the General Counsel contends, the 39-hour workweek was first invoked. In support of this position, the General Counsel introduced the testimony of a number of employees, the testimony of several individuals formerly employed by the Respondent in supervisory positions, and certain documentary evidence, including other of the Respondent's business records.

Rosa Suria, assistant financial aid officer, testified that when she was first hired by the Respondent in September 1974 as a receptionist in the admissions office, Gregory Chaberski, then administrator of admissions, told her that her hours would be from 8 a.m. to 4 p.m. with lunch from 1 to 2 p.m. However, although those were the hours she worked, Chaberski also directed her to fill out her biweekly timesheet to show that she worked from 7:45 a.m. to 4:10 p.m. with 37 minutes for lunch. He did not provide an explanation for this recordkeeping practice.

After working these hours for 3 years while a receptionist, Chaberski notified her of an opening in the financial aid office and referred her to Salvatore Adelfio, then the Respondent's treasurer and controller. Adelfio described the duties of the vacant position and told her that the hours would be from 9 a.m. to 5 p.m. with an hour for lunch. Following this interview, Suria, in October 1977, advanced to her present position of assistant financial aid officer,[6] in which she worked the hours thus assigned.

Rosa Suria and almost all other witnesses called by the General Counsel, whether supervisory or not, testified that they complete their biweekly timesheets for each entire pay period just once every 2 weeks on payday.[7] The timesheets are then submitted to the employees' respective supervisors who also sign them.[8] Employees are hourly rated.

When Rosa Suria first became assistant financial aid officer, she reported to Bruno M. Suria, financial aid officer from October 1977 until mid-October 1979.[9] After Bruno Suria resigned, Rosa Suria worked for his successor, Calvin T. Watlington.

The Surias testified that in October 1977 Rosa had informed Bruno that he was completing his own timesheets incorrectly by reporting arrivals at 9 a.m., departures at 5 p.m., with an hour for lunch. Although he actually had been working those hours, Rosa pointed out that everyone she knew had been reporting on their timesheets work hours from 8:45 a.m. to 5:10 p.m. with 37 minutes for lunch. Bruno replied that he wanted to check this. Together they went to the accounting office where they asked Antoinette Ceigle, a bookkeeper, why they were required to list work hours from 8:45 a.m. to 5:10 p.m., with 37-minute lunch periods, on their timesheets when those were not really their work hours. Ceigle replied that it was necessary to record the longer hours for bookkeeping purposes; the hours were logged that way for the school's recordkeeping convenience.[10]

In January, shortly before the election, George Leelike, the Respondent's manager of personnel relations,[11] went to Rosa Suria's office and told her that she should not get involved with the Union and should not encourage people to join the Union. Leelike informed Suria that she was not allowed to vote and that she should leave the premises with the supervisors at the time of the election. When Suria replied that she would do what she felt was right, Leelike retorted that someone working at McDonald's who had been told to shave off his beard had been terminated when he had refused to do so. Leelike stated that this was not a threat.[12]

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[6] Rosa Suria's status as a member of the bargaining unit is in issue. The record reveals that as assistant financial aid officer Rosa Suria assists students by filling out forms concerning financial aid, including loan application forms, notifies students that such aid is available, and helps the financial aid officer in preparing reports to the Federal Government. Besides Rosa Suria and the financial aid officer, financial counselor Bhisham Sachdeva is the only other individual employed in the financial aid office. Sachdeva does not report to Rosa Suria and she does not replace the financial aid officer in his absence. She does only her own work even when the financial aid officer is present. Rosa Suria signs only her own timesheets and does not approve the timesheets of other employees, a function performed in that office only by the financial aid officer. In the absence of the financial aid officer, Rosa Suria and Sachdeva report to the controller. Rosa Suria's ballot was challenged at the representation election by the Board agent on the ground that her name did not appear on the voting eligibility list and by the Union observer on the ground that she was a supervisor. As the challenged ballots were insufficient in number to be determinative, her status in the unit was never decided. Since the record contains no evidence that Rosa Suria has any of the supervisory criteria in Sec. 2(11) of the Act, or that she has been clothed with apparent supervisory authority, I find that she is an employee within the meaning of Sec. 2(3) of the Act and is properly included in the office clerical bargaining unit.

[7] The only exception to this was Edna Agapito, a receptionist in the bursar's office, who testified that she maintained her timesheets on a daily basis as instructed by the then bursar, Robert Gonzalez.

[8] The parties stipulated that the timesheets completed and signed by Rosa Suria and other office personnel since 1974 generally would show arrival at 8:45 a.m., departure at 5:10 p.m., with 37 minutes for lunch. While there was some deviation from this schedule, the general work pattern as set forth on the timesheets signed by the various employees in unit-type job classifications and countersigned by their supervisors did reflect the 39-hour workweek predicated on the 8:45–5 routine. Overtime premium pay was afforded only for work performed after 39 hours, and work performed after 35 hours, but not exceeding 39 hours, in a given week was paid at straight time.

[9] In May 1980, after Bruno Suria's departure from the Respondent's school, he and Rosa Suria were married.

[10] Bruno Suria, stipulated to have been a supervisor, also testified that his various superiors had told him that his normal work hours were from 9 to 5 with an hour for lunch. He resigned from the Respondent's employ before the alleged change in hours.

[11] Leelike is also one of the shareholders of the Respondent's stock and is a member of its board of directors.

As noted, the Union was successful at the January 18 election and was certified as the bargaining representative of the Respondent's office clerical employees on January 28.

Rosa Suria testified that thereafter, on or about February 21, she and the other financial aid office employees, who at the time, in addition to Sachdeva, also included financial counselor Magdeleine Alvarez, received the following memorandum, dated February 14, from Leelike addressed to all nonfaculty employees:

> It has become necessary to issue this memorandum to all non-Faculty employees for the purpose of clearly stating TCI's policy of work hours. The normal work week is comprised of 39 hours. The normal work day begins at 8:45 a.m. and ends at 5:10 p.m. There is a 37 minute lunch, and any breaks are to be authorized by the department supervisor. These hours may be rescheduled only by written approval in advance. These hours apply to all hourly employees and to those who are paid overtime. Any lateness will be docked from your paycheck and any unauthorized absences will not be paid.

When the above February 14 memorandum was distributed, Rosa Suria and the other financial aid personnel were told by Watlington that their hours were being changed. Instead of arriving at 9 a.m. and departing at 5 p.m., they thereafter were to come in at 8:45 a.m. and leave at 5:10 p.m. Watlington declared that they no longer would be allowed to take an hour for lunch, but would be limited to 37 minutes. If they came to work after 8:45 a.m., their pay would be docked.

Rosa Suria then asked Watlington when the provisions of the memorandum were to become effective, and was told that it would be all right to leave work at 5 p.m. that day, but on the following day the employees were expected to come in at 8:45 and to abide by the stated hours thereafter. Suria declared that these changes were being made because of the Union and that the Company most likely would use these conditions at the bargaining table. Watlington agreed that she probably was right.[13]

After the February 14 memorandum was circulated, Rosa Suria noticed the Respondent's president, Samuel Steinman, standing in front of her office at 8:45 a.m., checking on employees as they arrived for work. He also was present to ensure that employees did not leave work before 5:10 p.m. Before the memorandum, she had not seen Steinman before 9 a.m. Also, following the February 14 memorandum, Suria noted that Watlington, for the first time, had begun to log on his calendar the times that employees left for lunch and returned.

Rosa Suria testified that, although she since has worked the longer schedule as required by the memorandum and Watlington's directive, her compensation remains what it had been before February 14.

Bhisham Sachdeva, a counselor in the financial aid office,[14] testified that in August 1977, when he was first hired by the Respondent as a clerk-typist in that same office, he was told by the then financial aid officer, Mrs. Cudjoe, and the assistant financial aid officer at the time, Doris Jackson, that he would be working from 9 a.m. to 5 p.m. with an hour for lunch. However, when Sachdeva first filled out his timesheet by writing in the hours he had been told to work, Cudjoe told him that he was not supposed to complete the timesheets in this fashion, but, instead, was to put down 8:45 a.m. to 5:10 p.m. with a 37-minute lunch period. She explained that it was school policy to complete the timesheets in this manner. He thereafter filled out the timesheets as instructed, but continued to work the shorter hours originally assigned.

Sachdeva related that he continued to work the same hours after becoming a financial counselor in 1978.

Watlington and Sachdeva had an exchange concerning the latter's punctuality[15] and Sachdeva received the following memorandum, dated February 5, from Watlington on the subject of lateness and absences:

> Please be advised that your attendance as well as your lateness continues to increase in a manner which is not beneficial to the Financial Aid Office functioning properly.
>
> I have spoken to you on two-separate occasions about *arriving at work after 9:00 a.m.* and requested that you show some improvement. There must be a definite improvement in your attendance from this point on. [Emphasis supplied.]

On February 7, Sachdeva sent a reply memorandum to Watlington wherein he protested the charges of lateness and questioned the accuracy of the asserted prior reprimands referred to therein. In his response, however,

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[12] Rosa Suria's uncontradicted account of the foregoing conversation with Leelike is credited.

[13] Watlington did not testify.

[14] The parties stipulated that Sachdeva is employed in the relevant office clerical bargaining unit.

[15] Sachdeva's timesheet for the 2-week period ending February 8 contains certain corrections in that his arrival times for January 28, 30, and 31 were changed from 9:10, 9:05, and 9:10, respectively, to 9:30, 9:30, and 9:10. Sachdeva explained that these corrections had been made on February 8, the last day of that pay period, when, as usual, the timesheets for the period were prepared. Sachdeva had been late on those occasions and originally had entered his actual starting times for those dates. However, on February 8, Rodrique de los Reyes, then the Respondent's controller and treasurer, instructed Sachdeva to change these entry times to the corrected hours shown. He told Sachdeva that he would be paid for full days on those dates and should not worry. The timesheet also shows that Sachdeva's arrival times for February 4 and 5, originally inserted as 8:45, were changed to 9:15 and 9:45, respectively. A supervisory entry on the timesheet requested that Sachdeva be paid for 7.8 hours on January 28 to February 5, and noted that Sachdeva had been advised that future lateness would be deducted. The Respondent contends that the foregoing is consistent with its position because both before and after the election its regular workday was 7.8 hours.

Sachdeva did not take issue with the 9 a.m. starting time mentioned by Watlington.

Leelike's above-quoted memorandum of February 14 was given to Sachdeva by Watlington following the Union's certification. Watlington told Sachdeva that he would have to be on the job at 8:45 a.m. If he arrived for work after that time, deductions would be made from his pay. Sachdeva was told to take 37-minute lunches and to leave the job at 5:10 p.m. Sachdeva thereafter abided by the new hours.

Following receipt of Leelike's memorandum, Sachdeva noted that the Respondent's president, Steinman, was at the financial aid office every morning at or before 8:45 asking the whereabouts of given employees. As Sachdeva was situated in the front part of that office, some of these questions had been put to him. According to Sachdeva, such inquiries had not been made before the election.

Although Sachdeva's work hours have increased since the distribution of the February 14 memorandum and Watlington's accompanying explanatory instruction, his weekly earnings have not changed.

Bursar's office employee Ada Bosco[16] gave a similar account. She testified that when she was hired as a clerk-cashier in August 1978, she was told by her then supervisor, Bursar Robert Gonzalez, that her hours would be from 9 a.m. to 5 p.m. with an hour for lunch. Bosco continued to work these same hours in successive positions in that office as receptionist, from October 1978 until November 1979, and as a tuition counselor ever since. However, when at the end of her first 2 weeks with the Respondent she filled out her timesheet to reflect her actual hours, Gonzalez told her to change these entries to show a work schedule from 8:45 to 5:10, with lunch from 2 to 2:37 p.m., for bookkeeping purposes. Bosco thereafter maintained her timesheets as instructed.

Bosco testified that, following the representation election, she found Leelike's February 14 memorandum on her desk. When she asked John LiCausi, who had succeeded Gonzalez as bursar, about the memorandum, LiCausi replied that there was a change of hours. From then on, the employees were to come to work at 8:45 a.m., take 37 minutes for lunch, and get off at 5:10 p.m. If employees were not at work by 8:45, their pay would be docked. Although Bosco's work hours were increased in February, her compensation remained the same.[17]

Edna Agapito related that she was hired as a cashier in the bursar's office in October 1978, and that she has held her present position as receptionist- typist in that office since November 1979. When hired, she, like Bosco, had been told by Bursar Gonzalez that her work hours would be from 9 a.m. to 5 p.m. with 1 hour for lunch, but, as also was the case with Bosco, she had been directed by Gonzalez to complete her timesheets to show work hours from 8:45 a.m. to 5:10 p.m. with lunch from 1 to 1:37 p.m. Gonzalez had also told Agapito that this form of entry was for bookkeeping purposes.

Accordingly, while completing her timesheets as instructed, Agapito continued to work the original shorter hours until she received Leelike's memorandum of February 14. Since Agapito was given this memorandum, she has worked from 8:45 to 5:10 and has observed 37-minute lunch periods. There has been no increase in her pay to compensate her for the longer hours worked.

Agapito testified that, although she had been late for work before February, no deductions had been made from her pay. However, after February, her pay was docked for latenesses of 5, 10, and 15 minutes. Her timesheets show a schedule based on a standard workday of 7.8 hours. Accordingly, Agapito's record reveals that on January 8 she arrived for work at 9:45, had lunch between 1 and 1:37 p.m., and left work at 5:10, for a prorated total of 6.8 hours.[18] Her work hours as recorded for June 23, when she arrived at 9 a.m., also were proportionately reduced to a credit of 7.55.

Divinia Pagan[19] also testified that, after receiving Leelike's February 14 memorandum, her hours and those of other admissions office employees changed from 9 a.m. to 5 p.m., with an hour for lunch, to 8:45 a.m. to 5:10 p.m., and 37-minute lunch periods. Pagan related that, when she joined the Respondent in 1974, Salvatore Adelfio, the then controller and treasurer, had informed her that her hours would continue to be from 9 to 5 with the 1-hour lunchbreak, and that had been her routine until February 1980, when she had received Leelike's memorandum. At that time, her supervisor, Director of Admissions Martin Tucker, had told her that the hours provided in Leelike's memorandum would become effective immediately. Pagan, too, related that, although the hours became longer, there was no increase in pay, and that Steinman, starting the day after Leelike's memorandum was distributed, began to stand at the door to check employees as they arrived for work. On the first day that he did this, Steinman had asked the whereabouts of two employees.

Pagan identified a series of weekly work schedules concerning admissions office coverage during 3 weeks in mid-1977, several months in 1979, and the first 2-1/2 months of 1980. These schedules list the daily starting times for each employee assigned to the admissions office during the weeks represented.[20] The authenticity of these schedules, which were prepared by successive administrators of admissions under the authority of the dean of admissions, is not disputed. The schedule, dated June 16, 1977, begins with a preamble, which announces itself as the schedule of starting times for coverage of the admissions office for the next several weeks. The time frames or work shifts there indicated were 9 to 5, 10:30 to 6:30, and 12 to 8. The schedule then set forth next to the names of each admissions office employee daily starting times of 9, 10:30, or 12. With very few exceptions, all starting times shown were for 9. A like reference to the above time frames was made in the coverage schedule dated April 20, 1979, for the 6 weeks between April 30 and June 8 of that year. The assignment patterns there conformed to the earlier schedule, with the very great majority of the assigned starting times set at 9. While the remaining coverage schedules did not also refer to times when the shifts were to end, the starting times assigned for admissions office coverage through 1979 and into 1980 remained the same with a heavy emphasis on 9.

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[16] Bosco, also referred to in the record by her married name, Reyes, is in the bargaining unit.

[17] The Respondent argues that Bosco's testimony is contradicted by her time record for June 18, which shows that she arrived for work that day at 11 a.m., took lunch between 2 to 2:37 p.m. and did not leave work until 7:25, after staying late so as to work the full 7.8 hours. Also, while Bosco initially testified that on January 31 and February 7 her entered arrival times of 9:15 a.m. represented latenesses of 30 minutes, she changed this to avow that under the schedule then in effect she had been only 15 minutes late on those days.

[18] Although Agapito recalls having been late on January 8, she does not remember when she came to work. This, however, is compromised by her earlier testimony that it was her practice, when late, to put down her actual time of arrival.

[19] Pagan, the mother and mother-in-law of Rosa and Bruno Suria, respectively, began her employment with the school while it was still operated by R.C.A., and remained there in the Respondent's employ after May 1974. Since 1974, she has been an advisor in the admissions office.

[20] See G.C. Exhs. 7(a)-(h). Although the admissions office manning schedules for 1980 run through the week of March 10-14, by which time the change in hours alleged herein had become effective, the document for that week relates back as it shows coverage for the 4 preceding weeks and was dated February 12, which was before the issuance of Leelike's, above-quoted February 14 memorandum.

Pagan testified that the work hours shown in the admissions office coverage sheets represented the actual hours worked by employees in that office. Where the number "9" was placed next to the name of an employee, that employee was expected to work from 9 a.m. until 5 p.m., unless the letter "L" was inserted next to the starting time, in which case, the employee was expected to work late, until 8 p.m.[21] Employees assigned to start work at 10:30 were expected to work until 6:30. One employee, identified as J. Davis, was assigned to work this schedule on certain days so that he might be available to service veterans who attended evening classes.

Pagan, however, also recalled having received the following memorandum, dated July 18, 1974, from Nathaniel Buch, then school director, addressed to the Respondent's supervisors on the subject of office procedures:

> As you may know, we at T.C.I. are presently undertaking an intensive advertising campaign in order to greatly improve our enrollment picture for the Fall Term.
>
> In keeping with this undertaking, the following procedures will be reinstated for all office personnel immediately:
>
> 1) Each member of the staff will be on the premises for 7.8 hours per day. This means that your hours will reflect 8.4 hours each day with 37 minutes for lunch.
>
> 2) Lunch hours will be staggered so as to keep all areas covered at all times.
>
> 3) Counsellors will not schedule lunch between 12:00 Noon and 1:00 P.M.
>
> 4) Supervisors will continuously be aware of work being done by each person in their respective departments.
>
> 5) Personal Business Absence will be requested and approved by the immediate supervisor of each department prior to the day of the absence.
>
> 6) Absence due to illness must be reported to your immediate supervisor at the start of the day of this absence.

Pagan testified that when the above memorandum was given to her in 1974, on or about the time it was dated, her supervisor, then Admissions Administrator Gregory Chaberski, had asked her to read same, telling her that it was for the purpose of scheduling lunches only; no one should take lunch before 1 p.m. Chaberski spoke individually with each admissions office employee about their lunchtimes to ensure that the office would be fully staffed until 1 p.m. At the time, according to Pagan, all admissions employees generally were working from 9 to 5 with 1 hour for lunch, unless assigned to work an equivalent number of hours on another shift, or unless on required overtime. This did not change after Buch's memorandum and the duration of the lunch period was not affected, except that the lunchbreak subsequently was observed after 1 p.m.

In addition to Bruno Suria, the General Counsel presented the testimony of two other witnesses formerly in supervisory positions with the Respondent, Vincent Bruno[22] and Richard Carapezzi.[23]

Bruno testified that in February 1980 he attended a meeting of supervisors called by the Respondent's president, Steinman. Also in attendance were Woodrow Hsu, the dean of academics; Ray Lewis, associate dean of the preparatory department; Martin Tucker, administrator of admissions; Richard Bader, dean of administration; Michael Conlin, academics coordinator; and Rodrique de los Reyes, controller and treasurer.

Steinman opened the meeting by announcing that there would be a discussion concerning District 65, the union that had now come into being, and inviting the others to ask questions. Responding to an inquiry concerning the hours that the staff would thereafter work, Steinman declared that, when R.C.A. ran the school, the official school hours for all employees were 8:45 a.m. to 5:10 p.m. with 37 minutes for lunch. Even though those hours had not been enforced, Steinman stated that he would start enforcing them now because of the advent of the Union. He asserted that this was a perfectly legal situation and that the school would be using this as a tool to bargain with the Union at a later date. Steinman directed that all supervisors tell their staffs of this change and that all should abide by these hours, including the supervisors. In response to another query, Steinman declared that these hours would become effective immediately.

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[21] Admissions employees were required to work longer work schedules during busy times such as registration periods and at the start of each school semester.

[22] Bruno worked for the Respondent from October 1974 until his discharge in June 1980. Originally hired as a clerk while a full-time student at the Respondent's school, in April 1976, he became a full-time assistant to the associate dean of the preparatory department, Thomas Smithsi. In November 1976, Bruno became administrator of student services and registrar, which positions he held until leaving the Respondent.

[23] Carapezzi was hired by the Respondent in October 1977 as bursar. In June 1978, Carapezzi became the Respondent's accountant with responsibility for overseeing the work of accounting office personnel, including the bookkeeper, assistant bookkeeper, and accounts receivable clerk. He maintained all books and handled Federal, state, and corporate matters. Carapezzi continued in this position until he resigned from the Respondent in mid-March 1980.

Bruno testified that when the above-described February meeting was conducted, office employees were working from 9 to 5 with an hour for lunch and that he had instructed his own staff as to those hours as necessary. However, immediately following the above meeting with Steinman and the other managerial personnel, Bruno called a meeting of those assigned to work with him and informed them of the new hours. To enforce them, Bruno made certain that he personally was on the job by 8:45. Leelike's memorandum of February 14 was received about 1 week after the meeting with Steinman. Although the actual work hours were changed in February, the method of filling out the timesheets continued as before.[24]

Bruno related that, when, in April 1976, he became a full-time employee of the school as assistant to Associate Dean Thomas Smithsi, he asked the latter why the timesheets were being filled out so as not to show the hours actually worked. Smithsi had replied that this was just for accounting purposes. When Bruno later became registrar, he asked the same question of School Director Buch and was given the same answer.

The Respondent's former accountant, Carapezzi, testified that, while serving as the Respondent's bursar from October 1977 until June 1978, he instructed the employees assigned to work under his direction that their work hours were from 9 a.m. to 5 p.m. with 1 hour for lunch. Later, but before February, he and his accounting office employees also had worked these same hours.

Carapezzi related that, after receiving Leelike's February 14 memorandum, which he found on his desk on or about that date, he responded with his own written reply, dated February 20, to Leelike, with copies to Controller de los Reyes and to Administrator of Personnel Susan Sieczkowski.[25] Carapezzi's note is as follows:

> In regard to your memo dated February 14, 1980, I feel it necessary to state the following. At the time of my hire, October 10, 1977, one of the conditions of my hiring was that my hours consisted of a work day beginning at 9:00 a.m. and ending at 5:00 p.m., with a one hour lunch break. I was told at this time that this procedure is *company policy*. The thirty-nine hour work week was only a formality. If a change in this policy has occurred since then, I have failed to be notified. Accordingly, any people I have hired during this time span have been hired under the same conditions. I would greatly appreciate your immediate response of this matter. Thank you.[26]

Shortly after sending Leelike the above message, Carapezzi met Leelike in the hallway of the Respondent's premises and asked for clarification of the change in policy. Carapezzi told Leelike that, at the time he had been hired, he had been expected to work from 9 to 5 with 1 hour for lunch, and that he wanted to know why he and the persons employed in his office were now being required to work a 39-hour week. Although Leelike replied that he would meet with the employees in Carapezzi's department and discuss the matter, such a meeting never occurred.[27]

Ellen Harper[28] testified that, after receiving complaints from various members of the office clerical and faculty bargaining units about the change in hours affecting the office clerical unit, and following her own investigation, she sent the following letter, dated February 28, to Leelike at the Respondent's school:

> In our opinion, the recent increase in working hours for clerical employees represented by District 65, U.A.W. constitutes an unfair labor practice. We have filed charges in this regard with the National Labor Relations Board. A copy of our charge is enclosed.[29]
>
> We urge you to promptly reinstate the previous hours of work and pay bargaining unit employees for those additional hours already worked. Should this occur, we will of course withdraw our charge.
>
> We are prepared to meet with you to discuss this matter further if you wish.

Harper averred, without contradiction, that the Union had received no communication from the Respondent concerning the office clerical unit either before or after it sent the above February 28 letter to the school, and that no reply to this letter ever was received. Contract negotiations for the office clerical unit began in September. While there since have been discussions concerning working hours, there has been no agreement or resolution of this issue.

Samuel Steinman, the Respondent's president, testified that, in order for the present corporation to continue to operate the school after purchasing it from R.C.A in

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[24] Steinman questioned Bruno's general reliability by testifying that Bruno had been terminated because he had inappropriately permitted changes in student transcripts that did not correlate with actual grades, and that this resulted in diplomas having been incorrectly issued. In addition, the school had lost much money because the flow of information from student services that enabled the school to certify students who were receiving financial aid was very slow. Contrary to Bruno, who testified that he had not been informed of the reasons for his termination, Steinman testified that Bruno had been confronted with the evidence against him by his supervisor, Dean of Administration Bader, in July, and, soon thereafter, he had been let go. Bruno admittedly did not receive a copy of the internal personnel form subsequently given to Steinman, which set forth the reasons for Bruno's discharge. Bader was not called as a witness. The issue of Vincent Bruno's credibility will be considered below.

[25] Sieczkowski's duties as administrator of personnel differs from those of Manager of Personnel Relations Leelike, who works in labor relations, in that Sieczkowski is principally involved with verifying billing and handling of insurance claims for the Respondent's students. She also is responsible for maintaining personnel records.

[26] Although Carapezzi testified that he personally had delivered the above response to the personnel office and had given a copy to Sieczkowski with a request that she forward it to Leelike, Leelike denied receiving it.

[27] Another of the Respondent's business records, a payroll change notice for unit employee Alba Alcazar, also apparently contradicts the Respondent's timesheets. This document indicates that in June 1979 Alcazar was assigned to work from 12:30 to 8:30 p.m., hours corresponding to the General Counsel's position.

[28] Harper, an organizer for the Union for about 6 years, services the separate units of the Respondent's employees represented by the Union. Harper was the only union official who was involved in the organizational campaign for the Respondent's office clerical unit and, since certification, has served as the Union's chief negotiator for that unit.

[29] Subsequently, the charge in this proceeding was filed on March 3.

May 1974, it was necessary to retain all previous accreditations and degree-granting authority from the State Department of Higher Education and from the National Association of Trade and Technical Schools, and to gain approval from the Veteran's Administration and other agencies. To obtain these approvals, required for continued operation, the new management had to demonstrate that the school would be maintained with no change in administrative policy, curriculum facilities, or working conditions. The Respondent therefore successfully attempted to retain as many of R.C.A.'s former administrators and school employees as would be willing to remain.

Steinman declared that office clerical employees worked the 39-hour week when the Respondent took over operation of the school in 1974 and that in the interest of required continuity, there have been no changes in hours of work for clerical employees since that time. Steinman conceded, however, that, while it was necessary to maintain curriculum and faculty standards, office services, and the caliber of such facilities as libraries and laboratories, the clerical personnel involved in this proceeding do not conduct classes and are not directly associated with the school's academic standing.[30]

In explaining why the admissions office coverage schedules generally reflected starting times of 9 when, according to the Respondent, the work shift really began at 8:45, Steinman related that the net time during which the admissions office performed services was from 9 to 5. Accordingly, if admissions office employees are at work promptly at 9 a.m., except for peak periods, there would be no net diminution in the time during which services would be rendered in that office as compared with what had been available under R.C.A., as R.C.A. had followed the same policy. While testifying that the switchboard, too, does not open until 9 a.m., Steinman insisted that the hours on the posted admissions office coverage schedules are not the hours that those employees actually were expected to work, as they always had been required to be present by 8:45 and to leave at 5:10.

Steinman denied the account of the February managerial meeting given by Vincent Bruno. According to Steinman, he had called a meeting of ranking school personnel approximately 1 week after the Union's January 28 certification. In addition to those identified by Bruno as having been present, there were Richard Carapezzi;[31] George Leelike, manager of personnel relations; Walter Arizzni, vice president for marketing; Susan Sieczkowski, personnel administrator; and Richard Bader, then dean of admissions.

According to Steinman, he informed the group that, because the Union had won recognition as bargaining agent for the office clerical unit, the school would have to scrupulously avoid changing any of the terms and conditions of employment as such changes would have to be discussed in advance with the union representative. Responding to questions concerning tardiness and existing conditions of employment, Steinman told those assembled that they should make certain that they continued to do whatever had been done before. There was no discussion of negotiating strategy in future contract discussions with the Union.[32]

Steinman also denied that he had checked employee arrivals earlier than before following the issuance of Leelike's February 14 memorandum. Steinman explained that, since November 1979 when School Director Buch departed, Steinman has assumed Buch's duties. As a result, Steinman has arrived at the school much earlier than before to look into matters previously supervised by Buch, coming to work as early as 7:30 and 8 a.m. and remaining late. He has continued this practice since Buch's departure.

Steinman and Leelike trace the inception of Leelike's February 14 memorandum, which Steinman had authorized, to a tardiness problem then being experienced with financial aid employee Bhisham Sachdeva. Sachdeva had become upset when his supervisor, Financial Aid Officer Watlington, had refused to approve his timesheet as submitted because Sachdeva had not entered his lateness for the pay period in question. Sachdeva had explained to Leelike, called in on the matter, that his lateness had been caused by transportation problems. Sachdeva, in turn, was instructed to fill out his timesheet accurately with the proper arrival times. If Sachdeva wanted to record the reason for his lateness, it was up to him.

Leelike then reported the incident to Steinman, who asked him to look into the general matter of lateness in the office and to report back. When Leelike returned to Steinman with his findings on tardiness, the latter accepted Leelike's recommendation that, rather than deal individually with each employee, it would be wiser to remind the employees of the work hours by a general memorandum. Accordingly, Leelike's February 14 memorandum was distributed.

Leelike, too, affirmed that the working hours policy set forth in Buch's above-quoted memorandum of July 18, 1974, had not changed from that time to date. As did the Respondent's other officials, Leelike contended that the timesheets completed to show that 39-hour weeks generally had been worked by the Respondent's office employees since 1974 correctly represented the existing situation.

Although Leelike, as noted, denied receipt of Carapezzi's February 20 memorandum wherein Carapezzi had protested the asserted change in work hours, Leelike did recall going to Carapezzi's office in that period after Carapezzi had asked to speak with him. Carapezzi, during Leelike's visit, announced that he wanted to talk about his working conditions. He had received Leelike's memorandum and, in his mind, this February 14 communication constituted a change. Leelike replied that he knew of no change that had been intended. Carapezzi stated that he wanted Leelike to know that he was very upset about this. When Leelike asked what was making Carapezzi upset, Carapezzi reiterated that this represented a change. The conversation ended when Carapezzi walked out of his own office telling Leelike that he did not think he wanted to talk to him. Carapezzi resigned in mid-March.

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[30] Accreditation was actually accomplished in 1974 when the Respondent's attorney went to Albany, New York, where he provided the appropriate agencies with information as to how the school would be run.

[31] While Carapezzi recalled having attended such a meeting, he did not remember what had been said.

[32] Steinman's account of the February meeting was substantially corroborated by Arizzni and Leelike.

The Respondent's position as to the continuity of the 39-hour workweek was further supported by the testimony of Walter Arizzni, vice president for marketing,[33] and two longterm employees, Kathryn Archacki and Lee Goldberg.[34]

Archacki, secretary to the dean, testified that she has worked 39-hour weeks throughout her approximately 19 years at the school under R.C.A. and the present management.[35] When hired by the Respondent in 1974, she was told by the then controller, Adelfio, that her hours would be the same as those she had had with R.C.A. Archacki's hours, from 9 a.m. to 5:25 p.m. with lunch from 2 to 2:37 p.m., have been followed all the time she has been with the school. If Archacki works through her lunch recess, she will leave at 5 instead of 5:25 p.m.

When Archacki received Leelike's February 14 memorandum, which provided that the hours set forth therein could be "rescheduled only by written approval in advance," she asked her supervisor, Dean Hsu, if this memorandum applied to her as well. Hsu promised to check. He later reported that Archacki should continue to work the same schedule as before.

Goldberg, who is Arizzni's secretary, was employed by R.C.A. for about 8-1/2 years before the school was purchased by the Respondent. She averred that from the time she was with R.C.A. to the present she has worked 39-hour weeks, from 9:30 a.m. to 5:55 p.m.,[36] taking between 37 to 40 minutes for lunch. While she sometimes works later than 6 p.m., she never leaves before that time. When she was hired by the Respondent in 1974, Adelfio agreed to Goldberg's request that the same arrangement she had had under R.C.A. be continued and that she be allowed to come in later in the morning and stay later in the day to complete her 7.8 hours.

Goldberg received a copy of Leelike's February 14 memorandum that work hours were from 8:45 to 5:10, and, although that communique required that those hours be observed unless there has been advance written authorization, Goldberg has continued to work the same hours as before without discussing the matter with Arizzni and without obtaining written authorization.

C. *Discussion and Concluding Findings*

The Respondent does not contest the established principle that an employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in the existing hours of work or other terms and conditions of employment.[37] Rather, in response to the General Counsel's assertion that the workweek was unilaterally lengthened from 35 to 39 hours approximately 2 weeks after the Union was certified as bargaining representative for the Respondent's office clerical employees, the Respondent contends that the workweek always had been 39 hours and that no such change had occurred.

This matter is unusual in that the Respondent's timesheets since 1974, which support the Respondent's position, are under attack. The timesheets are also supported by Buch's 1974 memorandum. Conventionally, such business records, consistently maintained in the manner described for so extended a period, might be dispositive. In the present matter, however, the weight of the evidence, in the context of the credibility resolutions to be discussed below, supports the General Counsel's argument that the timesheets are inconsistent with other business records and do not reflect the hours actually worked by the Respondent's office clerical employees before mid-February.

As described above, the General Counsel presented the testimony of five employee witnesses who are in the bargaining unit and three of the Respondent's former supervisors. I credit the testimony of the employee witnesses. That they all were on the Respondent's payroll when, at economic risk to themselves, they testified against their Employer's interest is a factor to be counted in assessing credibility.[38] The credibility of these witnesses has also been evaluated in the context of the other factors to be considered herein.

The testimony of former Superviser Richard Carapezzi is credited as he was a neutral and disinterested witness when he testified. Unlike Vincent Bruno, who also gave evidence as a former supervisor, Carapezzi had not been terminated by the Respondent, but had voluntarily resigned. Although Personnel Manager Leelike did not admit receipt of Carapezzi's memorandum of February 20 protesting Leelike's February 14 communique concerning work hours, Carapezzi's credibility is enhanced by Leelike's testimony that Carapezzi, at the time, did complain about these changes when Leelike came to see him in his office. Leelike noted that Carapezzi, when seeking to discuss the changes, had been quite upset. Having credited Carapezzi, I find that on or about February 20 he prepared and distributed his memorandum in reply to Leelike.[39]

Carapezzi, on the other hand, detracted from Vincent Bruno's believability as to events at the managerial meeting called by Steinman in early February. There, according to Bruno, Steinman had declared that the work hours would be increased because of the advent of the Union and to provide the Respondent with a bargaining tool. Bruno's account is denied by Steinman and other company witnesses. Although Carapezzi, by his own testimony and other testimony, was among those present at the meeting, he did not recall what had been said. Considering Carapezzi's sensitivity to the subject change in hours, to the point where he protested the matter in writing and/or orally, if Steinman had made the statements attributed to him by Bruno, it is most unlikely that such remarks would have been disregarded by Carapezzi.

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[33] Arizzni, like Steinman and Leelike, is one of the 30 coequal shareholders in the Respondent corporation.

[34] Both Archacki and Goldberg are members of the office clerical bargaining unit.

[35] Archacki has been secretary to the dean during her entire employment.

[36] These hours are recorded by Goldberg on her timesheets.

[37] *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962).

[38] *World Generator Company, Inc.*, 242 NLRB 1295, 1299, fn. 11 (1979); *Georgia Rug Mill*, 131 NLRB 1304, 1305, fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962). While Agapito appeared to be the most inconsistent of the Respondent's employee witnesses, her testimony concerning her work schedule before and after mid-February is accepted as otherwise corroborated.

[39] See *Continental Distilling Sales Company, a Division of Publicker Industries, Inc.*, 145 NLRB 820, 827 (1964), enfd. in part 348 F.2d 246 (7th Cir. 1965), where much weight was given to the testimony of a neutral former supervisor.

In evaluating Vincent Bruno's testimony, I make no finding as to whether he was terminated because of the conduct attributed to him by Steinman. In not accepting Bruno's accounts of the mid-February meeting, it is noted that his version is not supported by Carapezzi; that, having been terminated, Bruno did have grounds for other than a neutral view of the Respondent; and that, as I found, his protestation that he had received no reason for his discharge is unconvincing. Bruno had been advanced from a routine part-time position while a student in the Respondent's school until he became registrar and administrator of student services. In short, he had not been badly treated. The record contains no evidence that Bruno had acted in any way to bring in the Union and there is no developed reason why the Respondent after furthering Bruno's career should have dealt so summarily as not to have notified him of the reasons for his termination.[40] Accordingly, so much of Bruno's testimony as relates to what Steinman stated at the early February meeting is not credited. However, as Bruno's testimony concerning the actual change in the length of the workday and the shortening of the lunch hour is corroborating by other evidence, that part is accepted.

Bruno Suria, like Carapezzi, had voluntarily resigned from his supervisory position, doing so even before the asserted change in hours became an issue. However, unlike Carapezzi, Bruno Suria, because of close family ties to his wife, Rosa Suria, and mother-in-law, Divinia Pagan, both of whom are still employed and have a material interest in the outcome of this proceeding, cannot be considered neutral. Nonetheless, Bruno Suria's testimony is consistent with the weight of the evidence as developed herein, is independently corroborated, and is accepted.

The testimony of the General Counsel's witnesses is corroborated by certain contemporaneously prepared documents of undisputed authenticity that provide insight as to the hours actually worked before mid-February. Accordingly, Financial Aid Officer Watlington's February 5 note to Sachdeva, reprimanding him for lateness, referred to two separate occasions when Watlington had spoken to him "about arriving at work after 9 a.m."[41] Also, the payroll change notice for employee Alba Alcazar shows that in June 1979 she worked a schedule consistent with what the General Counsel argues was followed before mid-February 1980. More significantly, taken at face value, the coverage sheets for the admissions office indicate that before mid-February most employees in that office were to be in the office from 9 a.m. to 5 p.m. The lesser number of employees who were assigned to other shifts in that office worked the same number of hours.

Steinman's testimony that, regardless of what the coverage schedules appeared to require, daytime employees nonetheless had been expected to be on the job between 8:45 a.m. and 5:10 p.m. is diluted by his further testimony that the office rendered services only between 9 a.m. to 5 p.m., that the school's switchboard did not open to receive calls until 9 a.m., and that, if these employees arrived for work promptly at 9 and left at 5, the office could operate with no diminution of services as compared to R.C.A. This testimony eliminates any substantive reason for the longer hours, at least as far as the admissions office is concerned.

Similarly, as no one can call the school before 9 a.m., it would appear that the Respondent did not represent itself as open to the public before that hour and that certain other clerical services did not commence before then.

In affording greater credence to the admissions office coverage sheets as business records than to the timesheets, spontaneity of preparation is a compelling factor. While there is considerable testimony that the timesheets were kept in a certain way "for bookkeeping purposes," it is undisputed that the coverage sheets were regularly prepared by the Respondent for its own needs over an extended period and that the time frames for the various shifts as indicated in those schedules had been freely promulgated. Logically, if the Respondent had then intended that the admissions office actually be manned from 8:45 to 5:10 and that employees on other shifts work corresponding hours, it would have been just as easy to have so specified.[42]

Steinman's explanation of a need to continue services as under R.C.A. in order to acquire or retain accreditation may have provided a rationale as to why the Respondent may have deemed it necessary to have timesheets completed to reflect a 39-hour workweek. However, as a practical matter, this, too, did not translate into substance. Accreditation was obtained after the school's attorney went to Albany and informed the relevant agencies how the school would be operated. However, the clericals are not directly connected to the Respondent's academic standing. While Steinman testified that the longer hours were needed so that there would be no reduction in clerical support services, as noted such services, in fact, would not be diminished if the employees were on the job between 9 a.m. and 5 p.m. With this background, I further credit the testimony of Divinia Pagan that her actual work hours while with R.C.A. conformed to the 35-hour week, and that she had been told by her supervisor that the July 18, 1974, memorandum from School Director Buch was intended only to ensure that employees did not leave the office for their 1-hour lunchbreak before 1 p.m.[43]

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[40] While Bruno did not receive the internal personnel form given to Steinman setting forth the reasons for the action taken against him, in denying that he had even been given reasons for his termination, Bruno, in my view, overstated his situation.

[41] It is rather unlikely that a formal supervisory reprimand on the subject of lateness would refer to an incorrect starting time.

[42] While adjustments to certain timesheets based on the 7.8-hour day, as in the cases of Bosco, Sachdeva, and Agapito, tend to enhance authenticity, the weight of the evidence supports the conclusions reached herein.

[43] In reaching the conclusions herein, I have discounted the testimony of Archacki, secretary to the dean, and Goldberg, secretary to the vice

Continued

From Union Organizer Harper's undisputed testimony, it is clear that the Respondent refused to notify or consult with the Union about the change in hours. This omission plainly violated Section 8(a)(5) and (1) of the Act even in the absence of a showing that the Respondent had acted in bad faith.[44] The Respondent was duty-bound to recognize and deal with the newly certified Union as the bargaining agent of the office clerical employees. By taking the unilateral action found herein, the Respondent unlawfully failed to fulfill its duty to bargain.[45]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time office clerical employees employed by the Respondent at 320 West 3lst Street, New York, New York, but excluding all other employees, teachers, maintenance and custodial employees, technical employees, managerial employees, confidential employees, head bookkeeper, guards, and supervisors as defined in the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By unilaterally increasing the length of the workday and the workweek and by unilaterally changing working conditions by reducing the daily lunchbreak period, having implemented these changes on or about February 14, 1980, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the foregoing conduct and by threatening an employee to discourage activity and support for the Union, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Respondent be required to rescind the unilateral changes found herein and to make affected employees whole for any losses sustained as a result of the changes.[46] Reimbursement shall include interest as provided in *Florida Steel Corporation*.[47] The Respondent also should be ordered to meet and bargain in good faith with the Union concerning work schedule changes and to post the customary remedial notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(b) of the Act, I hereby issue the following recommended:

ORDER[48]

The Respondent, Technical Careers Institutes, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with District 65, affiliated with United Automobile, Aerospace and Agricultural Implement Workers of America, by unilaterally altering terms and conditions of employment of the employees in the bargaining unit set forth below for which the Union is

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president for marketing. While both are technically within the bargaining unit, they are longterm employees who throughout their lengthy tenures have been assigned to work directly for management officials. Their positions have brought them privileges not otherwise accounted for as both work schedules other than the 8:45 to 5:10 routine currently mandated by the Respondent. Archacki assertedly is scheduled to work from 9 to 5:25, and is free to depart at 5 p.m. if she works through her lunch period. Goldberg works from 9:30 to 6, hours she claimed to have followed through her earlier years with R.C.A. and, with the Respondent's permission, to have continued ever since. Contrary to the terms of Leelike's February 14 memorandum, both continued to work their separate schedules without obtaining written authorization. While Archacki did consult with the dean for whom she worked on this matter and obtained verbal clearance, Goldberg continued to work as before with no discussion with her superior, Arizzni. The longstanding respective work relationships between Archacki and Goldberg and the high managerial officials with whom they are associated have, to some degree, set them apart from other unit employees and have affected their independence and focus as witnesses.

[44] *The Baughman Company*, 248 NLRB 1346, 1347 (1980); *Florida Steel Corporation*, 235 NLRB 941, 942–943 (1978).

[45] It also is concluded that Leelike's undenied January directive to employee Rosa Suria that she should not become involved with the Union, encourage others to support the Union, or vote in the forthcoming representation election, in the context of his reference to someone who had been discharged at McDonald's for not following instructions, was a threat intended to discourage Rosa Suria from working for and supporting the Union. This statement was therefore violative of Sec. 8(a)(1) of the Act. Although not separately alleged in the complaint, this incident was litigated at the hearing and is closely related to matters actually alleged.

[46] *The Baughman Company, supra; Atlas Tack Corporation*, 226 NLRB 222 (1976).

[47] 231 NLRB 651 (1977).

[48] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

the exclusive bargaining representative. The appropriate bargaining unit is:

> All full-time and regular part-time office clerical employees employed by the Respondent at 320 West 31st Street, New York, New York, but excluding all other employees, teachers, maintenance and custodial employees, technical employees, managerial employees, confidential employees, head bookkeeper, guards, and supervisors as defined in the Act.

(b) Threatening to discharge employees if they work for or support the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action:

(a) Upon request, meet and bargain in good faith with the Union, as the exclusive collective-bargaining representative of the employees in the appropriate unit described above, concerning the length of the workday, the workweek, lunch breaks, and other terms and conditions of employment, and embody any understanding reached in a signed, written agreement.

(b) Rescind the changes in the length of the normal workday, the length of the normal workweek, and the duration of the daily lunch break made in February 1980,[49] and make the employees whole for any loss of earnings, privileges, or benefits suffered as a result of such unilateral action in accordance with the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its New York, New York, school copies of the attached notice marked "Appendix."[50] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[49] No remedy is deemed appropriate here concerning overtime premium pay as the practice of affording same after 39 hours of work per week was unchanged.

[50] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Ricks Construction Company, Inc. *and* **General Teamsters & Food Processing Local Union No. 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 31-CA-9922

November 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 23, 1981, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Ricks Construction Company, Inc., Bakersfield, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Bakersfield, California, on March 17, 1981. The initial charge was filed on March 28, 1980,[1] by General Teamsters & Food Processing Local Union No. 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union). An amended charge was filed by the Union on June 23.

Thereafter, on September 26, the Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing alleging a violation by Ricks Construction Company, Inc. (herein called Respondent), of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (herein called the Act). The answer and amended answer, duly filed, deny the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, a brief has been received from the General Counsel.

Upon the entire record, and based upon my observation of the witnesses and consideration of the brief submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Board, in a related Decision issued on June 27,[2] asserted jurisdiction over Respondent finding as follows:

> Respondent, in the course and conduct of its business operations, annually performs services at the Elk Hills Naval Reserve valued in excess of $50,000 for Williams Brothers Engineering, herein called Williams.
>
> Williams is a Delaware corporation with its principal place of business in Tulsa, Oklahoma. Williams is engaged in the supervision of the exploration, drilling, and production of petroleum products, as an agent for the United States Government acting through the Secretary of the Navy, at the Elk Hills Naval Petroleum Reserve Number One in Kern County, California, and received in excess of $50,000 per month net operating fee from the United States Government during the same period of time described above.
>
> Williams in the course and conduct of its operations annually purchases and receives at its Elk Hills operation, products, goods, and materials valued in excess of $50,000 directly from points outside the State of California.
>
> The operations of Respondent in conjunction with the operations of Williams described above have a substantial impact on the national defense of the United States.
>
> Respondent, in the course and conduct of its operations, bought and received at its Bakersfield, California, facility products, goods, and materials valued in excess of $5,000 directly from points outside the State of California.

The instant complaint contains identical jurisdictional allegations. Respondent admits that it annually performs services valued in excess of $50,000 for Williams, and admits the allegation concerning the nature and extent of

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[1] All dates or time periods herein are within 1980 unless stated to be otherwise.

[2] *Ricks Construction Company, Inc.*, 250 NLRB 250, 251 (1980).

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Williams' operations at the Elk Hills Naval Reserve. However, Respondent's answer claims "no direct knowledge" that Williams purchases in excess of $50,000 worth of goods and material from outside the State of California for such operations, or that the operations of Respondent and Williams have a substantial impact on the national defense of the United States.

The General Counsel relies on the Board's jurisdictional determination in the foregoing case as being sufficient to establish jurisdiction herein, and so advised Respondent at the hearing. Respondent presented no evidence on the issue of jurisdiction.

On the basis of the foregoing admissions of Respondent, I find that the Board's jurisdiction over Respondent has been established under the national defense standards enunciated by the Board in *Ready Mixed Concrete & Materials, Inc.*,[3] and that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleadings is whether Respondent refused and/or delayed the reinstatement of unfair labor practice strikers following the Union's unequivocal application for reinstatement on their behalf.

B. *The Facts*

Respondent has a contract with Williams Brothers Engineering to provide labor for the drilling of oil and gas wells, and related operations, at the Elk Hills Naval Petroleum Reserve Number One in Kern County, California.

In *Ricks Construction Company, Inc., supra*, the Board found that Respondent had violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union's certification, on November 27, 1979, as collective-bargaining representative of the employees involved herein,[4] and by failing and refusing to furnish the Union with certain relevant and necessary information for the purposes of collective bargaining.

On March 10, prior to the Board's June 27 decision in the aforementioned case, the Union commenced a strike against Respondent in protest of Respondent's continued failure and refusal to bargain. Some 100 of Respondent's approximately 135 to 150 employees participated in the strike.

On March 19, the Union terminated the strike and sent the following telegram to Respondent:

> TEAMSTERS LOCAL 87 HEREBY MAKES AN UNCONDITIONAL OFFER TO RETURN ALL RICKS CONSTRUCTION EMPLOYEES TO THEIR JOBS NO LATER THAN 5 PM MARCH 19, 1980. INASMUCH AS OUR PICKET LINE WAS AN UNFAIR LABOR PRACTICE PICKET LINE, TEAMSTERS LOCAL 87 DEMANDS THAT ALL EMPLOYEES RETURNING TO WORK AS PER THIS TELEGRAM BE REINSTATED TO THEIR FORMER POSITION NO LATER THAN 5 PM MARCH 19, 1980. PLEASE BE ADVISED THAT REFUSAL TO RETURN ANY OF THE ABOVE MENTIONED EMPLOYEES TO THEIR FORMER POSITION WILL SIMILARLY BE CONSIDERED UNFAIR LABOR PRACTICES.

Thereafter, apparently on or shortly after March 20, Respondent reinstated the great majority of employees to their former jobs. However, on and subsequent to March 20, Respondent's supervisors, while assemblying the crews prior to the customary 7 a.m. starting time, refused to reinstate approximately 20 returning strikers who had timely reported for work, advising them that they had been replaced or that their positions had been filled.[5]

Various employees who were refused reinstatement on and after March 20 testified that they had been working for Respondent for substantial periods of time in the same job classifications, that they worked a regular workweek on a full-time basis, and were on a permanent employment roster maintained by Respondent. Respondent's area manager, Irvin Gramling, testified that, although Respondent's foremen maintain a daily roster of regular employees, nevertheless none of Respondent's employees are considered to be permanent employees. Gramling, by way of explanation, testified that he would not characterize himself as being a permanent employee even though he has occupied his position for 5 years.

Gramling further stated that, following the receipt of the aforementioned telegram on March 19, Respondent did not issue any directive or instructions to its foremen regarding reinstatement of the strikers, and thus the foremen were apparently permitted to use their own discretion regarding reinstatement. Gramling surmised that the foremen "may have had their crews already filled up" on the morning of March 20, or that there was insufficient work available, as justification for the failure of the foremen to reinstate the employees to their former jobs. Gramling acknowledged that some strike replacements hired between March 10 and March 19 were again "hired" on the morning of March 20. However, he was unable to estimate the number of strike replacements so employed.

C. *Analysis and Conclusions*

While Respondent implicitly suggests, by certain questions directed to the General Counsel's witnesses at the hearing, that there may have been another reason for the strike, the unrebutted record evidence shows, and I find, that the strike was instituted for the purpose of protesting Respondent's continued failure to bargain with the Union following Board certification. Indeed, the Board, on June 27, determined that Respondent's failure so to bargain and to provide certain requested information was violative of Section 8(a)(5) and (1) of the Act. I therefore find that the strike, commencing on March 10, was an unfair labor practice strike. Even assuming *arguendo* a dual motivation for the strike, it is clear that the aforementioned unlawful conduct of Respondent was a principal reason therefor. Thus, the strike was nevertheless an unfair labor practice strike. See *Larand Leisurelies, Inc.*, 213 NLRB 197, fn. 4 (1974), enfd. 523 F.2d 814 (6th Cir. 1975).

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[3] 122 NLRB 318 (1958).

[4] The unit is described as follows:

> All roustabouts, lead roustabouts, crane operator, backhoe operator, pushers, and working foremen employed by the Respondent at Elk Hills Naval Reserve, but excluding all office clerical employees, professional employees, guards, all other employees, and supervisors as defined in the Act.

[5] The record indicates that some of these 20 employees were reinstated at a later date, and that some have not yet been reinstated.

An employer is obligated to reinstate immediately unfair labor practice strikers to their former positions of employment upon application, discharging, if necessary, any employees hired as replacements during the strike. *Stanley Building Specialties Co., a subsidiary of the Stanley Works*, 166 NLRB 984, 986 (1967), enfd. *sub nom. United Steelworkers of America, Local 5571* [*Stanley-Artex Windows, Division of the Stanley Works*], 401 F.2d 434 (D.C. Cir. 1968); *United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 1780*, 244 NLRB 277 (1979); *Atlas Metal Parts Co., Inc.*, 252 NLRB 205 (1980), and cases cited therein at fn. 9.

The undenied and credible testimony of various employees who sought to return to work following the strike clearly demonstrates that Respondent's foremen, who possessed the authority to reinstate the employees, determined that they had been replaced and refused to give them preference over replacements hired during the strike. While there is no contention and no record evidence that the foremen were motivated by a discriminatory intent, such treatment of unfair labor practice strikers is inherently discriminatory and nonetheless unlawful. Moreover, although Area Manager Gramling speculated that there may have been no work available on March 20 for some of the approximately 20 employees involved herein, Respondent has not presented any probative evidence in support of this contention, particularly as the record evidence shows, and Gramling concedes, that an unknown number of strike replacements were employed subsequent to March 20. Thus, I find that Respondent has failed to sustain its burden of proof. See *Kayser-Roth Hosiery Company, Inc.* v. *N.L.R.B.*, 447 F.2d 396, 401 (6th Cir. 1971).

Respondent's apparent contention that the employees involved herein were simply casual or daily laborers who reported to work each day without assurance that they would be "hired" is totally specious and I discredit Gramling's assertions in this regard. Rather, the uncontradicted record evidence shows, and I find, that Respondent's employees are assigned to specific job classifications and work crews, that they are employed on a regular full-time basis, and that they are permanent employees.

On the basis of the foregoing, I find that, by failing and refusing to reinstate the unfair labor practice strikers named in the complaint, Respondent has violated Section 8(a)(3) and (1) of the Act as alleged. *Gulf States Manufacturers, Inc.*, 230 NLRB 558, 571 (1977); *Kayser-Roth Hosiery Co., Inc.*, 187 NLRB 562, 567 (1970).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The strike which commenced on March 10 was an unfair labor practice strike.

4. By failing and refusing to reinstate unfair labor practice strikers on and after March 20, Respondent has violated and is violating Section 8(a)(3) and (1) of the Act as alleged.

THE REMEDY

Having found that Respondent violated and is violating Section 8(a)(3) and (1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed under Section 7 of the Act.

Having found that Respondent has discriminatorily refused to reinstate the unfair labor practice strikers upon the Union's unconditional application on their behalf to return to work, Respondent shall be required to offer them immediate and full reinstatement to their former positions or, if such positions are no longer in existence, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements. Further, Respondent shall be required to make them whole for any loss of pay they may have suffered as a result of the discrimination against them. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Moreover, Respondent shall be required to post an appropriate notice to employees.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondent, Ricks Construction Company, Inc., Bakersfield, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to reinstate unfair labor practice strikers upon their unconditional application to return to work on or about March 20, 1980.

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[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer to the striking employees for whom the Union made unconditional application to return to work on about March 20, 1980, immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, discharging if necessary any replacements, without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay or other benefits suffered by reason of the discrimination against them in the manner described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at Respondent's facility at Bakersfield, California, and at appropriate locations at the Elk Hills Naval Reserve where Respondent customarily posts notices to its employees copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT fail to reinstate unfair labor practice strikers upon their unconditional application to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL offer the unfair labor practice strikers for whom the Union made unconditional application to return to work on or about March 20, 1980, immediate and full reinstatement to their former positions or, if such positions are no longer in existence, to substantially equivalent positions discharging if necessary any replacements, without prejudice to their seniority or other rights and privileges.

WE WILL make the said employees whole for any loss of pay they may have suffered as a result of the discrimination against them, with interest.

RICKS CONSTRUCTION COMPANY, INC.

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[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

H. O. Kline Transportation, Inc. *and* **Thomas J. Ventura.** Case 4-CA-9722

November 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 11, 1979, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, the Charging Party filed a brief in support of the General Counsel's exceptions, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me in Philadelphia, Pennsylvania, on May 7, 1979. In essence, the General Counsel's complaint alleges that on October 13, 1978,[1] Joseph F. Kline, vice president of the Respondent, threatened with physical assault Thomas J. Ventura, the Charging Party, because he had engaged in protected activity and thereafter in fact assaulted him,[2] both in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

The Respondent generally denied that it has committed any unfair labor practices, although admitting that a physical altercation occurred between Kline and Ventura on October 13.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AMD CONCLUSIONS OF LAW

I. JURISDICTION

H. O. Kline Transportation, Inc., is a class three common carrier, meaning that its gross volume of business is less than one-half million dollars a year. It does business in a four-state area including Delaware, New Jersey, Pennsylvania, and Maryland and is operated by a father and two sons.

During the year preceding issuance of the complaint herein the Respondent received more than $50,000 for transporting goods and materials across state lines. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 326 (herein the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

For a number of years the Union has represented a unit of the Respondent's drivers and warehousemen. The Respondent and the Union have been parties to a series of collective-bargaining agreements including the one which was in effect during the material time of the events herein.

Ventura has been the shop steward since February 1976, and as such he has been involved in meeting with the owners of the Respondent—H. O. Kline and his sons Bernard and Joseph. Ventura has discussed various matters of dispute arising under the contract and has formally processed grievances.

According to Ventura, and generally undisputed by the Respondent, on October 5, H. O. Kline was observed unloading a truck as was Bernard on October 12. Then in the late afternoon on October 13, when Ventura returned to the Company's premises from making a delivery, Joseph told him to finish unloading a truck, which Ventura claims Joseph had been doing.

Joseph denied that he did any unloading on October 13, but does admit that when Ventura returned he was, in fact, standing on the dock with papers in his hands.

In any event, according to Ventura he talked to Joseph about the events of October 5 and 12 as well as his contention that Kline was doing bargaining unit work

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[1] All dates are in 1978 unless otherwise indicated.

[2] Ventura claims that as a result of the assault he has been totally disabled from gainful employment, a claim which the Respondent disputes. The General Counsel contends that Ventura's disability resulting from an unlawful assault would require a backpay remedy. But because the nature and extent of the disability, if any, will involve medical testimony and, presumably, the amount of backpay would be affected by any workmen's compensation payments, the parties stipulated that the backpay issues should be deferred to a compliance proceeding. While Ventura's entitlement to workmen's compensation has not been litigated, the compensation insurance carrier has apparently begun making some kind of disability payments.

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that day. For management to do such work is a breach of contract.[3]

Ventura contends that when he told Joseph Kline that the Company had been breaching the contract, when he or the other owners did bargaining unit work, that Kline got upset and said, "If I fucked up the Company he would fuck me up."

After this Ventura went to the drivers' room, filled out a report, called his wife, punched his timecard, and proceeded to leave. On leaving he passed Kline who asked "if everything was okay." Ventura said yes, except that he did not appreciate Kline's threat. A few words were exchanged, then, according to Ventura, Kline picked him up, "slammed" him against the wall, and hit and kicked him. And after a few minutes Kline told Ventura to "get the hell off the premises."[4]

Kline contends that from the time Ventura returned to the dock in the afternoon until the physical altercation, a period of about 45 minutes, on three occasions Ventura brought up the subject of supervisors doing bargaining unit work, and kept "picking" at him. And according to Kline, Ventura followed him around the dock in an abrasive manner, badgering him about being on the dock and like. Kline testified that he told Ventura that if he wanted to file a grievance to do so but otherwise "to get off my back," and that he was "screwing up the Company." (Kline denies making the statement attributed to him by Ventura quoted above.)

In general agreement with Ventura, Kline contends that when Ventura came out of the drivers' office he said something about not liking to be threatened. Then, as Kline turned to walk away, "the man came after me." Kline shoved Ventura away because, he stated, he was afraid for his own physical safety—that Ventura has a reputation for aggressiveness and is known to have a permit to carry a gun. In any event, they scuffled a bit and in a few seconds the fight was over.

Finally, Kline contends that Ventura did not look injured as a result of the fight nor did he make any comment then about being injured.

Mary Ellen Shevchuck is a billing clerk for the Respondent who comes to work at or about 4:45 to 5 p.m. While she denied observing the beginning of the fight, she did see Kline and Ventura scuffling, at first thinking they were playing and then concluding that they were in fact fighting. The other secretary went to the door and said, "Joe, Tommy, stop, stop it."[5]

B. *Analysis and Concluding Findings*

The principal event upon which the General Counsel bases his complaint is, pure and simply, a fight between the two individuals who undisputably did not get along[6] and both of whom are aggressive. Even if Kline struck the first blow, which appears to be the case although not totally free from doubt, such is not necessarily an unfair labor practice. Certainly to threaten an employee with physical assault because he has engaged in protected activity, such as processing grievances, is a violation of Section 8(a)(1). *Jones Motor Company, a Division of Allegheny Corporation*, 202 NLRB 123 (1973). So is an actual assault. *Greyhound Taxi Co., Inc.*, 234 NLRB 865 (1978). But the fact that a management official scuffles with a union steward does not of itself prove a violation of the Act.

It does appear from the testimony of both Ventura and Kline that Ventura had advanced his contention that managers were violating the contract by doing bargaining unit work. He was privileged to do this whether he was a union steward or not. Ventura had a right upon observing these events as he perceived them, to tell Kline and, on receiving a negative answer, he certainly was privileged to file a grievance. But he was not necessarily privileged to spend 45 minutes off-and-on "badgering" Kline. And I find that this is precisely what Ventura did. Such was Kline's generally credible testimony, undenied by Ventura. Even so, I do not believe that such behavior caused Kline to threaten Ventura or be the aggressor in the fight.

It is noted that both Ventura and Kline recounted the facts in what appeared to be the most favorable to their particular cause. Nevertheless, I found Kline more straightforward and credible than Ventura. For instance, it appeared that Kline was willing to make admissions on material matters which were not in his interest. He did not deny that he was first to make physical contact.

I do not believe, as Ventura would have me, that he was blameless—that Kline attacked him unprovoked. Nor do I believe Ventura's version of the fight—that Kline "picked me up and sort of slammed me against the wall." It may be that Kline's act of pushing Ventura was the first touch, but such does not exonerate Ventura. Indeed, I believe he provoked the confrontation. From Ventura's testimony that just prior to the fight Kline asked him if "everything was okay" does not suggest a disposition on Kline's part to start a fight.

I do not find persuasive the General Counsel's argument that by not discharging Ventura for having assaulted Kline, which would have been permissible under the contract, the Respondent thereby admitted that Ventura did not hit Kline. A company does not have to discharge someone every time cause is given. There are here already two matters in litigation involving this fight, and to have discharged Ventura would just invite another. Finally, the issue is not whether Ventura assaulted Kline, but whether Kline's actions against Ventura were caused by Ventura's protected activity.

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[3] Indeed, subsequent to the events here, these alleged breaches of contract were resolved through the grievance procedure. The parties agreed that 1 day of pay for an employee would be paid for October 12, inasmuch as there was a member of the bargaining unit on layoff status on that day, but since no bargaining unit people were on layoff on October 5, the grievance as to that day was without merit. Apparently, Ventura's contention with regard to October 13 was not processed as a grievance.

[4] There is no allegation that Ventura was discharged. He is still considered an employee but has not worked since October 13 because of the injuries he claims to have suffered.

[5] Ventura contends that one secretary screamed, "Stop it Joe, stop it," which, of course, implies that Kline was the aggressor. On this point I credit Shevchuck over Ventura. Inasmuch as she was not participating in the fight, her observation of the events would figure to be more accurate. Further, she is generally a disinterested witness and has little stake in the outcome of this matter, whereas Ventura's interest in a favorable result here is potentially beneficial also to his workmen's compensation claim. Finally, Shevchuck's demeanor was more positive than Ventura's.

[6] Undenied is the testimony of Union Business Agent Michael J. Ciabattoni that the Klines had complained about Ventura as shop steward and had asked be be removed because "they felt he was very petty."

The General Counsel contends that I should infer Kline started the fight from the fact that he is bigger than Ventura and served in the Army in Vietnam. I am not persuaded that these facts prove that Kline was the aggressor, particularly in view of Ventura's undenied aggressiveness.

Ventura was not blameless, nor of course was Kline. But given the apparent personalities of the parties involved and their relationship one with the other, I can not conclude that Kline started the fight because Ventura sought to exercise the rights guaranteed employees under Section 7 of the Act.

As to the alleged threat, even if it occurred, the statement from Kline to Ventura that "he would fuck me up" really does not mean much. The General Counsel contends that this was in the context of Ventura discussing the grievances and therefore amounted to a threat of physical violence in violation of Section 8(a)(1). First, I do not believe that Kline made the statement in the words attributed to him. That is, I credit his denial. Secondly, what was said was said during the give-and-take of Ventura badgering Kline, and did not imply a threat of physical violence in violation of the Act.

Accordingly, I conclude the General Counsel has failed to prove by a preponderance of the credible evidence that the Respondent threatened physical assault, or in fact physically assaulted Ventura in violation of the Act. I will recommend that the complaint be dismissed in its entirety.

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The complaint is hereby dismissed in its entirety.

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[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Pick-Mt. Laurel Corporation *and* Local 170, Bartenders, Hotel, Motel & Restaurant Employees Union, AFL-CIO. Case 4-CA-8533

November 17, 1981

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On January 12, 1979, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] in which it adopted the Administrative Law Judge's finding that Respondent had violated Section 8(a)(5) and (1) of the Act, for reasons noted below. Upon a petition for review and a cross-application for enforcement of the Board's Order, the United States Court of Appeals for the Third Circuit denied enforcement of the Board's Order and remanded the case to the Board for further consideration consistent with its opinion.[2] The Board thereafter accepted the court's remand and notified the parties that they could file statements of position with the Board upon remand. The General Counsel has filed a statement of position and Respondent has filed a statement of position and a motion to reopen the record.[3]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In order to place the substance of the court's remand in proper perspective, we note the following facts: Respondent's predecessor, the MLH Development Company (MLH), began operation of the hotel and restaurant involved herein on June 5, 1975. In February 1975, months before the facility opened, MLH recognized the Union as the exclusive collective-bargaining representative of a unit of the facility's employees. In April 1975, before any employees were hired, MLH and the Union reached agreement on a collective-bargaining contract. This contract, executed on June 1, 1975, was effective until December 4, 1977. The agreement contained a valid union-security clause. Nevertheless, MLH unlawfully and regularly required new employees to sign union membership applications and dues-checkoff authorization cards at the time they were hired. In February 1977, the facility was acquired by P-B Associates, of which Respondent was the general partner.

On February 9, 1977, Respondent, as successor to MLH, began operating the hotel and restaurant facilities. It retained all of MLH's employees. On February 24, 1977, Respondent withdrew recognition from the Union. The following day, the Union called a strike and Respondent filed a representation petition with the Board. The charge herein was filed on March 4, 1977, alleging Respondent's refusal to bargain with the Union as a violation of Section 8(a)(5) and (1) of the Act.

In the earlier proceeding, the Administrative Law Judge found that Respondent had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, and refusing to bargain with it, on and after February 24, 1977. In so concluding, the Administrative Law Judge found that Respondent was a successor to MLH; that the contract between MLH and the Union established the Union's presumptive majority status; and that Respondent had not shown either that the Union in fact no longer represented a majority of the unit employees or that Respondent had a reasonably grounded doubt based on objective considerations of that majority status. In his decision, the Administrative Law Judge rejected Respondent's contention that its withdrawal of recognition was justified because its predecessor had unlawfully recognized the Union. The Administrative Law Judge found that this unlawful recognition occurred 2 years before the charge herein was filed, was outside the limitations period set forth in Section 10(b) of the Act, and could not be considered in determining the legality of Respondent's withdrawal of recognition. He also rejected Respondent's attempt to rely on the subsequent unlawful acts of MLH in requiring new employees to sign applications for membership and dues-checkoff authorizations on their first day of employment as he found "no showing that specific incidents" of such misconduct had occurred within the 6-month 10(b) period preceding the filing of the unfair labor practice charge in this case.[4]

Upon exception to the Administrative Law Judge's Decision, the Board agreed with the Administrative Law Judge's conclusion that Respondent had unlawfully withdrawn recognition from the Union. With regard to Respondent's reliance on its

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[1] 239 NLRB 1257.

[2] *Pick-Mt. Laurel Corporation* v. *N.L.R.B.*, 625 F.2d 476 (3d Cir. 1980).

[3] Respondent submitted a motion to reopen the record so that it might present evidence regarding the appropriateness of issuing a bargaining order at the present time in light of certain alleged changed circumstances at Respondent's facility. In light of our decision herein, we find it unnecessary to reopen the record to take such evidence and Respondent's motion is thus denied.

We also deny Respondent's later filed request for oral argument as the record, briefs, and various submissions are adequate to dispose of the issues presented for consideration.

[4] See 239 NLRB at 1261. Respondent had also offered other evidence clearly occurring in the 10(b) period, which it claimed supported its withdrawal of recognition from the Union. The Administrative Law Judge independently analyzed this evidence and found that it did not establish loss of majority or a reasonably based doubt of that majority.

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predecessor's earlier illegal recognition of the Union, the Board added that, as the circumstances surrounding the Union's initial recognition and execution of a contract with the predecessor occurred outside the 10(b) limitations period, they could not constitute an objective basis for a reasonably based doubt of majority status.[5] The Board accordingly adopted the Administrative Law Judge's recommended Order as modified.

On review, the Third Circuit held that the Board had erred in refusing to consider pre-10(b) evidence offered by Respondent concerning its predecessor's relationship with the Union. The court indicated that even if Respondent could not use pre-10(b) evidence to nullify the contract upon which the General Counsel relied to establish the presumption of the Union's majority status, there was no reason why Respondent could not rely on the evidence "surrounding the . . . contract's inception to shed light upon its refusal to bargain as background evidence buttressing Respondent's analysis of the various timely events which allegedly gave rise to its good-faith doubt of majority status."[6]

Also, the court referred to the predecessor's illegal practice of requiring employees to join the Union and to sign dues checkoffs on their first day of work. The court noted Respondent's argument that this practice, constituting an independent unfair labor practice as to each new employee hired including those hired within the 10(b) period, might serve as the "relevant temporal anchor" to which consideration of pre-10(b) events could be tied. However, the court remanded on this issue also since it concluded that neither Respondent's brief to the court nor the Board's decision addressed the relationship between this unlawful assistance during the 10(b) period and Respondent's claim of good-faith doubt.

Lastly, in light of Respondent's desire to use pre-10(b) evidence here to defend against, rather than to establish, an unfair labor practice the court directed the Board to explain, on remand, its reasons for using the date of the filing of the charge (March 4, 1977), as the benchmark for tolling the 10(b) period.

Having accepted the remand, the Board also accepts the court's opinion as the law of the case. Thus, we are compelled to consider evidence of events occurring prior to the advent of the 10(b) limitations period insofar as they shed light on objective considerations supporting Respondent's asserted reasonably based doubt of majority status. In this regard, the fact that the Union was recognized by, and negotiated a collective-bargaining agreement with, Respondent's predecessor without prior choice or designation by any member of the bargaining unit, though occurring outside the 10(b) period, may be used as background evidence lending credence to Respondent's assertion that its own observations within the 10(b) period were sufficient to prompt a reasonably based doubt of the Union's majority status. Such observations included expression of dissatisfaction with the Union made to Respondent's supervisors by at least 29 of the 103 employees employed by Respondent at the time Respondent withdrew recognition, an expression which under terms of the remand we must regard as substantial. Additionally, consistent with the court's direction to the Board, we note that the predecessor's conduct in unlawfully requiring new employees at the time of their hire to execute union membership and dues-checkoff cards also supports Respondent's claim that it doubted that the Union represented an uncoerced majority of its employees when it withdrew recognition and that its doubt was grounded on objective considerations.[7] Thus, pursuant to the remand of the court, we find that Respondent has presented evidence of objective considerations supporting its good-faith doubt of the Union's majority status sufficient to rebut the Union's presumption of majority status. We shall accordingly revoke our prior Decision and Order in this case and dismiss the complaint in its entirety.

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[5] See 239 NLRB 1257, at fn. 2.

[6] 104 LRRM at 2708, quoting 436 F.Supp. at 1355.

[7] With regard to this unlawful assistance offered to the Union by Respondent's predecessor, the Administrative Law Judge found that there was no showing that specific incidents of such unlawful assistance had occurred in the 10(b) period; which he deemed to commence on September 4, 1976; i.e., 6 months before the charge was filed on March 4, 1977. He stated that Respondent had only established that, on February 9, 1977, when it took over the facility, 50 of the then 80-employee unit complement had been working less than 6 months, or since August 9, 1976. He then noted that on the refusal to bargain date of February 24, the unit had expanded to 103 employees but that there was no evidence of which or how many of these employees had been hired within the 10(b) period, i.e., since September 4, 1976. He found this a critical point. Viewing this issue within the confines of the court's remand, however, we consider it unimportant that Respondent was unable to state with precision how many employees were hired within the 6-month 10(b) period utilized by the Administrative Law Judge. We note that at fn. 7 of its decision, the court recognized that Respondent had not produced specific evidence of the number of employees who were affected by the unlawful assistance from 6 months before the date Respondent *itself* wished to use as the tolling date for the 10(b) period, i.e., the refusal-to-bargain date. Still, the court questioned whether "evidence of a tainted majority" was necessary when Respondent only wanted to consider this evidence in conjunction with other evidence to establish—not proof of actual loss of majority—but only a reasonably based doubt of majority. In any event, the record contains uncontradicted testimony to the effect that the procedure requiring cards to be signed at the time of employment continued through February 9, 1977, and that there was constant turnover among Respondent's employees. Moreover, the record also contains a stipulation by the parties setting forth when various employees in the housekeeping department were hired which states that one housekeeping employee was hired by Respondent's predecessor on February 2, 1977, and another on February 6, 1977, clearly within the 10(b) period regardless of whether the filing of the charge or the withdrawal of recognition tolled the limitations period. In light of this evidence and our disposition herein, we find it unnecessary to pass on the issue of which date (the date the charge was filed, or the date recognition was withdrawn) should toll the 10(b) period in this case.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that its prior Decision and Order in this case be, and it hereby is, revoked and the complaint herein be, and it hereby is, dismissed in its entirety.

Loy Food Stores, Inc. d/b/a Ken's IGA *and* Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 33-CA-4747

November 17, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 22, 1981, Administrative Law Judge Richard L. Denison issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a brief in partial support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings,[2] findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Loy Food Stores, Inc. d/b/a Ken's IGA, Westville, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their own or other employees' union activities, sympathies, or desires.

WE WILL NOT threaten our employees with discharge, layoff, shift cancellation, reduced working hours, changes, or other reprisals because they join or assist a union or engaged in other union activities for the purpose of collective bargaining or other mutual aid or protection, or because they selected the Union as their exclusive collective-bargaining agent.

WE WILL NOT threaten our employees that other employees have been discharged for signing a union authorization card.

WE WILL NOT threaten our employees that we believe they started the union campaign.

WE WILL NOT discharge, lay off, or otherwise discriminate against employees because of their union sympathies, activities, or protected concerted activities.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, in the appropriate unit described below:

> All full-time and regular part-time employees employed by Loy Food Stores, Inc. d/b/a Ken's IGA at its Westville, Illinois, facility; but excluding the store manager, assistant managers, confidential employees, guards and supervisors as defined in the Act and all other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

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[1] The Respondent has requested that the record be reopened and/or amended to include the averred facts that discharged employees Holycross and Harper accepted the Respondent's unconditional offers of reinstatement in November 1980. We hereby deny this request. Even assuming that these two employees were reinstated, we note that the Respondent states that they were not given any backpay for the period between their discharges and their reinstatement, and as such we would find that the reinstatements were insufficient to erase the effects of the Respondent's unfair labor practices or ensure a free and fair election among the Respondent's employees.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[2] The General Counsel has excepted to the Administrative Law Judge's refusal to compare signatures for the purpose of authenticating authorization cards and his failure to place the signature samples in the rejected exhibits file. We agree with the General Counsel that the Administrative Law Judge erred by such actions, but we find that this error was not prejudicial. Although we do not endorse the conduct of he counsel for the General Counsel in attempting to resubmit the rejected material by attaching it to his brief to the Administrative Law Judge, we disavow the Administrative Law Judge's characterization of that conduct.

[3] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

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WE WILL recognize and, upon request, meet with and bargain collectively in good faith with Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive collective-bargaining representative of all our employees in the appropriate unit; and, if any understanding is reached, embody such understanding in a written and signed agreement.

WE WILL offer Brad Holycross and Phil Harper immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of our discrimination against them, plus interest.

LOY FOOD STORES, INC. D/B/A
KEN'S IGA

DECISION

STATEMENT OF THE CASE

RICHARD L. DENISON, Administrative Law Judge: This case was heard in Champaign, Illinois, on October 20, 21, and 22, 1980, based on a charge filed by Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, at times referred to herein as the Union or the Charging Party, on March 5, 1980.[1] The complaint, issued April 29 and amended at the hearing, alleges violations of Section 8(a)(1), (3), and (5) of the Act. The General Counsel contends that immediately prior to the Respondent's rejection of the Union's request for recognition, based on an asserted authorization card majority, the Respondent discharged two employees, and engaged in numerous acts of interference, restraint, and coercion, which precluded the holding of a fair election in an appropriate unit of the Respondent's employees.

The Respondent's answer, as amended, denies the allegations of unfair labor practices alleged in the complaint.

Upon the entire record in the case, including my observation of the witnesses and consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and the answer admits that at all times material herein the Respondent is and has been an Illinois corporation with an office and place of business located at Westville, Illinois, where it is engaged in the business of the retail selling of foodstuffs and related items. During the 12-month period preceding the issuance of the complaint, a representative period, in the course and conduct of its business operations, the Respondent derived gross revenues in excess of $500,000, and, in the course and conduct of its business operations, the Respondent purchased and caused to be transferred and delivered to its Westville, Illinois, facility, goods and materials valued in excess of $50,000 directly from points outside the State of Illinois. I find that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. SUPERVISORY STATUS

Based on paragraph 4 of both the complaint and the answer, I find that at all times material herein, the following named persons occupied the positions set opposite their respective names, and have been, and are, agents of the Respondent at its Westville, Illinois, facility, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

Kennard R. Davis	President
Gene Engle	Store Manager
Paul Baldwin	Assistant Manager
Michael Farmer	Assistant Manager
William Delp	Assistant Manager

IV. APPROPRIATE UNIT

Paragraph 7(a) of the complaint, as amended, alleges, and the Respondent's answer, as amended, admits that all full-time and regular part-time employees employed by the Respondent at its Westville, Illinois, facility; but excluding the store manager, assistant managers, confidential employees, guards, and supervisors as defined in the Act and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I so find.

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[1] The name of the Charging Party and the name of the Respondent appear as amended at the hearing.

All dates are in 1980, unless otherwise specified.

V. THE UNFAIR LABOR PRACTICES

A. *A Union Campaign Begins at the Respondent's Store*

The Respondent, a retail grocery store in Westville, Illinois, is affiliated with the Independent Grocers Association, commonly known as IGA. As of late February 1980, utilizing a work force of 5 supervisors and 30 part-time and full-time employees, as stipulated, the Respondent operated its business on a 3-shift, 24-hour-per-day, 7-day-per-week basis.

Terri Keller, a regular part-time checker, initiated the union activity at Ken's IGA by phoning Jim Newman, the Union's business agent, on January 17. After discussing with Keller the methods and procedures for conducting a card-signing drive, Newman asked for a list of employees' names and addresses and promised to send her a supply of authorization cards for her use in beginning the campaign. She received these cards on January 18, signed one, returned it to the Union by mail together with the employee list, and gave the remaining cards to employees at the store.

After receiving the list compiled by Keller, containing the names of 24 employees at the store including Meat Manager Bill Delp and Assistant Manager Willie Delp, on January 21 Business Agent David Kemp was assigned the responsibility of conducting the drive to organize the Respondent. Immediately thereafter, he mailed two authorization cards to each person whose name appeared on the list. At various times thereafter, as described in detail in the record, Kemp held union meetings at employees' homes. He solicited and received signed authorization cards both at these meetings and through the mail. The dated authorization cards in evidence show that as of January 29, in addition to Keller, cashiers Myra Nickle, Delores Nightlinger, and Rita Wynn, and checker Diana Roberts had signed union authorization cards.

B. *Store Manager Engle's January 29 Meeting With Employees*

Based on undisputed testimony by Owner Kennard R. Davis and Store Manager Gene H. Engle, the Respondent became concerned about its low gross profit and sales per man-hour ratio after they received the profit-and-loss statement for the end of 1979 and a visit from Zone Manager Lee Singleton emphasizing these deficiencies. In the meantime, Assistant Manager Mike Farmer told Engle and Davis that he had received the union card through the mail, and that a union organizer had stopped by his house while he was away. When Davis advised Singleton of this development, he instructed Davis not to accept the cards. Having all of these developments in mind, Davis and Engle had a number of informal talks in which they discussed what should be done. In addition to the store's economic problems, they also discussed the subject of the Union.[2] The end result of these conversations was that Davis decided that Engle should hold a meeting with the employees to talk about ways to improve the Company's economic circumstances and to give the Respondent's views concerning the Union.

Pursuant to a posted notice, the meeting was held at the store at 7 p.m. on January 29.[3] Only the checkers, stockboys, Davis, Engle, and Assistant Manager Paul Baldwin attended. Based on the estimates of Engle and Davis, the meeting lasted between approximately 1 to 2 hours. Engle was the only person to speak on behalf of the store's management. Although the meeting was ostensibly called mainly to discuss the store's unacceptable profit level, Engle, nevertheless, began by discussing the Union. He thanked the employees for attending, stated he understood there were some cards being circulated by a union, and expressed the hope that the employees would reconsider before signing, since he would rather deal personally with each individual on a one-on-one basis instead of involving a third party. The remainder of Engle's remarks about the Union were made in response to a question by Terri Keller, and a remark by cashier Margaret Valongeon. According to Engle and Davis, Keller asked if the employees would be fired if they signed cards, and Engle answered no, that that was her right as an individual and as an employee. Then Valongeon interjected, "No, he can't fire you, because that would be against our constitutional rights," to which Engle responded, "No, but the union recognizes that I have a right to make a profit, even if it means reduced store hours causing employee layoff." Engle and Davis testified that the remainder of the meeting was devoted to a review of the Company's financial problem, and to solicited suggestions from the employees as to how the adverse situation could be remedied.

Cashier Myra Nickle testified that the meeting was the first to be held in approximately a year and a half. It began shortly after 7 p.m. when Engle stated he had heard the employees received union cards by mail. He said that it did not matter if they were green, yellow, or blue, that the employees should make up their own minds whether or sign them. He continued, however, by saying that if the Union did get in, there would be a layoff. He said that the Union promised a lot of things, but that they did not always come through. There was also high cost and union dues. At approximately this point Terri Keller came into the meeting, slightly late. She asked if they signed cards, would they be fired, and Engle answered that he had no way of knowing who had signed cards, but that if a union did get in the hours would be cut. He said that he could not fire the employees, but he could lay them off. Then Engle talked about the economic conditions at the store. He asked the employees to estimate how much profit they made from a dollar. The employees were surprised to learn how small the Company's margin of profit was. Engle explained that the store was losing $800 or $900 a week and asked for suggestions for improvement. Prices not being changed at the end of a sale, customer theft, and deposits on soft drinks were the main areas mentioned. He emphasized that it was necessary for the store to make a profit, and that in order to maintain that profit he could lay people off.

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[2] Engle could not remember what he said to Davis during these discussions although he recalled that the subject of the Union "came up in conversation quite often." Davis remembered discussing employees' voting preferences with Engle, but could not remember when this topic was explored.

[3] Only Engle was uncertain of the date, which he believed to be January 28, but had failed to write anything down about the meeting and, consequently, could not remember. Other witnesses definitely fixed the date as January 29, and they are credited.

Terri Keller testified that she arrived at the point in Engle's remarks where he was saying that the Union makes a lot of promises, charges dues, but does not always deliver. He said they could ask Rita Wynn. He said he could not afford to keep all of them if the Union came in. Then he began talking about the Company's profits and losses and asked for a couple of the employees to estimate what they thought he made on the dollar. Their estimates were high, and he emphasized that he was not making as much as they thought. Then Keller asked if they signed union cards, would they be fired, and Engle answered no, because he did not know who signed. But then he said, "I do have the power to lay you off." Then Margaret Valongeon, another cashier, spoke up and said that he could not do that, because if he laid them off he would have to bring them back before he hired anyone else. Engle answered that he could not afford to keep them and would have to cut hours if the Union came in. Engle said that the store was losing $800 or $900 a week and asked for the employees to make suggestions on how to improve profits. Suggestions by employees were made, including considerable discussion about mismarked off-sale items and the failure to mark soft drinks. Keller also remembered Engle stating that it was up to each of the employees to decide for themselves concerning the Union.

Engle denied threatening the assembled employees with discharge or layoff if they signed cards or if the Union came in. However, Engle found it impossible while testifying to remember in any detail his actual remarks to the assembled workers. He emphasized that he had failed to make notes of anything he said. I was not impressed with his memory. Likewise, Davis' testimony concerning Engle's remarks about the Union were couched in general terms, and contained vague qualifying phrases, e.g., "something of that nature," and "something to the effect." Considering that the Company knew well in advance the message that it wished to communicate to the employees, while the employees did not know, I find Nickle's and Keller's versions more detailed and precise concerning that area of the meeting in which the topic of the Union was discussed. I credit their versions and find that, in his January 29 address, Engle did in fact threaten the employees with reduced hours, with a layoff, and some of them would go, if the Union came in, or if they signed union cards. Thus, the Respondent violated Section 8(a)(1) of the Act in this portion of Engle's speech, as alleged in paragraphs 5(a)(1), (2), and (3) of the complaint, as amended.

C. *Further Interrogation and Threats by the Store's Supervision*

According to Diana Roberts, a third-shift checker at the Respondent's store, on or about February 4 she was in the dairy department when Gene Engle engaged her in conversation concerning the Union in the presence of Assistant Manager William Delp. Engle said he knew the Union was trying to get in. Then he stated that he did not care whether employees signed cards, but that if the Union got in they would have to shut down the third shift, because there was no way they could afford to keep it open. Engle denied threatening employees that their work hours would be reduced if the Union succeeded in organizing the Respondent, but later qualified that denial by stating generally that he did not remember ever talking about the Union to any employee. Third-Shift Assistant Manager Delp testified that he remembered the conversation in question, which occurred about 7 a.m. as they were preparing to leave work at the end of the shift. Although Delp also had difficulty remembering all that was said, he did recall Engle stating that while there was not going to be a layoff, "We would be put down to the second or first shift if it closes down, the third shift." Delp could not recall precisely whether Engle's remarks were made on the occasion of the conversation with Roberts, or on another occasion around that time. Nevertheless, Delp's testimony clearly tends to corroborate that of Roberts and refute Engle's qualified denial. I credit Roberts and find that the Respondent, through Engle, threatened an employee that the third shift would be eliminated if the Union got in, as alleged in paragraph 5(e) of the complaint as amended.[4]

Myra Nickle testified that on February 15 about 5 p.m. in the store, Assistant Manager Paul Baldwin began to talk to her about the Union. No one else was present. He said that she should be ashamed of herself for starting the Union, and, when Nickle protested that she did not start the Union, Baldwin asked, "Well, then, who did?" When Nickle answered that she did not know and if she did would not tell him. Baldwin retorted, "You're hurting me by doing this, you know." Nickle asked what he meant, and Baldwin said, "Well, I had a talk with Gene and Ken, and they told me that I am going to lose my job. They said if they kept me I would be a stockboy, and that would be lower pay." The conversation ended at this point, when a customer interrupted.

Baldwin did not testify at any point in the hearing. Nickle's testimony was not impaired by cross-examination. I credit her testimony and find that the Respondent, through Baldwin, unlawfully interrogated Nickle concerning who started the Union, and threatened her that store employees' hours would be reduced if the Union came in, in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 5(c)(1) and (3). I also find that Baldwin's remark that Nickle should be ashamed of herself for starting the Union is violative of Section 8(a)(1), in that through this remark Baldwin coercively conveyed to Nickle the message that the Respondent believed she had instigated the Union's organizational drive, as alleged in paragraph 5(c)(2) of the complaint.

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[4] William Delp's uncertainty in his testimony concerning whether he heard one or two conversations between Roberts and Engle about the closing of the third shift caused counsel for the General Counsel to propose a further amendment to the complaint, par. 5(f), alleging that on or about February 4 Engle interrogated Roberts concerning her own and other employees' union activities. A close reading of the record reveals that Delp's testimony contains no account of Engle's having asked any questions during the conversation. The only mention of Engle asking anything about the Union is contained in a double question by counsel for the General Counsel after Delp had completed telling what he remembered of the conversation.

> Q. (By Mr. Somers) Okay. Now, you testified that Mr. Engle asked you if the Union was trying to get in, and that he said he would have to close down the third shift, right? If it did?
>
> A. Yes. He wasn't sure but he said he might have to.

On redirect examination Delp denied that Engle asked any questions, and no further clarification of this segment of Delp's testimony appears in the record. Under these circumstances, I find that the General Counsel has failed to prove that Gene Engle engaged in unlawful interrogation on or about February 4 as alleged in par. 5(f) of the complaint.

Myra Nickle further testified that on February 1 Assistant Manager Mike Farmer approached her in the store, alone, and asked, "Did you start this Union?" Upon receiving a negative answer Farmer asked, "Are you sure," and Nickle said that she was sure. Farmer acknowledged that he might have told the investigating Board agent that he had several conversations with employees about the Union during February 1980. He did not deny having a conversation with Myra Nickle about the Union around the time she specified, stating, instead, that he could not remember having such a conversation. Furthermore, although Farmer denied ever having asked Nickle *why* she started the Union, he did not specifically deny asking her *if* she started the Union—an entirely different question. Therefore, Nickle's testimony about the February 1 incident stands undenied and is credited. I find that the Respondent violated Section 8(a)(1) of the Act, through Farmer, by interrogating Nickle concerning her union activities, as alleged in paragraph 5(d) of the complaint.

Alleged discriminatee Brad Holycross testified that at the outset of his discharge interview with Gene Engle, alone, on February 28 at the store, Engle began by stating that "[W]ith all the union getting in here, there's going to be a lot of changes and a lot of people laid off." Engle denied making this threat. However, Holycross' testimony concerning Engle's alleged remarks is consistent with the statements found to have been made by Engle during his January 29 address to the assembled employees. I credit Holycross, who impressed me as an honest witness, and find that the Respondent, through Engle, threatened him during Holycross' discharge interview on February 28 as alleged in paragraph 5(b) of the complaint.

Alleged discriminatee Phillip Harper testified that on February 28, in the grocery area of the store, he heard Paul Baldwin tell Michael Farmer that when the Union got in there would be a layoff and many people would be laid off. Shortly thereafter Harper, being concerned about this statement, approached Baldwin, alone, in the area of the magazine rack and asked for more details. Baldwin responded they would cut back, and there would be only one assistant manager, Farmer, because he had more seniority than Baldwin, who would be reduced to a full-time stockboy. Continuing, Baldwin pointed his finger at Harper and said Harper would not have a job because he did not have enough seniority. Referring to himself, Baldwin said he would not be able to make it as a full-time stockboy because it did not pay enough, and if the Union got in he would probably have to quit, because if they were cutting hours he would not get that many hours and it would not be worth it. Baldwin said if the Union got in there would be a layoff and the store hours would be cut. Baldwin did not testify. Harper exhibited a reasonably good memory and was not questioned about this incident on cross-examination. I credit his testimony and find that the Respondent, through Baldwin, threatened Harper with a layoff if the Union came in, as alleged in paragraph 5(c)(3) of the complaint.

Based on undisputed and credited testimony by Myra Nickle, I find that on February 29 in the store, about 11 p.m., following the discharges of Holycross and Harper, Nickle approached Paul Baldwin and asked him why they had been fired. Baldwin answered that he did not know what had happened to Brad Holycross or why he was fired. Concerning Harper, Baldwin said he had been told by Gene Engle that he intended to keep Harper because he was a no vote for the Union, but then Engle heard that he had signed a card and planned to release Harper that evening after work. However, he said, when Engle found a lot of outdated and spoiled cottage cheese, he released Harper that morning. In his testimony, Engle admitted talking with Davis about employees' voting preferences, and with Baldwin about the Union. I find that the Respondent violated Section 8(a)(1) of the Act by threatening Nickle that one of her fellow employees had been fired because he signed a union card, as alleged in paragraph 5(c)(4) of the complaint.

D. *The Discharges of Brad Holycross and Phil Harper*

Brad Allan Holycross worked as a part-time stockboy on Saturdays and Sundays on the second shift from June 1979 until his discharge on February 28. He signed a union card on February 18 at a union meeting at Myra Nickle's home. Holycross' duties consisted of price marking items, stocking shelves, rotating products in the dairy case, and bagging and carrying out groceries for customers. Included within this general description of Holycross' duties was the specific task of changing the price marking on items from a sale price back to the regular price after the expiration of the sale. Holycross was not the only stockperson who worked Saturdays under the supervision of Gene Engle and Assistant Manager Mike Farmer, who conceded that the stockboys occasionally make mistakes in changing prices and also that the price lists from which they work are occasionally in error. The Respondent's president, Ken Davis, described Holycross' work performance prior to the January 29 employee meeting, as neither good nor bad.

During that portion of the January 29 employee meeting which was devoted to receiving employees' suggestions on how to improve profits, one of the topics discussed was mismarked off-sale items. Following the meeting, according to Davis, he talked with Mike Farmer, the Saturday night supervisor, who told him that remarking the off-sale items was the responsibility of Brad Holycross. Farmer, on the other hand, remembered Davis talking to him about profit and loss during the week after the meeting and stating that a lot of the price changes were not getting done. Farmer made no mention of Davis having asked for the identity of the employee responsible for changing the prices, or his having told Davis that Holycross performed this function. Farmer did testify that he simply told Holycross "that Ken was a little unhappy because of the pricing wasn't getting completely done." Thereafter, according to Farmer, during the remainder of January and on into February, he "noticed a few things" on occasion which had not been changed back to the regular price, but was unable to recall which items had not been changed. Farmer was unable to recall whether he ever discussed this problem with Holycross again. When asked if he ever discussed the matter with Ken Davis again, Farmer hesitated and answered, "I think I did." Farmer testified that he was never consulted by Ken Davis or Gene Engle about discharging Holycross for failure to change back sale items on Saturday night. He found out that Holycross had been discharged after the fact, when Engle told him he had let Brad go. According to Farmer, Engle never told him the reason for Holycross' discharge. He testified that he did not know the reason Holycross was terminated, but "I pretty well guessed." Farmer was never asked to elaborate on this response.[5]

Holycross was discharged on February 28 by Engle during a phone conversation with Holycross' mother, in which he stated that he was going to lay off her son and asked her to have Holycross contact him at the store. According to Engle, he acted upon instructions from Davis and fired Holycross solely because of his erroneous work in connection with the off-sale list. Engle's asserted reason for Holycross' discharge is consistent with the Respondent's April 2 position letter, but partially inconsistent with Davis' testimony that Holycross was released also for the purpose of reducing man-hours and improving the store's sale-per-man-hour ratio. Thus, it is clear that there are numerous inconsistencies in the testimonies of the Respondent's supervisors with respect to the events leading up to Holycross' termination. Furthermore, Davis and Engle acknowledged that during a meeting on February 25, only 3 days before Holycross' discharge (and 4 days before Harper's termination), the two men discussed the voting preferences of store employees with respect to a possible union election, at a time when they knew through Assistant Manager Farmer that almost all the employees had attended a union meeting on February 18. Davis admitted that the voting preferences of Holycross and Harper were specifically discussed at the same time when they were discussing their dissatisfaction with Holycross' and Harper's work.

All of these circumstances discussed above strongly suggest that the Respondent's expressed concern over Holycross' alleged failure to remark unidentified off-sale items is a pretext, and that the real reason for his termination was that the Respondent suspected he favored having the Union as his collective-bargaining representative. In my view, this perspective concerning the true reason for Holycross' discharge is confirmed by Engle's statement during his final interview with Holycross on February 28 in the back room of the store that, "With all the union getting in here, there's going to be a lot of changes and a lot of people laid off." In the light of that statement, Engle's further explanation to Holycross that he was doing the off-sale list wrong, his hair was too long, and Holycross' parents had cheated his son on the sale of a used television set is simply incredible and only serves to reinforce the conclusion that the Respondent was groping for a pretext with which to rid itself of a union adherent it could operate without. It is little wonder that the interview ended with Engle failing to answer Holycross' question about what he had done wrong with respect to the off-sale list. I find that the reasons espoused by the Respondent for Brad Holycross' discharge are pretexts and that he was discharged because of his known or suspected union sympathies and activities in violation of Section 8(a)(1) and (3) of the Act.

Phillip Harper worked as a full-time stockboy on the first shift, Monday through Friday. His immediate supervisor was Gene Engle. His duties were the same as those of Brad Holycross, and specifically included filling the dairy case. Because of the relatively short spoilage time, dairy products are date coded. When they become outdated they must eventually be removed. On February 29 Gene Engle telephoned the Harper home and told Phillip Harper's mother that he did not need Phillip any more, that he had been dissatisfied with his work because he had found outdated cottage cheese in the dairy case. In both Engle's and Mrs. Harper's versions of this conversation Phillip Harper's discharge was attributed by Engle to the discovery of the outdated cottage cheese. Davis, on the other hand, testified that Engle had told him Harper had failed to rotate milk on the evening of February 28. This inconsistency remains unresolved. Harper received no warning or opportunity to improve prior to his discharge. Furthermore, I find the Respondent failed to prove that Harper was primarily responsible for the dairy case since, at the least, the record reveals that other stockboys on other shifts also had the same duties as Harper, including the dairy case. These inconsistencies suggest that the asserted reason for Harper's discharge is a pretext.

There are other indicators which also point in this direction. Harper was hired in June 1979 and between that time and October performed the duties of a part-time stockboy on both days and nights. Although, according to Engle, Harper could not keep up with the work and was removed from the night crew, he was not fired because, in Engle's words, "He was better than nothing." Nevertheless, despite this dim appraisal of Harper's performance, in late October 1979 when full-time stockboy Paul Barber was fired and part-time stockboy Bart Atwood refused full-time work, Engle promoted Harper to the job instead of looking elsewhere. Moreover, his duties and responsibilities were increased. According to Engle and Davis, during the next 3 months Harper's deficiencies became readily apparent, and they discussed his poor attitude toward his job with him on a number of occasions. However, in contradiction of his contention, they also stated that during this period Harper did not commit any serious errors. Thus, the Respondent condoned whatever shortcomings Harper may have possessed, and Harper remained on the job until after it learned of the Union's organizational drive and made the previously discussed assessment of Harper's sympathies and activities concerning the Union. The extent of the Respondent's maintenance of an understanding attitude toward Harper, until the union question came upon the scene, is clearly revealed by its failure to discharge Harper when he and stockboy Chad Fueyo drank 4 quarts of Busch beer in Harper's car in the store parking lot, and then proceeded to drive the car in reverse through the store's front window.[6]

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[5] Later in his testimony, on redirect examination, Farmer gave answers pursuant to strongly suggestive leading questions from counsel for the Respondent which tended to show more communication between Farmer, Davis, and Engle with respect to the off-sale item pricing errors allegedly involving Holycross and, in addition, tended to emphasize more participation by Farmer in the process leading up to Holycross' release. Under all the circumstances, I am persuaded that Farmer's earlier version is the most reliable account.

As noted earlier in this Decision, in discussing the events leading up to the termination of Brad Holycross, Engle and Davis met on February 25 and discussed Harper's and Holycross' voting preferences in the light of their knowledge of the union campaign, and the report of Assistant Manager Farmer that almost all the employees had attended a union meeting on February 18. Engle also discussed the union situation with the assistant managers. Nevertheless, Engle insisted that it was his discovery of outdated Weight Watchers milk and cottage cheese in the dairy case which angered him and precipitated Harper's termination. On cross-examination, however, Engle conceded that he was unable to recall the coded dates stamped on the containers and was even unable to explain how to interpret the coded numbers. Having considered all of the evidence presented with respect to Harper's discharge, including the significant portions of testimony described above, I can only find and conclude, as I do, that the reason offered by the Respondent for Harper's termination is a pretext, and that he was actually discharged because of his known or suspected union activities and sympathies. The accuracy of this assessment is further confirmed by the undisputed testimony of Myra Nickle concerning her conversation with Paul Baldwin in the store about 11 p.m. on February 29. On that occasion Baldwin told Nickle that Engle had taken advantage of his discovery of the outdated cottage cheese to fire Harper that morning, instead of implementing his original plan to release Harper that evening after work, because he had heard that Harper had signed a union card. I find that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Phillip Harper on February 29.

E. *The Alleged Violation of Section 8(a)(5) of the Act*

Paragraph 7(b) of the complaint alleges that on or about February 21 a majority of Respondent's employees in the admitted appropriate unit, set forth in section IV of this Decision, designated and selected the Union as their collective-bargaining representative. Paragraphs 7(d) and 8, respectively, allege that the Union requested recognition on February 29, and since that time the Respondent has failed and refused to recognize the Union as the exclusive collective-bargaining representative of its unit employees. The General Counsel alleges in paragraph 12 of the complaint that the Respondent's unfair labor practices constitute a course of conduct precluding the holding of a fair election among the employees in the unit and are so serious and substantial in character and effect as to warrant the entry of a remedial order requiring the Respondent as of February 21 to recognize and bargain with the Union. Counsel for the General Counsel argues that the Respondent's actions dissipated the Union's support and dampened continued enthusiasm for union activity so as to effectively preclude the filing of a representation petition and the holding of a fair and free election.

The Respondent contends, apart from arguing that no unfair labor practices were committed, that the General Counsel has failed to show that the unfair labor practices were so coercive, pervasive, or extensive as to require a bargaining order, or that the application of traditional remedies would not insure a fair election. The Respondent also argues that the conduct which comprises the unfair labor practices did not affect the employees, that a large majority of the authorization cards were signed after the bulk of the illegal action had occurred, and that the Union secured its last authorization cards and sent its bargaining demand to the Respondent after all of the alleged unlawful conduct had been committed.

Joint Exhibit J-1, signed by a representative of each party to this proceeding, shows that as of February 29, the date of the Union's letter, in evidence, lawfully requesting recognition, the appropriate collective-bargaining unit consisted of 30 employees. On March 6 the Respondent rejected the Union's demand for recognition asserting a good-faith doubt of its majority status. At the hearing in this matter, the General Counsel introduced into evidence 19 authenticated authorization cards from bargaining unit employees, 16 of which were signed between January 18 and February 21. Of the remaining cards, two were dated February 28, and the last card was dated February 29, the date of the Union's written demand for recognition.[7] Each of the 19 authorization cards was received into evidence without objection, except for General Counsel's Exhibit 22, the authorization card of Dorothy Wilson, dated February 29. This card was introduced into evidence through the testimony of Delores Nightlinger who, after observing Wilson sign the card on that date, accepted it from Wilson and thereafter turned it in to Union Representative Kemp. Under these circumstances, I find that Wilson's card has been properly authenticated and is valid, despite the fact that Wilson did not fill in the blank spaces on the card provided for the name of the company, the store address and number, and her job title.

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[6] Neither employee was disciplined in any manner. Engle's explanation for this exercise in leniency was that the employees were off duty at the time of the incident, and if he had discharged them he would not have anyone to run the store since Westville was a small town. The contrast between the Respondent's inaction with respect to this incident, and its swift application of the ultimate sanction of discharge following the advent of the union campaign, when Harper, or possibly someone else, failed to rotate the cottage cheese, is striking, to say the least.

[7] Counsel for the General Counsel also offered into evidence copies of signatures (G.C. Exhs. 23-26 and 30) for comparison by the Administrative Law Judge for the purpose of authenticity corroboration. I rejected the exhibits on the basis of a lack of technical training as a handwriting expert and refused to permit these exhibits to be placed in the rejected exhibit file. Counsel for the General Counsel has attached photostatic copies of these rejected exhibits to his brief "for signature comparison, if necessary," and as "further evidence of the validity of four cards." These attachments to General Counsel's brief are stricken *sua sponte* and have not been considered. Regardless of whether my ruling was correct or incorrect, the sending of case related materials outside the record to the Administrative Law Judge by counsel for the General Counsel's attachment of these excluded documents to his brief, however well intentioned, is, to say the least, unprofessional and not to be encouraged. *United Brotherhood of Carpenters and Joiners of America and Scott and Duncan, Inc.*, 239 NLRB 1370, 1373, fn. 1 (1979).

The authorization cards are clear and unambiguous on their face. They state, "I . . . hereby authorize United Food and Commercial Workers International Union, AFL-CIO, or its chartered local union to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law." There is no evidence in the record to show that any of the cardsigners were told or assured that their card was to be used solely for the purpose of obtaining an election. Indeed, there is no evidence in the record from the card solicitors, the card signers, or anyone else, that any misrepresentation of any kind was made. I find that all of the cards introduced into evidence by the General Counsel are valid, and, therefore, I further find that on February 21, and thereafter, a majority of the Respondent's unit employees designated and selected the Union as their exclusive collective-bargaining representative.

Thus, the sole remaining question to be resolved is whether under the standards enunciated by the United States Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc., et al.*, 395 U.S. 575, 614-615 (1969), the Respondent's unfair labor practices warrant the issuance of a bargaining order. In the *Gissel* decision the Court stated, in part (at 614-615):

> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

The record shows that the Respondent began its course of unlawful conduct on January 29 during a store meeting with employees shortly after it learned of the beginning of the Union's organizational drive, and steadily thereafter increased its antiunion activities in severity and number of occurrences, culminating with the discharge of Phillip Harper on February 29, the date on which the last authorization card in evidence was signed. Thus, the Respondent's contentions, as set forth above, are not supported by the facts. After February 21, at which time the Union had obtained a one-card majority, only three additional authorization cards were obtained from the 30-employee unit during the period in which the Respondent's unlawful activity reached its climax, and none following the discharge of one-fifthteenth of its work force. Thus, analysis of the increasing seriousness of the Respondent's unfair labor practices in correlation with the declining success of the Union's organizational activities persuades me that the application of traditional Board remedies in the instant case would be insufficient, and that the holding of a fair and free election under such circumstances is highly unlikely. I therefore find the issuance of a bargaining order, as part of an appropriate remedy for the unfair labor practices committed, necessary. I find that the Respondent violated Section 8(a)(1) and (5) of the Act on February 21 and thereafter by failing and refusing to bargain with the Union as the exclusive representative of its employees in the appropriate unit. In accordance with the principles enunciated by the Board in *Trading Port, Inc.*, 219 NLRB 298 (1975), I find that the Respondent had an obligation to bargain with the Union as of February 21, 1980, by which date the Respondent had clearly embarked on a clear course of unlawful conduct which undermined the Union's majority status and made the holding of a fair election improbable.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with discharge, layoff, reduced hours, changes, or other reprisals if they signed union cards, joined, engaged in union activities, or selected the Union as their collective-bargaining representative; by interrogating employees concerning their own or other employees' union activities, sympathies, or desires; by threatening an employee that the Respondent believed that employee started the Union; by threatening employees that another employee had been fired because he signed a union card; and by threatening employees with the elimination of the third shift in the store, the Respondent through its supervisors and agents violated Section 8(a)(1) of the Act.

4. By discharging Brad Holycross on February 28 and Phillip Harper on February 29 because of their known or suspected union sympathies and activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

5. The collective-bargaining unit set forth in section IV of this Decision constitutes a unit appropriate for the

purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. Beginning on February 21, 1980, and at all times thereafter, the Union represented a majority of the employees in the unit set forth in section IV of this Decision, and is, and has been the exclusive representative of said employees for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. By refusing to recognize and bargain collectively with the Union with respect to the rates of pay, hours of employment, and other terms and conditions of employment of the employees in the appropriate unit on and after February 21, 1980, by which date it had embarked on a clear course of unlawful conduct which undermined the Union's majority status and made the holding of a fair election improbable, the Respondent violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent has not violated the Act in any respects other than those specifically found.[8]

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged Brad Holycross and Phillip Harper, I find it necessary to order that the Respondent offer them immediate and full reinstatement with backpay computed on a quarterly basis, plus interest as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[9]

Since the Respondent unlawfully refused to bargain with the Union, I shall also order the Respondent to bargain with Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, effective February 21, 1980, and to post an appropriate notice. Moreover, since I find that the unfair labor practices committed by the Respondent were serious in nature and struck at the very heart of rights intended to be protected by the Act, I find a broad cease-and-desist order is warranted.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Loy Food Stores, Inc. d/b/a Ken's IGA, Westville, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their own or other employees' union activities, sympathies, or desires.

(b) Threatening employees with discharge, layoff, reduced hours, changes, or other reprisals if they signed union cards, joined, engaged in union activities, or selected the Union as their collective-bargaining representative; interrogating employees concerning their own or other employees' union activities, sympathies, or desires; threatening an employee that the Respondent believed that employee started the Union; threatening employees that another employee had been fired because he signed a union card; and threatening employees with the elimination of the third shift in the store.

(c) Discharging, laying off, or otherwise discriminating against employees in regard to hire and tenure of employment, or any term or condition of employment, because they joined or assisted Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, or any other labor organization, or because they engaged in union activities or protected concerted activities.

(d) Refusing to bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment, with Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive representative of all employees in the appropriate unit described in section IV of this Decision.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, recognize, meet with and bargain collectively in good faith with the Food and Commercial Workers Union Local 550-R, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive collective-bargaining representative of all our employees in the appropriate unit set forth in section IV of this Decision; and, if any understanding is reached, embody such understanding in a written and signed agreement.

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[8] The complaint, as amended at the hearing, contains no allegation and the record contains no evidence which would support a finding that the Respondent conveyed to employees the impression that their union activities were under surveillance, which contention is raised for the first time on p. 46 of the General Counsel's brief. Nor do I make any finding concerning the contentions which emerge for the first time in that document and were not fully litigated at the hearing, concerning the awarding of unilateral wage increases to employees without first notifying and bargaining with the Union. In any event, with respect to this latter contention, a broad bargaining order found herein to be appropriate would encompass the complained of conduct.

[9] See, generally, *Isis Plumbing & Heating Co.*, 318 NLRB 761 (1962).

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Offer Brad Holycross and Phillip Harper immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Westville, Illinois, store, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 33, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 33, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint, as amended, be dismissed to the extent it alleges violations of the Act not found herein.

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[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

California Plant Protection, Incorporated, d/b/a C.P.P. Security Services[1] ***and*** **Brotherhood of Police and Security Officers, Local #3, Petitioner.** Case 39-RC-141

November 18, 1981

DECISION AND DIRECTION OF ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a petition for representation filed on November 14, 1980, under Section 9(a) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Thomas M. Good on December 11, 1980. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 1, this proceeding was transferred to the Board for decision. Thereafter, the Employer filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds they are free from prejudicial error. They are hereby affirmed.[2]

Upon the entire record in this proceeding, the Board finds:

1. The Employer, a California corporation with corporate headquarters in Van Nuys, California, maintains a branch facility in Rocky Hill, Connecticut, also known as the Hartford office, where it is engaged in staffing and supplying security officers to employers within the State of Connecticut. Between January 1, 1980, and December 11, 1980, the Hartford office obtained gross revenues amounting to approximately $225,000 from services furnished to Travelers Insurance Company; gross revenues amounting to approximately $136,000 from services to The New Haven Register; and gross revenues amounting to approximately $90,000 from services to The Farley Company. The parties stipulated that these companies are employers within the jurisdiction of the Board.

We find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. The Employer contests Petitioner's status as a labor organization. It questions the stability of Petitioner's structure and the participation of members in the organization.

Also, the Employer disputes whether Petitioner acts with the purpose of advancing employee interests instead of the interests of particular individuals.

Testimony at the hearing shows that Petitioner was formed in August 1980, that employees participate in the organization, that its purpose is to represent employees on wages, hours, and other working conditions, and its function is to negotiate bargaining agreements with management. Petitioner is affiliated with the Federation of Special Police and Law Enforcement Officers (herein Federation), and has a constitution and bylaws, officers, and an executive board. From the date of its formation to the date of the hearing, a period of about 4 months, Petitioner had sought to organize employees, had discussed with employees complaints they had against their employer, had met with employees who had signed union authorization cards and reported to them about organizational progress, and had filed several representation petitions and an unfair labor practice charge.

We find that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

The Employer's contentions, based in part on the record in *Burns International Security Services, Inc., supra*, that allegations of misconduct have been made against Federation, with which Petitioner is affiliated, and certain Federation officials, do not establish that Petitioner is unable to represent the interests of employees or is disqualified from representing employees. See the discussion of these contentions in the *Burns* Decision at Appendix, Supplementary Objection No. 5.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated and we find that the following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time security officers employed from the Employer's Rocky Hill, Connecticut, location, but excluding all supervisors,[3] and professional employees as defined in the Act.

Some of the security officers are designated "sergeants" and "lieutenants." These designations are based on a promotional system which confers increases in rank along with merit wage increases. Despite the designations, the sergeants and lieutenants perform essentially the same duties as other security officers. They do not schedule or assign work; they do not hire or fire or effectively recommend such action. We find that the sergeants and lieutenants are not supervisors as defined in the Act, and we include them in the unit.

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[1] The name of the Employer appears as amended at the hearing.

[2] The Hearing Officer took administrative notice of the records in *Bally's Park Place, Inc.*, 257 NLRB No. 132 (1981); *Burns International Security Services, Inc.*, 256 NLRB 959 (1981); *Wells Fargo Guard Services Division of Baker Protective Services, Inc.*, 236 NLRB 1196 (1978).

[3] The parties stipulated that field supervisors are supervisors within the meaning of the Act and should be excluded from the unit.

259 NLRB No. 39

5. Petitioner's president testified that Petitioner does not admit to membership employees other than guards and has not attempted to organize nonguards. He also testified that Federation does not admit to membership employees other than guards. The Employer contends, however, that under Section 9(b)(3) of the Act[4] Petitioner may not be certified to represent a unit of guards because of its affiliation with Federation, which the Employer asserts is affiliated with organizations which admit non-guards to membership—the Association of Public and Private Labor Employees (herein APPLE) and Allied International Union of Security Guards and Special Police (herein Allied). In support of its assertion that Federation is affiliated with APPLE and Allied, the Employer relies upon evidence in *Bally's Park Place, Inc., supra*. In the Decision in that case the Board found only a limited relationship between Federation and APPLE and no present or past affiliation between them that would disqualify the petitioning organization in *Bally's Park* from certification to represent a guards' unit by virture of its affiliation with Federation. The Board also found that the record in *Bally's Park* failed to establish that Allied represented employees other than guards, and, consequently, any affiliation between Federation and Allied would not subject a labor organization affiliated with Federation to disqualification from certification under Section 9(b)(3).

Based upon these findings in the *Bally's Park* Decision concerning Federation's relations to APPLE and Allied we find that Petitioner here is not disqualified under Section 9(b)(3) from certification to represent a guards' unit because of its affiliation with Federation.

[Direction of Election and *Excelsior* footnote omitted from publication.]

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[4] Sec. 9(b)(3) provides in pertinent part that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Teresa Coal Company, Inc. ***and*** **Roy Delong. Case 9-CA-15265**

November 18, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On June 30, 1981, Administrative Law Judge Claude R. Wolfe issued the attached Decision and on July 8, 1981, an erratum thereto in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Teresa Coal Company, Inc., Sidney, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge: This case was ably heard by both parties before me in Huntington, West Virginia, and Pikeville, Kentucky, on January 8 and March 25 and 26, 1981, pursuant to charges filed on April 30, 1980, and the complaint issued June 4, 1980. The complaint alleges violations of Section 8(a)(1) of the Act, as amended, consisting of the discharge of eight coal miners because they engaged in protected concerted activity, and a threat to discharge employees if they refused to enter the coal mine involved herein.

Respondent denies that it has committed the unfair labor practices alleged. Both parties filed post-trial briefs.

Upon the entire record and my observations of the demeanor of witnesses as they testified, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Kentucky corporation with offices and places of business in Canada and Sidney, Kentucky, where it has been engaged in the mining of coal. During the 12 months preceding the issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, purchased and received at its Canada, Kentucky, facility goods and materials valued in excess of $50,000 directly from points outside the State of Kentucky. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts Found*[1]

The coal seam at Respondent's mine is reached via an entrance way approximately 54 inches high at its lowest point and 18 to 20 feet wide extending about a half mile, or slightly less, from the outside entry to the work station. Prior to the coming of Section Boss Elmer Coyer in January 1980,[2] the men negotiated the entry passage by either walking in or riding in the bucket of a motorized scoop. The bucket measures about 6 by 9 feet, and the entire crew of 12 or 13 men would be carried in the scoop at one time. Scoops are commonly used for such a purpose in area mines, and Ray Chapman, district supervisor, Kentucky Department of Mines and Minerals, convincingly testified that so long as scoops are in good condition they are considered legally safe for usage in transportation of workers underground. Chapman's office has received no complaints, or issued any citations, or found any violations in Respondent's use of scoops. There is no evidence that any employee has suffered any physical injury while riding the scoop.

On those occasions when employees walk into the mine they are paid for the time thus spent, with overtime pay for any portion of that time over and above regular working hours.

Shortly after Elmer Coyer came to the mine in January, he instituted the use of a mantrip to convey workers in and out of the mine. A mantrip is a rectangular conveyance measuring about 8 by 20 feet. The one in use at Respondent's mine was characterized by some witnesses as a sled, from which I conclude it was on runners, pulled by the scoop.

The employees rode in the mantrip until about 2 weeks prior to April 17, when it became unusable because the access road was so wet and muddy, with holes in the roadway, that the mantrip could not traverse it without becoming stuck. The condition of the road was such that the scoop also occasionally became stuck in the roadway or could only progress halfway in. In either case the men had to get out and walk.

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[1] With minor exceptions, there is substantial agreement among the witnesses regarding the relevant facts.

[2] All dates are in 1980.

After the poor road conditions made it impossible to use the mantrip, the men either rode the scoop in and out or walked. During this 2-week period, the second-shift men had several discussions among themselves concerning their complaints about the scoop. The primary topic of discussion was the possibility of injury to men riding in the scoop if it should rise up sufficiently to push them out against the ceiling. The evidence establishes that on frequent occasions the scoop would start to rise toward the ceiling, which caused the riders to shout to the operator who then took appropriate action to lower it. It appears that the scoop's trailing edge could rise at least 24 inches, leaving only about a 30-inch clearance for the seated men. I conclude it would be quite possible for a sitting man of average height to be pushed against the ceiling in the event of a 24-inch rise. Coyer[3] concedes that he heard the men complain of being frightened by the propensity of one of the two scoops available to rise without notice due to a stuck control lever. It also appears that the scoop bucket was sometimes caused to rise by the operator's maneuvering over the various dips and bumps in the road. The men were also concerned about the possibility the scoop ejector might accidently push them off the back edge of the scoop.[4] The men also complained, and advised Coyer, that they were afraid they would be unable to get out of the mine quickly if they got hurt. This concern was exacerbated by the fact that two other employees had been injured in the mine within 2 weeks of April 17 and had to be carried out by men on foot, a rather difficult and time-consuming project considering the height of the passage. This latter concern helps to explain the employees' later rejection of the opportunity to walk in to work.

At the end of their shift on April 17, about 6:30 p.m., all 13 men on the second shift talked to Coyer in a group, and told him that the roadway needed repairing and if it was not fixed so they could ride in the mantrip they would not ride the scoop on April 18. I conclude this ultimatum was immediately precipitated by the fact that the scoop bucket had risen on the way out that evening.

Coyer promised to speak to Lacy Walters, who was then Respondent's president but has since severed this connection. I credit Coyer that he spoke to Walters that evening and told him they needed to repair the roadway and operate the mantrip because the scoop was crowded. Coyer, who himself had once fallen out of the scoop as had another employee, had previously made similar requests to Walters, but the road was not yet repaired on April 17.

On April 18, the second-shift employees gathered at the mine shortly before the 2:30 p.m. starting time. The roadway was not repaired, nor was the mantrip there. The men met with Coyer and said that they were not going to ride the scoop because it was dangerous. Coyer then went and talked to Walters. I credit Bill Sparks, Respondent's office manager, that Walters told Coyer to tell the men they could either ride the scoop, walk in, or "go to the house" (a localism for "go home"). Coyer delivered this message. The men offered to remain and work if they could work at repairing the roadway. This offer was declined, and eight of the employees left,[5] after telling Coyer they would be back on Monday, April 21. The five second-shift employees who did not leave were put to work repairing the road.

David Thornsbury testified that, as he was leaving, he encountered Walters who told him that if the men walked off the hill they would not have a job. Walters' version was that he told Thornsbury and a couple others that if they went home they quit as far as he was concerned. Both versions convey basically the same message that employees who left would be separated, but I credit the version of Thornsbury, a more impressive witness than Walters. Office Manager Sparks agrees with Walters that the eight who left were no longer employees after they walked off on April 18 because by leaving they quit.

All eight returned at the beginning of their shift on April 21.[6] I find they were prepared to go to work and had their work clothes and equipment with them. They met with Walters and Sparks because they heard from other employees that they had been fired. Walters told them he could not let them go to work because they had quit. The men countered that they had not quit and were ready to go to work. Walters repeated they had quit and he could not let them go to work if he wanted to, and the men persisted that they were fired. The "quit" versus "fired" argument went on for a few minutes until Walters told them to go to the Board if they thought they had a case. They then left. No more than two new employees had been hired prior to the return of the eight on April 21.

Prior to the second shift "going to the house" on April 18, the first shift walked out on April 18 protesting the nonpayment of a production bonus. Two first-shift employees quit rather than go back in. Contrary to Respondent, the evidence does not convincingly show more than a vague suspicion that the second shift may have left for the same reason, and the clear preponderance of the evidence shows they left for the reasons expressed to Coyer on April 17 and 18.

B. *Concluding Findings*

When the employees spoke to Elmer Coyer on April 17 and 18 protesting the use of the scoop for transportation, and, in effect, demanding the road be fixed and the mantrip be put in service before they entered the mine, they were acting concertedly in pressing a grievance of concern to them all. That concerted action was clearly protected because the method of transportation in and out of the mine is clearly a condition of employment.

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[3] Coyer is no longer associated with Respondent.

[4] The scoop is a very slow moving vehicle, and its speed was not discussed as a factor by the employees.

[5] Roy Delong, Wade Thacker, David Maynard, David Thornsbury, Larry Smith, Steven Morris, Jerome Newsome, and William F. Scott.

[6] This account of the events of April 21 is a fair summary of the complementary credible portions of the testimony of Roy Delong, William Scott, David Thornsbury, Larry Smith, Jerome Newsome, and Bill Sparks. Testimony to the contrary is expressly discredited.

The evidence with respect to the hazards of riding the scoop and the possible consequences of any delay occasioned by the necessity of carrying out an injured employee on foot establishes that the employees' action in protesting these conditions and requesting road repair and the return to use of the mantrip as conditions precedent to their entering the mine was not indefensible.[7] The repair of the road which would permit the use of the mantrip was certainly not an unreasonable request, as shown by Respondent's immediate start of that repair on April 18.

The employees have a statutory right to withhold their services in support of their grievance, and Respondent could not lawfully discharge them because they continued adamant in that refusal to work absent a remedy for their complaint,[8] nor could Respondent lawfully confront them with the choice of abandoning their statutory right or being terminated as employees. These alternatives were placed before the employees on April 18 by Coyer, pursuant to Walters' instructions, and plainly conveyed that discharge was imminent if they did not abandon their protected concerted withholding of services. I find this amounts to a threat of discharge violative of Section 8(a)(1) of the Act, and although not specifically alleged in the complaint it is fairly encompassed by complaint allegations, was fully litigated, and is intimately related to the subject matter of the complaint and the underlying charge.[9] Similarly, the statement of Lacy Walters to David Thornsbury that the men would have no job if they left was a threat of discharge for engaging in protected concerted activity, and violated Section 8(a)(1) of the Act.

Although Respondent would have it that the eight employees voluntarily quit on April 18 when they "went to the house," I cannot agree. Respondent's view that the men were given reasonable alternatives, particularly that of walking in on paid time, and therefore voluntarily quit when they left, is understandable, but is in error. There is no requirement in the statute or precedent that I have found requiring employees to abjure a colorable grievance merely because the employer presents an alternative arguably reasonable but not acceptable to them.

The men did not quit on April 18, but were in fact terminated on that date. That they had no intention of quitting is evidenced by their advice to Elmer Coyer that they would return on April 21 and by their return on that day ready to work. Moreover, the aforementioned threats of Coyer and Walters, together with the statements of Sparks and Walters that the men ceased to be employees when they left on April 18, warrant a conclusion that Respondent implemented its threats of termination because the eight employees continued to withhold their services. I find and conclude that Respondent violated Section 8(a)(1) of the Act by discharging Roy Delong, Wade Thacker, David Maynard, David Thornsbury, Larry Smith, Steven Morris, Jerome Newsome, and William Scott on April 18[10] because they engaged in protected concerted activity. This finding is based on and fully consistent with the teachings of the Supreme Court in *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). Respondent's reliance on *G. H. Reed and G. A. Reed, d/b/a Wind River Logging Company* v. *N.L.R.B.*, 430 F.2d 331 (10th Cir. 1970); and *N.L.R.B.* v. *Fruin-Colnon Construction Co. and Utah Construction and Mining Co., a Joint Venture*, 330 F.2d 885 (8th Cir. 1964), both denying enforcement of Board orders, is misplaced because both are inapposite on their facts; the issue in *Fruin-Colnon* is the applicability of Section 502 of the Act to a strike in violation of a collective-bargaining agreement; and nothing is more firmly established than the proposition that administrative law judges must follow Board precedents until the Board or the Supreme Court overrules them.[11]

I further find that Respondent violated Section 8(a)(1) of the Act by refusing the discharged employees reinstatement when they attempted to return to work on April 21. I view this as a continuation of the initial unlawful discharge and an effort to further perfect it. Walters' statement that he could not let them go to work if he wanted to constitutes an admission that he did not want to. The record requires a conclusion that the only discernible reason that he would not want to take them back was their concerted activity, all of which buttresses my original conclusion of unlawful discharge on April 18.

III. THE REMEDY

In addition to the usual cease-and-desist order and the posting of appropriate notices, my recommended Order will require Respondent to offer unconditional reinstatement to the eight employees discharged on April 18 to their former jobs, or substantially equivalent employment if those jobs no longer exist, and make them whole for all wages lost by them as a result of their unlawful discharge, such backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By threatening its employees with discharge because they engaged in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

3. By discharging and refusing to reinstate Roy Delong, Wade Thacker, David Maynard, David Thornsbury, Larry Smith, Steven Morris, Jerome Newsome,

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[7] This does not mean the conditions complained of were objectively unsafe, which I need not determine inasmuch as this case does not raise a question cognizable under Sec. 502 of the Act, but is, rather, concerned solely with the concerted presentation of a grievance and the exercise of the right to cease work in support thereof.

[8] *Ontario Knife Company*, 247 NLRB 1288 (1980).

[9] *Ackerman Manufacturing Company*, 241 NLRB 621 (1979).

[10] The complaint alleged April 21 as the date of discharge. I granted a motion to conform the pleadings to the proof insofar as minor variations in names and dates are concerned, and the complaint allegation of discharge "On or about April 21, 1980," is sufficient in itself. *Omico Plastics, Inc.*, 184 NLRB 767, 770 (1970).

[11] *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963).

[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

and William Scott because they engaged in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[13]

The Respondent, Teresa Coal Company, Inc., Sidney, Kentucky, its agents, officers, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to discharge employees because they engage in protected concerted activities.

(b) Discharging or refusing to reinstate employees, or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of their employment, because they engage in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions to Roy Delong, Wade Thacker, David Maynard, David Thornsbury, Larry Smith, Steven Morris, Jerome Newsome, and William Scott, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, in the manner set forth in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at Respondent's place of business in Sidney, Kentucky, copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten our employees with discharge because they engage in concerted activity protected by the National Labor Relations Act.

WE WILL NOT discharge or refuse to reinstate any of our employees, or in any other manner discriminate against them in regard to their tenure of employment or other term or condition of their employment because they engage in concerted activity protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Roy Delong, Wade Thacker, David Maynard, David Thronsbury, Larry Smith, Steven Morris, Jerome Newsome, and William Scott immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, without prejudice to their rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered by reason of our unlawful discrimination against them, with interest computed thereon.

TERESA COAL COMPANY, INC.

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[13] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

D'Agata National Trucking Co. and Carolina National Trucking Co. ***and*** **Jay Stuart Goldstein.** Case 4-CA-11931

November 18, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

Upon a charge filed on March 11, 1981, by Jay Stuart Goldstein, an individual, herein called the Charging Party, and duly served on D'Agata National Trucking Co. and Carolina National Trucking Co., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 4, issued a complaint on April 29, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent failed to file an answer to the complaint.

On August 3, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 7, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing issued on April 29, 1981, and served on Respondent by registered mail, return receipt dated April 29, 1981, specifically states that, unless an answer to the complaint is filed within 10 days from the service thereof "all of the allegations in the complaint shall be deemed admitted to be true and may be so found by the Board." As no answer was filed, counsel for the General Counsel, on August 3, 1981, filed a Motion for Summary Judgment. On August 7, 1981, the Board issued a Notice To Show Cause why the General Counsel's motion should not be granted and, on August 21, 1981, Respondent filed a response thereto.

Respondent's response to the Notice To Show Cause argues that the General Counsel's Motion for Summary Judgment should not be granted. Respondent contends that, in mid-April 1981, as a result of Board Agent Berger's urgings, it decided to pursue a settlement and commenced negotiations with Berger acting as intermediary. However, on April 29, the Regional Director issued a complaint and notice of hearing. Respondent claims that it did not consult an attorney at that time since it still believed that a settlement would be reached.

Respondent further asserts that, a few weeks later, Board attorney Rosenberger contacted Respondent's controller, Goldberg, and told him that Respondent ought to answer the complaint. However, Respondent states that it did not do so because it believed that the case had been resolved. Shortly after that conversation on June 24, 1981, the proposed settlement was rejected by the Charging Party. Immediately thereafter, Respondent contends, Goldberg called Rosenberger who informed him that she had not yet received the answer to the complaint. Goldberg promised Rosenberger that she would have the answer by the end of the week, which was 2 days away.

Respondent claims that the same day it contacted an attorney and typed up an answer. The next day, June 25, Respondent alleges the answer was signed, inserted in an envelope addressed to the Regional Director for Region 4, and placed on the table where all outgoing letters are left for posting and mailing each day. Respondent claims it never saw the answer or envelope thereafter and, since no Board agent informed it that the answer had not been received, thought it had been delivered.

We do not believe Respondent's submissions constitute good cause, within the meaning of Section 102.20 of the Board's Rules and Regulations, for failure to file a timely answer. In light of the above facts, and Respondent's promise to Board attorney Rosenberger that the answer would be filed in 2 days, it is apparent that Respondent's failure to answer the complaint was the result of its own negligence. Respondent does not even allege that it in fact mailed the answer, rather, it contends only that it left the envelope on a desk where mail is regularly collected. Moreover, at no time did Respondent request permission to file its answer after the 2 days had elapsed. In view of the foregoing, we find that Respondent has offered no valid reasons why the Motion for Summary Judgment should not be granted, and, under the rule cited above, the allegations of the complaint shall be deemed to be admitted to be true and are so found.[1] Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

D'Agata and Carolina are Pennsylvania corporations engaged in the interstate and intrastate transportation of freight and commodities. D'Agata and Carolina at all times material have had common ownership, management, labor policy, and interchange of personnel, and constitute a single integrated business enterprise and a single employer within the meaning of the Act. During the past year, Respondent received gross revenues in excess of $50,000 for transporting freight from the Commonwealth of Pennsylvania to other States. We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE UNFAIR LABOR PRACTICES

On or about January 26, 1981, Respondent discharged Jay Stuart Goldstein, and at all times since then Respondent has failed and refused, and continues to fail and refuse, to reinstate him to his former or substantially equivalent position of employment, on account of his union activities. We find that, by such conduct, Respondent has violated Section 8(a)(3) and (1) of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, we shall order that it cease and desist thereform and take certain affirmative action designed to effectuate the policies of the Act.

To remedy Respondent's discharge of Jay Stuart Goldstein in violation of Section 8(a)(3) and (1) of the Act, we shall order that Respondent offer immediate and full reinstatement to him to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings suffered by him because of his unlawful discharge. The backpay shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).[2]

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. D'Agata National Trucking Co. and Carolina Trucking Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Jay Stuart Goldstein because of his union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, D'Agata National Trucking Co. and Carolina National Trucking Co., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall:

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[1] See *Sullivan Magee & Sullivan, Inc.*, 229 NLRB 543 (1977); *Ancorp National Services, Inc., Casco Division*, 202 NLRB 513 (1973).

[2] In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of their union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer Jay Stuart Goldstein immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Jay Stuart Goldstein whole for any loss of earnings he may have suffered due to the discrimination practiced against him as provided in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Philadelphia, Pennsylvania, facility, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Jay Stuart Goldstein to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Jay Stuart Goldstein whole, with interest, for any loss of earnings he may have suffered as a result of his unlawful discharge.

D'AGATA NATIONAL TRUCKING CO.
AND CAROLINA NATIONAL TRUCKING CO.

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Sheet Metal Workers Local Union 156, AFL-CIO *and* Martin, Inc. and Trio Industries, Inc. and International Association of Bridge and Structural Iron Workers, Local 147, AFL-CIO. Case 25-CD-212

November 18, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Martin, Inc., alleging that Sheet Metal Workers Local Union 156, herein called the Respondent or Sheet Metal Workers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer, Trio Industries, Inc., to assign certain work to its members rather than to employees represented by International Association of Bridge and Structural Iron Workers, Local 147, AFL-CIO, herein called the Iron Workers.

Pursuant to notice, a hearing was held before Hearing Officer John Petrison on June 19, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated,[1] and we find, that the Employer, a Connecticut corporation with its principal place of business in Shelton, Connecticut, is engaged in commercial construction. During the past year, the Employer received goods and materials valued in excess of $50,000 at its jobsites directly from suppliers located outside the State where said jobsites were located. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

We find that Sheet Metal Workers Local Union 156, AFL-CIO, and International Association of Bridge and Structural Iron Workers, Local 147, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

Trio Industries, Inc., the Employer, was hired as a subcontractor to install all of the windows and the finish metal work in a building being constructed at One Summit Square. The finish metal work consists of all the entrances, revolving doors, and grillwork. The grill is an ornamental one about 12 inches wide and 40 feet long with bars spaced half an inch apart. Under the grill is a four-coil fan unit which occupies 15 percent of the area, the rest of which is empty space. Approximately 117 feet of grill will be installed on each of 28 floors.

The Employer has had a collective-bargaining agreement with the Iron Workers since 1947 and has used employees represented by the Iron Workers to install grills for over 24 years. Consistent with its past practice, the Employer assigned this work to its employees represented by the Iron Workers.

In February 1981, the local business agent for the Sheet Metal Workers approached Trio's field superintendent, Joseph Noonan, and asked him "who was installing the grills?" Noonan replied that he would use ironworkers and, when questioned "Why," responded that the Company had had an agreement with the Iron Workers since 1947 and had always used them to install grills. In April, the general contractor's superintendent was advised that the Sheet Metal Workers was going to picket the job if Trio used ironworkers. Also in April, Noonan received a copy of a request for a hearing before the Impartial Jurisdictional Disputes Board (IJDB). By letter Loren Cheney, Trio's erection manager, responded to the request for hearing by stating that he "would in no way" give up any part of the work to the Sheet Metal Workers. On April 24, 1981, the IJDB voted to award the work in dispute to the Sheet Metal Workers on the basis of trade practice. Trio and Iron Workers Local 147 ignored this award because neither had agreed to submit the dispute to the IJDB nor had participated in the IJDB proceeding.

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[1] The commerce data pertaining to the Employer was inadvertently omitted at the hearing. Thereafter on August 28, 1981, the parties executed a formal stipulation as to these facts and further stipulated that the Employer was engaged in commerce within the meaning of the Act.

On May 20, pickets appeared at the jobsite with signs stating that the Iron Workers was unfair to the Sheet Metal Workers. Employees represented by the Iron Workers continued to install the grills for the next 5 or 6 days; however, the rest of the job was shut down during this period as none of the other unions would cross the picket line. On May 22, Martin, Inc., another subcontractor on the job, filed the instant charge.

B. *The Work in Dispute*

The work in dispute involves the installation of grillwork at the construction site located at One Summit Square, Fort Wayne, Indiana.

C. *The Contentions of the Parties*

The Employer contends that the work should be assigned to employees represented by Iron Workers Local 147, on the basis of the collective-bargaining history, area and industry practice, Company practice, relative skills involved, efficiency of operation, and employer preference. The Sheet Metal Workers contends that the ruling of the IJDB is binding. The Iron Workers contends that the Employer's assignment of the work should be upheld.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and (2) the parties have not agreed upon a method for the voluntary adjustment of the dispute. It is clear that the picketing at the jobsite was to protest the Employer's assignment of the disputed work to its employees represented by the Iron Workers and to force the Employer to assign the work to employees represented by the Sheet Metal Workers. Accordingly we find that reasonable cause exists to believe that Respondent violated Section 8(b)(4)(D) of the Act.

The Sheet Metal Workers contends that an agreed-upon method for voluntary adjustment of the dispute exists because the Employer voluntarily submitted itself to the jurisdiction of the IJDB by writing a letter in response to the notice of hearing. The Employer and the Iron Workers assert that the decision is not binding as to them because neither had agreed to submit the dispute to the IJDB nor had participated in that proceeding.

We find no merit in the Sheet Metal Workers claim that the Employer agreed to be bound by the procedures of the IJDB. The record shows that the collective-bargaining agreement between Trio and the Iron Workers specifically disclaims reliance on the mechanism of the IJDB. Accordingly, we conclude that there is no agreed-upon method for settlement of the dispute that is binding on all parties and that this dispute is, therefore, properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various relevant factors. The following factors are relevant in making the determination of the dispute before us:

1. Area and employer past practice

The employees represented by the Iron Workers have installed the same type of grill for Art Iron at a Fort Wayne public library and a junior high school. Art Iron had also used Fort Wayne ironworkers to install that type of grill in Lima, Wapaeceneta, and Defiance, Ohio. The Sheet Metal Workers entered no evidence of area practice at the hearing. For the past 24 years the Employer has assigned the installation of grillwork exclusively to employees represented by the Ironworkers. Area and employer past practice, therefore, favor an award to those employees.

2. Economy and efficiency of operations

Employees represented by the Iron Workers perform work for the Employer other than that which is in dispute. As a result the Employer is able to interchange employees between grillwork and other metal finishing work and perform both the disputed and other work with one work force. Furthermore, since the Employer performs no sheet metal work, an award of the work to employees represented by the Sheet Metal Workers would appear to require the Employer to hire two work complements. Therefore, economy and efficiency of operations favor an award to employees represented by the Iron Workers.

3. Employer assignment and preference

The Employer has assigned the work in dispute to employees represented by the Iron Workers and has expressed the preference that the disputed work be performed by those employees. We find that the Employer's assignment and performance favor an award of the disputed work to employees represented by the Iron Workers.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees represented by the Iron

Workers are entitled to perform the work in dispute. In making this determination, we are awarding the work in question to employees who are represented by the Iron Workers, but not to that Union or its members. Accordingly, the present determination is limited to the work being performed by the Employer at One Summit Square in Fort Wayne, Indiana.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Trio Industries, Inc., who are represented by International Association of Bridge and Structural Iron Workers, Local 147, AFL–CIO, are entitled to perform the installation of grillwork at the construction site located at One Summit Square, Fort Wayne, Indiana.

2. Sheet Metal Workers Local Union 156, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Trio Industries, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Sheet Metal Workers Local Union 156, AFL–CIO, shall notify the Regional Director for Region 25, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

J. W. Mircroelectronics Corporation *and* Kathy R. Sudler *and* Janice Johnson. Cases 4-CA-10173-1 and 4-CA-10173-2

November 18, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 30, 1980, Administrative Law Judge Elbert D. Gadsden issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge that the employees' work stoppage was concerted activity for the purpose of "mutual aid or protection" within the meaning of Section 7 of the Act. It is undisputed that the work stoppage was to protest the harassment suffered by night-shift employees when they left work. The employees wanted to be assured that, when leaving work, they would not be subject to racially motivated heckling or threats to their physical well-being. The employees therefore had a specific demand related to their conditions of employment. Their problem existed only because of their attendance at work.

Furthermore, the employees' concerns were not beyond Respondent's control. The hecklers were able to carry out their harassment of Respondent's employees because they were allowed to congregate in the parking lot area, on property rented by Respondent.[1] And as the tenant of this property, Respondent could have had the hecklers removed. As of the week of the work stoppage, however, Respondent's responses to the employees' complaints had failed to secure the area.[2]

We also agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) of the Act by terminating employees Janice Johnson and Kathy Sudler.[3] Contrary to the Administrative Law Judge, we find that Johnson is entitled to reinstatement.

We adopt the Administrative Law Judge's finding that Respondent's contention that it discharged Johnson for her racial remarks was pretextual,[4] although in making this finding, the Administrative Law Judge concluded that, because of her remarks, Johnson was not entitled to reinstatement. He stated that the unlawfulness of her termination could not serve to condone the irresponsible and inflamatory racial remarks uttered by Johnson during the April 24, 1979, employee-management meeting.

It is well settled, however, that not every impropriety committed in the course of Section 7 activity deprives the offending employee of the protection of the Act. A line must be drawn between situations where employees exceed the bounds of lawful conduct in a moment of exuberance or in a manner not activated by improper motives and those flagrant cases in which the misconduct is violent or of such serious character as to render the employees unfit for further service. Viewed in context, we do not consider Johnson's remarks so egregious as to warrant denying her the Act's complete protection.[5]

Thus, as indicated, Johnson and her fellow workers had been the victims of repeated racially motivated attacks culminating with the April 20, 1979, incident. On April 23, when she asked Respondent's president, Williams, to meet with the employees, he refused. Later that afternoon, while John-

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[1] The incident of April 20, 1979, that precipitated the work stoppage, began in the parking lot area, although it continued when the employees walked towards the bus stop on Philmont Avenue.

Also, as found by the Administrative Law Judge, from the summer of 1978 until 1979, Respondent's employees had their automobile tires slashed and were subjected to racial slurs, heckling, and harassment performed by members of the white community in the parking lot area.

[2] In response to previous complaints, Respondent had called the police and complained to its landlord, The Singer Company, about the problem. Respondent had also hired a full-time security guard who was to check the parking lot area during its night shift.

In fact, Respondent's actions in response to the concerns raised by the employees' work stoppage tends to belie its claim that the employees' problems in this regard were outside its control. Thus, Respondent was able to get The Singer Company's agreement to build a fence around the parking lot in order to keep out trespassers. Respondent also urged the local transit authority to move the bus stop used by the employees to the front of Respondent's plant.

[3] The Administrative Law Judge also found, however, that their terminations violated Sec. 8(a)(3) of the Act. The complaint does not allege that their terminations constituted an 8(a)(3) violation. Nor was it argued that their work stoppage was in support of a union. We therefore do not adopt the findings that the terminations of employees Johnson and Sudler violated Sec. 8(a)(3) of the Act and we shall modify the Administrative Law Judge's recommended Order and notice accordingly.

Further, the complaint did not allege that any discharges—other than the discharges of Johnson and Sudler—were violative of the Act. Accordingly, we need not pass on the legality of other terminations effectuated by Respondent.

[4] As the Administrative Law Judge noted, Walter Bond and Deborah Charles, two other employees who had leadership roles in the work stoppage activities, were terminated even though they did not make racially derogatory remarks.

[5] See, e.g., *Coors Container Company*, 238 NLRB 1312, 1320 (1978); *Associated Grocers of New England, Inc.*, 227 NLRB 1200, 1206-07 (1977). Chairman Van de Water, in agreeing to reinstate Johnson, would not rely on the precedent cited herein.

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son and other employees were outside the building preparing for their meeting with Respondent's personnel manager, they saw Williams leave the building in a hurry. At this meeting, Respondent stated that it did not have any solutions for the abusive white community outside the plant.

Against this background, it is understandable that Johnson's remarks, although regrettable and not to be condoned, may have been caused by frustration and the emotional confrontation with Respondent. Because we do not consider her conduct so egregious as to render her unfit for further service with Respondent, we shall order that Johnson be reinstated.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, J. W. Microelectronics Corporation, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging employees from instigating and participating in a protected concerted work stoppage or activities by terminating their employment or otherwise interfering with, restraining, or coercing employees in regard to their tenure of employment, or any term or condition of employment, because of their protected concerted activities.

(b) Discouraging employees from participating in a protected concerted walkout or activities in protest of Respondent's discharge of fellow employees by terminating their employment or otherwise interfering with, restraining, or coercing employees in regard to their tenure of employment, or any term or condition of employment, because of their protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Kathy R. Sudler and Janice Johnson immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay suffered by reason of the interference, restraint, and coercion against them, with interest, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).[6]

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at Respondent's place of business in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT restrain or coerce our employees in the exercise of their protected Section 7 rights by terminating their employment because they instigated and engaged in a concerted work stoppage in protest of related working conditions.

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[6] In accordance with his dissent in Olympic Medical Corporation 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discourage our employees from instigating, participating, or supporting a concerted protest work stoppage by terminating their employment, or otherwise interfering with, restraining, or coercing our employees in regard to their tenure of employment, or any term or condition of employment, because of their protected concerted activities.

WE WILL NOT discourage our employees from concertedly protesting the discharge of fellow employees by terminating their employment, or otherwise interfering with, restraining, or coercing our employees in regard to their tenure of employment or any term or condition of employment because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise and enjoyment of rights guaranteed them by Section 7 of the National Labor Relations Act, except to the extent that such rights might be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

WE WILL offer Kathy R. Sudler and Janice Johnson immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay suffered by reason of the interference, restraint, or coercion against them, with interest.

All our employees are free to engage in, or refuse to engage in, protected concerted activities to protest a work-related problem, or to protest the discharge of fellow employees, or to engage in other activities for mutual aid and protection, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

J. W. MICROELECTRONICS CORPORATION

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge: Upon individual charges of unfair labor practices filed on May 5, 1979, by Janice Johnson and Kathy R. Sudler, respectively, hereinafter called the Charging Parties, against J. W. Microelectronics Corporation, herein called Respondent, an order consolidating said cases and a consolidated complaint was issued by the Regional Director for Region 4, through the General Counsel of the National Labor Relations Board on June 18, 1979.

In substance, the consolidated complaint alleges that Respondent discharged the Charging Parties (employees) because they engaged in concerted activities for purposes of collective bargaining or other mutual aid or protection.

On or about June 29, 1979, Respondent filed an answer denying that it has engaged in any unfair labor practices as alleged in the complaint.

The hearing in the above matter was held before me in Philadelphia, Pennsylvania, on December 18, 1979. Briefs have been received from counsel for the General Counsel and for Respondent, respectively, which have been carefully considered.

Upon the entire record in this case and from my observations of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent J. W. Microelectronics Corporation is, and has been at all times material herein, a Pennsylvania corporation with an office and place of business in Philadelphia, Pennsylvania, where it is engaged in the manufacture and nonretail sale of electronic component systems and subsystem products.

In the course and conduct of its business operations, Respondent has annually sold and shipped from its Philadelphia, Pennsylvania, facility products, goods, and materials valued in excess of $50,000 to points outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Respondent J. W. Microelectronics Corporation is, and has been at all times material herein, engaged in the manufacture and nonretail sale of electronic component systems and subsystem products.

Respondent's Philadelphia facility is located near Fairmont Park which is adjacent to Philmont Avenue. Also adjacent to its building is a parking lot which belongs to its landlord, the Singer Company. Some personnel of Respondent (particularly supervisory personnel) generally park on said parking lot during Respondent's second (night) shift. Also adjacent to the lot is a field (recreation) which also belongs to the Singer Company. The park is several hundred feet away from Respondent's manufacturing facility. The Singer Company permits community groups to use the park for recreational purposes and the record shows that groups of community persons (white males) congregate in the park late at night drinking beer, smoking dope, and heckling and harassing the black employees of Respondent on the night shift as they leave the plant en route to their cars or to the public bus stop on Fairmont Avenue.

Prior to April 20, 1979, Respondent had received several complaints from its employees with respect to being harassed and heckled by the unidentified white persons from the community who congregated in the park during late hours of the night. In response to such complaints Respondent had previously called the police on occasion and had also complained to the Singer Company about the problem. Respondent had hired a full-time security guard 2 months prior to April 20, who was to check the area of the parking lot during its second or nightwork shift. Nevertheless, the record shows that the community in which Respondent's business facility is located is a substantially, if not totally, white community and its presence there appears to have been against the wishes of a large number of community residents. In any event, the dispute presented for determination in this proceeding arose out of this sociological conglomerate of facts.

During the summer evenings of 1978-79, automobile tires of Respondent's employees had been slashed and said employees victims of racial slurs (niggers) accompanied by profanity when leaving work at 12 midnight. The heckling and harassment were performed by members from the white community standing on the Singer Company's parking lot.

Finally, the record shows that the following named persons occupied the positions set opposite their respective names, and are now, and have been at all times material herein, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Jesse Williams	President
Vernol Jackson	Production Supervisor
Stanley Mulligan	Personnel Manager
Steven: (Steve) Aaronson	General Manager during some period of time herein.[1]

B. *Harassment by Some Members of the White Community on April 20 and the Activities of the Victimized Black Employees in Response Thereto*

Respondent's plant operates a second or night shift consisting of about 30 employees. The night shift works from 3:30 p.m. to midnight and all except two of the employees are female. Just about all of said employees except three or four are black.

According to the undisputed testimony of Janice Johnson and Kathy Sudler, which I credit, they along with fellow employees Walter Bond, Charlene Johnson, and others were leaving work at midnight on Friday, April 20, 1979.[2] As they waited a few seconds for their ride on the parking lot, and later proceeded to walk towards the bus stop on Philmont Avenue, several (approximately 10) male members of the white community commenced following them and yelling, "Get those niggers." "Kill them m—f—ers." "Get them out of our neighborhood." "We don't want them here"; and they proceeded to throw bottles, rocks, and bricks at them (employees). In an effort to protect Johnson, Sudler, and other female fellow employees, fellow employee Walker Bond and a male friend of his came towards them and became involved in a fight with the hecklers, in which scuffle Bond's male friend received a cut on the arm.

Over the weekend (April 21-22), Janice Johnson further testified undisputedly that fellow employees Deborah Bass and others called her on the telephone. They agreed to request a meeting with Jesse Williams, president of the Company, to discuss the incident which occurred on Friday night, April 20. Thereupon, Johnson called Williams on Monday morning (April 23) and told him what had happened on Friday night as they left work. She asked him if he could meet with herself and fellow employees on the night shift at 3 o'clock that afternoon. Williams said, "No, he could not meet with them at that time but that he would have Manager Steve Aaronson to meet with them."

At 3 p.m. on Monday, April 23, Johnson, Kathy Sudler, and other employees met outside the building in preparation for a meeting with management. They observed President Williams come out of the building and leave in a hurry.

Plant Manager Steve Aaronson did not meet with them but Personnel Manager Stan Muligan met with them in the plant's cafeteria. Present with him were John Collier, night-shift foreman, and Vernol Jackson, production supervisor. After a heated discussion during which the employees informed management about the Friday night incident, Supervisor John Collier said management did not have a solution. Janice Johnson then said, in responding to Collier, that if the Company did not have a solution, she suggested that the second-shift employees should not return to work until management found a solution. In the midst of all the yelling and shouting Williams ended the meeting. The second-shift employees left the cafeteria and met across the street in Fairmont Park where they discussed seeking outside help.

On the next day, Tuesday, April 24, Janice Johnson, her husband, and other employees on the night shift went to city hall and met with City Councilman Lucien Blackwell. Johnson continued to testify as follows:

> Q. What did the second shift say to Mr. Blackwell?
>
> A. We told him what had happened Friday and what kind of response we got from the President of the company and that the police wasn't there. [H]e called the police commissioner in that district and he said he wasn't aware of the problem that had happened on Friday and then he called Mr. Williams, but they said he was out. So then he called Tim Dougherty of the Philadelphia Tribune.
>
> A. That's a newspaper. A Philadelphia newspaper.
>
> Q. Then you called up Mr. Dougherty and what happened, if anything as a result of the phone call to Mr. Dougherty?
>
> A. Mr. Dougherty came over and took a report of what was being said. And, I did most of the talking.

The report of Tim Dougherty described in General Counsel's Exhibit 2 was published in the Friday, April 27, issue of the Tribune. After the meeting with Councilman Blackwell on Tuesday, Johnson and her fellow employees returned to the plant and the day-shift employees were sitting in the cafeteria. They wanted to know what had happened at Blackwell's office at city hall. She proceeded to tell the day-shift employees what had happened on Friday night and also what happened at Blackwell's office. At that time Plant Manager Steve Aaronson and Supervisor Vernol Jackson walked into the cafeteria and announced there was no work for the night shift on Tuesday, April 24, and that he was not sure about the rest of the week. He said some of them would be put on the day shift. Johnson replied, "[T]hat would not solve the problem because you know how those Caucasians are, if they do it at night, they'll do it in the day time."

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[2] All dates herein refer to 1979, unless specifically indicated otherwise.

Johnson continued to testify as follows:

> Q. Did he say anything else to you?
>
> A. He said that—yes, he said that we would be paid for the time that the company had allowed us—for the days that the company had gave us off, we would be paid for it and he also said at this point, he wasn't sure if we had to work the rest of the week.
>
> Q. Did he say anything about the Monday night meeting or the Monday afternoon meeting?
>
> A. Yes. He was not told about the meeting on Monday that Mr. Williams did not tell him about the meeting on Monday and that was why he wasn't there.
>
> Q. Okay, what, if anything was going to happen the next day?
>
> A. He also told us that if anyone was interested that Mr. Williams had arranged a meeting at 9:00 with the Commissioner of Human Relations down at city hall with Clarence Farmer.

Johnson further testified that as they left the building they met members of an organization called the House of Umoja, which works with gangs to avoid violence. It is a security force and its members asked to meet with them, so she and about 15 other fellow employees went to the home of employee Walter Bond for a meeting. They decided to select six employees to speak for the night shift (Janice Johnson, Kathy Sudler, Deborah Bass, Carolyn Knight, Deborah Charles, and Walter Bond). Then they selected two of the employees (Janice Johnson and Walter Bond) to speak for the six designated employees. The group agreed that if one employee was fired by Respondent all of them would walk out.

On the next day, Wednesday, April 25, 20 plus employees from the night shift attended the meeting at the Human Relations Commission at 9 a.m. Present were President Williams, Lucien Blackwell of the commission, Farmer, and members Umoja. Blackwell met privately with President Williams and they came out and announced that it would provide two plainclothesmen and two uniformed police in marked cars. Janice Johnson then asked President Williams if the night-shift employees were going to be compensated, and he said they would discuss that in a meeting at the plant at 3:30 p.m. She and other employees attended the 3:30 p.m. meeting (April 25) and present at that meeting were President Williams and Kleit or Klink from the Human Relations Commission. During the meeting Kleit or Klink from the commission told employees that Respondent was going to try to build a fence around the building and try to get the public bus rerouted. A representative from the police department was also present.

Subsequently, Williams then told employees that they went over his head by going down to city hall. Janice Johnson then told him that she personally requested a meeting with him and he said, "No," and designated lower management personnel (Steve Aaronson), who did not meet with them. Williams, nevertheless, asked employees to return to work but the employees advised that they were tired from the long day's meetings, that some of them had not come dressed to return to work, and that some had to make babysitting arrangements, etc. Supervisor John Collier then asked the employees for a show of hands for returning to work, but all the employees decided to go home. Johnson said at that time, she noticed President Williams had a piece of paper in his hand on which he had written and underlined the names of Janice Johnson and Walter Bond.

Thereafter, all of the employees on the night shift reported to work the next day Thursday, April 26, and as Janice Johnson went to punch her timecard, she noticed that it was not there. Janice Johnson's testimony with respect to all of the meetings was corroborated by fellow employee Kathy Sudler, Johnson continued to testify as follows:

> Q. When you arrived at work, what did you find?
>
> A. Well, when I got to work it was early. So, I went to punch my timecard in and to see that it was not in its place. So, I went to the office and I met Vernol Jackson in the hallway and he walked to the office with me. And when I started to ask the secretary what happened to my timecard, Stan Mulligan said, "Janice Johnson, we have terminated you. Here is your check and could we please have our badge." And at that time, I left the building.
>
> Q. Let me ask you this first. Did anybody know you were fired or did you just leave work?
>
> A. Well when I had left out the building Thursday, there was an employee that worked on the day shift. I told her, would you go back in the building and tell Kathy Sudler I had been fired so they could tell the rest of the employees because we were all supposed to walk out. She told Kathy Sudier and Kathy Sudler, Charlene Johnson, Annettie McDaniels, Ricki Exume, Linda Banks and Brenda Merrell walked out the building.

Likewise, Kathy Sudler reported to work on Thursday, April 30, and punched in. After she was informed by employees that Janice Johnson and Walter Bond were fired, she proceeded to remind the employees of their agreement to walk out if any employee was fired. At this juncture, Supervisor John Collier appeared and Sudler continued her testimony as follows:

> A. I was in the back talking to the employees. And he came up to me and said, "What are you

> doing back here" and I told John Collier Janice Johnson had been fired. And we all said if anyone had been fired, we all were going to stick together.
>
> Q. What did he say about that?
>
> A. He said, "Kathy, are you going to stay or are you going to punch your card?" I said, "I'm going to punch my card."
>
> Q. Did you?
>
> A. Yes.
>
> Q. Did anybody go with you?
>
> A. Yes.
>
> Q. Who went with you?
>
> A. Charlene Johnson, Ricki Exume, Brenda Merrell, Linda Banks and Annettie McDaniels.
>
> Q. Did all these people punch out with you?
>
> A. Yes.

However, she says she does recall Collier telling the employees there would be police protection at the plant and that Respondent had contacted the Singer Company, its landlord, and was working to get security for the parking lot, a fence, and changing the parking area. She said Mulligan did not tell her why she was being terminated.

Kathy Sudler further testified, without dispute, that on the next day, Friday, April 27, she joined Janice Johnson, Walter Bond, and Charlene Johnson in securing signs with which they picketed the plant, and also distributed handbills (G.C. Exh. 3). The handbills were a replica of the signs which bore the writings "Strike JWM as unfair labor practice," "unfair management so honor our strike"; "We were fired for the concern we had for our fellow workers, etc. not only ourselves"; "Strike." "Strike unfair labor practice, strike"; "Management unfair please help protect our rights, strike"; and "Strikeperson fired for protecting rights"; "You need your jobs, we need ours to" and "unfair labor practice"; "Strike unfair management at J.W.M. Corp., strike." (And the last sign said, "strike J.W.M. Corp. unfair labor practice, strike.")

On the following Monday, April 30, Kathy Sudler said she received a letter (G.C. Exh. 4) from Respondent advising that she was terminated for refusing to work. She stated that Charlene Johnson received a like letter of termination on April 30, also.

Stanley Mulligan, personnel manager for Respondent since February 1979, stated that he first learned about the Friday night incident on Monday, April 23. He said he expressed concern about the safety of the employees and in essence corroborated the prior testimony of the contents of the several meetings in which management and employees were present. He denied that employee Janice Johnson was terminated because she agitated a work stoppage but instead, stated that he received a letter from President Williams (G.C. Exh. 5) dated April 26, asking him to investigate. He sent a letter of report (G.C. Exh. 6) to President Williams. In response thereto, President Williams in his letter (G.C. Exh. 7) directed Mulligan to terminate of Janice Johnson. Thereupon he terminated Johnson on April 26. Thereafter, Deborah Charles called and resigned on April 26 before he had an opportunity to terminate her as he intended to do.

Manager Mulligan further testified that employees Kathy Sudler, Charlene Johnson, Nettie McDaniels, and Brenda Merrell were terminated for walking off the job. He said Respondent's employees' handbook provides, at pages 38 and 39, for termination of employees for participating in or agitating a work stoppage, slowdown, or any other work curtailment. (G.C. Exh. 8.)

On cross-examination, Manager Mulligan testified that Respondent has about 190 employees and that at one time five employees used to be selected as employee of the month. Prior to February 1979, Kathy Sudler had been selected such an employee. He further testified that Respondent's personnel records do not show a reason for Kathy Sudler's departure on April 26, but its records marked Ricki Exume as AWOL, and that Exume, Linda Banks, and Nettie McDaniels walked out with Kathy Sudler on April 26. The reason for Sudler's discharge was insubordination or refusal to carry out work assignments. In doing so, the employees willfully countermanded orders of management. He acknowledged that Brenda Merrell did not report for work on April 27 and that no comment is on her timecard.

Respondent produced Juanita Pegues as a witness who testified that the Friday night incident occurred about two city blocks from the plant. Pegues further testified that on Friday, April 20, the hecklers jumped two fences in order to get to the employees. They jumped the fence of the Orkin Company and also the Singer Company and she was on Philmont Avenue going towards Busteton Avenue to catch the bus. At that point the hecklers started throwing bottles and yelling racial slurs.

Manager Mulligan's testimonial account of the Tuesday meeting was as follows:

> A. I walked into the meeting along with Vernol Jackson. At that time, he was trying to explain what were the actions we had taken to secure their safety. There was general chaos among the employees. There was a lot of shouting, trying to shut people down as such. Steve Aaronson came in during the meeting and then tried to also do the same thing, at that time, that particular time, I had a lieutenant from the local office, police lieutenant, from the local police department in my office. And Steve was trying to explain to them the things that we were doing and had done to secure their safety. And he said, "You know if you like, you don't have to take my word for it, you can ask Stan. Stan tell them." I said, "A policeman is in my office now" and that's when Janice, who was standing on her feet, jumped up. She jumped up in between and she shouted at the other employees as she was banging her hand on the table. "Why should we listen to these people. We know all caucasians are animals." With that, Steve just threw up his hands and he sort of wandered off a little bit. The night shift left, the entire night shift.

Mulligan denied Steve Aaronson said there would be no work because work was available. He said Aaronson, who is white, left Respondent's employ a couple of days thereafter.

Mulligan further stated that although Williams ordered the discharge of Johnson, Bond, and Sudler, he did not know about their leadership among the employees.

Manager Mulligan further testified that on Friday, April 27, employees Rickie Exume and Linda Banks returned to work and were hired by Respondent because Exume called in the previous day and said although she walked out the day before, she had done so because she was genuinely concerned about her safety. She asked to report to work pursuant to the directive of Supervisor John Collier. The other four workers, Nettie McDaniels, Kathy Sudler, Charlene Johnson, and Brenda Merrell, were sent letters of termination for refusal to work. Linda Banks was allowed to return to work, but he does not know why she was permitted to return.

Manager Mulligan testified that Janice Johnson made racial remarks and she and Walter Bond were abusive to management in their Tuesday meeting.

III. ANALYSIS AND CONCLUSIONS

A. *The Work Stoppage*

The issues presented for determination in this proceeding are as counsel for the General Counsel sets forth as follows:

1. Was the employees' work stoppage concerted activity protected under the National Labor Relations Act?
2. Was Janice Johnson terminated because she instigated the work stoppage?
3. Was Kathy Sudler terminated because she engaged in a concerted work stoppage to protest the discharge of fellow workers Janice Johnson and Walter Bond?

The work stoppage which occurred as a result of the instigation of Janice Johnson and other employees' protest of the racially motivated heckling and harassment they experienced from some male members of the white community appears to be well established by the evidence. The threats of violence, heckling and harassment by which Janice Johnson and fellow black employees were victimized occurred after working hours and after they left the immediate premises of Respondent.

Respondent had no managerial control over the hecklers and was not responsible for their conduct. The record indicates that initially Respondent intimated that the problem was one for which it was not responsible and one which was above and beyond its control. This is so, because President Williams appeared reluctant to meet with the employees when he was first requested to do so by Janice Johnson. Secondly, when management officials were first apprised of the problems on Friday, April 20, their response was "we have no solutions." Notwithstanding, Respondent thereafter took several initiatives to protect the employees. It spoke to its landlord, Singer, which also owned the subject parking lot and park on which the hecklers would come to carry out their harassment of the employees. Respondent also called the police on several occasions, contacted the public bus company in an effort to have the bus rerouted to stop in front of its plant, considered building a fence around the lot, and secured a meeting with the Human Relations Commission. While all these exemplary things were done by Respondent, it should be noted that a key to an understanding of the issue is the right of the employees to complain, protest, and engage in other activities for the *mutual aid and protection* of fellow employees, even if the source of their grievance or concern is remote to the employer and the jobsite.

As counsel for the General Counsel points out, the Supreme Court in *Eastex, Inc.* v. *N.L.R.B.*, 437 U.S. 556, 563 (1978), "held that the Section 7 right to engage in concerted activities for the purpose of . . . mutual aid and protection," was intended by Congress to protect such activities in the broader purpose, as well as the narrower purpose of "self organization" and "collective bargaining." The Board has given Section 7 a broad interpretation as enunciated by the Supreme Court in *N.L.R.B.* v. *Peter Callier Kohler Swiss Chocolates Co., Inc.*, 130 F.2d 503 (2d. Cir. 1942), *Bethlehem Shipbuilding Corporation Ltd., et. al.* v. *N.L.R.B.*, 114 F.2d 930 (1st Cir. 1940), and others. It is therefore clear that the conditions against which Janice Johnson and other employees protested by engaging in a work stoppage was protected activity under the Act and the above cited authorities.

B. *Discharge of Janice Johnson*

Although Respondent did not have direct control over the events which took place after the second-shift employees left the plant, a crucial question raised by the evidence is whether Respondent's termination of Janice Johnson was in any way motivated by her work stoppage activity.

Respondent contends it terminated Janice Johnson for making racially inflammatory statements about management during the employees-management meeting on April 23 when, among other things, Janice Johnson in effect said in reference to a white supervisor: "Why should we listen to these people . . . and their lies . . . We know all caucasians are animals." Since there were other negative remarks made by other employees during the meeting, President Williams asked Personnel Manager Stanley Mulligan to investigate and give him a report on the conduct of employees during the meeting. Mulligan's report gave information upon which Mulligan said President Williams terminated Janice Johnson, Walter Bond, and Deborah Charles. The latter three employees were charged with telling the employees management was not doing anything to help them with their problem. Johnson, Bond, and Charles were also charged with making inflammatory statements at the meeting, but Bond and Charles were not charged with making any racially derogatory remarks. Nevertheless, Bond and Charles were also terminated.

Hence, it is readily apparent that Walter Bond and Deborah Charles, who did not make racial remarks, were terminated because of their advocacy for and participation in the work stoppage activity, which activity is protected by the Act. Since Janice Johnson was the first one discharged along with Bond and Charles, it becomes obvious that she was part of a lot (Bond, Charles, and Johnson) which Respondent wanted to elimfnate from its employ. Thus, Respondent's discriminatory motive for Johnson's discharge is thereby revealed. Correspondingly, Respondent's contention that it discharged Janice Johnson for her racial remarks is exposed, partially as a supplementary reason, and obviously as a pretext to conceal its other reason. Nevertheless, since Johnson's discharge was in part motivated by her protected leadership role in the work stoppage activities, Respondent's discharge of her was discriminatory and violative of Section 8(a)(3) and (1) of the Act.

However, this does not go to say that Janice Johnson's racially, derogatory, and inflammatory remarks did not also constitute a valid reason for her termination. *418 Geary, Inc. d/b/a Stage Deli and Theater Lounge*, 238 NLRB 276, 279, fn. 10 (1978); *Diocese of Fort Wayne-South Bend Inc.*, 230 NLRB 267; and *Charles Edwin Laffey, d/b/a Consolidated Services*, 223 NLRB 845 (1976). However, the above finding does not condone the irresponsible and inflammatory racial remarks uttered by Janice Johnson during the Tuesday employees-management meeting. As the record shows one white supervisory employee left the employment of Respondent 2 days later. The record does not specifically show why said employee left the employment of Respondent and Respondent did not offer any evidence in this regard. Nevertheless, such language by Johnson was certainly excessive and was deemed damaging to employee-management relations, as well as to race relations among employees. It would be interesting to know what demands Janice Johnson would have exacted of management had management publicly made racially derogatory remarks in reference to black persons. Thus, it is clear that Respondent also had cause to discharge Johnson even though such cause was coupled with an unlawful motive (Johnson's protected concerted activities). Consequently, although I will recommend that Respondent make Johnson whole for the discriminatory discharge I will not recommend that she be reinstated by Respondent.

C. *Respondent's Termination of Kathy Sudler*

On Thursday, April 26, Kathy Sudler learned from employees in the plant that Janice Johnson and Walter Bond had been fired. In keeping with the employees' agreement to walk out if Respondent fired any of the protesting employees, Sudler proceeded to inform employees on the second shift that Respondent had fired Janice Johnson and Walter Bond and reminded them of their agreement to walk out. As she was in the process of doing this, Production Supervisor John Collier walked up and asked Sudler what was she doing back there. Sudler told him Janice Johnson had been fired and that all the employees were going to stick together. Collier in effect told Sudler she should leave work if she was going to continue her protest. He also asked her if she was going to stay or punch out. Sudler said she was going to punch out and she did in fact do so, along with fellow employees Charlene Johnson, Annettie McDaniels, Ricky Exume, Linda Banks, and Brenda Merrell. Supervisor Collier did not testify in this proceeding and I credit Sudler's testimony that she informed Collier that she and other employees were sticking together (walking out) in protest of Respondent's termination of Johnson and Bond.

Personnel Manager Stanley Mulligan gave the Company's account of Sudler's discharge since Collier did not testify herein. Manager Mulligan contended that Respondent (presumably Collier or other managerial personnel) did not know why Kathy Sudler and other employees walked off the job on April 26. However, the evidence contradicts this contention by the credited testimony of Sudler, who advised Supervisor Collier why she and other employees were walking off the job. Moreover, Sudler and other employees picketed the plant commencing at noon on the following day, April 27. They wore signs which protested the termination of fellow employees for engaging in the protest against racial harassment. I was not persuaded that none of Respondent's managerial staff or employees in favor of management did not observe Sudler and other employees picketing the plant on April 27. Hence, Respondent's denial of knowledge of the whereabouts of Sudler on April 27 is not convincing, in view of the fact that Sudler advised Supervisor Collier that she and other employees were walking off the job in protest of the discharge of fellow employees Johnson and Bond. The picket signs clearly indicated that the employees were protesting the terminations of their fellow workers. Hence when Collier decided to terminate Sudler and the other employees on April 27, he did so with knowledge of their purpose as stated to him by Sudler on April 26, as well as by their participation in the picket line on April 27. Therefore, Respondent's contention that it discharged Sudler and other employees for failure to report to work on April 27 because they left work early on April 26 is pretextual to conceal its real reason for terminating them for protesting the discharge of fellow employees Johnson and Bond.

It is well established law that Section 8(a)(1) of the Act protects the right of employees to protest the discharge of other employees, even if such other employees were discharged for lawful reasons. *Auto-Truck Federal Credit Union*, 232 NLRB 1024 (1977), *Associated Cleaning Consultants & Services, Inc.*, 226 NLRB 1066 (1976), and *Roemer Industries, Inc.*, 205 NLRB 63 (1973).

Based on the foregoing conclusions, findings, and legal authority, I conclude and find that Respondent's termination of Kathy Sudler and other employees who protested the termination of Johnson and Bond with her violated Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in close connection with its operations as described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. REMEDY

Having found that Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 protected rights in violation of Section 8(a)(1) and (3) of the Act, by discriminatorily terminating employees Janice Johnson and Walter Bond for engaging in protected concerted protest activities on April 23 through 26; and that it discriminatorily terminated the employment of Kathy Sudler, because she along with fellow employees Charlene Johnson, Annettie McDaniels, Brenda Merrell, Ricky Exume, and Linda Banks walked off the job on April 26, 1979, to protest the terminations of Janice Johnson and Walter Bond, the recommended Order will provide that Respondent cease and desist from engaging in such unlawful conduct.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from in any other manner whatsoever interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

Upon the basis of the above findings of fact and upon the entire record of this case, I make the following:

CONCLUSIONS OF LAW

1. J. W. Microelectronics Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The second-shift employees work stoppage protest to management about racial and physical harassment by white male hecklers from the community as the employees leave the plant en route home, constituted protected concerted activity under the Act.

3. By discriminatorily terminating Janice Johnson's employment for engaging in protected concerted activity in instigating the work stoppage in protest of the employees' problem of racial harassment, Respondent violated Section 8(a)(1) and (3) of the Act.

4. By discriminatorily terminating the employment of Kathy Sudler because she engaged in a protected concerted work stoppage to protest Respondent's discharge of fellow employees Janice Johnson and Walter Bond, Respondent violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Air-Vac Industries, Inc., Leeward Constructors, Inc., Air-Vac Environmental Limited *and* Local Union No. 282, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 29-CA-7887

November 18, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On June 29, 1981, Administrative Law Judge Howard Edelman issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, Air-Vac Industries, Inc., Leeward Constructors, Inc., and Air-Vac Environmental Limited, Smithtown, New York, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following at the end of the last sentence to paragraph 1(a):

"The appropriate bargaining unit is:

"All drivers of Respondents employed at their Smithtown, New York location; excluding all other employees, guards and supervisors as defined in the Act."

2. Substitute the following for paragraph 1(e):

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain in good faith with Local Union No. 282, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, as the representative of the employees in the unit described herein, by refusing to sign the supplemental agreement submitted to us and agreed to on or about October 23, 1979.

WE WILL NOT refuse to implement the terms of the supplemental agreement described above and effective as of January 1, 1980.

WE WILL NOT bargain directly with employees, promising employees hospitalization benefits and other benefits or improvements in their working conditions or terms of employment.

WE WILL NOT threaten our employees with the partial closure of our operations and layoffs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL recognize the Union as the exclusive bargaining representative of our drivers with respect to rates of pay, wages, hours, and other terms and conditions of employment. The appropriate bargaining unit is:

> All drivers of the Employers employed at our Smithtown, New York location; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL, upon request by the Union, execute the supplemental agreement agreed upon on or about October 23, 1979, and give retro-

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[1] Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In view of the nature and extent of Respondents' violations and in order to more fully effectuate the policies of the Act, we have, *sua sponte*, determined that the Administrative Law Judge's recommended broad cease-and-desist Order is unwarranted in this case. Accordingly, we will modify the Administrative Law Judge's recommended Order and notice to include the narrow injunctive language. See, generally, *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

The Administrative Law Judge inadvertently failed to include the description of the unit in his recommended Order and notice. We have corrected them accordingly. We also delete the Administrative Law Judge's reference to *F. W. Woolworth Company*, 90 NLRB 289 (1950), in his recommended remedy. See, e.g., *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970); *Paramount Plastic Fabricators, Inc.*, 190 NLRB 170 (1971).

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active effect to all the provisions in said supplemental agreement as of January 1, 1980.

WE WILL jointly and severally make whole the employees in the unit described above, with interest, for our failure to implement the supplemental agreement we agreed to.

AIR-VAC INDUSTRIES, INC., LEEWARD CONSTRUCTORS, INC., AIR-VAC ENVIRONMENTAL LIMITED

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge: This case was heard before me on December 8, 1980, in Brooklyn, New York. The complaint in this case issued on May 30, 1980, based on an unfair labor practice charge filed on March 26, 1980, by Local Union No. 282, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, which alleged that Air-Vac Industries, Inc., and Leeward Constructors Inc., a single employer, herein respectively called Respondent Air-Vac and Respondent Leeward and collectively called Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act.

The complaint alleges, *inter alia*, that Respondents Air-Vac, Leeward, and Air-Vac Environmental Limited, herein called Respondent Environmental, violated Section 8(a)(1) and (5) of the Act by refusing to sign and execute a collective-bargaining agreement with the Union.[1] The complaint also alleges that, following refusal by Respondents to execute the collective-bargaining agreement negotiated with the Union, Respondents bargained directly and individually with its employees, offered and promised its employees hospitalization benefits, and threatened its employees with a partial closing of its business and layoffs, in order to discourage their assistance and support for the Union.

The parties to this proceeding did not file briefs. Upon consideration of the entire record, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Air-Vac is a New York corporation which at all times material herein has maintained its principal office and place of business in Smithtown, New York. Respondent Air-Vac is engaged in the construction, maintenance, and rehabilitation of drain and sewer systems for private corporations. During the past year which period is representative of its annual operations generally, Respondent Air-Vac in the course and conduct of its business performed services valued in excess of $50,000 of which services were performed in New York State for customers who during the same period purchased and caused to be transported to their places of business goods and materials valued in excess of $50,000, which were delivered to their place of business in interstate commerce directly from States of the United States other than the State in which they are located.

Respondent Leeward is a New York corporation which at all times material herein has maintained its principal office and place of business in Smithtown, New York, operating out of the same facility as Respondent Air-Vac. Respondent Leeward is engaged in the maintenance and rehabilitation of drain and sewer systems for municipalities located in Nassau and Suffolk Counties. During the past year, which period is representative of its annual operations generally, Respondent Leeward, in the course and conduct of its business, performed services for such municipalities valued in excess of $50,000, which services were performed within New York State for municipalities which during the same period purchased and caused to be transported to their places of business goods and materials valued in excess of $50,000 which were delivered to their places of business in interstate commerce directly from States of the United States other than the State in which they are located.

Respondents Air-Vac and Leeward admit, and I find, that said Respondents are and have been at all times material herein employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondents Air-Vac and Leeward also admit and I find that, at all times material herein, they have been affiliated businesses, with common officers, ownership, directors, and operators, and constitute a single integrated business enterprise, the said directors and operators formulating and administrating a common labor policy affecting the employees of said Respondents.

I further find that Respondent Environmental is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

II. THE LABOR ORGANIZATION INVOLVED

Respondents admit and I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Respondent Leeward commenced its operation in 1970. Respondent Air-Vac commenced its operation in 1971. At all times herein, Respondents Leeward and Air-Vac were owned by Edward Jost and his wife, who were also the sole officers and directors of both the corporations. Additionally, Respondents Leeward and Air-Vac have had at all times since 1971 common supervisory personnel and employees and have operated out of the same facility. Prior to 1977, Respondents Air-Vac and Leeward performed maintenance and rehabilitation work on drain and sewer systems for municipalities located principally in the counties of Nassau and Suffolk

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[1] During the course of the hearing herein, the complaint was amended to include Respondent Environmental as a single integrated business enterprise with Respondents Air-Vac and Leeward, having been affiliated businesses with common officers, ownership, directors, and operators whose directors and operators formulate and administer common labor policy.

[2] Respondent Environmental did not admit or deny that it was an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Nor are there any jurisdictional facts contained in the record which establish independently that Respondent Environmental is an employer engaged in commerce within the meaning of the Act. This finding is based upon my conclusion described below that Respondents Air-Vac, Leeward, and Environmental are a single employer and that Respondent Environmental is an *alter ego* of Respondent Leeward. *B.J.S. Drugs*, 243 NLRB 830 (1979).

Sometime in or around November 1977, Respondent Air-Vac commenced performing drain and sewer system construction and maintenance work for private companies in the heavy construction industry located primarily in the counties of Nassau and Suffolk. At this time, in order to be able to perform such work for private companies and to avoid labor disputes, Respondent Air-Vac signed a collective-bargaining agreement with the Union covering its drivers who perform such construction and maintenance work.[3] The collective-bargaining agreement herein expired on June 30, 1978. Thereafter, Respondent Air-Vac entered into a subsequent collective-bargaining agreement with the Union which was effective from July 1, 1978, through June 30, 1982.

At the time Respondent Air-Vac initially entered into its collective-bargaining agreement with the Union, it was orally agreed by union representatives and Edward Jost that all heavy construction work would be performed through Respondent Air-Vac and that such work would be covered by the Union's contract. It was further agreed that Respondent Leeward would continue to operate as a nonunion corporation performing municipal work exclusively.

From November 1977 through July 1980, Respondents Air-Vac and Leeward have employed five to seven drivers in a single common unit. Following the execution of the union contract, a seniority list was prepared by Respondent Air-Vac. Those drivers having the highest seniority were awarded the more lucrative Air-Vac work. Since such work was covered by the Union's contract, the drivers received a higher rate of pay than those performing similar work for Respondent Leeward. Additionally, drivers performing work for Respondent Air-Vac received the contract benefits which included pension and hospitalization benefits. The lower seniority drivers performing work for Respondent Leeward were not covered by the Union's contract and received no hospitalization or pension benefits.

At times, depending on the volume of work available, all Respondents' employees might be performing work for Respondent Air-Vac. At other times the entire complement of employees might be performing work for Respondent Leeward. Generally, however, the two to three employees with the lowest seniority were assigned to work jobs for municipalities performed by Respondent Leeward.

Sometime in September 1979 the employees of Respondents Air-Vac and Leeward, including Union Shop Steward Thomas Sallie, met with Edward Jost. The employees demanded that Jost provide hospitalization and other benefits for those employees working on Respondent Leeward's jobs. These employees were not performing sufficient work under the Union's contract with Respondent Air-Vac to qualify for the union benefits provided in such agreement. When Jost refused, the Union commenced a strike. The strike concluded when Jost agreed to meet with union representatives for the purpose of negotiating a supplemental agreement on behalf of the employees performing work for Respondent Leeward.

Sometime during the latter part of October 1979, Jost and his attorney, Leonard Kimmell, met at the Union's offices with Union Representative Andrew Boggia, Union Attorney Brian McCarthy, and Union Steward Thomas Sallie. During this meeting, Jost explained that he could not afford to pay the rates and benefits provided for in Respondent Air-Vac's agreement on municipal jobs performed by Respondent Leeward because the municipalities paid lower contract rates than the private corporations. Boggia told Jost that the Union would do everything it possibly could to influence the municipalities to raise their contract rates. During this meeting, all terms of a supplemental agreement between Respondent Leeward and the Union were agreed upon. After reaching an agreement, Boggia reassured Jost that he would contact the various town supervisors and exert union influence in order to convince the municipalities to raise the contract rate paid to Respondent Leeward. Jost replied that, if the rates were not increased, there was no way he could pay the new contract rate. Boggia responded that he could not help this.

The agreed-upon terms were incorporated into a written "supplemental agreement" drawn up and submitted to the Union for employee ratification and signature by Respondents Air-Vac and Leeward (by its attorney, Kimmell). The supplemental agreement submitted to the Union provided in part as follows:

> AGREEMENT entered into between Air-Vac Industries Inc. and its subsidiary Leeward Constructors Inc., 137 Oakside Drive, Smithtown, New York (herein called the Company) and Building Material Local Union No. 282, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 1975 Linden Boulevard, Elmont, New York (herein called the Union).
>
> WHEREAS, Air-Vac Industries Inc. and the Union entered into a collective bargaining agreement effective July 1, 1978 covering the terms and conditions of employment of its members employed by Air-Vac, and
>
> WHEREAS, the employees of Air-Vac have from time to time been assigned to work for Leeward on contracts with various public municipalities at which time they did not receive wages and fringe benefits in accordance with the contract between Air-Vac and the Union, and
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> WHEREAS, such assignments of employees to Leeward to perform public work was done in good faith belief that the bargaining agreement between Air-Vac and the Union was not applicable to such

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[3] In November 1977, Respondent Air-Vac became a signatory to the heavy construction excavating collective-bargaining agreement between Nassau-Suffolk Constructors Association Inc., an employer association, and the Union.

> employees when performing public work for Leeward, and
>
> WHEREAS, it has been established that the contract rates paid to Leeward by public municipalities are not presently sufficient to enable the Company (Respondent Leeward) to grant employees all the wages and other benefits under the bargaining agreement with the Union, and
>
> WHEREAS, the parties agree that the continued operation of the Company (Respondent Leeward) is in the best interests of the employees,
>
> NOW THEREFORE, it is hereby agreed as follows:
>
> 1. The collective bargaining agreement effective July 1, 1978 between Air-Vac and the Union shall cover at all times, all of the Company's (Respondent Leeward's) employees including such times as they are employed by the Company performing work for public municipalities except as set forth below.

Thereafter, paragraphs 2, 3, and 4 of the supplemental agreement provided for wage rates which, although below that provided in Respondent Air-Vac's agreement, were more than presently in effect for work performed for Respondent Leeward, and for contributions by Respondent Leeward into the Union's pension, welfare, and annuity funds for those employees performing municipal work for Respondent Leeward. The concluding paragraph 6 of the supplemental agreement provided as follows:

> 6. In consideration for the undertakings by the Company (Respondent Leeward) set forth above, the Union and its members employed by the Company agreed to make no claim for unpaid wages or unpaid trust fund contributions under the bargaining agreement that may have arisen prior to the date of this agreement.

There is no language contained in the supplemental agreement as drawn up by Respondent Leeward's attorney, which would indicate directly or impliedly that the supplemental agreement was in any way conditioned upon the municipalities raising the contract rate for work performed by Respondent Leeward on behalf of such municipalities.

Upon receiving the supplemental agreement prepared by Respondent Leeward's attorney, Kimmell, Boggia turned over the agreement to Shop Steward Sallie to obtain ratification by the employees. Shortly thereafter Sallie met with all employees and described the terms of the supplemental agreement to them. The employees thereupon orally ratified the agreement. Sallie returned the agreement to Boggia informing him of the employee ratifications. Boggia thereupon signed the supplemental agreement and submitted it to his attorney, McCarthy, who forwarded the agreement to Attorney Kimmell.[4]

Sometime in January or February 1980, Boggia telephoned Respondents and spoke to Jost's wife. He asked Mrs. Jost when the supplemental agreement would be signed and she indicated that her husband was out of town and she did not know whether the agreement had been signed. About 1 month later, on or about the end of February, when the agreement had not been submitted to the Union, Boggia telephoned Kimmell and asked him when the agreement would be signed. Kimmell stated that he had given the agreement to Jost and indicated he did not know when and if Jost had signed the agreement. Boggia informed Kimmell that he intended to file charges with the National Labor Relations Board.

Jost admits that he did not sign the supplemental agreement submitted to him by the Union, nor did he implement the terms and conditions set forth therein. Jost contends that the agreement was orally conditioned upon the Union being able to obtain a higher contract rate from the municipalities for work performed for them. In this respect, Jost testified, "My feeling was that if we had gotten the increase [from the municipalities], we certainly would have went [sic] along with the supplemental sgreement."

Sometime in January 1980, Jost assembled all employees and informed them that he was not going to sign the supplemental agreement between Respondent Leeward and the Union. He explained to the employees that he would not be able to go along with the supplemental agreement because he had been unable to get an increase in his contract rate from the municipalities. He informed the employees that, if he had to pay the contract benefits and wage increases provided in the supplemental agreement, he would have to close his doors and give up the municipal work and that employees would lose their jobs. He also told the employees that he would try to provide them with hospital benefits in lieu of the benefits provided for in the supplemental agreement provided he could obtain such benefits at a lower rate than that set forth in the supplemental agreement. He asked the men to think about this and to get back to him.

Sometime later, employees informed Jost that they would rather have the union contract but would not close the door to his proposal entirely.

At all times prior to January 1980, all employees who performed work for municipalities were on Respondent Leeward's payroll and received Respondent Leeward's paychecks. After January 1980, the employees who performed work for municipalities were transferred to the payroll of Respondent Environmental.

Respondent Environmental was formed in 1979. It is owned solely by Jost and his wife who are the sole officers and directors as well. Respondent Environmental operates out of the same facility as Respondents Air-Vac and Leeward and employs the same supervisory personnel. Prior to January 1980, Respondent Environmental was primarily engaged in the cleaning of oil spills on highways, stack cleaning, and the wholesale sale of various chemical cleaners and degreasers to municipalities and private corporations used for the purpose of cleaning sewers and drains. Prior to January 1980, Respondent Environmental employed on its payroll a single outside salesman who was engaged in the selling of the aforementioned chemical cleaners and degreasers to municipalities and private corporations.

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[4] The record does not disclose the date ratification took place. Nor does the record disclose the date when Union Attorney McCarthy forwarded the supplemental agreement to Respondent.

Subsequent to January 1980, all those employees classified as drivers who were employed by Respondent Leeward, performing work for municipalities, were transferred to Respondent Environmental's payroll. Thereafter, these employees received Respondent Environmental checks. These employees working for Respondent Environmental, excluding the outside salesman, continued to perform the same work under the same supervision, using the same equipment as they had been performing when working for Respondent Leeward.[5]

IV. ANALYSIS AND CONCLUSIONS

A. *The Single Employer Issue*

A critical issue presented in this case is whether Respondents Air-Vac, Leeward, and Environmental constitute a single employer within the meaning of the Act.

The Supreme Court held in *Radio & Television Broadcast Technicians, Local Union 1264, International Brotherhood of Electrical Workers, AFL-CIO, et al.* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), that in determining whether enterprises constitute a single employer:

> The controlling criteria set out and elaborated in Board decisions are interrelation of operations, common management, centralized control of labor relations and common ownership.

The Board in *Blumenfeld Theatres Circuit, a partnership, et al.*, 240 NLRB 206, 214, 215 (1979), held that a "single employer" status, for the purposes of the National Labor Relations Act, depends upon all the circumstances of the case [and] that not all of the 'controlling criteria' specified by the Supreme Court [in *Radio & Television Broadcast Technicians, supra*] need be present."

Turning our consideration to the instant case, it is admitted by Respondents Air-Vac and Leeward that these two entities are affiliated businesses with common officers, ownership, directors, and operators and constitute a single business enterprise, the said directors and operators formulating and administering a common labor policy. However, it is denied that Respondent Environmental is a single employer along with Respondents Air-Vac and Leeward. In this connection, the evidence establishes that all three Respondent Companies are owned by Jost and his wife. Moreover, Jost and his wife are the sole directors and officers of all three corporations, formulating and administering a common labor policy. Additionally, Respondents operate out of the same facility using the same equipment. The employees of all three Companies are supervised by a single supervisor. Additionally, and most significantly, Respondents utilize a single complement of employees.

In view of the admissions by Respondents Air-Vac and Leeward as to single employer status and in view of the evidence described above, and the above-cited authorities, I conclude that Respondents Air-Vac, Leeward, and Environmental constitute a single integrated enterprise, and a single employer within the meaning of the Act.

B. *The Appropriate Unit*

Although I have concluded that Respondents Air-Vac, Leeward, and Environmental constitute a single employer, such conclusion does not necessarily support a finding that a single employerwide unit is appropriate for bargaining. In this connection, the Supreme Court, following the Board's theory in a line of prior Board cases, held in *South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers, AFL-CIO, et al.*, 425 U.S. 800, 805 (1976), that a determination that two affiliated firms constitute a single employer "does not necessarily establish that an employerwide unit is appropriate, as the factors which are relevant in identifying of the breadth of an employer's operation are not conclusively determinative of the scope of an appropriate unit." The Supreme Court remanded to the Board for determination of the question of whether the employees employed by Peter Kiewit Sons' Co. and South Prairie Construction Co. constituted an appropriate unit within the meaning of Section 9 of the Act.

On remand the Board in *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76, 77 (1977), held that in determining the appropriate bargaining unit, the following factors were particularly relevant: "the bargaining history; the functional integration of operations; the differences in the types of work and skills of employees; the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and the extent of interchange and contact between the groups of employees."

An examination of the facts of the instant case establish that Jost and his wife are in complete charge of all three Companies and orders are passed from them to a single supervisor utilized by all three Companies. Additionally, there is but a single complement of employees. Prior to January-February 1980, this single complement of employees performed work either for Respondent Air-Vac or Respondent Leeward. The type of work performed by the employees comprising this single complement was essentially the same work except that Respondent Air-Vac employees performed work for private companies whereas Respondent Leeward's employees performed work for municipalities. Employees were selected to perform the more desirable and higher paid Respondent Air-Vac work, based on a single seniority list. The employees having the greatest seniority received assignments for Respondent Air-Vac work while those within the same complement with lesser seniority received assignments for Respondent Leeward work. At certain times, depending upon work availability, the entire complement of employees might be performing work for Respondent Air-Vac. On other occasions, where no Respondent Air-Vac work was available, the entire complement of employees might perform work for Respondent Leeward. Most of the time those employees with greater seniority performed work for Respondent Air-Vac while those employees on the lower end of the seniority list performed work for Respondent Leeward. A single supervisor supervised the work of all employees whether working for Respondent Air-Vac or Respondent Leeward.

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[5] Sometime after March 2, 1980, Respondents Air-Vac, Leeward, and Environmental moved from their 137 Oak Side Drive, Smithtown, location to 45 Terry Road, Smithtown. To date, all operations operate from this facility.

Prior to the January-February 1980 period, Respondent Environmental operated essentially as a sales corporation, employing a single outside salesman. At some point in time during the January-February 1980 period, and at all times thereafter, following the negotiation of the supplemental agreement herein, all employees performing work for municipalities and on the payroll of Respondent Leeward receiving Respondent Leeward's checks were transferred to the payroll of Respondent Environmental and received Respondent Environmental checks. The effect of this transfer was that the employees performing work previously performed by Respondent Leeward were now performing the same work for Respondent Environmental. Except for the change of payroll all else remained the same. Thus, the same employees performed the same work under the same supervision. The facts establish that Respondent Leeward and Respondent Environmental had the same management, had the same business purpose and operation, utilized the same equipment, serviced the same customers, employed the same supervision, and utilized the same single complement of employees. The Board had held that, in these circumstances, an *alter ego* relationship between two such enterprises exists. See *Young's Metal Fabricators and Roofing, Inc. and Young's Sheet Metal and Roofing Inc.*, 241 NLRB 978 (1979); *Crawford Door Sales Company, Inc., and Cordes Door Company, Inc.*, 226 NLRB 1144 (1976).

I therefore conclude that, in addition to Respondents Air-Vac, Leeward, and Environmental constituting a single employer, Respondent Environmental was an *alter ego* of Respondent Leeward. I further conclude that, based on all the factors recited above, including common ownership, officers, and directors, common supervision, a common facility, single complement of employees, the similar nature of the work involved, and the utilization of the same equipment, that the single unit of employees which I find to be commonly employed by Respondents Air-Vac, Leeward, and Environmental constitutes an appropriate unit for bargaining within the meaning of the Act.

C. *Representative Status of the Union*

The facts establish that the Union has, at all times material herein, represented the employees of Respondent Air-Vac. This is established by the existing collective-bargaining agreement between Respondent Air-Vac and the Union. In view of my conclusions, described above, that Respondents Air-Vac, Leeward, and Environmental constitute a single employer and that Respondent Environmental is an *alter ego* of Respondent Leeward, and in view of my further conclusion that Respondents herein employ the same complement of employees, I conclude that, at all times material herein, the Union represented such complement or unit of employees which I have found to be an appropriate unit for bargaining.

Such conclusion is further established by an examination of the language of the supplemental agreement drawn up by Respondents' counsel contained in the "whereas" provisions of the agreement, where it is set forth by way of a recitation of prior bargaining history:

> [T]he employees of [Respondent] Air-Vac have from time to time been assigned to work for [Respondent] Leeward on contracts with various public municipalities at which time they did not receive wages and fringe benefits in accordance with the contract between [Respondent] Air-Vac and the Union, and WHEREAS, such assignments of employees to [Respondent] Leeward to perform this public work was done in a good faith belief that the bargaining agreement between [Respondent] Air-Vac and the Union was not applicable to such employees when performing public work for [Respondent] Leeward.

Thus, as among themselves, the Union and Respondents recognized that, while the Union at all times material herein represented the single complement of employees employed by all Respondents herein, the contract benefits were applicable to only the employees when performing Respondent Air-Vac work. The effect of the supplemental agreement is not to expand the scope of employee coverage of the bargaining unit, but rather to increase the type of work covered by the agreement.

D. *The Supplemental Agreement*

The next issue presented is whether the Union and Respondents reached an agreement on the terms of the supplemental agreement involved in this case. Respondents take the position that the agreement reached was conditioned upon Respondents' receiving a higher contract rate from the municipalities for the work they performed. Respondents' contention is based on Jost's testimony that he understood the promise made by Boggia during the negotiation on October 23 that the Union would use its influence in obtaining from the municipalities such higher contract rate to be an implied agreement by the Union that the supplemental agreement was conditioned on Respondents' obtaining such higher rate from the municipalities. However, this contention is not supported by the evidence. There is no evidence that Boggia or any other union representative stated expressly at any time during the negotiations that the supplemental agreement negotiated was conditioned upon Respondents' obtaining a higher contract rate from the municipalities. Boggia affirmatively denies that such statement was made during the negotiations or at any other time. Moreover, an inspection of the terms of the supplemental agreement, including the preliminary language, fails to include anywhere within the four corners of the agreement any language, either directly or by implication, indicating that such agreement was conditional on Respondent Leeward's receiving a greater rate from municipalities. Clearly, had the agreement been so conditioned, such condition would have been inserted within the agreement itself. That this is true is established by the inclusion in the preliminary language reciting the reason for the differences in the lower rates and benefit coverage to be applied to employees performing work for Respondent Leeward where it is set forth as follows:

> WHEREAS, it has been established that the contract rates paid to [Respondent] Leeward by public municipalities are not presently sufficient to enable the company to grant employees all the wages and other benefits under the bargaining agreement with the Union.

In view of the meticulous preliminary language preceding the actual terms of the supplemental agreement, as illustrated by the above example, I conclude that, had such conditional agreement existed, it is inconceivable that such condition would not have been inserted in the agreement. In this regard, the agreement was drawn up by Respondents' counsel. I therefore conclude that the parties did not condition the supplemental agreement on Respondent Leeward's receiving higher contract rates from the municipalities.

Moreover, under the parole evidence rule, a prior contemporaneous oral agreement may not alter the terms of a written contract. The Board has consistently applied this rule in refusing to permit a party to a collective-bargaining agreement to vary the terms thereof by proving a contemporaneous or prior oral agreement or undertaking. *Gollin Block and Supply Company*, 243 NLRB 350 (1979), and cases cited therein.

Neither can it be argued by Respondents that its financial inability to implement the terms of the supplemental agreement because of the failure to obtain from the municipalities an increased contract rate excuses the unilateral repudiation of the supplemental agreement. *Nassau County Health Facilities Association, Inc. and its Members; et al.*, 227 NLRB 1680, 1684 (1977).

There is no dispute but that the parties reached agreement on all substantive terms and conditions set forth in the supplemental agreement. This is established by the testimony of Boggia and Jost and reflected by the supplemental agreement drawn up by Respondents' attorney and submitted to the Union.

In view of my conclusion that there was no understanding or condition, either oral or written, whereby the supplemental agreement herein was conditioned on Respondent Leeward's obtaining a higher rate from the municipalities, and in view of my conclusion that Respondents and the Union agreed upon all substantive terms and conditions set forth in the supplemental agreement, I find that Respondents, by failing and refusing to execute this supplemental agreement and to implement its terms, has violated Section 8(a)(1) and (5) of the Act. *H. J. Heinz Company* v. *N.L.R.B.*, 311 U.S. 514 (1941); *Gollin Block and Supply Company, supra.*

E. *The 8(a)(1) Violations*

The undisputed evidence establishes that Respondents bargained directly and individually with its employees in January 1980 when Jost assembled all employees and informed them that he was not going to sign the supplemental agreement between Respondent Leeward and the Union. At this time he explained to the employees that if he had to pay the benefits provided in the supplemental agreement he would have to close his doors and give up the municipal work and that employees would lose their jobs. During this meeting he told the employees that he would try to provide them with hospital benefits in lieu of the benefits provided in the supplemental agreement provided he could obtain such benefits at a lower rate than provided in the supplemental agreement. It is also undisputed that such meeting took place without the knowledge, consultation, consent, or presence of union representatives. The Board has long held that dealing with employees directly at a time when there is a recognized collective-bargaining representative and promising or discussing terms and conditions not sanctioned by a collective-bargaining agreement and outside the presence of any union representative constitutes direct dealing with employees and interference with their Section 7 rights. Accordingly, I conclude that Jost's promise that he would try to provide employees with hospital benefits in lieu of those benefits provided in the supplemental agreement constituted direct dealing with employees and that, by engaging in such activity, Respondents thereby violated Section 8(a)(1) of the Act. *Mountaineer Excavating Co., Inc.*, 241 NLRB 414 (1979); *John M. Lastooka, trading as Ram Construction Company*, 228 NLRB 769 (1977). I also find Jost's statement to the employees at this meeting, that if he had to pay the contract benefits and wage increases provided in the supplemental agreement, he would have to close his doors, give up the municipal work, and employees would lose their jobs, to be an unlawful threat of partial closing with an implied threat of loss of jobs, violative of Section 8(a)(1) of the Act. *Henry A. Young d/b/a Columbia Engineers International*, 249 NLRB 1023 (1980).

CONCLUSIONS OF LAW

1. Respondents Air-Vac, Leeward, and Environmental are, individually, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents Air-Vac, Leeward, and Environmental constitute a single employer within the meaning of the Act.

3. Respondent Environmental is an *alter ego* of Respondent Leeward.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. The Union is the exclusive collective-bargaining representative of all drivers employed by Respondents Air-Vac, Leeward, and Environmental.

6. At all times material herein, since 1976, the Union has had a collective-bargaining agreement with Respondent Air-Vac covering the employees in the bargaining unit described above in paragraph 5 of the Conclusions of Law.

7. On or about October 23, 1979, the Union and Respondents Air-Vac, Leeward, and Environmental reached an agreement as to all terms of a supplemental

collective-bargaining agreement covering the employees in the bargaining unit described above in paragraph 5.

8. Respondents Air-Vac, Leeward, and Environmental by refusing to sign the agreement described above in paragraph 7 and by refusing to implement the terms of such agreement violated Section 8(a)(1) and (5) of the Act.

9. Respondents Air-Vac, Leeward, and Environmental by bargaining directly and individually with the employees described above in paragraph 5 and by offering and promising such employees hospitalization benefits and other benefits and improvements violated Section 8(a)(1).

10. Respondents Air-Vac, Leeward, and Environmental by threatening its employees with partial closure of its business and impliedly threatening its employees with layoff violated Section 8(a)(1) of the Act.

11. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondents Air-Vac, Leeward, and Environmental have engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take the following affirmative action designed to effectuate the policies of the Act. My recommended Order will require Respondents Air-Vac, Leeward, and Environmental to execute the supplemental agreement submitted to them described hereinabove, and to apply all the provisions of said supplemental agreement retroactively to January 1, 1980, and to further make whole unit employees as appropriate for failure to do so in the manner described by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977),[6] making available, if necessary, records for computation purposes and posting the attached notice.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record in this case, I hereby issue the following recommended:

ORDER[7]

The Respondents, Air-Vac Industries, Inc., Leeward Constructors, Inc., and Air-Vac Environmental Limited, herein called Respondents Air-Vac, Leeward, and Environmental, respectively, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Local Union No. 282, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, as the representative of its employees in the unit described herein by refusing to sign the supplemental agreement submitted to them and agreed to on or about October 23, 1979.

(b) Refusing to implement the terms of the supplemental agreement described above and effective as of January 1, 1980.

(c) Bargaining directly with employees and promising employees hospitalization benefits and other benefits or improvements in their working conditions or terms of employment.

(d) Threatening its employees with layoffs and the partial closure of its operations.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the National Labor Relations Act, as amended:

(a) Recognize the Union as the exclusive bargaining representative of the employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(b) Upon request by the Union, execute the supplemental agreement agreed upon on or about October 23, 1979, and give retroactive effect to all of the provisions in said supplemental agreement as of January 1, 1980.

(c) Jointly and severally, make whole the employees in the unit described above, in the manner and to the extent set forth and prescribed in "The Remedy" section of this Decision.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order, if any.

(e) Post at its place of business copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondents' authorized representative, shall be posted immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

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[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein, shall as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Teamsters Local Union No. 574, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America ***and*** **Lola Wheeler.** Case 14-CA-14589

November 19, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 14, 1981, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in response to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, to modify his remedy,[2] and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Teamsters Local Union No. 574, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Cape Girardeau, Missouri, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before me at Cape Girardeau, Missouri, upon an unfair labor practice complaint,[1] issued by the Board's Regional Director for Region 14, which alleges that Respondent Teamsters Local Union 574, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America,[2] violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the complaint alleges that Respondent discriminatorily discharged Lola Wheeler because of her union activities and her protected concerted activities, that it unlawfully repudiated its collective-bargaining obligations with the labor organization representing its office clerical and building maintenance employees and unlawfully withdrew recognition from that Union, and that it refused to reinstate unfair labor practice strikers upon their unconditional offer to return to work. Respondent insists that Wheeler is a supervisory employee who is not entitled to the protection of the Act, that the labor organization with whom a preceding administration at Local 574 had concluded a collective-bargaining agreement covering office and janitorial employees was unlawfully assisted, that the collective-bargaining agreement it negotiated is null and void, and that the strikers who requested reinstatement were economic strikers who had been replaced at the time they tendered their applications to return to work. Upon these contentions, the issues herein were joined.[3]

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In the remedy section of his Decision, the Administrative Law Judge recommended that the backpay for four unfair labor practice strikers should commence running 5 days after they first requested reinstatement. In *Drug Package Company, Inc.*, 228 NLRB 108 (1977), the Board pointed out that the 5-day period after which backpay for an unfair labor practice striker begins to run exists to provide a reasonable accommodation between the interest of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. On the other hand, if an employer has rejected, attached an unlawful condition to, or ignored an unconditional offer to return to work, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work. *Interstate Paper Supply Company, Inc.*, 251 NLRB 1423 (1980). In the instant case, Respondent ignored the offer to return to work by the four unfair labor practice strikers. In such circumstances, the Administrative Law Judge erred by imposing a 5-day period on the tolling of backpay for the four unfair labor practice strikers, and, therefore, we have modified the Administrative Law Judge's recommended remedy, and we shall direct that the backpay for the four unfair labor practice strikers shall commence from their first offer to return to work. For the reasons set forth in their partial dissent in *Drug Package Co., Inc., supra*, Members Fanning and Jenkins would in any event begin Respondent's backpay obligation from the date the strikers offered to return to work.

[1] The principal docket entries in this case are as follows:

Charge filed herein by Lola Wheeler against Respondent (herein sometimes called Local 574 or the Teamsters) on January 12, 1981, and an amended charge filed on February 13, 1981; complaint issued by the Regional Director for Region 14 against Respondent on February 19, 1981; Respondent's answer filed on March 3, 1981; hearing held in Cape Girardeau, Missouri, on March 23 and 24, 1981; briefs filed with me by the General Counsel, the Charging Party, and Respondent on or before April 27, 1981.

[2] Respondent admits, and I find, that it is a labor organization which represents employees in negotiating wages, hours, and terms and conditions of employment with employers located in southeast Missouri, and is an integral part of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a multistate labor organization. Respondent maintains its place of business at Cape Girardeau, Missouri. In the course and conduct of its business, Respondent collects from its members dues, initiation fees, and per capita taxes in excess of $50,000 per year and annually remits from Cape Girardeau, Missouri, to the International Headquarters in Washington, D.C., per capita taxes in excess of $50,000. Accordingly, Respondent is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. Office Employees and Building Maintenance Employees Unit of Teamsters Local Union No. 574 is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Certain errors in the transcript herein have been noted and corrected.

259 NLRB No. 37

FINDINGS OF FACT

I. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent is a large Teamsters local which has about 26,000 members. Its jurisdiction extends to most of southeastern Missouri. It is affiliated with the Teamsters International, the Teamsters Central States Conference, the Mo-Kan Conference, and Teamsters Joint Council 13. Like most Teamsters locals, its principal operating head is the secretary-treasurer, who is elected by the membership for a 3-year term. Other officials who are elected at the same time may or may not hold full-time positions with the Local. When they do, they are employed and paid as business representatives. These elected officials, together with three trustees, constitute the Local's executive board.

Charging Party Lola Wheeler has been an employee of Local 574 since 1956. Like all of the members of Respondent's office staff, she is a dues-paying member of Local 574[4] and reports to the secretary-treasurer. Until January 7, 1981, she was employed without a break in service under four different secretary-treasurers. Originally, she was the only employee on Respondent's clerical staff. As the Local grew in membership and activity, three additional clerical positions were added and Wheeler assumed the title of office manager. A fifth member of the office and janitorial bargaining unit is a part-time janitorial employee who performs routine cleaning and small maintenance chores.

This case arises out of the ashes of a bitter internal political dispute which racked Local 574 throughout 1980. At a referendum election conducted on December 14, 1980, incumbent Secretary-Treasurer Donald Hurst was defeated by a slim margin by David Prater, a longtime member of an insurgent Teamsters group known as PROD. With one exception, Prater's entire slate of candidates, which campaigned as "Team 80," defeated the incumbent slate headed by Hurst. Because of the issues which emerged in the campaign between Hurst and Prater, the office staff became politically involved in the election dispute. They were discharged shortly after Prater took office on January 1, 1981.

Because of her long tenure as a member of the office staff and as office manager, Wheeler was well known to the rank-and-file of Local 574 and had known Prater for many years. In 1977, in her capacity as a member of Local 574, she was involved in a floor fight with Prater at a membership meeting over a change in the bylaws which Prater had proposed. Prater sought a bylaws restriction which would have limited the wages of office personnel to $6 per hour. The net effect of this amendment would, at that time, have cut Wheeler's salary in half and would have caused substantial reductions in the pay of the other clerical employees. She was successful in defeating this proposal by an overwhelming majority.

In June 1980, after the campaign for Local offices was well underway, Prater visited Wheeler at her home and asked her to remain neutral in the campaign. She assured Prater that she did not want to become involved in the campaign. However, as the campaign took shape, Prater, who was running on an economy platform, became critical of the salaries and the performance of the office personnel.[5] The office staff became increasingly disquieted during the summer months by recurring rumors that they would all be fired if Prater were elected. Accordingly, they decided to organize.

In informal conversations among themselves, the office staff discussed various options open to them. They rejected a suggestion that they should join a union affiliated with another international labor organization, because they did not want to do anything which would jeopardize the health, welfare, and pension benefits they enjoyed as members of the Teamsters. They also rejected the idea that they should join Teamsters Local 688, which represents office clerical employees employed by various Missouri Teamsters locals. They felt that Local 688, which is located in St. Louis, was too far from Cape Girardeau to do an effective job of representing them. Their only remaining option was to form their own labor organization and this they decided to do, calling it Office and Building Maintenance Employees Unit of Teamsters Local Union 574. Because of her experience and ability, the other employees looked to Lola Wheeler to serve as their spokesperson and she did so.

Wheeler approached Hurst with the information about what the office staff intended to do. Hurst expressed the opinion that they would be better protected if they joined Teamsters Local 688 and volunteered to contact Local 688 on their behalf. When Wheeler told Hurst that the office staff was set on forming their own union, he said he would recognize and deal with it.

During the late summer months of 1980, the office staff drew up a list of proposals and secured contracts from other locals to assist them in formulating contract language. They were not at all dissatisfied with existing wages and benefits and incorporated them into their proposals. Their overriding concern was job security. Among other things they proposed a provision prohibiting Respondent from discharging clerical and janitorial employees without just cause. They also proposed a grievance and arbitration procedure resulting in final decisions by a neutral on disputed matters of contract interpretation and application. They also asked for severance pay, a benefit which they did not currently enjoy. Wheeler had several conferences with Hurst concerning the provisions of the proposed contract. As most of the proposals incorporated existing benefits, there were few disputes between them. Hurst rejected certain proposals relating to paid holidays and vacations but finally agreed to a 19-month contract which he signed on September 2, 1980. On the union side, the contract was signed not only by Wheeler but also by each member of the bargaining unit. There was addendum relating solely to the janitorial services performed by Heisserer and she signed this portion of the contract.

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[4] While the collective-bargaining agreement discussed hereinafter contains a provision requiring office and janitorial employees to be members of Local 574, it is undisputed that this longstanding practice has existed in order that these employees may be eligible to participate in Teamsters health, welfare, and pension plans.

[5] The salaries paid to the office and janitorial staff were generous by any definition and were as follows: Lola Wheeler, office manager, $555 a week; Louis Borchelt, insurance office supervisor, $435; Christine Gross, dues office supervisor, $390; Linda Greer, office secretary, $300; and Delores Hemmerer, janitor (part time), $190. Included in this figure was any overtime which might be worked by the members of the office staff. They had made an agreement with Hurst in 1980 for a pay increase with the understanding that they would not receive additional compensation for overtime, except by way of compensatory time, and then only with official permission.

Hurst told the office employees that it was not necessary to submit the contract to the executive board for approval and asked the employees to keep the contract a secret since he did not want it to become an issue in the campaign. They agreed to do so. Because he did not submit the contract to the Union's executive board for approval, this omission caused some concern among the bargaining unit members as to its binding effect upon Local 574 in the event of a change of administration. On November 2, they spoke with Clyde E. Craig, the Union's attorney, when Craig was in Cape Girardeau, and asked him if he thought the contract was legal and binding. He expressed the opinion that it was binding. On December 3, Hurst sent Craig a detailed letter which had been composed by Wheeler and which asked Craig several specific questions about the legality of clerical unit contract. The contents of this letter will be discussed *infra*. The letter mentioned Wheeler by name as a contact person and suggested the possibility of a conference call to discuss Craig's response to the questions posed. The office staff arranged such a call to Craig on December 9 and discussed their concerns with him personally. Hurst was a party to this conversation. In response to a question posed to Craig concerning whether it was necessary to have executive board approval of the contract before it was final and binding on Respondent, Craig gave a guarded reply, saying that it was not necessary for the employees to have the contract approved by the executive board since Hurst had the authority to hire office employees and set their wage rates. However, he felt that it would strengthen their hand if such approval was obtained.

Late in the campaign, the political attacks on the office employees became so pronounced that the staff members felt compelled to reply. They drew up a piece of campaign literature defending their job performance and attempting to justify the pay they were receiving. It was entitled "We've Kept Our Mouths Shut as Long as We Can." In this open letter, they asked the membership to vote for the Hurst slate and signed it individually. It was then mailed to the entire membership by one of the Hurst-slate candidates.

The 2-week transition period between the Prater victory on December 14 and the end of the Hurst administration on December 31 was marked by considerable tension in Respondent's office, none of which was alleviated by the behavior of the defeated officers. Hurst visited the office only once or twice during this period of time. He refused to speak with Prater when the latter came to the office to discuss union business. Wheeler brought to Hurst's attention the fact that a per capita tax of $3.50 was due to the International from Local 574 on December 20 and that there was not enough money in the Union's checking account to meet the payment. She suggested that Hurst convene a meeting of the executive board to authorize the cashing of a certificate of deposit so that funds would be on hand for this purpose. Hurst refused, telling her to let Prater worry about it when he took over.

On December 16, Wheeler wrote a letter to Prater about ongoing union business, particularly the requirement of an annual audit which would soon fall due. She recommended to Prater that he continue to retain the accounting firm which had been handling the books in the past. She also informed him that Hurst would permit Prater to examine the books in the office at his convenience. Prater spoke with Wheeler on several occasions during the transition period. On one such occasion, she informed him about the delinquency in the payment of the per capita tax to the International and wrote a letter to the International, at Prater's request telling the International that the money would be immediately forthcoming after he assumed office.

On or about December 30, Hurst wrote a letter to Prater outlining the problems and activities of the Union which required his immediate attention and left it on the desk in the office which Prater was about to occupy. Attached to this letter was a copy of the collective-bargaining agreement between Local 574 and the Office Clerical Union which Hurst had signed on September 2.

Prater took advantage of New Year's Eve and New Year's Day holidays to go over the books and records of the Union. He came across Hurst's letter and with it the first information which had come to his attention concerning the clerical unit contract. On January 2, 1981, the first working day of his term of office, Prater held a meeting with the clerical staff and with incoming President Richard Griggs, incoming Vice President Wilbur Muenche, and Joseph Masterson, a newly appointed business agent. He told the assembled individuals that he intended to be boss and was told by the members of the office staff in response that he would have their full support and cooperation. He also said he wanted to eliminate some of the tension in the office. He noted that he was aware that the clerical staff had endorsed his opponents during the election but assured them that "politics is over," that the staff and the new officers were going to be friends, and that everyone should relax because no one was going to be fired. Prater criticized a claim for wages which had been made by some clerical employees for their service as poll watcher at the December 14 election and said that the claim would not be honored. He also told the employees that he had read the clerical contract and did not like it but would be bound by it, adding that if an economic pinch came about, Linda Greer, as the most junior employee in the office, would be the first to be laid off. He also outlined certain changes in the office procedure, saying that if at any time he were not in the office, employees should refer contract interpretations on grievable matters to Griggs, the new president, rather than answering the questions themselves. He also told the office personnel that he wanted them to adhere strictly to an 8-hour day and did not want them working beyond 4:30 p.m.

On the following Tuesday, Prater drove to St. Louis to confer with the Local's attorney. I credit corroborated admissions from Prater that, during this consultation, his attorneys showed him the letter of December 3, 1980, which Hurst had written to Craig requesting Craig's advice concerning the binding effect of the clerical unit contract.[6] On Wednesday morning, Prater arrived at the union office before its scheduled opening hour of 8 a.m. When Wheeler arrived for work, he told one of the business agents who was on hand to ask her to come into the office. When she entered the office, Prater informed her that she was discharged, that he could not work with her, did not trust her, and was not going to employ her any longer. Wheeler asked him what was wrong. I credit her testimony to the effect that Prater then said that he had been in St. Louis at the office of the Union's law firm and had seen the letter which she wrote to the firm concerning the clerical contract. He insisted that she had written the letter, even though it bore Hurst's signature, because he felt that Hurst could hardly sign his own name. He then told Wheeler that he did not like the letter, felt that she was working against him, and insisted that he simply would not have it. He instructed her to clean out her desk and leave the premises. He also voiced the opinion that the clerical contract was illegal.

About this time, two other office employees, Linda Greer and Christine Gross, arrived for work. They went into Prater's office and were told by Prater that Wheeler had been fired and that he was not going to recognize their contract with Local 574 because Craig had said the contract was illegal. He also said that he had seen a letter in Craig's office and it had made him very angry. He then gave them the option of working without a contract, but with no reduction in wages or benefits, or of walking out with Wheeler. Greer and Gross left the office to discuss it.

Before leaving the office, Wheeler phoned fellow employee Louise Borchelt, told her that she (Wheeler) had just been fired, and asked Borchelt to come immediately to the office. After Borschelt arrived, she and her fellow workers had a total of three conversations with Prater. In the course of these conversations, Prater told the three remaining employees that the contract was invalid but that they could work if they wanted with the same pay and benefits they had been receiving. Prater was asked to reconsider his decision to discharge Wheeler, but he refused. He told the employees that, if they walked out, their action would be deemed a voluntary quit on their part. They asked Prater what it was in the contract that he did not like. His reply was that he did not like anything about it and was not going to discuss it because his attorney told him that it was illegal. He was also asked to reconsider his disavowal of the contract but he refused. After the employees caucused briefly, Prater spoke with them again but merely to reiterate what he had said before. He argued that the contract was illegal because he could not act both as their employer and as their union representative. He also advised them, as their union representative, not to go on strike. At this point, all of the employees, including Wheeler, left the office and went to consult an attorney.

On the afternoon of January 7, they established a picket line in front of the Teamsters office and carried hand-lettered signs which read: "Teamsters Local Union No. 574 refuses to recognize Office Employees and Building Maintenance Employees Unit." They maintained their picket line in front of the union office until February 8. At the regular membership meeting which occurred on January 11, the turmoil which had erupted in the business office on January 7 came to the floor of the meeting. All the striking office employees, including Wheeler, were present and, as they were union members, they participated in the meeting. Prater described the contents of the clerical contract to the membership and said that he had known nothing of it before taking office. He said that the outgoing members of the executive board were also unaware of its existence. He assured the members that, if the office employees had transferred their membership to Local 688 in St. Louis and had negotiated a contract using the St. Louis local as their bargaining agent, the contract would have been valid, but he insisted that it was a conflict of interest for Local 574 to act both as employer and as union representative for the office staff. Prater was asked from the floor why he had discharged Wheeler. He replied that he could not answer upon advice of his attorney. Wheeler challenged Prater concerning the statement made to him by his attorneys that there was a conflict of interest on the part of Local 574 in recognizing the clerical union, noting that his attorney was telling him a different story from the one the office staff had received from the same lawyer a few weeks earlier. Prater also insisted that the contract with the office staff was invalid because it had not been approved by the executive board. The meeting wore on in a bitter wrangle over the events which had transpired on January 7. One member suggested that Wheeler be reinstated and another made a formal motion that the clerical contract be recognized. Prater refused to recognize the motion, stating that he would not allow 300 to 400 members to make the decision for the entire membership, because he had to represent all of them.

Prater began to hire replacements for Wheeler and the striking employees. On January 23, the strikers wrote Prater a letter requesting reinstatement. The letter was ignored. On February 9, their attorney wrote Prater a similar letter offering reinstatement but received no response. At the hearing, Prater testified that there were no vacancies in the office when these letters were received and none have arisen since that time.

II. ANALYSIS AND CONCLUSIONS

A. *The Supervisory Status of Lola Wheeler*

The parties to this litigation have vigorously contested the issue of whether Wheeler was either a supervisor within the meaning of Section 2(11) of the Act or a managerial employee who lacks the protection of the Act, and they have offered a great deal of evidence and argument in support of their respective contentions. The strongest indications pointing to her supervisory or managerial status are that, as the office staff grew from a one-woman operation, Wheeler took on the title of office manager and was paid a salary at the time of her discharge of $555 per week, plus fringe benefits. On the other hand, the record establishes that her daily duties were both clerical and administrative in character. She kept the Union's books, distributed incoming mail, handled filing and typing for business agents, and performed other related chores. It is also clear from the record that she did not hire or fire anyone. On one or two occasions, she participated in the interviewing or recruitment of a couple of clerical employees, and on one occasion gave a candidate for employment a typing test at the request of Respondent's secretary-treasurer.[7] Respondent's office staff was small and was made up of capable, experienced women who required little, if any, supervision in the daily performance of their duties. There was rarely if ever any need to administer discipline. The responsibility for doing so reposed in the secretary-treasurer.[8] The only direction which Wheeler gave to other clerical personnel was to parcel out extra or overflow typing work which had been given to her by business representatives. In such instances, she would assign the work to whichever clerical employee was caught up with her regular duties and was available for additional work. Wheeler made routine purchases of office equipment and supplies and maintained a log showing which business agents were out of the office and where they could be reached. Respondent observed a policy of flextime with respect to its clerical employees, all of whom were expected to work overtime without additional compensation when their duties required. If one of these employees desired time off for a personal errand, they would inform Wheeler that they were leaving.

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[6] Since the letter was in the hands of the Union's attorneys, Prater had at least constructive knowledge of its contents, but it is clear from the record that, despite protestations to the contrary, he had actual knowledge as well.

Most of the clerical employees had their own basic specialized assignments and Wheeler was not free to change these assignments. Because of their expertise in their areas of responsibility, other employees were sometimes referred to as supervisors although they had no one to supervise. This supervisory status referred to their responsibility for particular work, such as pension benefits or dues payments, rather than to any power which they might exercise over the tenure or job performance of another individual. The same was basically true of Wheeler. The difference in her case was that she had 25 years of experience in Respondent's office, was intimately familiar with every facet of the Union's activities, and could answer questions and perform services pertaining both to the work of office clericals and business representatives as well. Hence, she was called upon repeatedly for advice or assistance by other personnel relating to matters in their areas of responsibility. She excelled in English composition and was regularly relied on to write letters, provide business agents with proposed contract language, and draw up documents such as grievances, organizing literature, unfair labor practice charges, and arbitration cases. Because of this expertise and experience, she also assisted in training new employees on the rare occasions when new employees were hired.

The bargaining unit here in question was composed of five individuals, including Wheeler. It is undisputed that they all reported to the secretary-treasurer, who is the officer empowered by the Union's bylaws to employ office personnel. Most secretary-treasurers were necessarily away from the office 2 or 3 days a week, although they could usually be reached in emergencies. One or more business agents, some of whom held union office, were normally present in the office during office hours. At the time of Wheeler's discharge, all office personnel were under strict orders from Prater to refer all questions involving contractual interpretations to himself or, in his absence, to the Union's new president, Griggs, rather than answer a member's inquiry directly. It is undisputed that, before this time, Wheeler might, in the absence of the secretary-treasurer, attempt to answer a member's inquiry on a contract question if there was an applicable precedent to guide her. While Wheeler attended executive board meetings, it was only in the capacity of a clerical employee who was assigned to take and prepare minutes.

The official reports are replete with Board and court cases on the subject of what constitutes a supervisor or a managerial employee, yet no area of the law better illustrates the Holmesian dictum that "general principles do not decide concrete cases."[9] The criteria for establishing supervisory responsibility are set forth in Section 2(11) of the Act and there is ample decisional authority for the proposition that the existence of any one of these elements is sufficient to designate an employee as a supervisor.[10] However, the sporadic or occasional exercise of supervisory authority is insufficient to constitute an employee a supervisor.[11] Nor is the mere existence of a title, which may connote supervisory or managerial authority, sufficient in and of itself to warrant a finding that the holder of the title is a supervisor.[12] Hence, titles such as "assistant director of nursing"[13] "personnel manager,"[14] "assistant personnel manager,"[15] "assistant branch manager,"[16] or "office manager"[17] have been found not to be conclusive of supervisory authority. "Titles and symbols without the possession and exercise of supervisory power do not constitute a person a supervisor."[18] Hence, the fact that Wheeler bore the title of office manager at Respondent's office and used this title from time to time in correspondence or interoffice memoranda does not by itself make her a supervisor.

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[7] The clerical contract has an unusual provision which entitles clerical employees to notification and an opportunity to recommend candidates to fill any vacancies which might arise in the office staff. Because of the generous pay and allowances accorded to office employees, there has been very little turnover and few vacancies have ever arisen.

[8] There is testimony that several years ago Wheeler criticized employee Soma O. Jauch because she breached office policy by accepting a phone inquiry from a member during the lunch hour. I regard this event as both remote and isolated and having little probative value as to Wheeler's power and authority as of September 1980 or January 7, 1981.

[9] *Lochner* v. *New York*, 198 U.S. 45, 75, 76 (1905).

[10] *Henry Colder Company*, 163 NLRB 105 (1967); *N.L.R.B.* v. *Ohio Power Company*, 176 F.2d 385 (6th Cir. 1949).

[11] *G. K. Chevrolet, Inc.*, 176 NLRB 416 (1969); *J. J. Newberry Co., a wholly Subsidiary of McCory Corporation*, 249 NLRB 991 (1980); *Oregon State Employees Association*, 242 NLRB 976 (1979).

[12] *N.L.R.B.* v. *Harmon Industries, Inc.*, 565 F.2d 1047 (8th Cir. 1977).

[13] *Milford Manor, Inc.*, 233 NLRB 1283 (1977).

[14] *J. J. Newberry Co., supra.*

[15] *Maremont Corporation, World Parts Division*, 251 NLRB 1617 (1980).

[16] *Fall River Savings Bank*, 246 NLRB 831 (1979).

[17] *Saladmaster Corporation*, 216 NLRB 769 (1975); *Empire Gas, Inc. of Denver*, 254 NLRB 626 (1981).

[18] *Saldamaster Corporation, supra* at 773.

One of the principal arguments advanced by Respondent in support of its contention on this point is that Wheeler assigned work to other employees in the office. However, the record is void of proof that she responsibly directed employees in the performance of their duties or that she exercised independent judgment in making these assignments. The work in question was routine typing which she gave to other clericals who did not happen to be busy at the moment. Such assignments do not invest supervisory authority in the individual making the assignment.[19] The Board has also held repeatedly that the deferral by employees to the statements or advice of another employee because of his or her expertise, ability, or experience does not amount to evidence of supervisory authority.[20] In this case, Wheeler was certainly a talented and experienced employee and it is no suprise that others looked to her for assistance or advice in the day-to-day operation of the Union's business office. This recognition of ability should not be confused with supervisory power, which reposed in the secretary-treasurer of Respondent.

One factor which strongly supports the employee status of Wheeler is the ratio of supervisors to employees which would result if she were found to be a supervisor.[21] There were five employees in the office, including a part-time janitor, who reported to the secretary-treasurer, resulting in a ratio of 5 to 1 if Wheeler should be deemed to be a rank-and-file employee. Were she found to be a supervisor, there would be four employees to two supervisors, a ratio which suggests an inordinate preponderance of supervisory personnel. See *Rexart Color & Chemical Co., Inc., supra; J. J. Newberry Co., supra*. Other factors relied on by Respondent in support of its argument that Wheeler is a supervisor are comparatively minor and have been addressed by the Board adversely to Respondent's contention in other cases. The fact that Wheeler made routine purchases of office supplies and equipment does also not evidence of supervisory authority on her part,[22] nor does the fact that she had access to confidential information warrant a different conclusion.[23] Indeed, it appears that all the office clerical employees had access to confidential information as part of their daily duties.

Respondent argues in the alternative that, if Wheeler is not a supervisor in the statutory sense, she is at least a managerial employee and hence was excluded from the protection of the Act. The Board has already held that Teamsters business agents are not managerial employees, even though they are charged with the responsibility for executing union policies and representing the Union in dealings with employers and its membership. *Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 244 NLRB 794 (1979). It has repeatedly come to the same conclusion with respect to union field representatives, both at the International and local level, regardless of what titles might be assigned to them by their principals.[24] In the instant case, one of the principal functions performed by Wheeler and the other personnel in the Union's business office was to assist business representatives in the performance of their various duties. Since these representatives are not managerial employees, it follows that their assistants, including Wheeler, should not qualify for this designation either. Accordingly, in light of the above-recited factors, I conclude that Lola Wheeler was neither a supervisor nor a managerial employee and was entitled to enjoy the protections provided by Sections 7 and 8 of the Act.[25]

B. *The Clerical Employees Union and Its Contract With Respondent*

Respondent admits that Office Employees and Building Maintenance Unit of Teamsters Local Union No. 574 is a labor organization, in that it meets the statutory criteria set forth in Section 2(5) of the Act. However, Respondent insists that this Union is an unlawfully assisted union and hence the contract which it concluded with Respondent is null and void. Respondent filed no charges against the clerical union and no complaint has been issued seeking to disestablish it or to nullify the contract which it concluded. Indeed, it would appear that such an attack might well be barred at this point because of limitations. However, this contention is made by way of defense to the complaint issued against it. For Respondent to prevail on this point, it would have to make a confession of error and then ask the Board to permit it to profit from the fruits of its own wrongdoing. Such a position has few equities and less support in the record.

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[19] *Dynalectron Corporation*, 231 NLRB 1147 (1977); *Ohio State Legal Services Association*, 239 NLRB 594 (1978); *W. C. McQuaide, Inc. v. N.L.R.B.*, 552 F.2d 519 (3d Cir. 1977).

[20] *Oregon State Employees Association, supra*; *Dawson Metal Products, Inc.*, 183 NLRB 191 (1970); *Rexard Color & Chemical Co., Inc.*, 246 NLRB 240 (1979).

[21] There is little basis here for applying a standard often used by the Board in finding supervisory status; namely, the suggestion that Wheeler was in complete charge of the office during the frequent absences of the secretary-treasurer. Not only was the Union's principal official normally available by phone in the event of an emergency, but it is also clear that one or more business agents, some of whom were elected officials, were normally present in the office, even when the secretary-treasurer was absent. There was no need for Wheeler to step in and fill the shoes of this official while he was away.

[22] *Barnes and Noble Bookstores, Inc.*, 233 NLRB 1326 (1977); *Dynalectron Corporation, supra*; cf. *Simplex Industries, Inc.*, 243 NLRB 111 (1979).

[23] *Maremont Corporation, supra.*

[24] See *Oregon State Employees Association, supra; Retail Store Employees Union Local 444, Retail Clerks International Association, AFL-CIO*, 153 NLRB 252 (1965); *Retail Store Employees Union, Local 428, AFL-CIO*, 163 NLRB 431 (1967); *Grand Lodge International Association of Machinists and Aerospace Workers, AFL-CIO*, 159 NLRB 137 (1966); *American Federation of Labor and Congress of Industrial Organizations*, 120 NLRB 969 (1958); *International Ladies' Garment Workers' Union AFL-CIO v. N.L.R.B.*, 339 F.2d 116 (2d Cir. 1964).

[25] The General Counsel argues, in the alternative, that even if Wheeler is found to be a supervisor or a managerial employee, her discharge would still violate Sec. 8(a)(1) of the Act because of its impact on other employees who do enjoy the protections of the Act. Beginning with *Better Monkey Grip Company*, 115 NLRB 170 (1956), enfd. 243 F.2d 836 (5th Cir. 1957), cert. denied 353 U.S. 864, the Board has held, in an almost consistent line of cases, that an employer violates Sec. 8(a)(1) of the Act when it discharges a supervisor for union-related considerations because of the interference this discharge causes with the rights of other employees. *Alamo Express, Inc., and Alamo Cartage Company*, 127 NLRB 1203 (1960); *Miami Coca Cola Bottling Company doing business as Key West Coca Cola Bottling Company*, 140 NLRB 1359 (1963); *Murray Golub, Selwyn Golub, and Albert Golub d/b/a Golub Bro. Concessions*, 140 NLRB 120 (1962); *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782 (1962); *Oil City Brass Works*, 147 NLRB 627 (1964); *Ideal Baking Company of Tennessee, Inc.*, 143 NLRB 546 (1963); *Fairview Nursing Home*, 202 NLRB 318 (1973); *Carter Lumber, Inc.*, 207 NLRB 391 (1973); *Donelson Packing Co., Inc. and Riegel Provision Company*, 220 NLRB 1043 (1975); *VADA of Oklahoma, Inc.*, 216 NLRB 750 (1975); *Trustees of Boston University*, 224 NLRB 1385 (1976); *Fort Vancouver Plywood Company*, 235 NLRB 635 (1978); cf. *L & S Enterprises, Inc.*, 245 NLRB 1123 (1979). However, because of the above finding relating to the status of Wheeler, it is not necessary to address this contention of the General Counsel and I do not do so.

The clerical union in question was formed as the result of an option which was freely and intelligently exercised by all of the members of the office staff when confronted with the situation which faced them in the summer of 1980. Prater admitted that, had they joined a sister local, the question of unlawful assistance would not exist and the contract of September 2 would be legal and binding. Indeed, Hurst expressed a similar opinion relating to Local 688 when Wheeler first approached him about the desire of the clerical staff to organize. There is no doubt that the Union, informally organized though it was, enjoyed the unanimous support of the members of the bargaining unit, as is evidenced by the signatures contained on the contract in question. There is also no doubt that the initial impetus toward the formation of this Union and the decision to take this route toward collective bargaining sprang from the desires of the employees, who came to their conclusion with no prompting or suggestion from Respondent's officers. Inasmuch as Wheeler has been found to be a rank-and-file employee, any contention of vicarious sponsorship because of her activities must perforce fail.

Respondent points to a provision in the September 2 contract which requires employees to join Local 574 within 30 days of their employment. From this premise it argues that, by joining Local 574, an employee designates Respondent as its bargaining agent. Since Respondent cannot be both an employee's employer and bargaining agent, a conflict of interest has been created which should permit the Respondent to escape the contractual obligations it undertook on September 2. The contention is frivolous.

It is undisputed that all the members of the office staff of Local 574 had long been members of that Union and had joined in order to be eligible to participate in the Teamsters health, welfare, and pension benefits. Because of the peculiar though not unique posture of this case—involving, as it does, a labor organization acting as an employer rather than as a collective-bargaining representative—the action of its employees in seeking and obtaining membership takes on a different character than it would if they were employed by a commercial enterprise and had joined the Teamsters to secure its services as their bargaining agent. For employees of Respondent's office staff, membership in Local 574 is analogous to the situation which would exist if a commercial enterprise were to ask or insist that its employees also be corporate stockholders. It was Respondent who paid the employees here in question and who asked for services in return. It was their employer and there can be no quibble on this point. Membership in Local 574 was simply a means of obtaining employee benefits, not a vehicle for obtaining collective-bargaining representation. The employees had designated their own Union as their bargaining representative and Respondent had recognized and dealt with it as such until January 7, 1981. When this representative entered into a contract with Local 574 which required membership in Local 574, it was not abridging any of the legal rights of the members of the clerical union. There is no statutory reason why such a provision might not be included in their contract under the facts and circumstances of this case. See *Retail Store, Employees Union, Local 428, AFL-CIO, supra.*

Respondent points to the way in which Hurst negotiated the contract with Wheeler as evidence to support its contention that the clerical union was unlawfully assisted. The question of unlawful assistance does not turn on whether a union was given a hard time or an easy time in negotiating a contract. The question of assistance goes to the manner in which a union comes into being and achieves initial recognition. What follows from that point is simply the fortunes of war. No one in authority in Respondent's organization in any way assisted in the formation of the Union or suggested that it be formed. Indeed, the contrary suggestion was made. No one in authority in Respondent's organization influenced the decision on this point on the part of any bargaining unit member. When the independent clerical union achieved majority status, Respondent had no legitimate reason for denying it recognition or for refusing to bargain with it. Accordingly, the defense that an assisted union entered into a sweetheart contract finds no support whatsoever in the record in this case.

With respect to Hurst's authority to negotiate the contract in question, it is clear that Hurst, as secretary-treasurer, had authority under Respondent's bylaws to hire office employees and to fix their compensation. This is sufficient authority to permit him to establish wages, hours, and terms and conditions of employment on a collective basis as well as on an individual employee basis. In determining such authority, the Board is not bound by technical rules of contract law or by the strictures of common law concepts of principal and agent. *Adams Iron Works, Inc.*, 221 NLRB 71 (1975). Respondent's legal counsel informed the employees in the unit that the secretary-treasurer had authority, without executive board approval, to conclude the contract in question, and such a representation, in and of itself, should estop Respondent from reneging on the contract after it was concluded. Therefore, I conclude that Respondent was bound by the terms of the September 2 agreement. When, on January 7, 1981, it repudiated both the agreement and the underlying collective-bargaining relationship upon which the agreement was based, it violated Section 8(a)(1) and (5) of the Act. *C & S Industries, Inc.*, 158 NLRB 454 (1966); *Detroit Cabinet and Door Co.*, 247 NLRB 1415 (1980); *Nedco Construction Corp.*, 206 NLRB 150 (1973); *Home Roofing Co., Inc.*, 211 NLRB 910 (1974); *Merryweather Optical Company*, 240 NLRB 1213 (1979).

C. *The Discharge of Lola Wheeler*

Wheeler's leadership in her relationship to other office clerical employees was well recognized by Respondent. Indeed, it is an element of Respondent's argument that Wheeler was not an employee at all but a supervisor. It was Wheeler who negotiated the clerical union contract with Hurst and who also composed the letter which Hurst sent to his attorneys in early December seeking legal advice on the validity of that contract. Her name appears in the text of Hurst's letter. Prater strongly suspected that Wheeler drafted the letter and told her so at the time he discharged her.

There is no dispute that Wheeler as well as the rest of the clerical staff were political opponents of Prater during the election campaign which culminated in a "Team 80" victory on December 14. Prater had experienced run-ins with Wheeler during the time he was a rank-and-file member and relies on these events, rather than on her efforts on behalf of the clerical employee bargaining unit, to lend substance to his decision to fire her. He also points to the embarrassment he suffered by reason of the delay in transmitting the December per capita tax to the International office in Washington as a basis for her discharge, although it is difficult to see how this problem, overblown though it was, could be laid at Wheeler's doorstep. This delinquency was directly attributable to Hurst's refusal to put money in the checking account with which to meet the payment, all of which stemmed from Hurst's desire to embarrass a political opponent who had just defeated him. Given this set of facts, there was no way that Prater could have paid the tax until after he and his slate took office on January 1 and assumed the legal authority to cash the certificate of deposit which was used to pay the bill. Prater admits that Wheeler had no responsibility for paying the tax, so any problems in this regard were simply irrelevant to the performance of her duties.

However, all of these matters were well known to Prater when, on January 2, he held a harmony meeting with Wheeler and the other members of the office clerical staff for the purpose of enlisting their support for his new administration. He told them on this occasion that bygones would be bygones and that politics would be a thing of the past. He expressly stated that no clerical employee would be fired. Accordingly, any reliance on events or actions which predated this statement as a basis for discharging Wheeler is plainly pretextual. The motivating cause for his action necessarily lay in something which occurred thereafter.

Prater said that one of the reasons he fired Wheeler was that she worked overtime in violation of his instructions. The additional hours in question which she worked involved services actually performed for Respondent and did not impose upon Respondent any additional cost, unless it voluntarily elected to grant her compensatory time off. Indeed, her diligence in this regard could be attributed only to a desire to please a new boss and to get her work done. As a defense to a discriminatory discharge complaint, this pretext is probably unique in the annals of Board history. As an actual motivating cause for the events that followed, it is nonsensical, in that Prater was present at the office during the hours that Wheeler was assertedly there in violation of his instructions but said nothing to her. His afterthought—that he was just lying in wait to see if she would obey his orders—has an ominous and discriminating ring to it, if it has any meaning at all. Likewise, Wheeler's asserted slowness in getting out a mailing to shop stewards during the days immediately preceding her discharge have no standing as the precipitating cause of that decision, inasmuch as Prater testified that he had decided to fire Wheeler before learning of the alleged lateness of the mailing, something he did not discover until the morning of the termination and just a few moments before speaking to Wheeler.

The key to the discharge of Wheeler is the December 3 letter from Hurst to Craig which Prater first learned about on January 6, the day before he fired Wheeler. Upon visiting his attorney's office for the first time since becoming secretary-treasurer, Prater was shown a letter written by his bitter nemesis in an attempt to preserve the jobs of the office staff. He rightly judged that the letter originated with the discriminatee. The text of the letter is in the record. It recites a meeting between Hurst and Craig on November 2 in Hurst's office and sets forth Craig's oral opinion, rendered at that time, that the clerical contract (a copy of which was enclosed) would be binding both on Hurst and any successor who might be elected. The Hurst-Wheeler letter goes on to recite that Prater's slate had threatened to fire the office staff and that, under great provocation, the staff abandoned its neutrality. It spoke of "a great many false statements" about incumbent officers which the "Team 80" slate had circulated, as well as the threat of the Prater slate to replace them.

The letter then posed to Craig a number of specific questions, including whether it was necessary to obtain executive board ratification of the clerical contract whether such approval prior to election day would carry greater weight than approval granted after that date, and whether the office staff should inform Prater or Davis, another candidate, of the existence of the contract before or after January 1, in the event that either of them was elected to replace Hurst. The letter went on to ask detailed legal advice as to how an employee should proceed to vindicate her rights in the event that the Hurst slate lost and she should be discharged. It asked whether aggrieved clerical employees could picket the Teamsters building, whether a civil suit would lie in the event of an unjust discharge, and whether Craig or his firm could represent any clerical employee who needed legal assistance in such matters. The letter concluded with the expressed hope that Hurst would be reelected and with the request that Craig contact either Wheeler or himself to let them know when he could contact them to discuss the questions raised.

When Prater saw this letter, he became angry and decided to discharge Wheeler. It is clear from the record that it is the contents of the letter which had just been brought to Prater's attention that sealed Wheeler's fate and it is the character of this letter which determines the lawfulness of the discharge. There is a great deal in the letter which suggests partisan politics and a high degree of political coordination between Hurst and Wheeler against Prater and Prater's slate. It is understandable that Prater should have become incensed upon receiving this information, since it establishes that at least in one respect his political adversaries were plotting against him. However, the basic thrust of the letter is to protect the fruits of collective bargaining and the protected concerted activities and union activities of employees which antedated collective bargaining. The effort of the office employees, even though they were acting in conjunction with Hurst, in calling upon Craig for advice and assistance concerning their contract was in and of itself a protected concerted activity and a union activity, inasmuch as it was a collective effort to assure the continuation of their employment status. When Prater fired Wheeler for engaging in this activity, he was firing her for something more than taking part in political activity designed to prevent him from becoming her employer. He was firing her because of activities which she undertook, in conjunction with other employees, relating to wages, hours, and terms and conditions of employment and in derogation of her right to form and support the clerical employee union. Accordingly, the discharge violated Section 8(a)(1) and (3) of the Act.

D. *The Clerical Unit Strike of January 7, 1981*

The precipitating causes of the strike by the office clerical unit were twofold—the discharge of Wheeler and the repudiation by Prater of their contract and their Union. Prater informed all the office staff on the morning of January 7 that he had been advised by his attorney that the September 2 contract which Hurst had signed was illegal. He also told them they could continue to work under existing wages and benefits but without the protection of the agreement. One of those protections was a grievable provision preventing discharge except for just cause. After a brief caucus among themselves, the office staff came to the conclusion that, if Prater repudiated their contract, they had no more protection than did Wheeler so they decided to strike. As noted above, the repudiation of this agreement and of the collective-bargaining relationship which gave rise to it was an unfair labor practice. Accordingly, when the office staff walked out and established a picket line in front of the building, they were acting to protest not one but two unfair labor practices. Hence, their strike was an unfair labor practice strike.

On January 23, and again on February 9, the office employees requested reinstatement, and sought it unconditionally. On both occasions, their request went unheeded. An employer is under a legal obligation to reinstate unfair labor practice strikers upon their unconditional request, and it is no defense that it has hired others to take their places. The failure to honor such a request is an unfair labor practice, in and of itself. *National Tape Corporation*, 187 NLRB 321 (1970); *Abingdon Nursing Center*, 197 NLRB 781 (1972); *ABCO Engineering Corp.*, 201 NLRB 686 (1973). When Prater failed to reinstate the striking clerical employees in late January and early February, Respondent violated Section 8(a)(1) and (3) of the Act.

Upon the foregoing findings of fact, and upon the entire record herein considered as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent Teamsters Local Union No. 574, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, is now and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Office Employees and Building Maintenance Employees Unit of Teamsters Local Union No. 574 is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time office employees and building maintenance employees employed at Respondent's Cape Girardeau, Missouri, office, excluding business representatives, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about September 1, 1980, Office Employees and Building Maintenance Employees Unit of Teamsters Local Union No. 574 has been the exclusive collective-bargaining representative of all of the employees in the unit found appropriate in Conclusions of Law 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from Office Employees and Building Maintenance Employees Unit of Teamsters Local Union No. 574 as the exclusive collective-bargaining representative of its employees in the bargaining unit found appropriate in Conclusions of Law 3 herein; and by repudiating the provisions of a collective-bargaining agreement concluded with said labor organization on or about September 2, 1980, Respondent herein violated Section 8(a)(5) of the Act.

6. By discharging Lola Wheeler because of her membership in and activities on behalf of Office Employees and Building Maintenance Employees Unit of Teamsters Local Union No. 574; and by refusing to reinstate Louis Borchelt, Delores Heisserer, Christine Gross, and Linda Greer upon their unconditional offer to return to work, Respondent herein violated Section 8(a)(3) of the Act.

7. By the acts and conduct set forth above in Conclusions of Law 6 and 7; and by telling employees, including Lola Wheeler, that Lola Wheeler had been discharged because of her union and protected concerted activities, Respondent herein violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions which are designed to effectuate the purposes and policies of the Act. Since the violations of Section 8(a)(1) of the Act found herein are serious and pervasive, I will recommend to the Board a so-called broad 8(a)(1) order designed to suppress any and all violations of that Section of the Act. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). I will also recommend that Respondent be required to offer full and immediate reinstatement to Lola Wheeler, Louis Borchelt, Delores Heisserer, Christine Gross, and Linda Greer, and to make them whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula,[26] with interest thereon at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. *Olympic Medical Corporation*, 250 NLRB 146 (1980); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In the case of Lola Wheeler, backpay shall commence running as of the date of her discharge. *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979). In the case of the four unfair labor practice strikers, backpay shall commence running 5 days after they first offered to return to work. I will recommend that Respondent be required to recognize Office Employees and Building Maintenance Employees Unit of Teamsters Local Union No. 574 as the exclusive collective-bargaining representative of its office clerical and janitorial employees and to give effect to the collective-bargaining agreement which it concluded with this labor organization on or about September 2, 1980. *C & S Industries Inc., supra; J & L Painting Contractors, Inc.*, 239 NLRB 867 (1978). I will also recommend that Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein considered as whole, and pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER[27]

The Respondent, Teamsters Local Union No. 574, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Cape Girardeau, Missouri, and its officers, trustees, business representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that an employee has been discharged for engaging in union activities and in protected concerted activities.

(b) Refusing to reinstate unfair labor practice strikers upon their unconditional request for reinstatement.

(c) Discouraging membership in or activities on behalf of Office Employees and Building Maintenance Employees Unit of Teamsters Local Union No. 574 or any other labor organization by discharging employees or otherwise discriminating against them in their hire or tenure.

(d) Refusing to recognize and bargain with the aforesaid labor organization as the exclusive collective-bargaining representative of all of its full-time and regular part-time office clerical and janitorial employees, exclusive of guards, business representatives, and supervisors as defined in the Act, and refusing to give full force and effect to a collective-bargaining agreement which it concluded on or about September 2, 1980, with the aforesaid labor organization.

(e) By any other means or in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Recognize and, upon request, bargain collectively with Office Employees and Building Maintenance Employees Unit of Teamsters Local Union No. 574 as the exclusive collective-bargaining representative of all of Respondent's full-time and regular part-time office clerical and janitorial employees, exclusive of guards, business representatives, or supervisors, as defined in the Act.

(b) Give full force and effect to a collective-bargaining agreement which Respondent concluded with the aforesaid labor organization on or about September 2, 1980.

(c) Offer to Lola Wheeler, Louis Borchelt, Delores Heisserer, Christine Gross, and Linda Greer full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to the rights which they previously enjoyed, and make them whole for any loss of pay or benefits which they have suffered by reason of the discriminations found herein, in the manner described above in the section entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records neccesary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Cape Girardeau, Missouri, office copies of the attached notice marked "Appendix."[28] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that, insofar as the complaint alleges matters that have not been found herein to be violations of the Act, the said complaint is hereby dismissed.

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[26] *F. W. Woolworth Company*, 90 NLRB 289 (1950).

[27] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[28] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Teamsters Local Union No. 574 is posting this notice to comply with an Order of the National Labor Relations Board, which was issued after a hearing in a case in which we were found to have violated certain provisions of the National Labor Relations Act.

WE WILL NOT announce to employees that an employee has been discharged for engaging in union activities or in protected concerted activities.

WE WILL NOT refuse to reinstate unfair labor practice strikers upon their unconditional application to return to work.

WE WILL NOT discharge employees or otherwise discriminate against them in their hire or tenure in order to discourage their membership in or support of Office Employees and Building Maintenance Employees Unit of Teamsters Local Union No. 574, or any other labor organization.

WE WILL NOT in any other manner or by any means interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act. These rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for their mutual aid and protection.

WE WILL recognize and bargain collectively with Office Employees and Building Maintenance Employees Unit of Teamsters Local Union No. 574 as the exclusive collective-bargaining representative of all of our full-time and regular part-time office clerical and janitorial employees, exclusive of business representatives, guards, and supervisors as defined in the Act, and WE WILL give full force and effect to a contract which we concluded with that labor organization on or about September 2, 1980.

WE WILL offer to Lola Wheeler, Louise Borchelt, Delores Heisserer, Christine Gross, and Linda Greer full and complete reinstatement to their former or substantially equivalent positions, and WE WILL make them whole for any loss of earnings they may have suffered by reason of the discriminations practiced against them, with interest.

TEAMSTERS LOCAL UNION NO. 574, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA

Fremont Manufacturing Division, The Oil Gear Company, Inc. *and* **Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO.** Case 17-CA-10387

November 19, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

Upon a charge filed on May 29, 1981, by Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, and duly served on Fremont Manufacturing Division, The Oil Gear Company, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a complaint and notice of hearing that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 9, 1981, following a Board election in Cases 17-RC-9112 and 17-RC-9122, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about May 15, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so.[2] On June 29, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 21, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 27, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a statement in opposition to the General Counsel's Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its statement in opposition to the Motion for Summary Judgment, Respondent contends, in substance, that the Board's certification is invalid (1) because "line leaders" are supervisors and should not be included in the unit found appropriate; (2) because at a hearing on Respondent's objections the Hearing Officer, contrary to the Regional Director's instructions, refused to allow Respondent to present evidence with respect to the supervisory status of the line leaders; and (3) because the Board agent conducting the election failed to honor Respondent's challenge to the ballot cast by line leader Roy Rodgers, and thereby interfered with the election process, requiring that the election be set aside. Respondent also contends, assuming for the sake of argument that the certification is valid, that the Union, which requested certain information from Respondent by virtue of its claimed status as the statutory bargaining representative of Respondent's employees, is not entitled to any information concerning subcontracting without a greater showing of relevance.[3] Respondent does, however, concede that, assuming it is obligated to bargain, the Union is entitled to the requested information with respect to wages, hours, age, and sex of its unit employees, as well as a listing of unit employees on temporary

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[1] Official notice is taken of the record in the representation proceeding, Cases 17-RC-9112 and 17-RC-9122, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] The complaint herein contained an allegation of a general refusal to bargain arising out of Respondent's admitted purpose of testing the Board's certification of the Union as the exclusive bargaining representative of its employees in the unit found appropriate. Thus, Respondent contends, *inter alia*, that its "line leaders" are statutory supervisors and that the Board erroneously included this classification in a unit of production and maintenance employees. The complaint additionally alleged that Respondent has failed and refused to provide the Union with certain requested information as being necessary for and relevant to the Union's status as exclusive bargaining representative of certain of Respondent's employees. The request for information, as well as a general request to bargain, was made on April 16, 1981, and renewed on May 4, 1981. Respondent denied both requests on May 15, 1981.

[3] Respondent filed its statement in opposition to the General Counsel's Motion for Summary Judgment on August 24, 1981, contending, in part, and as noted above, that summary judgment should not be granted with respect to Respondent's refusal to provide the Union with information regarding subcontracting. Thereafter, on September 2, 1981, the Union sent a telegram to the Board and all parties withdrawing its request for the subcontracting information. Counsel for the General Counsel then filed, on September 11, 1981, a motion to amend the complaint herein so as to delete that portion which refers to the Union's request for information regarding subcontracting by Respondent. In view of the fact that neither the Union nor the General Counsel wishes to proceed with respect to Respondent's alleged refusal to supply information concerning subcontracting, we hereby grant the General Counsel's motion to amend, but, in so doing, we do not pass on the merits of that allegation.

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layoff. The General Counsel contends, with respect to all issues excepting Respondent's failure and refusal to provide certain requested information, that Respondent is raising issues which were, or could have been, raised in the representation proceeding and is precluded from relitigating them herein. The General Counsel further contends that, as a matter of law, Respondent has violated Section 8(a)(5) of the Act by failing and refusing to provide certain requested information to the statutory representative of its unit employees. We agree with the General Counsel.

A review of the record herein, including that of the representation proceeding in Case 17-RC-9112, establishes that on September 20, 1980, Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO, filed a petition seeking certification as the representative of certain employees of Respondent. The Regional Director for Region 17 conducted a hearing on September 24, 1980.[4] On October 10, 1980, the Regional Director issued a Decision and Direction of Election. By telegram dated November 5, 1980, the Board denied Respondent's timely request for review. On November 6, 1980, a secret-ballot election was conducted by the Regional Office in which the Union herein received a majority of the votes cast.[5] Thereafter, Respondent timely filed objections to the election. On December 3, 1980, a hearing was held before Hearing Officer Robert A. Fetsch, and on December 11, 1980, the Hearing Officer issued his Report on Objections,[6] recommending that the Union herein be certified as the statutory bargaining representative of Respondent's production and maintenance employees. Respondent thereafter filed exceptions to the Hearing Officer's report, and the Union herein filed a brief in opposition thereto. On April 9, 1981, the Board issued a Decision and Certification of Representative.[7] Respondent then timely filed a motion for reconsideration of the Board's Decision and Certification of Representative, and the Union herein filed a motion to dismiss such motion for reconsideration. On April 30, 1981, the Board issued an order denying Respondent's motion for reconsideration.

With respect to Respondent's contentions in opposition to the Motion for Summary Judgment insofar as it claims that the Board's certification is invalid, it is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[8]

It is also well settled that there is a general obligation on an employer to provide information requested by the bargaining representative of its employees where such information is necessary and relevant to that bargaining representative's performance of its duties.[9] As alluded to above, the Union, on April 16, 1981, requested the following:

> 1. Names of all current bargaining unit employees, including their seniority dates, ages, sex, current rate of pay and classification.
>
> 2. Names of all bargaining unit employees on layoff, including their seniority dates, ages, and last rate of pay and classification.
>
> 3. Names of all bargaining unit employees on layoff, sick or disability leaves, including their seniority dates, ages and last rate of pay and classification.
>
> 4. Information spelling out any incentive, piecework, bonus, or merit increase plans currently provided or administered by the company, include how these plans are computed.
>
> 5. A copy of Employee Profit Sharing Plan and/or Employee Stock Purchase Plan.
>
> 6. A list and description of all fringe benefits (other than Pension and Insurance Plans) and how they are computed.
>
> 7. A copy of employee retirement or pension plan including company/employee costs of contributions and employee benefits.
>
> 8. A copy of all insurance plans and benefits provided to active, retired, laid off and disabled bargaining unit employees and their dependents; such as hospital-surgical, major medical, sickness and accident, life, dental and eye care insurances.

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[4] The hearing was originally scheduled with respect to Case 17-RC-9112, in which the Charging Party herein sought to represent a unit of Respondent's production and maintenance employees. At the hearing, a representative of the United Steelworkers of America, AFL-CIO-CLC, appeared and presented the Hearing Officer with a petition seeking to represent the same unit of employees. The Steelworkers' petition was docketed as Case 17-RC-9122. Inasmuch as the same issues were raised by both petitions, all parties were present, and no party objected to the consolidation of these cases, the Hearing Officer consolidated the cases for hearing. The United Steelworkers of America, AFL-CIO-CLC, is not, however, a party herein.

[5] The tally of ballots showed that 29 employees cast valid ballots for the Union herein, and that no ballots were cast for the Steelworkers; 13 ballots were cast against the participating labor organizations, and there were no challenged, or void, ballots.

[6] On December 24, 1980, the Hearing Officer issued an addendum to his Report on Objections correcting an inadvertent error as to the Union's name.

[7] 255 NLRB 818. On April 16, 1981, the Board issued a corrected Decision and Certification of Representative. The Board's Decision held, *inter alia*, that Respondent's exceptions to the Hearing Officer's report were not timely filed.

[8] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[9] See, generally, *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1955); *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967).

9. The current company/employee costs or contributions for the respective insurance coverage premiums reflected as an individual hourly, weekly or monthly cost per employee for both employee and dependent coverage. Also include *your* actual premium and/or rebate provisions.

Any specific information the company has regarding future increase or decrease in the cost of current employee/dependent insurance coverage premiums.

10. All current job descriptions and qualifications for these jobs.

11. All current company work rules and regulations.

12. Any and all other information not specifically requested above that the company has knowledge of and is relative [sic] and vital to "rates of pay, wages, hours of employment, or other conditions of employment" as provided for under the National Labor Relations Act and defined by the National Labor Relations Board and the courts relating to the mandatory and permissive subjects of bargaining.

13. List of all present jobs, projects and/or work that the company has subcontracted out to other companies and/or any company which may be part of this company, along with the following information:

(a) Name of company and location

(b) Rate per hour the company charges.

(c) Number of employees performing the subcontracted work.

(d) How many man hours involved.

(e) Total cost of subcontracted work.

(f) Reason why the work was subcontracted.

14. Shift schedule and hours of work.

15. All information and data concerning safety programs and safety regulations.

Respondent concedes in its opposition to the Motion for Summary Judgment that "the Union would be entitled to information concerning wages, hours, the age of employees, the sex of employees, lists of employees on temporary layoff, and certain other information which constitute mandatory subjects of bargaining, and which are, therefore, presumptively relevant."[10] A review of the requested information reflects that all of the listed items, with the exception of the items numbered "12" and "13,"[11] fall within the ambit of data which an employer must, upon request, provide to the Union. Thus, for example, insurance and pension plan information,[12] details of profit-sharing plans,[13] and information with respect to job classifications[14] are all presumptively relevant to the Union's duties as bargaining representative of the employees in the appropriate unit. We therefore hold that Respondent must provide the Union with the information requested in items numbered "1" through "11," and "14" and "15," set out above.

The issues raised by Respondent in this proceeding are either without merit or were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a Wisconsin corporation, with a facility located in Fremont, Nebraska, where it is engaged in the business of the production of hydraulic components. Respondent, in the course and conduct of its business operations, annually purchases goods and services valued in excess of $50,000 directly from sources located outside the State of Nebraska, and annually sells goods and services valued in excess of $50,000 directly to customers located outside the State of Nebraska.

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[10] Such concession assumes, for the sake of argument, that the Union's certification is valid.

[11] Insofar as item 12, a "catch-all" request, does not delineate particular data, but rather utilizes the sweeping language of legal conclusion in place of specific description, we shall not require Respondent to respond thereto. Thus, the language of item 12 would appear to require Respondent to not only determine what types of information are "vital to 'rates of pay, wages, hours of employment, or other conditions of employment' under the National Labor Relations Act and defined by the National Labor Relations Board and courts relating to the mandatory and permissive subjects of bargaining," but would also require Respondent to analyze its own business practices and conditions to ascertain whether any facet of its operation falls within the ambit of such determination. We do not believe that Sec. 8(d) of the Act imposes such a requirement. Accordingly, we shall dismiss that portion of the complaint which pertains to Respondent's failure to provide the information requested in item 12.

Item 13 is no longer under consideration. See fn. 3, *supra*, wherein we granted the General Counsel's motion to amend the complaint so as to delete this portion of the requested information.

[12] See, generally, *The East Dayton Tool and Die Co.*, 239 NLRB 141 (1978).

[13] *N.L.R.B.* v. *Toffenetti Restaurant Co., Inc.*, 311 F.2d 219 (2d Cir. 1962), enfg. 136 NLRB 1156 (1962).

[14] *Lock Joint Pipe Company*, 141 NLRB 943 (1963).

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and we find that Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees including line leaders employed at its facility located at 700 South Downing Street, Fremont, Nebraska, but excluding the receiving department employees, office clerical employees, ndustrial engineering employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On November 6, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 17, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 9, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 16 and May 4, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit, and to provide certain requested information necessary for and relevant to its duties as statutory bargaining representative in the above-described unit. Commencing on or about May 15, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit, and to provide certain requested information necessary for and relevant to its duties as statutory bargaining representative in the above-described unit.

Accordingly, we find that Respondent has, since May 15, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and has refused to furnish it with certain requested information relevant and necessary for the purpose of collective bargaining, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. As we have also found that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union certain information, we shall order Respondent to furnish the Union with such information.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817;

Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Fremont Manufacturing Division, The Oil Gear Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees including line leaders employed at Respondent's facility located at 700 South Downing Street, Fremont, Nebraska, but excluding the receiving department employees, office clerical employees, industrial engineering employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 9, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about May 15, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing on or about May 15, 1981, and at all times thereafter, to bargain collectively with the above-named organization by failing and refusing to provide requested information necessary for and relevant to the Union's duties as statutory bargaining representative in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusals to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent did not violate the Act by refusing to provide the information requested in the item numbered "12" set out above.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Fremont Manufacturing Division, The Oil Gear Company, Inc., Fremont, Nebraska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the appropriate unit described below, concerning rates of pay, wages, hours, and other terms and conditions of employment. The appropriate unit is:

> All full-time and regular part-time production and maintenance employees including line leaders employed at its facility located at 700 South Downing Street, Fremont, Nebraska, but excluding the receiving department employees, office clerical employees, industrial engineering employees, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to bargain with Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of Respondent's employees, in the appropriate unit described above, by refusing to furnish requested information relevant and necessary for the purpose of collective bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, furnish the above-named Union with the following information: the names of all current bargaining unit employees, including their seniority dates, ages, sex, current rate of pay and classification; the names of all bargaining unit employees on layoff, including their seniority dates, ages, and last rate of pay and classification; names of all bargaining unit employees on layoff, sick or disability leaves, including their seniority dates, ages and last rate of pay and classification; information spelling out any incentive, piecework, bonus, or merit increase plans currently provided or administered by the company, including how these plans are computed; a copy of the employee profit-sharing plan and/or the employee stock purchase plan; a list and description of all fringe benefits other than the pension and insurance plans and how they are computed; a copy of the employee retirement or pension plan including company/employee costs or contributions and employee benefits; a copy of all insurance plans and benefits provided to active, retired, laid-off, and disabled bargaining unit employees and their dependents, such as hospital-surgical, major medical, sickness and accident, life, dental and eye care insurances; the current company/employee costs or contributions for the respective insurance coverage premiums reflected as an individual hourly, weekly, or monthly cost per employee for both employee and dependent coverage, including the company's actual premium and/or rebate provisions and any specific information the company has regarding future increases or decreases in the cost of current employee/dependent insurance coverage premiums; all current job descriptions and qualifications for these jobs; all current company work rules and regulations; the shift schedule and hours of work; and all information and data concerning safety programs and safety regulations.

(c) Post at its Fremont, Nebraska, facility copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that copies of said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to bargain collectively with Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO, by refusing to furnish information necessary and relevant for the Union to fulfill its obligation to represent our employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time production and maintenance employees including line leaders employed at our facility located at 700 South Downing Street, Fremont, Nebraska, but excluding the receiving department employees, office clerical employees, industrial engineering employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, upon request, furnish the above-named labor organization with the following information: the names of all current bargaining unit employees. including their seniority dates, ages, sex, current rate of pay and classification; the names of all bargaining unit employees on layoff, including their seniority dates, ages, and last rate of pay and classification; names of all bargaining unit employees on layoff, sick or disability leaves, including their seniority dates, ages, and last rate of pay and classification; information spelling out any incentive, piecework, bonus, or merit increase plans currently provided or administered by the company, including how these plans are computed; a copy of the employee profit-sharing plan and/or the employee stock purchase plan; a list and description of all fringe benefits other than the pension and insurance plans and how they are computed; a copy of the employee retirement or pension plan including company/employee costs or contributions and employee benefits; a copy of all insurance plans and benefits provided to active, retired, laid-off, and disabled bargaining unit employees and their dependents; the current company/employee costs or contributions for the respective insurance coverage premiums reflected as an individual hourly, weekly, or monthly cost per employee for both employee and dependent coverage, including the company's actual premium and/or rebate provisions and any specific information the company has regarding future increases or decreases in the cost of current employee/dependent insurance coverage premiums; all current job descriptions and qualifications for these jobs; all current company work rules and regulations; the shift schedule and hours of work; and all information and data concerning safety programs and safety regulations.

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[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FREMONT MANUFACTURING DIVISION, THE OIL GEAR COMPANY, INC.

Community Health Services, Inc. *and* Federation of Community Health Professionals, a/w Maine Federation of Teachers, Nurses and Health Professionals, AFT–AFL–CIO, Petitioner. Case 1–RC–17139

November 20, 1981

DECISION ON REVIEW AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 3, 1981,[1] the Regional Director for Region 1 issued a Supplemental Decision, in which, inter alia, he overruled the challenges to the ballots of the Employer's 12 mental health workers (MHWs) finding them to be professional employees within the meaning of Section 2(12) of the Act.[2] Thereafter, the Employer filed a timely request for review of the Regional Director's Supplemental Decision contending, inter alia, that the 12 MHWs were improperly included in the professional unit as they are technical employees.

By telegraphic order dated June 26, the Employer's request for review was granted solely with respect to the Regional Director's disposition of the challenged ballots.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the entire record in this proceeding and finds the following: The Employer is a provider of community health and home health care services, with offices in various communities in the State of Maine. The Petitioner seeks to represent all full-time and regular part-time professional employees employed by the Employer at its various locations, including MHWs. The Employer asserts that MHWs are technical employees who should be excluded from the unit.

The Employer employs 12 MHWs, who are classified in 4 grade levels, with Grade IV being the highest level. One MHW is classified in Grade IV, four within Grade III, four within Grade II, and three within Grade I. For employment as a Grade I MHW—the entry level position—the Employer prefers, but does not require, that an employee have a bachelor's degree, although any employee lacking a degree must be working actively toward one. To be eligible for classification in Grades II and III, an MHW must possess a bachelor's degree and 1–2 and 2–3 years of paid, related experience, respectively. MHWs eligible for Grade IV must possess a bachelor's degree in the human services field and 3–4 years of paid, related experience. Of the 12 MHWs currently employed, 1 has a master's degree and 10 have bachelor's degrees. Most holders of bachelor's degrees majored in human services disciplines, such as psychology, social work, or sociology, although some MHWs hold degrees in music education, music, or English. MHWs with little or no prior experience or relevant education background receive on-the-job training. Additional in-service training programs are available to MHWs, although attendance is not mandatory.[3] MHWs are not licensed by the State of Maine, nor are they registered or certified by any national or state professional organization.

MHWs (1) provide assistance to clients through counseling in problem solving, (2) determine whether clients may be in need of professional treatment and, if necessary, refer them to psychiatrists or psychologists, (3) plan and participate in group therapy sessions along with other employees of the Employer, and (4) confer with clients' psychiatrists and with public or private agencies with which clients may be involved. MHWs do not provide psychoanalysis or any form of mental health treatment which would be provided by a psychiatrist or psychologist. MHWs spend approximately 65 percent of their working time meeting with clients in their homes, and are not closely supervised through either direct observation of their counseling of clients or review of their reports and client records.

Based on the above facts, and noting in particular the Employer's education requirements for MHWs and their background, the Regional Director found that MHWs are professional employees under Section 2(12) of the Act. In its request for review, the Employer contends that the Regional Director has misapplied the Board's criteria for determining professional status,[4] and that this case is

259 NLRB No. 45

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[1] Unless otherwise noted, all dates hereinafter are in 1981.

[2] On February 6, the Acting Regional Director for Region 1 issued a Decision and Direction of Election in this proceeding, directing an election among all of the Employer's professional employees including MHWs. Thereafter, the Employer filed a timely request for review on the grounds, inter alia, that the Acting Regional Director erred in finding that MHWs are professional employees. By telegraphic order dated March 2, the Board denied the Employer's request for review but amended the Decision and Direction of Election to permit MHWs to vote subject to challenge.

On March 6, the election was conducted, and the tally of ballots shows that the Petitioner received 27 votes, 23 votes were cast against the Petitioner, and 12 ballots (cast by MHWs) were challenged. Thereafter, on March 13, the Employer filed timely objections to the election which were overruled by the Regional Director in his Supplemental Decision.

[3] The in-service education programs include periodic lectures, monthly group meetings where employees discuss their work among themselves, and partial tuition reimbursement for job-related courses.

[4] Sec. 2(12)(a) of the Act defines "professional employee" as:

Continued

governed by the Board's decision in *Butler Hospital*,[5] wherein the Board found mental health workers to be technical employees. Here, as in Butler, entry-level mental health workers are only encouraged, not required, to possess a bachelor's degree as a condition of employment, and there is no requirement that mental health workers holding such degrees have had academic training in an employment-related discipline. In fact, a number of the Employer's MHWs possess degrees in subjects totally unrelated to employment duties. New employees here and in Butler receive on-the-job and in-service training; indeed, the 3- to-4-month orientation program required for new employees in Butler appears to be more extensive than that required by the Employer here. In neither case does the Employer require its mental health workers to be licensed or certified. Moreover, the Employer's MHWs perform duties virtually identical to those performed by Butler Hospital's mental health workers. They "observe, report and record the [client's] behavior, activity, and his physical and emotional condition . . . [and] develop therapeutic interpersonal relationships with [clients] by engaging the [client] in therapeutic discussion."[6] In addition, they assist professional staff in obtaining information from the client, but do not engage in psychotherapy or other types of treatment normally performed by professional psychologists or psychiatrists. Therefore, in terms of their academic qualifications, training, lack of licensure or certification, and duties, the Employer's MHWs are indistinguishable from the mental health workers in Butler, whom we found to be technical employees.[7]

Accordingly, we shall exclude MHWs from the unit of professional employees and sustain the challenges to their ballots. As the tally shows that the Petitioner received a majority of the valid ballots cast, we shall issue the following certification.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Federation of Community Health Professionals, a/w Maine Federation of Teachers, Nurses and Health Professionals, AFT–AFL–CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time and regular part-time professional employees employed by the Employer at its various locations within the State of Maine, including registered nurses, graduate nurses, physical therapists and occupational therapists, but excluding all other employees, licensed practical nurses, VD epidemiologists, outreach workers, home health aides, mental health workers, office clerical employees, guards and supervisors as defined in the Act.

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes . . . .

[5] 250 NLRB 1310 (1980).

[6] *Id.* at 1310–11.

[7] The Acting Regional Director, in his Decision and Direction of Election, considered the Employer's contention that *Butler* was controlling but found it distinguishable in that here, unlike *Butler*, (1) all MHWs above the entry-level position are required to hold college degrees, (2) most MHWs possessed degrees in the human service field, and (3) MHWs appear to receive less supervision and exercise greater discretion and independent judgment in the performance of their work. However, the record indicates that the duties and jobfunctions of the MHWs here and in *Butler* and the manner in which they are performed are substantially the same. Moreover, although the Employer requires a bachelor's degree for MHW II, III, and IV, such degree does not have to be specialized. Besides, the possession of a college degree does not necessarily establish professional status (see *Binghamton Press Company, Inc.*, 226 NLRB 808, 809–810 (1976). Accordingly, we find that these factors are insufficient to establish that the Employer's MHWs are professional employees.

Faulkner Hospital *and* **John B. Walsh.** Case 1-CA-17751

November 20, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 30, 1981, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Faulkner Hospital, Boston, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge our employees because they have engaged in activities protected in Section 7 of the National Labor Relations Act.

WE WILL NOT coercively interrogate our employees about their activities protected in Section 7, or threaten them with discharge because they have engaged in such protected activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer employee John Walsh immediate and full reinstatement to his former position or, if this position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered due to the discrimination practiced against him, with interest.

FAULKNER HOSPITAL

DECISION

STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge: The unfair labor practice charge was filed in this case on August 14 and was amended on September 10, 1980. The complaint issued on September 26, 1980. A hearing was conducted on May 7 and 8, 1981, in Boston, Massachusetts. Briefly, the General Counsel contends that Faulkner Hospital (herein called Respondent or the Hospital) violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging Charging Party John B. Walsh on or about April 4, 1980, "because Walsh gave a written statement to a fellow employee in connection with [the] fellow employee's claim for unemployment compensation and because Respondent believed that Walsh, in giving [this] written statement . . . assisted [the] fellow employee in a grievance pertaining to [the fellow employee's] discharge." The General Counsel also contends that Respondent's representatives, in connection with the above incident, made coercive statements to Walsh, in further violation of Section 8(a)(1) of the Act. Respondent denies that it has violated the Act as alleged. Respondent also contends, *inter alia*, that Walsh was, at all times pertinent to this case, a supervisor within the meaning of Section 2(11) of the Act.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We agree with the Administrative Law Judge that Respondent's discharge of employee Walsh violated Sec. 8(a)(1) of the Act. Contrary to the contentions raised by Respondent in its exceptions, the evidence establishes that Walsh's letter on behalf of discharged employee McCarthy was voluntarily undertaken by Walsh in support of and in concert with a statutory employee and, thus, it is clear that Walsh did not act alone or on a matter solely of personal concern. See *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977); *Schlegel Oklahoma, Inc.*, 250 NLRB 20, 24 (1980). Accordingly, we reject Respondent's contention that this case must be considered under the principle of *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975). While Respondent further contends that Walsh's letter on behalf of McCarthy compromised the integrity of its security system, the evidence in this regard contains no factual basis demonstrating any specific manner in which Walsh's letter actually or potentially compromised the security of Respondent's facility in a manner warranting an intrusion upon Walsh's exercise of concerted activities otherwise protected by the Act. Accordingly, in agreement with the Administrative Law Judge, we find that Respondent's discharge of Walsh was attributable to Walsh's protected concerted activities and, thereby, tended to interfere with the exercise of Section 7 rights in violation of the Act.

[3] In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

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Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by counsel, I make the following:

FINDINGS OF FACT

Respondent, with facilities on Centre Street in Boston, is admittedly an employer engaged in commerce. Charging Party John B. Walsh started working for the Hospital as a garage attendant about June 1975. Later, about March 1976, Walsh became a security officer or guard at the Hospital. And about August 1977, Walsh was given the title "security supervisor."[1] Walsh, during the period relevant to this case, worked from midnight to 8 a.m., 5 days a week. In addition, the Hospital employed Gerald McCarthy as a maintenance employee prior to May 1979. At that time, the Hospital contracted with Balco Corporation for the performance of its maintenance work, and McCarthy then became an employee of Balco.

Walsh testified that about 2:20 a.m. on February 28, 1980, while performing guard duties at the Hospital, he and guard Francis O'Brian investigated the unauthorized presence of a motor vehicle on the third floor of the Hospital's garage. Walsh recalled the incident, as follows:

> Mr. McCarthy came out of [the] car, and he said, "Jack, we're not doing anything," and he bumped into his car, and I saw that he was pretty intoxicated. And I said, "Jerry, I didn't say you were doing anything. I said, what are you doing?" He said, "well, we're just having a few beers."[2]
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> * * * * *
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> So, I told Mr. McCarthy ". . . Jerry, this isn't the place for having beers." And I started walking toward the third floor door, and on the way . . . I said, "Jerry, why don't you go some other place." And he asked me to open up the third floor door so that he could go to the bathroom, [and] I said I couldn't do that.

That ended the incident, and Walsh and O'Brian "proceeded down to the Emergency Room."

Walsh, as he further testified, was notified later that morning that "two typewriters were missing" from the Hospital. Consequently, about 10 a.m. that same day, Walsh informed Security Chief Joseph McBrine that McCarthy "had been on the Hospital premises last night." McBrine suspected that McCarthy "stole them [the typewriters], or so he thought," and instructed Walsh to "write up an incident report on the night's activities." General Counsel's Exhibit 2 is that report and recites the McCarthy incident, in pertinent part, as follows:

> [T]he driver of the sedan in question exited and came to the rear of his car immediately. It was Jerry McCarthy (painter-Balco) who was driving and he stated, "Hey Jack we aren't doing anything" . . . "just out having a few beers." At this point I suggested to Jerry that this wasn't the spot to hang around having a beer, and that I was trying to save him some trouble. Jerry agreed and I started to the building with officer O'Brian, when Jerry asked if we could leave the third floor door open so that he could go to the bathroom. It was apparent in Jerry's intoxicated state that I could be talking all night, so I offered to stay while he went to the bathroom. Jerry commented, "No thanks buddy I'm not ready yet."

Walsh next testified that, on the following day, February 29, McBrine stated to Walsh that "McCarthy definitely stole the typewriters," "he was going to be fired" by Balco, and he had a criminal record. Later, on March 3, McBrine again told Walsh that McCarthy "was being fired." McBrine then stated the reasons for McCarthy's firing, as follows: "[H]e broke a Balco corporate policy in drinking on the property and he was intoxicated on the property." Walsh, during this discussion with McBrine, "pointed out to McBrine that my report said that he [McCarthy] was intoxicated, but . . . I didn't see any liquor." McBrine assured Walsh: "[D]on't worry about it—he's being fired for being intoxicated on the property." Walsh expressed concern to McBrine because, as Walsh explained, "I didn't think that was right to use my report like that when he was just trying to investigate about typewriters being stolen." McBrine again assured Walsh: "[N]ot to worry about it."

Thereafter, about March 6, as Walsh further testified, McCarthy telephoned Walsh at the Hospital. McCarthy wanted "to talk" to Walsh and Walsh agreed to meet with McCarthy. Walsh later telephoned his superior, McBrine, and had the following conversation:

> I [Walsh] called Mr. McBrine in his office to tell him that McCarthy had called me and he wanted to speak to me. . . . Mr. McBrine said, why do I even bother getting involved . . . you know he stole the typewriters, but I said, we're not sure who stole them. And that was all he said.

On the following day, March 7, Walsh met with McBrine and again discussed the McCarthy matter. This time, as Walsh recalled, McBrine said, "[Y]ou better drop this thing or you are going to get yourself in a lot of trouble."

Later, on March 12, McCarthy again telephoned Walsh at the Hospital. Walsh recalled:

> He [McCarthy] was pretty drunk. And he started threatening me. He started calling me fucking asshole . . . and he said he was going to get me . .

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[1] There is a dispute here as to whether Walsh was in fact a supervisor under Sec. 2(11) of the Act. The evidence pertaining to his status is discussed *infra*.

[2] There was also an unidentified person in McCarthy's vehicle at the time.

> and he can't believe that I would lie about him in my report.

McCarthy told Walsh, "[Y]ou never saw me in the Hospital with liquor." Walsh agreed. McCarthy asked, "[T]hen why did you say you saw me in the Hospital with liquor." Walsh responded, "I never did." McCarthy stated, "[T]hat's not what I was told when I was questioned by Mr. McBrine and the Boston police officer." Walsh promised to "look into this and get back" to McCarthy.

On March 13, Walsh confronted McBrine at the Hospital, asking McBrine, "[H]ad he used a bluff interrogation on McCarthy." Again, McBrine said, "[W]hat are you worried about"—"he stole the typewriters, right?" Walsh was "upset" and "pretty loud" in this conversation. Walsh asked McBrine:

> [D]id you [McBrine] read off the record and then insinuate that I [Walsh] had also seen him with liquor in the Hospital? Mr. McBrine said, yes . . . but don't you worry about it.

Walsh again expressed his concern and fears to McBrine. McBrine replied, "[S]tay away from him." Walsh explained to McBrine how difficult it was not to receive telephone calls from McCarthy. McBrine ultimately replied, "[D]o what you have to do."[3]

Walsh further testified that about March 16 McCarthy again telephoned him at the Hospital and "threatened" him "because I lied about him [being] on the Hospital property having liquor." Again, Walsh acknowledged to McCarthy: "I never saw you with any liquor." Walsh thereafter spoke to McBrine about this incident. McBrine again warned Walsh: "You are going to get yourself in trouble over it." Walsh, however, insisted "that I [Walsh] was going to go on with this investigation, and he [McBrine] said . . . go ahead." Later, about March 19, Walsh also spoke with Hospital Vice President David Folker about this matter. Walsh expressed to Folker his concern and fear of McCarthy and that "somebody here . . . [was] saying I had seen Mr. McCarthy on the premises with alcohol, and . . . I don't even know if this guy was stealing anyway." Folker told Walsh, "[D]on't worry about the stealing"—"don't worry about it."

Subsequently, about March 23, Walsh again spoke to McBrine. Walsh testified:

> I wanted to know what we could do to straighten this out. I said, "I'm getting put in a real bad position." I said, "This guy has been told a lie to, I have an obligation as a state special police officer to straighten it out." I said, "You know, I didn't ask for this trouble, I don't know what to do."
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> And Joe [McBrine] told me not to worry about it. He said, "Just keep your nose out of it, you know." And I said, "but I can't." And he said, "Well, do what you have to do."
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> Then he referred to my report again, and he said, there's a lie on my report on the third page, and it says: Jerry returned back to his car to finish his beers, and he said, well, then he had beers with him.
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> And, I said, no, that was what I was informed of by Jerry. I said, I didn't see him with any liquor. He said, oh, you didn't? And I said, Mr. McBrine, I said, Joe, that's what I've been yelling about for the last two or three weeks here. I said, and everyone seems to be misunderstanding me and overlooking the damn thing. So, that was pretty much the end of the conversation.

About March 28, 3:40 a.m., McCarthy telephoned Walsh at the Hospital. McCarthy wanted to know if Walsh was "going to tell the truth." Walsh agreed that he would tell the truth about the incident. McCarthy then explained to Walsh, in part as follows:

> I [McCarthy] have an unemployment hearing in the morning at 8 a.m. . . . I need a letter saying that you never saw me with liquor . . . . You know I have a wife and eight kids . . . all they want is what is coming to them from unemployment.

Walsh agreed to write such a "letter."

Walsh prepared a document (G.C. Exh. 3) and handed it to McCarthy later that morning "right outside the Hospital . . . on Centre Street." Walsh's meeting with McCarthy, in front of the Hospital, took about 8 to 10 minutes. Walsh then returned to work.[4] General Counsel's Exhibit 3 states:

> Upon your request for an urgent written reply concerning alcoholic beverages on the night of Feb. 26–27th, my written report makes mention to the fact that I thought you were under the influence of alcohol. But due to the urgency of another call, I didn't recall you having any alcohol in your vehicle or on your person.

Subsequently, about 8 a.m. on March 28, Walsh was instructed to meet with McBrine. McBrine then apprised Walsh that the "head of Balco," Robert Campbell, had telephoned McBrine and informed him "that McCarthy . . . had a letter from "Walsh" contradicting [the] original report"; that McCarthy "had gone to [his] Union"; and that McCarthy was "going to cause some litigation problems for Faulkner." Walsh acknowledged to McBrine that he had given McCarthy a written statement. McBrine faulted Walsh for giving such a statement. Walsh was later taken to Folker's office. Folker was also "real upset" because Walsh had given "a letter like that" to McCarthy. During this discussion, Folker asked Walsh: "[I]f [he] was ordered to stay away from

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[3] Walsh then apprised McBrine, in the presence of another security supervisor, John Curtin:

> I [Walsh] had better take care of the situation with McCarthy. Hoping to meet him when he was sober and the most it would become was a push match. And it was left that way. I told them I would keep them informed of the situation.

[4] Walsh previously had shown G.C. Exh. 3 to guards DeVincenzo and O'Brian—"they knew I was going to give [McCarthy] a statement." Also, DeVincenzo went "outside, standing behind a tree," and witnessed Walsh's meeting with McCarthy, "out of concern" for Walsh.

Mr. McCarthy?" Walsh responded, "I was advised to stay away."[5] Folker ultimately told Walsh that he was "fired." Folker explained, *inter alia*, "It was a dumb thing to do."

Walsh testified that about April 1 he received in the mail a letter from McBrine, dated March 28, 1980 (G.C. Exh. 4). McBrine notified Walsh in this letter that Walsh was "suspended without pay" "pending investigation" of "charges." The enumerated "charges" state: "[H]av[ing] several telephone conversations" with McCarthy "thereby disobeying a lawful command"; "giv[ing] . . . McCarthy a written document"; "hav[ing] a clandestine meeting with" McCarthy "while lawfully on duty"; and "leav[ing] your post . . . without proper authority." (*Ibid.*)

Thereafter, on or about April 4, Walsh went to the Hospital and spoke with, among others, McBrine and Folker. Walsh recalled that Folker told him that he would be permitted to "resign" for "any reason that [he] decided and . . . they would give [him] recommendations", because Folker, as well as McBrine, regarded him as a "good employee." Walsh, however, wanted "time to talk to [his] advisers." Walsh later received a letter from McBrine, dated April 7, 1980 (G.C. Exh. 5). McBrine notified Walsh in this letter that Walsh was "terminated as of 3:30 p.m. April 4." The cited reasons for this action are: "[H]av[ing] several conversations with . . . McCarthy . . . disobeying a lawful command"; "supply[ing] him with written information"; "leav[ing] your post"; and "exercis[ing] poor judgment." (*Ibid.*)

Walsh further testified that prior to his meeting with McBrine and Folker on or about April 4, Hospital employees had circulated a petition on his behalf. At the April 4 meeting, as Walsh recalled;

> They [Management] said he [the employee circulating the petition] was out in left field, that he wouldn't be long with the Faulkner, something would be done about him. They wanted a copy of the petition. They wanted to know if it was Union affiliated or . . . had something to do with the Union, and I told them no. . . . They wanted a copy of it and I told them they could not have a copy of it. They wanted to know what it was about; I told them it had something to do with me and the way the situation was handled.

David Folker, vice president of the Hospital, testified, *inter alia*, that McCarthy worked for the Hospital prior to May 1979 and then became an employee of Balco performing the same or similar duties; that Balco has a collective-bargaining agreement with a union covering its employees and containing a grievance procedure; and that he, Folker, recommended to Balco, in his letter dated March 7, 1980, that McCarthy be given "the fullest disciplinary action." See General Counsel's Exhibit 6.[6] Folker previously had spoken with Robert Campbell, a representative of Balco, about this incident:

> Mr. Campbell then asked me if I [Folker] would give him a letter indicating what the Hospital's posture would be . . . concerning this. There, I think, had also been some discussion with regard to Union support of McCarthy in whatever . . . mechanism would be necessary. I think that the letter or the discussion was a question to ally, for lack of a better word, or to get a clear cut support in terms of what the Hospital's view was.

Folker further testified that—after being apprised that Walsh had given McCarthy a supplemental statement—he spoke to Balco's vice president, Anthony Shaker, and "we . . . generally agreed to wait and see if the note surfaced or whatever." Folker added; "The information concerning the note surfaced immediately thereafter." See General Counsel's Exhibit 8, a letter from the International Brotherhood of Firemen and Oilers, AFL–CIO, to Shaker, dated April 7, referring to McCarthy's "grievance" and Walsh's note to McCarthy. Also, see General Counsel's Exhibit 7, a letter from Folker to Shaker, dated April 10, acknowledging "receipt of the information provided me concerning the letter prepared by Mr. John B. Walsh and delivered by him to Gerald McCarthy." Folker also testified that during his conversation with Shaker, which resulted in the April 10 letter (G.C. Exh. 7), he was told the following:

> The business agent for the Union . . . had told Mr. Shaker that the Union felt that there was a [substantial] grievance, or at least some basis for the grievance, for reinstatement of Mr. McCarthy, because of conflicting representation of events.

Folker generally acknowledged that Walsh had an "exemplary record" while employed at the Hospital; that Walsh was "offered a chance to resign which he declined"; and that "the release of this letter by Mr. Walsh [to McCarthy] was going to cause all kinds of problems for Balco and for Faulkner" and "could raise difficulties between Balco and McCarthy's Union." Folker admittedly referred to a "petition" signed by Hospital employees during his meeting with Walsh on or about April 4. Finally, Folker acknowledged that, previously, he had stated that Walsh "is incapable of lying"—"he had a compulsion to tell the truth."

I credit the testimony of Walsh as detailed above. Walsh's testimony stands in large part uncontradicted by the testimony of Folker or McBrine. Insofar as the above testimony of Walsh differs with the testimony of Folker or McBrine, I am persuaded on this entire record, including the demeanor of the witnesses, that the detailed account of this sequence by Walsh is accurate, reliable, and trustworthy. Indeed, I agree with Folker's earlier acknowledgment to the effect that Walsh "is incapable of lying" and "had a compulsion to tell the truth," qualities which it seems are becoming more difficult to find these days. And, as discussed below, it is this "compulsion" or desire on Walsh's part "to tell the truth" and do the "right thing," which resulted in his discharge.

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[5] McBrine explained to Folker: "[H]e [McBrine] guessed it was only advice that he really gave" Walsh.

[6] Folker's March 7 letter to Balco asserts, *inter alia*, "Mr. McCarthy was consuming the contents of a recognizable can of beer during his discussion with the security" officer.

Discussion

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 7." The presentation of employee grievances pursuant to the terms of a collective-bargaining agreement comes within the protection of Section 7. As the Sixth Circuit stated in *N.L.R.B.* v. *Halsey W. Taylor Company*, 342 F. 2d 406, 408 (1965):

> We are not concerned in this case with the merit or lack of merit of [the employee's] grievance. But it is clear that Sec. 7 protects his right to utter it as a matter of concerted activity with other employees for mutual aid

Also see *N.L.R.B.* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967). Equally protected under Section 7 is the pursuit of employee unemployment compensation claims. For, as the Board explained in *Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB 75, 76 (1978):

> It has long been recognized that this Board is required to administer the Act with careful accommodation to the statutory scheme as a whole. It is equally well settled that the matter of unemployment compensation benefits arises out of the employment relationship . . . and is one aspect of the national labor policy.

The Board, in applying these principles, has held that an employer violates Section 8(a)(1) by laying off an employee because he "assisted" and "submitted an affidavit" on behalf of another employee in connection with the latter's complaint before the Massachusetts Commission Against Discrimination. *The Massachusetts Women's Hospital d/b/a Parker Hill Medical Center*, 227 NLRB 1289 (1979). Likewise, the Board has held that an employer violates Section 8(a)(1) by discharging an employee because he provided "help" and "support" to another employee in support of the latter's grievance. *Theatre Now, Inc. and The Grease Company*, 211 NLRB 525, 534 (1974), 221 NLRB 1110 (1975), reversed 567 F.2d 531 (2d Cir. 1977). And, the Board has held that an employer violates Section 8(a)(1) by laying off an individual:

> . . . because he had, pursuant to request, furnished a statement which [the union] proffered shortly thereafter, during a contractual arbitration proceeding, to support a rank-and-file worker's grievance. *Rohr Industries, Inc.*, 220 NLRB 1029 (1975).[7]

In addition, the Board has held that an employer "may violate Section 8(a) of the Act not only with respect to actions taken affecting [his] own employees, but also by actions affecting employees who do not stand in such an immediate employer-employee relationship." *Lucky Stores, Inc.*, 243 NLRB 642, 643 (1979). For, as the Board, in agreement with the Trial Examiner, explained in *Fabric Services, Inc.*, 190 NLRB 540, 541-542 (1971):

> I find no basis, either in the declared policy of the Act or in any delineating provision of it for construing Section 8(a)(1) as safeguarding employees in the exercise of the Section 7 rights only from infringements at the hands of their own employer. To the contrary, the specific language of the Act clearly manifests a legislative purpose to extend the statutory protection of Section 8(a)(1) beyond the immediate employer-employee relationship. Thus Section 8(a)(1) makes it "an unfair labor practice for *an* employer—to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." And Section 2(3) declares, "The term employee shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise. . . ." Moreover, Section 2(9), which defines "labor dispute" as including "any controversy . . . regardless of whether the disputants stand in the proximate relationship of employer and employee" further discloses a statutory aim to give the Act's various prohibitions a broad rather than narrow reading, except, of course, where the prohibition is limited in its internal context or is specifically restricted by other express language of the Act. See *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 192.

Also see *A. M. Steigerwald Co.*, 236 NLRB 1512, 1515 (1978).

Applying these principles to the credited evidence of record here, I find and conclude that Respondent violated Section 8(a)(1) by discharging employee Walsh because Walsh assisted and gave a written statement to employee McCarthy used in support of McCarthy's pending grievance proceeding. Walsh, in furnishing McCarthy with this statement, was acting in good faith and engaging in conduct plainly protected by Section 7 of the Act.

Thus, Walsh was employed by the Hospital as a guard. McCarthy was, prior to May 1979, employed by the Hospital as a maintenance employee. The Hospital, in May 1979, contracted its maintenance work to Balco. McCarthy then became an employee of Balco. Walsh, on February 28, 1980, wrote an incident report concerning McCarthy's presence at the Hospital. See General Counsel's Exhibit 2. Walsh's superiors, McBrine and Folker, were most anxious to recommend to Balco that it fire McCarthy. McBrine and Folker, through design or carelessness, interpreted Walsh's report to state that McCarthy was observed by Walsh at the Hospital with alcoholic beverages on his possession. Folker in fact relayed this false information to Balco in his letter dated March 7, 1980. Walsh, however, repeatedly attempted to correct this mistake. Walsh was ultimately asked by McCarthy to give McCarthy a statement truthfully explaining the incident. Walsh prepared such a statement. See General Counsel's Exhibit 3. McCarthy turned this statement over to his Union and it was used in processing his grievance under the Union's contract with Balco. The Hospital, particularly Folker, had fully collaborated with Balco in causing McCarthy's discharge and considered itself, in effect, an "ally" of Balco in this endeavor. The Hospital therefore became annoyed at Walsh's insistence that his earlier report to the Hospital be limited to show only what he had actually observed.

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[7] In *Rohr Industries, supra*, the laid-off individual was found to be a "supervisor," under the Act. In the instant case, as discussed below, I find Walsh to be an employee and not a supervisor as claimed. Consequently, it is unnecessary for me to reach the question, whether the discharge of a "supervisor," under the circumstances present here, violates Sec. 8(a)(1). See, generally, *Rohr Industries, supra; Theatre Now, Inc., supra*; and *Alfred M. Lewis, Inc.*, 250 NLRB 496 (1980), and cases cited.

In sum, the Hospital fired Walsh because Walsh had furnished McCarthy with a statement truthfully stating what Walsh had observed. The statement, as noted, was used incidental to McCarthy's grievance proceeding. I regard Walsh's attempt here to furnish McCarthy with a truthful and reliable account of the incident in letter form no less protected than if Walsh had appeared personally at an unemployment compensation hearing or grievance hearing and there explained his earlier incident report.

The Hospital claims, *inter alia*, that Walsh was fired because, in speaking with McCarthy, he violated a "lawful command." The credible evidence of record makes it clear that Walsh was not in fact given such a "command." The Hospital claims that Walsh was fired because he had a "clandestine meeting" with McCarthy and left his post "without proper authority." The credible evidence of record shows that Walsh's 8- to 10-minute meeting with McCarthy in front of the Hospital was not "clandestine" and did not cause him to leave his post. The credible evidence of record also shows that guard employees would leave their duty stations for personal matters for more substantial periods without being disciplined or fired. In short, Folker, annoyed at and embarrassed by Walsh's "compulsion to tell the truth" about this incident, fired him, in vio lation of Section 8(a)(1) of the Act.

In addition, Folker engaged in conduct which tended to impinge upon employee Section 7 rights when he stated to Walsh on April 4—in connection with a petition then being circulated by Walsh's fellow employees in an attempt to have Walsh reinstated—that the employee circulating the petition "was out in left field" and "he wouldn't be long with" the Hospital. Folker, at the same time, "wanted a copy of the petition" and quizzed Walsh if it "had something to do with the Union." The circulating of such a petition is protected concerted activity and Folker's statements, under the circumstances present here, tended to discourage and inhibit such activity, in violation of Section 8(a)(1). See *Kings Terrace Nursing Home and Health Facility*, 229 NLRB 1180, 1183 (1977).

The Hospital asserts that Walsh was a "supervisor" beyond the protection of the Act. A "supervisor" is defined in Section 2(11) of the Act, as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Actual existence of true supervisory power is to be distinguished from abstract, theoretical, or rule-book authority. It is well settled that a rank-and-file employee cannot be transformed into a supervisor merely by investing him or her with a "title and theoretical power to perform one or more of the enumerated functions." *N.L.R.B.* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959). What is relevant is the actual authority possessed and not the conclusory assertions of a company's officials. And, while the enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive, the section also "states the requirement of independence of judgment in the conjunctive with what goes before." *Poultry Enterprises, Inc.* v. *N.L.R.B.*, 216 F.2d 798, 802 (5th Cir. 1954). Thus, the individual must consistently display true independent judgment in performing one of the functions in Section 2(11) of the Act. The exercise of some supervisory tasks in a merely "routine," "clerical," "perfunctory," or "sporadic" manner does not elevate a rank-and-file employee into the supervisory ranks. *N.L.R.B.* v. *Security Guard Service, Inc.*, 384 F.2d 143, 146–149 (5th Cir. 1967). The existence of independent judgment alone will not suffice; "the decisive question is whether [the individual involved has] been found to possess authority to use [his or her] independent judgment with respect to the exercise by [him or her] of some one or more of the specific authorities listed in § 2(11) of the Act." *N.L.R.B.* v. *Brown & Sharpe Manufacturing Company*, 169 F.2d 331, 334 (1st Cir. 1948). In short, "[s]ome kinship to management, some empathetic relationship between employer and employee, must exist before the latter becomes a supervisor for the former." *N.L.R.B.* v. *Security Guard Service, Inc., supra*, 384 F.2d at 149.

On this record, I find and conclude that Walsh did not sufficiently possess the authority to use his independent judgment with respect to the exercise by him of one or more of the specific authorities and indicia enumerated in Section 2(11) of the Act. He has not been shown here to have "responsibly" directed the employees or to have "effectively" recommended "such action." Thus, Walsh, as he credibly testified, worked from midnight to 8 a.m. He did not participate in the hiring process. In the past, he had recommended, without success, the hiring of various persons. He had no authority to discipline or discharge employees. He recalled that he had recommended that an employee be disciplined and his recommendation was ignored by Chief McBrine. He did not have the authority to promote or recommend the promotion of employees. All job evaluations, including the evaluation of Walsh, were performed by Chief McBrine. He explained that, in the past, he had attempted to become involved in the evaluation process and was instructed by Chief McBrine that this was not his job. He did not have authority to assign or responsibly direct employees. The performance of chores on the midnight shift was handled by the three to four security employees on a voluntary and "democratic" basis. He did not receive advance requests from employees for time off. Such requests went to Chief McBrine. On occasion, he would be told that an employee was going home early, however, he was once criticized by Chief McBrine for permitting this. He was hourly paid and received overtime. He made about 50 cents more per hour principally because of his grade level. He could not authorize overtime work. His job duties included: riding through the garage, releasing bodies, taking telephone calls, making rounds, pulling medical records, responding to pharmacy calls, collecting patient valuables, dealing with unruly persons, escorting nurses, and relaying messages to medical services or to an administrator or director on call. He spent about 95 percent of his time performing the same chores which his coworkers performed. When he was given the title "supervisor," there was no discussion about his authority and he was given no special instructions. He periodically switched shifts with rank-and-file security officers and "supervisors." This would result, on occasion, in no designated "supervisor" being present on the night shift.[8]

In conclusion, I find Walsh to be an employee. I find that the Hospital, in violation of Section 8(a)(1), fired employee Walsh because he assisted and gave a written statement to employee McCarthy, which was used by McCarthy in his grievance proceeding. Further, I find that the Hospital violated Section 8(a)(1) by coercively questioning employee Walsh about an employee petition being circulated to get Walsh reinstated, and by threatening that the employee circulating that petition would be, in effect, fired.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce as alleged.

2. Respondent violated Section 8(a)(1) of the Act by discharging employee Walsh because he assisted and gave a written statement to employee McCarthy, which statement was used by McCarthy in a grievance proceeding pertaining to McCarthy's discharge. Respondent further violated Section 8(a)(1) by coercively interrogating employee Walsh about an employee petition being circulated, seeking the reinstatement of Walsh, and by threatening that the employee circulating the petition would be fired.

3. The unfair labor practices found above affect commerce as alleged.[9]

THE REMEDY

To remedy the unfair labor practices found above, Respondent will be directed to cease and desist from engaging in such conduct, or like or related conduct, and to post the attached notice. Respondent will also be directed to offer to employee Walsh immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings sustained as a result of Respondent's unlawful conduct, by paying him a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of Respondent's offer of reinstatement, less net earnings during such period, with backpay computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest computed as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).[10]

ORDER[11]

The Respondent, Faulkner Hospital, Boston, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they have engaged in activities protected under Section 7 of the National Labor Relations Act.

(b) Coercively interrogating employees about their activities protected under Section 7 of the Act, and threatening employees with discharge because they have engaged in such protected activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act:

(a) Offer employee John Walsh immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings in the manner set forth in this Decision.

(b) Preserve and, upon request, make available to the Board, or its agents, all payroll and other records as set forth in this Decision.

(c) Post at its facility in Boston, Massachusetts, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, in conspicuous places, and be maintained for 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

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[8] I credit the above testimony of Walsh. As noted, he impressed me as a trustworthy and credible witness. His testimony relating his job authority and duties is substantiated in large part by the testimony of O'Brian. Folker and McBrine, in their testimony, cited job descriptions and various memoranda, attempting to attribute to Walsh authority and job duties involving discretion and alleged indicia of supervisory or managerial status. I do not credit these general and conclusory assertions of authority. I am persuaded here that Walsh has truthfully and accurately related his duties and authority.

[9] Respondent moves to correct the transcript (June 26, 1981). The General Counsel opposes some five of the requested corrections (June 30, 1981). Under all the circumstances, the proposed corrections which are undisputed are granted, and those which are disputed will be denied. The transcript, in this limited respect, is sufficiently understandable and no sufficient reason for further change has been demonstrated.

[10] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Respondent will preserve and make available to the Board, upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine compliance with and the amount of backpay due under the terms of this Decision.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Saxon Theatre Corp. of Boston d/b/a Sack Cinema at Assembly Square *and* Local 182, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the U.S. & Canada, AFL-CIO, Petitioner. Case 1-RC-17358

November 11, 1981

DECISION AND DIRECTION OF ELECTION

BY MEMBERS FANNING, JENKINS, ZIMMERMAN

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on July 6, 8, 9, and 10, 1981, before Hearing Officer Wendy M. Bittner. Thereafter, pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 1 transferred this proceeding to the National Labor Relations Board for decision. The Employer and the Petitioner have both filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds they are free from prejudicial error. They are hereby affirmed.

On the entire record in this proceeding, including the briefs, the Board finds:

1. The parties stipulated and we find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The petition filed sought a unit of all full-time and regular part-time projectionists at the Employer's movie theater. The Union contends that the proposed bargaining unit is comprised of two employees, George Giampietro and Philip Solomon. The Employer contends that Giampietro is a supervisor within the meaning of Section 2(11) of the Act and that the proposed unit is therefore inappropriate because it is comprised of only one employee. Thus, the sole issue in this proceeding is whether Giampietro is a supervisor.

The theater which was opened on June 12, 1981, has eight screens and normally shows eight different movies to eight separate audiences. The normal operating hours are 1 p.m. to midnight, sometimes with extra midnight shows on the weekends. The theater has a manager who is assisted by three assistant managers. The theater also employs 50 to 60 service employees who sell tickets, refreshments, and perform the various ushering and cleanup functions.

The Employer currently employs only the two aforementioned projectionists. They are responsible for threading the films on the projection equipment and for monitoring and maintaining that equipment. The Commonwealth of Massachusetts requires that all projectionists working in commercial movie theaters obtain a license by passing a combined written and physical examination. The projectionists work in a projection booth which is a large room with two desks. The booth is kept locked when not in operation and only the manager has a key.

Giampietro has worked for the Employer at other theaters for 7-1/2 years. Solomon is a new employee. Giampietro works a half day on Wednesday and all day on Thursday, Friday, and Saturday. Solomon works a half day on Wednesday and all day on Sunday, Monday, and Tuesday. Thus, they are never present at the same time. Both are hourly employees. Both are listed on the Employer's payroll printouts as merely "projectionists." Both fill out timesheets which are reviewed for accuracy by the management and submitted to the Employer's main offices. The projectionists receive their paychecks directly from the manager. Both projectionists perform identical functions in the operation of the projection equipment. Giampietro has no special responsibilities and has no special title. The projectionists are both required to fill out the projection booth report form in the same manner and sign it as "operators" and Giampietro's role with respect to these reports is indistinguishable from Solomon's. Both projectionists share the use of two desks in the booth.

The Employer's memorandums of policy go to the manager and not to Giampietro. Giampietro does not attend management meetings. The Employer provides an extensive film and sound presentation course for managers and assistant managers. Giampietro was not invited to attend this course. Only the manager has the authority to call in a service technician to repair the projection equipment.

With respect to the scheduling of hours of work for projectionists, Giampietro has no special authority. Giampietro and Solomon mutually agree on an acceptable schedule. If there is a change in the normal schedule, the projectionists will first inform the manager. If either projectionist is going to be absent from work, he will request the other to cover his shift or he will find another replacement.

Giampietro is not responsible for performing evaluations of Solomon. There is no evidence that he has ever adjusted grievances, or meted out discipline with respect to Solomon.

Prior to the opening of the theater, Giampietro was asked by management whether he knew a skilled person who might want to work as a projectionist at the theater. Giampietro informed management that he had a friend who was interested, and Giampietro suggested Solomon. Giampietro's knowledge of Solomon and his qualifications resulted from his friendship with Solomon as part of a small group of projectionists and film buffs that normally make themselves aware of job openings in the industry. With respect to Solomon's hourly wage, Giampietro did not initiate any suggestions or recommendations with respect to his pay scale. When asked what he thought Solomon's wage should be, he declined to make a suggestion.

In light of the record herein we are not persuaded that Giampietro is a supervisor. Section 2(11) of the Act defines a supervisor as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The record reveals Giampietro is merely the Employer's most experienced projectionist. His daily operational routine is identical to that of the other projectionist. It has not been established that he possesses any of the above indicia of supervisory authority. With the exception of the first week that the theater was open, the two employees never work at the same time. Giampietro is an hourly employee, receives overtime, and exercises no special management privileges. The Employer has presented no documentary evidence from its records to indicate that he is a supervisor.

The lynchpin of the Employer's claim that Giampietro is a supervisor is its contention that he had the power to hire and actually hired Solomon. We find that, in referring Solomon, Giampietro functioned only as a skilled craftsman with knowledge of a pool of qualified applicants and that his role was not that of a supervisor invested with the authority of management to hire.[1]

Thus, we find that Giampietro is not a supervisor and properly belongs within the unit. Accordingly, we shall direct an election among the employees in the following appropriate unit, as requested:

> All full-time and regular part-time projectionists employed at the Employer's Assembly Square Cinema, Somerville, Massachusetts but excluding all other employees, guards and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]

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[1] *Circle Resorts, Inc. d/b/a Circus Circus*, 244 NLRB 880, 882 (1979), enfd. in pertinent part 646 F.2d 403 (9th Cir. 1981); *Advance Envelope Manufacturing Company, Inc.*, 170 NLRB 1459, 1465 (1968); *Southern Bleaching & Print Works*, 115 NLRB 787, 790–791 (1956). The Employer contends that Giampietro is a supervisor because he was a supervisor at its Natick theater and his duties at the Somerville theater have remained the same. However his duties at Natick may be characterized, we find that it has not been established that Giampietro possesses supervisory authority, or has excercised such authority, at Somerville.

Sheet Metal Workers International Association, Local Union No. 13, AFL-CIO (Sheet Metal Contractors Association, Hudson & Bergen Counties, New Jersey) *and* Paul Mirable. Case 22-CB-4378

November 23, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On August 20, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, both Respondent and the Charging Party filed exceptions and supporting briefs, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Sheet Metal Workers International Association, Local Union No. 13, AFL-CIO, Union, New Jersey, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following paragraph as paragraph 1(c):

"(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to refer nonmembers to jobs through our exclusive hiring hall.

WE WILL NOT demand the payment of back dues for periods when dues were not validly required as a condition of employment, as a requirement for reinstatement into membership and referral through our hiring hall.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make whole Paul Mirable for any loss of earnings, plus interest, he may have suffered as a result of our refusal to refer him to work and WE WILL reimburse him for the back dues, which we required him to pay.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION No. 13, AFL-CIO

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in Newark, New Jersey, on April 30, May 1, 18, and 19, 1981. The charge was filed on June 27, 1980, and the complaint was issued on September 26, 1980, alleging that Sheet Metal Workers International Association, Local Union No. 13, AFL-CIO (Respondent), violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by all parties.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE ASSOCIATION

Sheet Metal Contractors Association, Hudson & Bergen Counties, New Jersey (the Association), a New Jersey corporation with its principal offices in New Jersey, is an association of employers whose members are engaged in the business of building construction in New Jersey. For many years the employer-members of the Association have delegated to it the authority to conduct collective-bargaining negotiations on their behalf

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[3] We have modified the Administrative Law Judge's recommended Order and notice to conform to the statutory language.

259 NLRB No. 56

and to enter into a collective-bargaining agreement. During the 12 months preceding the issuance of the complaint, the employer-members of the Association purchased goods valued in excess of $50,000 from suppliers in other States for delivery within New Jersey.

The complaint alleges, the answer admits, and I find that the Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The complaint alleges that beginning December 30, 1979,[1] Respondent refused to refer Paul Mirable to work from its exclusive hiring hall because he was not a member of Respondent. The complaint also alleges that on June 24, 1980, Respondent required Mirable, as a condition precedent to reinstatement, to pay back dues for the period following September 24, when Mirable was not a member of Respondent. Respondent denied the allegations. The issues are:

(1) Did Respondent refuse to refer Mirable to work from its exclusive hiring hall because he was not a member of Respondent; and

(2) Did Respondent require Mirable to pay back dues as a condition precedent to reinstatement to membership in Respondent and referral from its hiring hall.

B. *The Facts*

1. Background

Mirable, a journeyman sheet metal worker, has been a member of Respondent for approximately 13 years. Respondent is a party to a collective-bargaining agreement with the Association, the most recent of which was effective from July 1, 1978, through June 30, 1981. The collective-bargaining agreement provides for an exclusive job referral system whereby all sheet metal workers to be employed by the employer-members of the Association must be referred by Respondent.

During August, Mirable worked for several days at a job in Ithaca, New York. The job was under the jurisdiction of Local 112 in Elmira. As a result of that job, Mirable was brought up on charges by Local 112, was found guilty and fined $1,000 by Local 112, and was expelled from membership in the International. Thereafter, Mirable appealed to the International but his appeal was denied as being untimely.

During the pendency of the appeal, until December 6, Respondent permitted Mirable to seek work through its exclusive job referral system. Mirable was in fact referred to employment on several occasions during the fall of 1979. Respondent also accepted the tender of dues by Mirable in October and November. However, by letter dated November 30, the International notified Respondent that since Mirable was fined $1,000 "and expelled by Local 112, it will be necessary for him to pay his fine and to receive clearance from Local 112 before he can be reinstated and dues accepted." On December 18, Raymond Fleck, Respondent's financial secretary-treasurer, sent Mirable a check for $204 as reimbursement of the November dues, reinstatement, and appeal fees and advised Mirable that "Local 13 cannot accept your dues until you receive clearance from Local 112." Thereafter, no dues were accepted.

2. Refusal to refer through hiring hall

On December 3, Mirable was referred through Respondent's exclusive job referral system to a job for Hawthorne Sheet Metal, an employer-member of the Association. The job for Hawthorne lasted about a day and a half. On December 6, Mirable returned to Respondent's hall to seek work. Mirable credibly testified that George Murray, Respondent's business manager, told him that he "couldn't sign the book no more."[2] Mirable credibly testified, as follows:

> Q. Did Murray tell you why you couldn't be referred to work?
>
> A. Yes, because you're not a member no more.
>
> Q. Did you sign in that day?
>
> A. No. I wasn't allowed to sign in. Only . . . if you're in the union you can sign in.

Mirable testified that during the next several months he kept on coming to the hall, asking for work. He testified that both Murray and William Voitle, Respondent's business agent, repeatedly told him "because I have no card, you can't work out of the hall." Mirable's testimony was corroborated by Paul Schachter, Mirable's attorney and one of his witnesses. Schachter testified that Mirable came to him in March 1980 with respect to his not being referred by Respondent. Schachter credibly testified as follows:

> Q. So what did you do?
>
> A. After doing some preliminary investigation of the facts of the case I called up Local 13 and I spoke to George Murray concerning the status of Mr. Mirable.
>
> Q. When was this conversation?
>
> A. This was on March 11th.
>
> Q. And what was said in the conversation?
>
> A. I told Mr. Murray—I identified myself. I said I'm Paul Schachter, Director of the Labor Law Clinic; we're trying to assist Mr. Mirable in getting reinstated to his job so that he could be again referred out from the hiring hall since he was not being referred out at the instant time . . . . and Mr.

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[1] All dates refer to 1979 unless otherwise specified.

[2] Inasmuch as the events of December 6 occurred prior to the 10(b) period, I am not finding any violation of the Act based on such events. However, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose 10(b) ordinarily does not bar such evidentiary use of anterior events." *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al.* v. *N.L.R.B.*, 362 U.S. 411, 416 (1960).

> Murray told me that they had no objection to reinstating Mr. Mirable. The problem was, however, that they had to get clearance from Owen Jones at Local 112 in upstate New York.
>
> I asked Mr. Murray if Mr. Mirable would be referred out to jobs pending getting the clearance from . . . Mr. Jones, since . . . Mr. Mirable had already paid the fine.
>
> Mr. Murray told me that as soon as Mr. Mirable was reinstated to the union, he would be able to be referred out for jobs again.
>
> Q. Did Murray say anything further in the conversation? He said that as soon as Mr Mirable was reinstated he could be referred out from the hall at Local 13.
>
> Q. Did Murray say anything further?
>
> A. Yes. When I asked Mr. Murray if Mr. Mirable could be referred pending his reinstatement into the union, the answer was that only—he would have to be in the union because only union people could be referred from the hall.

Schachter also testified with respect to a further conversation he had with Murray towards the latter part of April 1980. Schachter inquired of Murray whether Mirable's application for reinstatement was being processed, to which Murray replied in the affirmative. Schachter credibly testified as follows:

> I asked Mr. Murray if Mr. Mirable would be referred out to jobs now that the application was being processed. Mr. Murray said, no, that he would not be referred out to jobs until he was reinstated into the union, which he expected to be shortly.

While Murray denied that he told Mirable that he could not sign the out-of-work list, he admitted that he told Mirable "you have to pay the fine or I'm not able to send you to work." Murray also testified that when Mirable finished the Hawthorne job he came to the hall but "didn't sign an out-of-work sheet, and he didn't sign the book."

I credit Mirable's testimony that Murray and Voitle told him "because I have no card, you can't work out of the hall." This testimony, in effect, was corroborated by Schachter who credibly testified that Murray told him that only union people would be referred from the hiring hall and that Mirable would not be referred again until he was reinstated into membership. Murray virtually conceded this when he testified that he told Mirable that "you have to pay the fine or I'm not able to send you to work." With respect to Murray's testimony that Mirable appeared at the hall after the Hawthorne job but did not sign the book, it is inconceivable that Mirable would voluntarily not have signed the book. Murray testified that under the hiring hall procedure, when an individual reports out of work "he comes into the union office and we have slips of paper on the desk in a box and he signs in the paper and he signs his name." He also testified that this procedure is something that the members "automatically" follow. Inasmuch as Mirable had finished the Hawthorne job and was out of work, it is incredible that he would have appeared at the hall and, on his own volition, not have signed the out-of-work list. The evidence instead clearly points to the credibility of Mirable's statement that he was instructed not to sign the out-of-work list.

Accordingly, I find that Mirable was told by Respondent that he could not sign the out-of-work list because he was not a member of Respondent. After December 30, this instruction was reaffirmed by Respondent's statements that because Mirable had no "card," he could not "work out of the hall." I find that commencing December 30[3] Mirable was not referred to jobs by Respondent through its hiring hall because he was not a member of Respondent.

3. Employment at Hudson Food

Mirable testified that he attended an executive board meeting of Respondent on April 21, 1980. While at the union office he met Peter Nigro, vice president of Hudson Food Service Equipment Company (Hudson), who offered him a job as a welder. Mirable felt that he could not take the job because he did not have a "card." Peter Nigro corroborated Mirable's testimony as to the job offer. He stated that he met Mirable at the union office on April 21. He testified as follows:

> Q. Would you tell the court the circumstances under which you met him, what had happened, how he was introduced to you and so forth?
>
> A. I just met him in the outer offices there and I asked him if he was a sheet metal worker and he said yes and I asked him if he was working. He said no. I asked him if he wanted to work with us. I needed at that time a man in the shop to do sinks and dish tables.

Joseph Nigro, president of Hudson, testified that Mirable first came to work on June 16, 1980. He testified that he called either Murray or Voitle who told him that Mirable "could work." However, Nigro testified that he could not have sent Mirable to do "outside" work without a union card.

Based upon the testimony of Mirable, Peter Nigro, and Joseph Nigro, I find that Mirable was offered a job with Hudson on April 21, 1980. However, this job was not referred by Respondent through the hiring hall. Instead, Mirable happened to meet Peter Nigro at the union office. After finding out that Mirable was a welder, Nigro offered him a job. I conclude that the job offer was not a referral by Respondent through its hiring hall.

4. Reinstatement fee

Mirable testified that Fleck invited him to come to an executive board meeting on April 21, 1980. At that time he was told that he would have to pay the sum of $395 to be reinstated to membership in Respondent. Mirable testified that that night Fleck handed him General Counsel's Exhibit 3(b) which itemizes the total of $395 as follows: $296—"8 months back dues" for October 1979–May 1980; $25—"reinstatement fee"; and $74—"June & July dues." Mirable testified that he paid the $395 on June 24, 1980.[4] Fleck did not deny Mirable's version of the events.

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[3] While the practice of nonreferral began on December 6, as pointed out above, inasmuch as December 6 antedates the 10(b) period, no violation is being found for events occurring prior to December 30.

I credit Mirable's testimony which essentially is uncontroverted and I find that Respondent required Mirable to pay a fee of $395 as a condition precedent to being reinstated into membership in Respondent. I find that the $395 fee consisted of $296 back dues for the period October 1979 to May 1980; $25 reinstatement fee; and $74 as dues for June and July 1980.

C. *Discussion and Analysis*

1. Refusal to refer

The law is well settled that a union violates Section 8(b)(1)(A) and (2) of the Act when, under an exclusive hiring-hall agreement with an employer, it accords its own members preference in job referrals over nonmembers using its hiring hall facilities. *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Los Angeles-Seattle Motor Express*] v. *N.L.R.B.*, 365 U.S. 667, 674–675 (1961); *N.L.R.B.* v. *Local 269, International Brotherhood of Electrical Workers, AFL–CIO, and Mercer County Division, New Jersey Chapter, National Electrical Contractors Association* 357 F.2d 51, 55 (3d Cir. 1966). As the Board has stated in *Sachs Electric Company*, 248 NLRB 669, 670 (1980).

> The operation of a union hiring hall imposes considerable responsibilities on the union agents in charge of the hall. Thus, they must neither foster nor countenance discrimination with regard to access to, or referral from, the hall on the basis of International union membership, local union membership, or any other arbitrary, invidious, or irrelevant considerations.

Respondent concedes that if in fact Mirable was discriminated against because of his not being a member in Respondent, such discrimination constitutes a violation of the Act.[5] I have found that in early December Respondent was notified by the International that it could no longer accept dues from Mirable. Soon thereafter, Mirable was told he could no longer "sign in" and was thereafter not referred to jobs from the hiring hall. These findings are based upon Mirable's credible testimony which was corroborated by the testimony of Schachter. Indeed, Murray himself testified that he told Mirable "you have to pay the fine or I'm not able to send you to work."

I further find that the discrimination continued until June 24, 1980. While Mirable was offered a job with Hudson in April 1980 this was not pursuant to a referral through Respondent's hiring hall.

Accordingy, I find that from December 30, 1979, until June 24, 1980, Respondent refused to refer Mirable to jobs from its hiring hall because Mirable was not a member of Respondent in violation of Section 8(b)(1)(A) and (2) of the Act.

2. Reinstatement fee

An applicant cannot be required to pay back dues for a period when dues were not validly required as a condition of employment. *Bricklayers', Local No. 8, supra*, 235 NLRB at 1005. I have found that Mirable was not offered work through Respondent's hiring hall from December 30, 1979, until June 24, 1980. I have further found that on June 24, 1980, Respondent demanded, and Mirable paid, the sum of $296 as back dues for the period of October 1979 through May 1980.

Respondent argues that the money requested constituted a "reinitiation" fee. However, the record does not support a finding that Mirable was asked for a "reinitiation" fee. On the contrary, General Counsel Exhibit's 3(b), which was handed to Mirable on June 24, 1980, specifically states the $296 as "8 months back dues." The "reinstatement fee" is specifically stated to be $25.

Accordingly, I find that Respondent's requirement that Mirable pay back dues for the period of December 30, 1979, to June 24, 1980, violates Section 8(b)(1)(A) and (2) of the Act. See *United Brotherhood of Carpenters and Joiners of America, East Pennsylvania Industrial District Council, AFL-CIO (Ridge Homes, a Division of Evans Products Co., Inc.)* 224 NLRB 1144, 1148 (1976).

CONCLUSIONS OF LAW

1. The Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to refer Mirable to employment through its hiring hall from December 30, 1979, to June 24, 1980, because Mirable was not a member of Respondent, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

4. By requiring Mirable to pay back dues for the period of December 30, 1979, to June 24, 1980, as a condition precedent to Mirable's reinstatement to membership and referral through the hiring hall, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[4] Mirable credibly testified that he gave Fleck $400 and received change so that the total paid was "three ninety something." While the record contains a receipt for $99, which appears to include $25 as reinstatement fee and $74 for June and July dues, I credit Mirable's testimony that he in fact paid an additional $296, for a total of $395.

[5] Respondent adduced testimony to show that during the winter months a number of employees were out of work. In the first place, Respondent has not shown that jobs were unavailable. In fact, Voitle conceded that "Mirable would have had no problem getting a kitchen equipment job if he had signed the list between December of 1979 and July of 1980." More importantly, however, the Board has held that where a union refuses to refer an applicant because of improper union considerations, the General Counsel need not prove that jobs were available at the time of the request for referral. *Bricklayers' and Stonemasons' International Union, Local No. 8, B.M. & P.I.U. of America (California Conference of Mason Contractor Associations, Inc.)*, 235 NLRB 1001, 1005 (1978).

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Respondent having refused to refer Mirable to employment through its hiring hall from December 30, 1979, to June 24, 1980, I shall order Respondent to make Mirable whole for any loss of earnings he may have suffered by not being referred to jobs during that period.

In addition, having found that Respondent unlawfully required Mirable to pay back dues as a condition precedent to his reinstatement into membership and referral through the hiring hall, I shall order Respondent to reimburse him for the amount of back dues paid for the period of December 30, 1979, to June 24, 1980.[6]

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest shall be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Sheet Metal Workers International Association, Local Union No. 13, AFL-CIO, Union, New Jersey, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to refer nonmembers to jobs through its exclusive hiring hall.

(b) Demanding the payment of back dues for periods when dues were not validly required as a condition of employment, as a requirement for reinstatement into membership and referral through the hiring hall.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Paul Mirable for any loss of earnings he may have suffered as a result of Respondent's refusal to refer him to work, in the manner set forth above in the section entitled "The Remedy."

(b) Reimburse Mirable for back dues which he was required to pay for the period December 30, 1979, to June 24, 1980, plus interest, in the manner set forth above in the section entitled "The Remedy."

(c) Post at its offices, meeting halls, and hiring halls, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[6] Counsel for Mirable urges that I order Respondent to reimburse the $1,000 fine which Mirable paid to Respondent for transmittal to Local 112. At the hearing, counsel for Mirable moved to amend the complaint to include an allegation that Mirable was required to pay the $1,000 fine. Counsel for the General Counsel and Respondent objected to the motion. Pursuant to *GTE Automatic Electric, Inc.*, 196 NLRB 902 (1972), I denied the motion to amend. Accordingly, inasmuch as the matter of the fine was not litigated in this proceeding, I cannot order the relief requested by the Charging Party.

[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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L. M. Settles Construction Co., Inc. *and* **Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO.** Case 7-CA-17873

November 24, 1981

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On June 29, 1981, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, brief, and brief in opposition, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein,[2] and to adopt his recommended Order.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the Administrative Law Judge's Conclusion of Law:

"4. By refusing to furnish Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, or its agents, for an audit, its books and record of original entry, including its general ledger, for the period September 1, 1979, to the date of completion of the audit, the Employer has refused to bargain collectively with the Union, in violation of Section 8(a)(5) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, L. M. Settles Construction Co., Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: This case was heard before me on March 13 and May 27, 1981, in Detroit, Michigan.

Upon an original charge filed on June 9, 1980,[1] by Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO (the Union), the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on July 30.

In essence, the complaint alleges that L. M. Settles Construction Co., Inc. (the Employer), refused to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act), when it refused the Union's May 9 request to conduct a comprehensive audit of its financial records, including its general ledger, which, the complaint claimed, was needed to enable the Union to police the Employer's administration of a collective-bargaining agreement between the parties.

The Employer filed a timely answer, filed a written amendment thereto, and made a further oral amendment at the hearing which admitted certain matters but denied the substantive allegation and that it committed any unfair labor practices.

All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and meet material evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. Counsel for the General Counsel and the Union's counsel argued orally. In addition, the Employer's counsel and the Union's counsel filed briefs on June 8 and 15, 1981, respectively. I was administratively advised that the General Counsel would file no brief. I have carefully considered the oral arguments and the contents of the briefs submitted.

Upon consideration of the entire record, the arguments, and the briefs, and from my observation of the single witness and his demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Based upon the Employer's answer, as finally amended, there is no issue as to jurisdiction or labor organization status.

The Employer, a Michigan corporation, has maintained its office and place of business in Livonia, Michigan, where it has been engaged in the drywall construction business.

At all material times, the Employer has been a member of the Michigan Dry Wall Contractors Association, Inc. (the Association), which is comprised of employers engaged in the drywall construction industry and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

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[1] In adopting the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to permit the Union to examine its financial records, including its general ledger, for the purpose of conducting a comprehensive audit, we agree with his finding that deferral to arbitration is inappropriate herein because the audit authorization provisions for fringe benefit payments contained in art. XVIII are explicitly exempt from the grievance and arbitration provisions of art. XX of the parties' agreement. Accordingly, we find it unnecessary to rely on the Administrative Law Judge's further grounds for declining to defer this matter to arbitration.

[2] We will modify the Administrative Law Judge's Conclusions of Law to conform more fully with his recommended Order.

[1] All dates hereinafter are in 1980 unless otherwise stated.

During the calendar year immediately preceding issuance of the complaint, the various members of the Association generated gross revenues in excess of $500,000. During the same period of time, the members of the Association purchased goods and supplies valued in excess of $50,000 from various suppliers which, in turn, purchased such goods and caused them to be transported and delivered to their Michigan facilities directly from points located outside Michigan.

Upon all the foregoing, I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The material facts are undisputed. They are a composite of the testimony of the sole witness, Michael G. Maher, administrative assistant to the Union's fringe benefit funds, and supporting documentary evidence.[2]

(The Employer objected to some of Maher's testimony regarding what was reported to him by employee Chandler as hearsay. The Employer argues I should draw adverse inferences regarding what apparently emanated from Chandler because he was present at the hearing, but was not called to testify. I decline to make such inferences because the documentary evidence fully supports and confirms all matter which Maher attributed to Chandler. In all other respects, Maher's testimony stands uncontradicted. The Employer rested without calling any witness to testify in its behalf).

At all material times, the Employer, as a member of the Association, has been a signatory to a collective-bargaining agreement between the Union and the Association. At the time of the events relevant herein, the Employer was bound to such a collective-bargaining agreement in effect until May 31, 1980.

In material part, the collective-bargaining agreement (art. XVIII) provides for the Employer to make regular contributions to the Union's deposit fund to cover the fringe benefit package contained in said agreement. The amount of such contribution is based on the number of hours worked by each employee covered by that agreement.

The funds contributed by Association members is administered by trustees of Painters Union Deposit Funds (the Trustees). Article XVIII, section 2, contains the employer-members' authorization for "any accountant selected by the Trustees . . . to make regular audits of . . . [their] . . . payroll records to ascertain whether . . . [they have] . . . complied with the requirements" of the collective-bargaining agreement. Additionally, the audit authority provides for "any accountant selected by the Trustees . . . to have access to, and to inspect any and all books, records, accounts, ledgers, and records of original entry, for the purpose of determining whether or not the Employer has conformed with" its obligations to make fringe benefit contributions. Finally, the provision for regular audits specifies "such inspection shall be made only on an express order of the . . . Trustees."

On or about July 18, 1979, the Union conducted a regular audit (apparently pursuant to the contractual provisions quoted above) of the instant Employer's books and records. At that time, employee Chandler was not working for the Employer.[3]

Chandler started work for the Employer in a classification covered by the collective-bargaining agreement during the second week of September 1979. The Employer issued a check, dated September 14, 1979, to Chandler for $210. Because the Employer had not yet received Chandler's withholding authorizations, that check represented his gross wages.[4]

Sometime in November 1979, Chandler showed Maher a copy (or original)[5] of the $210 check. Chandler told Maher he believed other employees had been paid the "same way."

In Maher's experience, he occasionally found employers had circumvented their obligation to make fringe benefit contributions by making wage payments to employees from funds held in other than payroll accounts. Such payments had been made by issuance of so-called side checks. Thus, upon seeing Chandler's $210 check, Maher became suspicious that the Employer might be seeking to avoid its contractual obligations. Accordingly, Maher examined the Employer's contribution report forms. He concluded that the $210 check was drawn upon the Employer's general account by noting that the check was of the same kind which was used by the Employer to send its fringe benefit contributions to the Union.

On or about January 23, 1980, Maher reported to the trustees. He explained the existence of a possible breach of the Employer's obligation to contribute to the fringe benefit funds. The trustees ordered Maher to conduct a full comprehensive audit, including the books of original entry of the Employer.

By letter dated January 23, dispatched by regular mail, Maher wrote the Employer he had been instructed by the Trustees "to conduct a full Comprehensive Audit of all your records, and books of original entry, for the period January 1, 1978, to the date of completion of this Audit." Maher's letter asked the Employer to contact him within 5 days to arrange the audit. Maher received no response.

On February 6, Maher dispatched another letter by certified mail to the Employer. Its terms were identical to the January 23 letter. The February 6 letter was returned to Maher marked "Unclaimed."

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[2] Maher testified on behalf of the General Counsel.

[3] It is not asserted that this audit revealed any deficiency in the Employer's contributions.

[4] Chandler did not negotiate the check. It was later replaced by the Employer with a payroll check representing Chandler's net wages after appropriate withholding deductions.

[5] Maher was unsure whether he saw the original. I do not consider this significant.

On March 3, Maher once again dispatched his February 6 letter, this time by regular mail.

On March 21, Maher wrote the Employer. He referred to his letters of January 23 and February 6. The March 21 letter states, in relevant part, that the trustees "have given express orders for . . . . [Maher] . . . to conduct a full Comprehensive Audit of all your records, and books of original entry, for the period January 1, 1978 to December 31, 1979." Maher asked the Employer to contact him within 5 days to arrange for his examination of the records. The March 21 letter ends with the admonition that the Employer's failure to comply would result in Maher's request of the trustees for them to file unfair labor practice charges.

The Employer's president, Louis Settles, telephoned Maher around March 25 or 26. Settles asked Maher what he was seeking. Maher requested production of specific material, including the general ledger. Settles said he needed more time to consider the request.

Sometime later, Settles contacted Maher. They arranged for Maher to examine the Employer's books at Settles' office on May 9.

On May 9, Maher, together with a field auditor, met with Settles. Settles was presented with a copy of Chandler's $210 check. Settles explained that no deduction authorization form had been received by the Employer at the time that check had been issued. Settles also told Maher that check had not been cashed and was replaced with the Employer's payroll check.

Settles then gave Maher some of the records he requested. Specifically, Maher examined certain quarterly reports and individual payroll summaries. Maher asked to examine the Employer's general ledger. Settles declined to produce it.

Maher completed his examination of the records provided. He verified that all fringe benefits for Chandler and all other employees reported by the Employer to the Union's funds appeared consistent with the Employer's payroll summaries. Nonetheless, Maher repeated his request to examine the general ledger. Settles said he would have to think about whether he would produce the general ledger and would "get back" to Maher.

Maher credibly testified, and was unshaken during cross-examination on this issue, that without studying the general ledger he could not determine whether any "side" check had been issued to any employee. Maher further testified that the fringe benefit contribution forms, alone, would not necessarily reflect that an employer had made contributions for all hours worked. Those forms comprise a self-serving declaration by an employer of whatever number of hours worked the employer desires to place thereon.

About 2 weeks later, Maher and Settles spoke. Maher asked to see the general ledger. Settles said he decided not to deliver it.

Shortly thereafter, Maher reported to the trustees that Settles refused access to all the books and records and that the comprehensive audit was not completed. The trustees concluded they needed the general ledger to determine whether any employee had been issued a "side" check. The trustees directed Union Attorney Gold to pursue the issue. This resulted in the filing of the charge underlying the instant Complaint.

B. *Analysis*

The General Counsel and the Union contend the comprehensive audit, including the Employer's general ledger, is necessary and relevant to the Union's performance of its collective-bargaining obligations. As to necessity, they claim the general ledger, specifically, is needed to ascertain whether the Employer's fund contribution report forms accurately reflect all payments made to employees. Thus, if the general ledger were to reveal no side checks had been issued to employees, that would indicate the Employer fulfilled its fringe benefit obligations. On the other hand, if the general ledger reveals such side checks had been issued, the Union might decide to take appropriate action to enforce the contract.[6]

The Employer contends (1) no *prima facie* case has been established, and (2) the Board should defer to arbitration. The Employer claimed the General Counsel "must establish . . . [the Union] . . . held a reasonable belief that it will discover contract violations from the information requested."

I agree with the position taken by the General Counsel and the Union.

1. Relevance and necessity

The Employer asserts the evidence reflects the Union had only a speculative hint of any contract violation. As such, the Employer contends a *prima facie* case had not been established.

I find the facts show the Union had cause to believe the Employer breached its contractual obligation to make fringe benefit contributions. Thus, Maher was presented with Chandler's side check. This, alone, was a sufficient basis to doubt the accuracy of the information submitted by the Employer on its fringe benefit contribution reports.

Additionally, Maher was informed other employees had been paid the same way. Though literally hearsay, that information buttressed and enhanced his doubts.

The trustees then acted responsibly in ordering the comprehensive audit. That order set in motion the machinery by which the Union could obtain information by which it could determine whether a contract breach was present.

It is well established that a labor organization, obligated to represent employees in a bargaining unit with respect to their terms and conditions of employment, is entitled to such information from the employer as may be relevant and reasonably necessary to the proper execution of that obligation. *Vertol Division, Boeing Company*, 182 NLRB 421 (1970); *N.L.R.B.* v. *Whitin Machine Works*, 217 F.2d 593 (4th Cir. 1955), cert. denied 349

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[6] Art. XX of the relevant collective-bargaining agreement establishes an extensive grievance and arbitration procedure "whenever a dispute arises between . . . [the parties] . . . concerning the carrying out of this agreement." However, as will be shown in subsec. II,B,2, *infra*, the subject of fringe benefit contributions is expressly excluded from operation of the grievance and arbitration procedure.

U.S. 905. The right to such information exists not only for the purpose of negotiating a contract, but also for the purpose of administering a collective-bargaining agreement. The employer's obligation, in either instance, is predicated on the need of the union for such information in order to provide intellignt representation of the employees. *F. W. Woolworth Company*, 109 NLRB 196, 197 (1954), enfd. 352 U.S. 938 (1956).

The test of the union's need for such information is simply a showing of "probability that the desired information was relevant, and that it would be of use to the Union in carrying out its statutory duties and responsibility." *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 437 (1967).[7] The union need not demonstrate that the information sought is certainly relevant or clearly dispositive of the dispute between the parties. The fact that the information is of potential relevance is sufficient to give rise to an obligation on the part of an employer to provide it. *The Brooklyn Union Gas Company*, 220 NLRB 189 (1975).

The appropriate standard in determining the potential relevance of information sought in aid of a bargaining agent's responsibility is a liberal discovery-type standard. *Acme Industrial, supra.*

Herein, the evidence reflects the Employer granted the Union access to a variety of records and reports on May 9. Nonetheless, I conclude that the material produced was insufficient to permit a fair and complete evaluation of the Employer's compliance with its contractual obligation to make fringe benefit contributions. Indeed, the Employer's denial of the general ledger constitutes a reservation to the Employer of the right to satisfy the legal standard upon its unilaterally determined standard of relevance. Such usurpation is contrary to the Employer's agreement, article XVIII, which grants the trustees the right to conduct audits. Moreover, such a reservation is impermissible under Board law. *L & M Carpet Contractors, Inc.*, 218 NLRB 802, 804 (1975). In *L & M*, as herein, an employer submitted some but not all, of the records requested by the auditor. The Board left undisturbed the administrative law judges' finding that the employer refused to bargain in violation of Section 8(a)(5) and (1) by failing or refusing to provide access to *all* the records, including the general ledger.

The question of relevance is properly for the Board's determination. In *Acme Industrial, supra*, the Court noted (385 U.S. at 435–436):

> There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149. . . . The only real issue in this case, therefore, is whether the Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights.

I find the contents of the general ledger presumptively relevant to the Union's collective-bargaining functions herein. *Murray Bagdasorian d/b/a Michael Rossi Carpet Co.*, 208 NLRB 748, 753 (1974); *Michigan Drywall Corporation, M & D Drywall, Inc., and James F. Mullins*, 232 NLRB 120 (1977). This is so because production of the Employer's general ledger would have permitted the Union to compare payments made by the Employer to employees (if such payments appear in the general ledger) with the hours worked which were reported by the Employer on its fringe benefit contribution reports; or the Union would have discovered that no such side payments had been made. To deprive the Union of this ability to make such a comparison effectively vitiates its collective-bargaining obligation to police implementation of the collective-bargaining agreement. *Ellisworth Sheet Metal, Inc.*, 224 NLRB 1506, 1509 (1976), reaffirmed 232 NLRB 109 (1977).[8]

The Supreme Court commented upon the efficacy of such purpose. Though *Acme Industrial* arose in the context of a union's need for information to determine whether it should proceed with a grievance, the legal principles and rationale derived from that opinion are apposite herein. Thus, the Court noted (385 U.S. at 437–438):

> When the Respondent furnishes the requested information, it may appear that . . . the grievances filed are without merit. On the other hand, even if it appears that such activities have taken place, an arbitrator might uphold the contention that no breach of the agreement occurred. . . . Such conclusions would clearly not be precluded by the Board's threshold determination concerning the potential relevance of the requested information.

The Employer urges the Union was engaged in a fishing expedition. It claims there is "no real evidence to suggest [the presence] of a violation of the coutract." I conclude this argument begs the question. The very purpose of the Union's requested audit was to enable it to determine whether a contract violation was present. That purpose, in my opinion, satisfies the Court's recognition that relevancy is a threshold question for the Board's determination.

As previously quoted, the standard for such determination is satisfied by showing a "probability that the desired information was relevant, and that it would be of use to the Union in carrying out its statutory duties and responsibilities." 385 U.S. at 437. I conclude the existence of Chandler's side check, coupled with Maher's experience that other employers had used side checks as a means to avoid their fringe benefit obligations, comprised sufficient probability the instant Employer might be avoiding its contractual commitment.

I have already discussed, and concluded, the general ledger could have been used by the Union to promote its statutory responsibilities. Moreover, the Court strongly encouraged the use of the earliest opportunities to determine whether the Union had an actionable claim. Thus, the Court observed (385 U.S. at 438): "Arbitration can function properly only if the grievance procedures leading to it can sift out meritorious claims." I have already observed this is one of the possible results of the Employer's compliance with the request for the comprehensive audit, including the general ledger.

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[7] This case is cited by both the Union and the Employer.

[8] The fact that Chandler's check was not negotiated by him does not render moot the need to audit. Maher had been apprised of the possibility other employees had been given side checks. If so, there is no evidence to suggest such checks also had not been negotiated. Thus, the only sure way to conclude the issue was by an examination of the Employer's books of original entry—specifically, its general ledger.

Upon all the foregoing, I find the General Counsel has sustained the burden of proving the comprehensive audit of the Employer's records, including the books of original entry and general ledger, are relevant and necessary to the Union's performance of its collective-bargaining obligations. Because the Employer admittedly did not furnish the general ledger, I further find that neglect violated Section 8(a)(5) and (1) of the Act, as alleged.

2. Arbitrability

As noted, the Employer urges the Board to defer the issues to the arbitration provisions of the collective-bargaining agreement.

The General Counsel asserts deferral is inappropriate because grievances relating to the fringe benefit funds are expressly exempt from application of the grievance and arbitration provisions of article XX of the parties' agreement.

The agreement, article XX-H, declares, "Article XX shall not apply to disputes arising between the Union and an Employer concerning Article XVIII hereof."[9]

I conclude there is no merit to the Employer's position that "the grievance procedure would settle the present dispute." Patently, the instant controversy is expressly excluded from operation of the grievance and arbitration procedure.

Moreover, the Board will not apply its deferral principles *Collyer* (*Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971)) unless the contractual grievance and arbitration provision at least arguably encompasses the type of dispute in question. *Urban N. Patman, Inc.*, 197 NLRB 1222 (1972). Accordingly, I agree with the General Counsel.

If my conclusion that the grievance and arbitration provisions are inapplicable to the instant issue is imprudent, there exists yet another reason to decline to defer. Thus, in my view, the Employer's suggestion to defer restricts the parties in the statute's quest for maintenance of labor-management stability. The Employer's proposal requires recourse to the intricate grievance and arbitration machinery of article XX. That procedure involves an informal hearing, a possible investigation, a formal hearing, and, finally, binding arbitration before an impartial arbitrator.

It is clear that production of the requested information may well serve to cause the Union to abandon any such recourse if it should be satisfied, from an examination of the requested records, that the Employer has fulfilled its contractual fringe benefit obligations.

The Supreme Court, in *Acme Industrial*, declared (385 U.S. at 438): "[I]f all claims originally initiated as grievances had to be processed to arbitration, the system would be woefully overburdened." I conclude the Employer's position would foster such a result.

In any event, as I have found the withholding of the requested records has eliminated the Union's ability to assess whether a contract breach existed, it would not be possible to utilize either the grievance and arbitration procedure or any other legal means, for no facts exist which give rise to a grievance or any other legal action based on the failure to pay the required fringe benefit contributions. The source of such facts has been obscured by the Employer's unlawful refusal to deliver the general ledger.

It is unclear just what subject matter the Employer would have subjected to the grievance and arbitration provisions. If it is the Employer's failure to have complied with the request for a *comprehensive* audit which should be grieved, the exclusion of article XX-H would prevent such a grievance because the audit authority is contained in article XVIII. Thus, the Employer's proposal effectively eliminates all remedial possibilities.

Upon the foregoing, I find no merit in the Employer's contentions regarding deferral.

Upon the basis of the foregoing findings of fact, conclusions, and the entire record, I make the following:

CONCLUSIONS OF LAW

1. L. M. Settles Construction Co., Inc., is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. All of the Employer's employees covered by the collective-bargaining agreement between the Union and the Michigan Dry Wall Contractor Association, Inc., scheduled to terminate on May 31, 1980, constitute a unit of employees appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act.

4. By failing to permit the Union to conduct a full comprehensive audit of its records, including its general ledger and other books of original entry, in accordance with the Union's various requests between January and May 1980, the Employer refused to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of the Act.[10]

THE REMEDY

Inasmuch as I have found the Employer refused to bargain with the Union by declining to permit the full comprehensive audit, I shall order the Employer to cease and desist from engaging in such unfair labor practice and affirmatively take such actions as will dissipate the effects of its unfair labor practice.

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[9] Art. XVIII is entitled "Painters Union Deposit and Other Trust Funds." As noted, this article, *inter alia*, establishes the Employer's obligation to make fringe benefit contributions and gives the Union the right to audit.

[10] I reserved ruling upon the Employer's oral motion to dismiss the complaint allegations. Based upon the aforesaid conclusions of law, the Employer's motion is hereby denied.

The Order shall require the Employer to permit the Union fund trustees, or their designees, to conduct the comprehensive audit requested between January and May 1980, and to produce for such purpose to the Union all records, including its general ledger and other books of original entry, for the Union's examination.

The Union requested the period to be covered by its audit begin on January 1, 1978, and encompass the intervening time until the date the audit is complete. In my opinion, the record does not support such an extensive undertaking. Maher testified the Employer had been audited for the first 6 months of 1979. Although the extent of that audit was not fully developed, there is evidence the Union had been satisfied of no improprieties. It was not until Chandler began working in September 1979 that the facts show the Union had any cause to question the Employer's activities. Though I am mindful of the possibility the Employer might have been derelict before Chandler began to work, the state of the record provides little, if any, evidence to justify the breadth of the Union's request. Accordingly, I shall order the Employer to submit its general ledger and other books of original entry for audit only for the period beginning with September 1, 1979, to the date of its completion.

The Union has requested a variety of remedial provisions such as a "make-whole" remedy, a requirement that the Employer pay interest upon whatever deficiencies are uncovered by the audit ordered, and enforcement of the contractually mandated liquidated damages provision.[11]

As to the request for a make-whole remedy, the Employer resists, claiming, in effect, such a remedy is inappropriate because it places the Board in the posture of having gone beyond the limits of *Acme Industrial* by rendering a decision on the merits of the underlying dispute. Thus, the Employer argues the Supreme Court held, in *Acme Industrial*, the Board appropriately considered only the threshold issue of the relevance and necessity of the information sought.

I find merit to the Employer's position. The complaint before me does not allege the Employer refused to bargain by a failure to pay the fringe benefit contributions. In each of the cases cited by the Union in support of its make-whole request, the Board had before it the specific issue that an employer refused to bargain by having failed to make the contractually required fringe benefit payments. See, e.g., *H & R Contracting Corp.*, 255 NLRB 491 (1981), failure to pay contributions; *Tolmich, Inc. d/b/a Orange County Metal Processing*, 252 NLRB 1269 (1980), discontinuance of health and welfare payments; *Memley Plating Company*, 252 NLRB 1264 (1980), failure to transmit dues; *Allen Materials, Inc., Debtor-In-Possession*, 252 NLRB 1116 (1980), termination of health and welfare contributions; *Ace Masonry, Inc.*, 252 NLRB 287 (1980), unilateral discontinuance of fringe benefit payments; *William Minter Masonry Contractor, Inc.*, 252 NLRB 130 (1980), discontinuance of trust fund payments; and *V. Pangori & Sons, Inc. and David Cuvrell, Receiver in Bankruptcy*, 248 NLRB 405 (1980), discontinuance of fringe benefit payments.

Thus, I find each of the above-cited cases contain material distinctions from the case at bar. The instant complaint and litigation before me does not go so far as those cases. I have been required to resolve only the Union's right to information. This involves consideration only of the threshold issues to which the Supreme Court alluded in *Acme Industrial*. I have done so. To do more would not only wreak an injustice upon the Employer, but would effectively conclude an issue which clearly was not, and had not been contemplated to be, litigated. Accordingly, the Union's make-whole request is denied.

With respect to the request for liquidated damages, there is a collective- bargaining provision covering that subject. Thus, article XVIII, section IV, provides "that the damages which will result from the failure of an Employer to pay his fringe benefit contributions on time, or in the correct amount, are difficult to calculate with any certainty and, therefore, any Employer who fails to make payments to the funds, in accordance with this Agreement, shall pay as liquidated damages, in addition to the contribution due: Delinquency for 1-15 days—5 percent of monthly contribution; Delinquency for 15-30 days—10 percent of monthly contribution; Delinquency for 30-45 days--20 percent of monthly contribution."

The Employer does not address this specific issue.

In *Finger Lakes Plumbing & Heating Co., Inc.*, 254 NLRB 1399 (1981), the Board reaffirmed its Order (253 NLRB 406 (1980)) based on the charging party's exceptions to an administrative law judge's omission to order payment of contractually mandated liquidated damages for failure to pay fringe benefit fund contributions. Thus, the Board ordered such was an appropriate remedy.

Finger Lakes contains the same distinction noted above in the cases dealing with a make-whole remedy. The Board's liquidated damage order was predicated upon the Board's finding of an unfair labor practice in the Employer's unlawful discontinuance of fringe benefit payments. In the absence of such a finding in the case at bar, I deny the request for payment of the contractual liquidated damages.

Regarding the request for a provision for the Employer to pay interest upon moneys the Employer may owe the fringe benefit funds, it is hereby denied for two reasons. First, all the cases which my research has uncovered in which interest was even considered by the Board were based on a finding by the Board that such moneys actually were due, which finding, in turn, was based on a complaint of the General Counsel alleging that the failure to make such payments constituted an unfair labor practice. As noted above, the instant complaint contains no such allegation. Second, the Union's request is, in any event, premature. Thus, in *Allen Materials, Inc., supra*, the Board commented, in footnote 2, that it "does not provide at the adjudicatory stage of the proceeding for addition of interest at a fixed rate on unlawfully withheld fund payments." The Board left the matter to the compliance stage. See also *Merryweather Optical Company*, 240 NLRB 1213 (1979).

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[11] The General Counsel did not address the scope of the remedy.

Finally, the Order shall require the Employer to refrain from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

Upon the above findings of fact, conclusions of law, the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

The Respondent, L. M. Settles Construction Co., Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to furnish Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, or its agents, for an audit, its books and record of original entry, including its general ledger, for the period September 1, 1979, to the date of completion of the audit.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the free exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Furnish to Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, or its agents, for inspection and examination, all records necessary, including its general ledger and other books and records of original entry, for said labor organization to make a comprehensive audit under article XVIII of the parties' collective-bargaining agreement.

(b) Post at its Livonia, Michigan, location, and at any other central location to which the Employer's employees in the bargaining unit found appropriate herein regularly report, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT refuse to furnish Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, or its agents, our general ledger and other records and books of original entry, for auditing purposes, from September 1, 1979, to the date said labor organization conducts a comprehensive audit which began on May 9, 1980.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the free exercise of the rights set forth at the top of this notice.

L. M. SETTLES CONSTRUCTION CO., INC.

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[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

International Brotherhood of Electrical Workers, Local Union No. 292, AFL-CIO *and* Frantz Klodt & Son, Inc. and Honeywell, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 1145. Case 18-CD-268

November 25, 1981

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Frantz Klodt & Son, Inc., alleging that International Brotherhood of Electrical Workers, Local Union No. 292, AFL-CIO, herein called Local 292, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring Honeywell, Inc., herein called the Employer, to assign certain work to its members rather than to employees represented by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 1145, herein called Local 1145.

Pursuant to notice, a hearing was held before Hearing Officer David M. Biggar on September 10, 1981. All parties except Local 292 appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearings and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Delaware corporation with its principal place of business in Minneapolis, Minnesota, is engaged in the manufacture of temperature control systems, computers, and military defense systems. During the calendar year ending December 31, 1980, the Employer purchased and received at its facilities within the State of Minnesota products, goods, and materials from outside the State having a value in excess of $50,000. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Local 292 and Local 1145 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

Honeywell has leased office space from Frantz Klodt & Son, Inc., in the Park Place office complex in St. Louis Park, Minnesota, and has performed construction-related improvements in its office space. It has assigned the installation of wire molding and related electrical work on these premises to its employees represented by Local 1145.

The record shows that in the last week of July and on August 3, 1981, John Wagner, business representative for Local 292, contacted James Becker, the maintenance supervisor for Honeywell, at the Park Place project. Wagner claimed that the work in dispute belonged to members of Local 292 rather than to Honeywell's employees represented by Local 1145, and indicated to Becker that Local 292 would banner the project. Becker advised Wagner that the work in dispute on such projects had normally been performed in the past by employees of Honeywell represented by Local 1145, and that this assignment would not be changed. Wagner then contacted Jon Blackstone, Honeywell's manager of labor relations for its Minneapolis operations, to claim that this work belonged to members of Local 292. Blackstone suggested that perhaps there was some compromise that could be reached that would allow work on the project to continue. Wagner indicated that he did not want to be involved in a dispute with Honeywell and would listen to alternative proposals. This conversation occurred on or about August 5, 1981. However, on August 6, 1981, before any alternative proposals were discussed, Local 292 placed a banner on the project. It is unclear as to the language on the picket sign but the testimony indicated that the effect of the picketing was that employees represented by Local 292 and employed by Minnetonka Electric Company, an electrical subcontractor of Frantz Klodt & Son, Inc., at Park Place, walked off the job. They did not return until the electricians represented by Local 1145 were removed from the project by Honeywell.

B. *The Work in Dispute*

The work in dispute involves the installation of wire molding, nonpermanent wiring, and related electrical work on modern wall partitioning located on floors leased to Honeywell, Inc., at the Park Place office project located at 5775 Wayzata Boulevard, St. Louis Park, Minnesota.

C. *The Contentions of the Parties*

The Employer and Frantz Klodt & Son, Inc., contend that the work should be assigned to Honeywell's employees represented by Local 1145, relying on Honeywell's collective-bargaining agreement with Local 1145, economy and efficiency of operations, nd employer assignment and preference.

Local 1145 asserts that the Employer's assignment of the work should be upheld as it falls within the terms of its collective-bargaining agreement with Honeywell.

Local 292 did not appear at the hearing. However, it informed the Board's Region 18 that its picketing of the Park Place project was to advertise to the public that electrical work was being performed on the project by employees who are not paid according to the standards and working conditions established in the area by Local 292.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

The parties stipulated that there is no agreed-upon method of resolving the work assignment in dispute at the Park Place project which would bind all of the parties involved.

The record shows that in the last week of July and the first week of August 1981 Local 292 demanded that Honeywell assign the disputed work to its members rather than to Honeywell's own employees represented by Local 1145, and threatened to picket the Park Place project if Honeywell did not accede to its demands. The record further shows that on August 6 Local 292 did in fact banner the building and picket the project causing a walkout by a subcontractor's employees represented by Local 292.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[1] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[2]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

Local 1145's collective-bargaining agreement with Honeywell covers the electricians who are performing the work in dispute as part of a production and maintenance unit. However, it does not specifically apply to the assignment of the work in dispute. Local 292 does not have a collective-bargaining agreement or a relationship with Honeywell. We find that this factor favors neither Union.

2. Company practice

It has been the Employer's practice for over 20 years to assign work similar to that in dispute to its own employees represented by Local 1145. This past practice favors an award of the work to Honeywell's employees represented by Local 1145.

3. Economy and efficiency of operations

The Honeywell electricians perform work for the Employer other than that which is in dispute. As a result, the Employer is able to perform both the disputed work and other tasks with one work force. Therefore, economy and efficiency of operations favor an award to Honeywell's employees represented by Local 1145.

4. Employer preference and assignment

The Employer has expressed its preference that the disputed work be performed by its employees presently doing the work. We find that the Employer's assignment and preference favor an award of the disputed work to its employees represented by Local 1145.

Conclusions

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that Honeywell's employees who are represented by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 1145, are entitled to perform the work in dispute. We reach this conclusion relying on the factors of company practice, economy and efficiency of operations, and employer preference and assignment.

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[1] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [*Columbia Broadcasting System*], 364 U.S. 573 (1961).

[2] *International Association of Machinists, Lodge No. 1743, AFL-CIO* (*J. A. Jones Construction Company*), 135 NLRB 1402 (1962).

In making this determination, we are awarding the work in question to Honeywell's employees who are represented by Local 1145, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Honeywell, Inc., who are represented by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 1145, are entitled to perform the installation of wire molding, nonpermanent wiring, and related electrical work at the premises leased by Honeywell in the Park Place office project located at 5775 Wayzata Boulevard, St. Louis Park, Minnesota.

2. International Brotherhood of Electrical Workers, Local Union No. 292, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Honeywell, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Brotherhood of Electrical Workers, Local Union No. 292, AFL-CIO, shall notify the Regional Director for Region 18, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

Honda of America Mfg., Inc. *and* **International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).** Case 8-CA-15050

November 25, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on July 27, 1981, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), herein called the Union, and duly served on Honda of America Mfg., Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint on August 17, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 19, 1981, following a Board election in Cases 8-RC-12320 and 8-RC-12482, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about July 17, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative. On August 26, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 10, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 16, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent asserts that the Union's certification was improperly issued in Cases 8-RC-12320 and 8-RC-12482 because the unit of boiler operators found appropriate by the Regional Director is inappropriate for bargaining. Respondent contends that the only appropriate unit would consist of all production and maintenance employees at its facility, including the boiler operators. Respondent admits that it has refused, and continues to refuse, to bargain with the Union, but alleges that it has no legal obligation to do so.

The General Counsel asserts that Respondent's answer raises no contentions other than those fully considered and rejected by he Board in the underlying representation proceeding and, since all other factual allegations of the complaint stand admitted in Respondent's answer, that there are no matters in issue requiring a hearing before an administrative law judge.

Our review of the record herein, including the record in Cases 8-RC-12320 and 8-RC-12482, discloses that the Union filed a petition for an election on April 27, 1981.[2] After a hearing, the Regional Director, on June 12, 1981, issued a Decision and Direction of Election in which he ordered that an election be held among the employees in the following appropriate unit:

> All boiler operators employed by the Employer at its Marysville, Ohio, facility, excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act, and all other employees.

Respondent filed with the Board a request for review, dated June 24, 1981, of the Regional Director's Decision and Direction of Election. The Board denied Respondent's request for review on July 8, 1981.

An election by secret ballot was conducted on July 10, 1981, in which four votes were cast for, and no votes were cast against, the Union. There

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[1] Official notice is taken of the record in the representation proceeding, Cases 8-RC-12320 and 8-RC-12482, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended. We note that the date of issuance of the certification is July 20, 1981, rather than July 19 as alleged in the complaint.

[2] An election petition concerning the same bargaining unit had been filed in Case 8-RC-12320 by International Union of Operating Engineers, Local Union 589, on November 14, 1980. The petitions were consolidated for the purpose of hearing.

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were no challenged ballots. On July 20, 1981, the Acting Regional Director certified the Union as the exclusive representative for collective bargaining of the employees in the aforementioned unit.

In a letter to the Union dated July 17, 1981, Respondent stated that although it had not yet received the Certification of Representative from the Regional Director it would not consider such certification valid upon its issuance, and therefore Respondent would decline to bargain with the Union for the unit of boiler operators. Respondent has refused at all times since July 17, 1981, to bargain with the Union.[3]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[5] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is and has been at all times material herein an Ohio corporation engaged in the manufacture and sale of motorcycles at its facility located in Marysville, Ohio. Respondent annually ships goods valued in excess of $50,000 directly from its Marysville facility to points located outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All boiler operators employed by the Employer at its Marysville, Ohio, facility, excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act, and all other employees.

2. The certification

On July 10, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 8, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 20, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *Respondent's Refusal To Bargain*

Commencing on or about July 17, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since July 17, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

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[3] In view of Respondent's anticipatory repudiation of its bargaining obligation, we find immaterial the absence of an allegation in the complaint that the Union made a formal request that Respondent meet with it for purposes of collective bargaining.

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5] We find no merit in Respondent's contention that its averred application of the "Japanese approach to labor relations" at its facility constitutes special circumstances warranting further consideration by the Board.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Honda of America Mfg., Inc., set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Honda of America Mfg., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), is a labor organization within the meaning of Section 2(5) of the Act.

3. All boiler operators employed by Respondent at its Marysville, Ohio, facility, excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 20, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 17, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Honda of America Mfg., Inc., Marysville, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), as the exclusive bargaining representative of its employees in the following appropriate unit:

> All boiler operators employed by Respondent at its Marysville, Ohio, facility, excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Marysville, Ohio, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All boiler operators employed by us at our Marysville, Ohio, facility, excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act, and all other employees.

HONDA OF AMERICA MFG., INC.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Kaiser Foundation Hospitals and Kaiser Foundation Health Plan of Oregon *and* Service Employees International Union, Local No. 49, AFL-CIO. Case 36-CA-3541

November 25, 1981

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING, JENKINS, ZIMMERMAN, AND HUNTER

On September 18, 1981, the Board issued a Decision and Order[1] in this proceeding dismissing the 8(a)(1) and (5) complaint in its entirety.[2] On October 19, 1981, Fred Tenderella,[3] one of the employees whom Respondent refused to discharge, as requested by the Union, filed a request for "attorney's fees and other costs" under the Equal Access to Justice Act.[4]

We find no merit in Tenderella's contention that he is entitled to an award under the Equal Access to Justice Act.

As noted above, the Board's Decision and Order in this matter issued September 18, 1981; since the Equal Access to Justice Act did not become effective until October 1, 1981, Tenderellas request for an award is untimely.[5] Further, the question of timeliness aside, Section 102.143 of the Board's Rules and Regulations, which deals with, *inter alia*, entitlement and eligibility, limits awards to "a *respondent* in an adversary adjudication who prevails in that proceeding." (Emphasis supplied.) Tenderella was not the respondent in this proceeding; indeed, Tenderella was not even a "party" in this matter. Accordingly, Tenderella is not entitled to an award under the Equal Access to Justice Act.

ORDER

It is hereby ordered that Fred Tenderella's request for an award under the Equal Access to Justice Act be, and it hereby is, denied.

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[1] 258 NLRB No. 4.

[2] The complaint alleged violation of Sec. 8(a)(1) and (5) of the Act based on Respondent's refusal to comply with the union-security provisions of the collective-bargaining agreement between Respondent and the Union.

[3] At the hearing in this matter, Tenderella moved to intervene. Tenderella's motion to intervene was denied by the Administrative Law Judge. The Board affirmed the denial of Tenderella's motion to intervene, but considered Tenderella's "appeal" to the Administrative Law Judge's Decision as an *amicus curiae* brief.

[4] P. L. 96-481, Sec. 201 Stat. 2325 (1981) (to be codified in 5 U.S.C.).

[5] See *G. W. Hunt d/b/a Foremost Foods Distributing*, 258 NLRB No. 158 (1981). We find no merit in Tenderella's contention that his request is timely because the Board's Order is not "final" until after the time has passed for filing a motion for reconsideration. Under Sec. 102.48(d)(2) of the Board's Rules and Regulations, any party may move for reconsideration of the Board's decision and order within 20 days of issuance. However, Sec. 102.48(d)(3) provides that filing of a motion for reconsideration "shall not operate to stay the effectiveness" of the Board's action. See also Sec. 102.148(c), which provides that the filing of a motion for reconsideration does not stay the time for filing an application for an award under the Equal Access to Justice Act.

259 NLRB No. 75

The Ithaca Journal-News, Inc. *and* **Ithaca Typographical Union No. 379.**[1] Case 3-CA-9692

November 27, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 27, 1981, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) of the Act by telling two employees on separate occasions that they would receive wage increases if the Union were decertified. Contrary to the Administrative Law Judge, however, we conclude that Respondent did not violate Section 8(a)(3) and (1) when, during collective-bargaining negotiations with the Union, (1) it discontinued merit increases for unit employees, and (2) it did not grant them the same increases in their automobile mileage allowance that it granted to employees in its advertising department.[3]

On June 1, 1979, the Union filed a petition to represent Respondent's newsroom employees. On the same date, it sent Respondent a letter stating in pertinent part that any attempt by Respondent "to change the status quo with regard to past practices of wages, hours and working conditions during the period of our organizing efforts and subsequent contract negotiations is in violation of Section 7 and 8 of the National Labor Relations Act. . . ." Respondent replied, in a letter dated June 7, 1979, that its understanding of the Union's statement was as follows:

> No further wage, benefits or working condition changes can be made in the newsroom while you are trying to convince newsroom employees to join the Typographical Union unless these changes were announced prior to receipt of your letter.
>
> * * * * *
>
> However, if, after learning all the facts, they decide to be represented by your Union, I believe you are also correct in stating that wages, benefits and working conditions cannot be changed until an agreement is reached.

The election was held on August 8, 1979, and the Union was subsequently certified as the exclusive representative of the newsroom employees. Negotiations for a collective-bargaining contract began August 1979 and continued until September 1980, culminating in tentative agreement, which had not been ratified as of the date of the hearing, October 27, 1980. Merit increases, which were not retroactive, were granted to newsroom employees in September 1980 pursuant to this agreement.

During negotiations, on November 15, 1979, the Union sent Respondent a letter saying it had no objections to Respondent's effecting "scheduled pay increases" in the bargaining unit. Respondent replied in a subsequent letter that it did not know what the Union meant by such term, inasmuch as salaries and other terms and conditions of employment were then being negotiated. The Union responded on December 19 that its position was based upon "past practice," and it listed 16 employees who it believed were entitled to pay increases. Finally, on January 9, 1980, Respondent sent a letter telling the Union that salary increases for unit employees had been given on a "discretionary basis" and, like all other discretionary terms of employment, were subject to negotiation. This letter further stated that increases for probationary employees, since they were given automatically, were an exception.[4]

The Administrative Law Judge found that Respondent had a longstanding policy of regularly evaluating the performance of newsroom employees and granting them annual wage increases. He relied on the testimony of witnesses as to what they were told when hired and upon payroll records showing the dates and amounts of increases received by each employee, and he concluded that Respondent's discontinuance of this practice was

259 NLRB No. 60

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[1] The name of the Charging Party (herein called the Union) appears as amended at the hearing.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] Respondent reimbursed employees who used their own automobiles in connection with their work on a per-mile basis.

[4] The evidence shows that, almost without exception, Respondent has given probationary employees wage increases after they have successfully completed approximately 6 months of work. Respondent continued this practice during negotiations, and these actions are not at issue.

discriminatory. Prior to the appointment of Al Greene as managing editor in mid-1978, Respondent apparently had a fairly regular practice of granting merit increases to employees in January and June or July of the year. Greene, however, modified this practice.[5] According to employee John Maines, Greene told him when he was hired that he would receive a raise at the end of a 6-month probationary period and would be considered for a raise annually thereafter. However, Carol Eisenberg testified that Greene told her she would be reviewed 6 months after receiving her probationary raise. The testimony of these witnesses is thus conflicting and does not, in itself, clearly establish a policy of regular merit increases.[6]

The practice under Greene has been even less regular and definite than these statements would indicate. In 1978, including the 5-month period before Greene became managing editor, of 13 employees who ostensibly would be entitled to nonprobationary raises, 10 received 1 increase and 3 received no increases. In 1979, of 18 employees ostensibly eligible for nonprobationary raises, 2 employees received 2 increases, 9 received 1 increase, and 7 employees got no increase.[7] While most of these increases in 1978 and 1979 were given in June, in both years a significant proportion of them was granted randomly in other months. The amounts of wage increases also did not follow any discernible pattern. Based on a weekly salary, increases ranged from $10 to $20 and were apparently unrelated to increases received either at the time by comparably paid employees or in the past by the particular employee.

Both before and during Greene's tenure, Respondent did not conduct any formal or written evaluations of newsroom employees. It did not systematically review the performance of newsroom employees and grant raises to those who met a minimum standard, nor did it rate them according to any criteria. Rather, as Greene expressed it, when an employee "sparkled," he or she got a merit raise. Employees who were chosen for merit increases were so informed in brief, oral reviews or received the increases in their paychecks without any discussion. Employees who did not receive increases were excluded not because they had failed a review with objectve, articulable standards or, indeed, because they had failed any review whatsoever; they simply had not achieved the entirely subjective standards of Greene or his predecessor. The arbitrary manner in which Respondent dispensed merit increases is further shown by a memorandum to Greene written by newsroom employees, just before the petition was filed, expressing their frustration at the lack of regular merit increases.

The circumstances herein are considerably different from those in *General Motors Acceptance Corporation*, 196 NLRB 137 (1972), enfd. 476 F.2d 850 (1st Cir. 1973), and other cases where the Board has found a violation in an employer's unilateral discontinuance of a merit increase program.[8] In *General Motors Acceptance Corporation*, the employer instituted a wage freeze of its own accord when the union filed the petition therein, but it continued giving employees semiannual merit reviews, in May and November. Prior to the wage freeze, employees who were rated "fair" or higher in the merit reviews received raises, which were effected at different times during the year. In the 9 months of the calendar year before the freeze, nearly all of the eligible employees had received merit increases in approximately the same amount.

Whereas the employer in *General Motors Acceptance Corporation* exercised discretion only with respect to certain aspects of its merit increase program, Respondent's granting of increases has been entirely discretionary. The timing and the amounts of raises, and the selection of employees to receive them, have not been determined in any objective or consistent manner. Respondent did not regularly evaluate employees irrespective of whether they were to receive increases and thus did not continue periodically to review employees after the filing of the petition without granting them increases. Thus, it is impossible to conclude with any degree of certainty when, and if, merit increases would have been given and which employees would have received them. See *The Great Atlantic & Pacific Tea Company, Inc.*, 192 NLRB 645 (1971). Requiring Respondent during negotiations to continue giving raises to employees selected by it, at times and in amounts unrestricted by a clearly established pattern, is tantamount to licensing it to grant them unilateral wage increases, contrary to *N.L.R.B.* v. *Benne Katz, etc. d/b/a Williamsburg Steel Products, Co.*, 369 U.S. 736 (1962). In sum, the evidence fails to establish that Respondent had a merit increase program that it was bound to continue during negotiations.

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[5] Respondent did not, at all material times herein, provide any other type of wage increases, such as cost-of-living raises.

[6] When advised by the Administrative Law Judge that her evidence on this point was becoming cumulative, counsel for the General Counsel made an offer of proof as to the testimony of other witnesses concerning statements to them when they were hired. Assuming that the General Counsel's representation of their testimony is correct, however, we note that their testimony would show the same disperity between being reviewed at 6-month or at 1-year intervals.

[7] Prior to the merit increases given in September 1980 pursuant to the parties' tentative agreement, the last such increases were given in June 1979. The decision to grant these increases was made before the petition was filed on June 1, 1979.

[8] E.g., *Allied Products Corporation, Richard Brothers Division*, 218 NLRB 1246 (1975), enfd. in pertinent part 548 F.2d 644 (6th Cir. 1977); compare *Oneita Knitting Mills, Inc.*, 205 NLRB 500, fn. 1 (1973), with *Southeastern Michigan Gas Company*, 198 NLRB 1221 (1972), enfd. 485 F.2d 1239 (6th Cir. 1973). See, generally, *Charles Manufacturing Company*, 245 NLRB 39 (1979).

Furthermore, because Respondent's discontinuance of merit increases was alleged and litigated as discriminatory conduct in violation of Section 8(a)(3), rather than as a unilateral change in violation of Section 8(a)(5), the General Counsel also had to show that Respondent was motivated by animus toward employees' selection of the Union. The Administrative Law Judge found that such unlawful motivation was evidenced by (1) the aforementioned two statements violating Section 8(a)(1), made by Greene in the spring of 1980, promising employees wage increases if they decertified the Union; and (2) evidence that some employees hired during the period when merit raises were not being given, after receiving their probationary increases, were paid more than senior employees. Contrary to the Administrative Law Judge's implication in footnote 9 of his Decision, the record does not show that all new hires, after receiving their probationary increases, were paid more than all senior employees. Moreover, there is no evidence whether the few senior employees who were paid less than some of the new hires had comparable skills, experience, and duties. Thus, the mere fact that some new employees received more pay than some senior employees is inconclusive to establish antiunion motivation. The two statements found to violate Section 8(a)(1) are insufficient to show such animus in light of Respondent's position, manifested in the exchange of correspondence initiated by the Union, that it was precluded by law from granting merit increases because of its collective-bargaining obligations.

Therefore, we conclude that Respondent did not violate Section 8(a)(3) and (1) of the Act by discontinuing merit increases for newsroom employees during negotiations with the Union.

We also disagree with the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(3) and (1), while it was engaged in collective bargaining, by not granting newsroom employees the same increases in their mileage allowance for use of their personal automobiles that it granted to employees in its advertising department. The only evidence that Respondent had such a practice was a memorandum from Respondent's publisher dated May 30, 1979, stating that the circulation department would receive a certain rate and "[a]ll other departments will go from 13-1/2 cents per mile to 14-1/2 cents per mile." Testimony established that "all other departments" referred to the newsroom and the advertising department. The record does not reveal the practice, if any, before this date. The advertising department subsequently received two more increases, which were not given to the newsroom: From 14-1/2 cents to 15-1/2 cents per mile on an unspecified date, and from 15-1/2 cents to 16-1/2 cents per mile on January 22, 1980. In February 1980, a newsroom employee asked Respondent's publisher why the newsroom had not received the increase that was recently granted to the advertising department; the publisher replied that the mileage allowance was a subject of collective-bargaining negotiations and could not be changed then. Apparently pursuant to the tentative agreement between Respondent and the Union, the rate for newsroom employees was increased to 16-1/2 cents per mile shortly before the hearing.

Contrary to the Administrative Law Judge, we do not think one ambiguous memorandum proves that Respondent had an "established past practice" of granting the newsroom the same mileage allowance it granted to the advertising department. See *United Technologies Corporation (formerly United Aircraft Corporation)*, 226 NLRB 750 (1976). Even if this document were sufficient to show such a practice, the evidence fails to prove that Respondent's motivation in discontinuing it was discriminatory. The above statement by Respondent's publisher does not indicate animus toward the employees' selection of the Union, and the two statements by Greene found to violate Section 8(a)(1) bear upon the unrelated issue of merit increases. Accordingly, we shall also dismiss this allegation of the complaint.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, The Ithaca Journal-News, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Ithaca Typographical Union No. 379 is a labor organization within the meaning of Section 2(5) of the Act.

3. By promising employees Judith Horstman and Carol Eisenberg that they would receive wage increases if the Union were decertified, Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not violate Section 8(a)(3) and (1) of the Act by discontinuing merit increases for newsroom employees while it was engaged in collective-bargaining negotiations with the Union.

6. Respondent did not violate Section 8(a)(3) and (1) of the Act by not granting newsroom employ-

ees the same increases in their mileage allowance that it granted to employees of its advertising department while it engaged in collective-bargaining negotiations with the Union.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Ithaca Journal-News, Inc., Ithaca, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promising employees that they would receive wage increases if the Union were decertified.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its office and place of business located in Ithaca, New York, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT promise our employees that they will receive wage increases if the Union is decertified.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

THE ITHACA JOURNAL-NEWS, INC.

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge: This case was heard in Ithaca, New York, on October 27 and 28, 1980. The charge was filed by Ithaca Typographical Union No. 379 (herein the Union) on March 28, 1980. A complaint based on that charge issued on May 7, 1980, alleging that The Ithaca Journal-News, Inc. (herein Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.

Issues

The primary issues are:

1. Whether Respondent denied merit increases and refused to raise the mileage allowance for newsroom employees in violation of Section 8(a)(1) and (3) of the Act.

2. Whether Respondent violated Section 8(a)(1) of the Act by promising emoloyees pay raises if they decertified the Union.

3. Whether Respondent's conduct comes within the 6-month limitation rule contained in Section 10(b) of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed on behalf of the General Counsel and Respondent. The briefs have been carefully considered.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, The Ithaca Journal-News, Inc., is a newspaper of general circulation published daily in Ithaca, New York. Respondent, in the course and conduct of its business operations, purchases, transfers, and delivers to its Ithaca, New York, plant goods and materials valued in excess of $50,000, which are transported to said location directly from States of the United States other than the State of New York. During the past 12 months Respondent has received gross revenues in excess of $200,000, has subscribed to two interstate news services, and has published advertisements for nationally marketed products.

I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

II. THE LABOR ORGANIZATION INVOLVED

Ithaca Typographical Union No. 379 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

On June 1, 1979, the Union filed a petition to represent newsroom employees of Respondent. The election was held on August 8. 1979, and the Union was subsequently certified. Negotiations for a collective-bargaining contract began in August 1979 and continued until September 1980, when a tentative agreement was reached between the bargaining committee of the Union and the bargaining committee of Respondent.[1]

On June 7, 1979, Respondent instituted a policy of not granting any wage increases (with the exception of probationary increases for new emoloyees). That practice continued until the pay and benefit increases had been made pursuant to the signing of a tentative agreement in September 1980, referred to above.

The following letter dated November 15, 1979, was sent by Donald C. Ball, secretary of the Union, to Peter Hickey, publisher of Respondent:

> This letter is to inform you that International Typographical Union No. 379 has no objections to the Ithaca Journal putting into effect scheduled pay increases in the newsroom. It is to be understood that any increases put into effect will not prejudice our contract negotiations in the newsroom.
>
> Because of rate of inflation and also due to the fact that some bargaining unit employees are overdue on their raises, we would hope that you comply with this request.

B. *Respondent's Past Practice*

Respondent contends that its past practice was as follows:

When Al Greene[2] took over from his predecessor he did not become aware of any written or verbal policy concerning pay increases. He established a policy of granting an increase if the individual successfully completed a 6-month probation period after hire and, after the employee passed that threshold, the policy was to give employees discretionary increases based on their performance. Respondent also contends that Greene had no particular system for giving raises; that if the reporter felt he was doing a good job he would ask for a raise or if Greene felt the reporter was doing a good job he would initiate a request for a raise for that employee. Employee requests were not always granted.

The General Counsel, on the other hand, contends that, prior to June 1979, Respondent had a clearly established past practice of granting periodic merit increases for newsroom employees. The pattern appears to have varied from time to time but generally those increases were granted on yearly bases or at 6-month intervals.

Four newsroom employees testified, Judith Horstman, John Maines, Carol Eisenberg, and Jane Marcham, concerning what they were told at the time they were initially hired and with respect to their actual history of increases while employed by Respondent. Their testimony reveals that there was indeed a pattern, albeit a varied one. The payroll records in evidence reveal that, after the 6-month probationary increase, employees received pay raises practically every year. In some cases employees received two pay raises in 1 year followed by no pay raises the following year and then a resumption of pay raises on a fairly scheduled annual basis, although many of the increases did not fall exactly on anniversary dates.

Employee Eisenberg testified that, when she was employed by Greene in mid-June 1979, Greene told her she would be on probation for 6 months and if she did an acceptable job during that time she would get a raise at the end of that period, would be reviewed 6 months thereafter, and would receive subsequent raises if she continued doing a competent job. Eisenberg said she received increases 6 months and 12 months after she was initially hired. Six months after her second increase (December 1979 or January 1980) she asked Greene for a raise inasmuch as she thought she was doing a good job. Greene responded that he thought she was doing a good job and would like to give her a raise but could not "because the labor negotiations are under way."[3] She said that, after that, Greene gave her the same answer when she asked for a raise on other occasions.

Maines testified that, when he was hired by Greene in February 1979, Greene told him he could expect a raise at the end of the 6-month probationary period and, if he made it through the period, he would be considered for a raise at the end of his first year and every year after that. Maines said he received an increase in June 1979, which Greene told him was based on merit but that when he asked Greene about a raise after he had worked for a year (February 8, 1980) Greene told him he had done good work; that Greene was not unhappy at all with his work; that he would love to give him a raise; but he could not because his hands were tied by the union matter.[4]

Employee Judith Horstman testified that she asked for a raise near the end of 1979, and Greene responded that while contract negotiations were in progress he could not grant an increase because his hands were tied. It was during this time that the Union stated it would not have any objection if Respondent granted wage increases on behalf of bargaining unit members as it had done in the past.

C. *The Alleged Promise of Pay Raises if the Employees Would Decertify the Union*

Judith Horstman further testified that, in late February or early March 1980, she again asked Greene for a raise.

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[1] As of the date of the hearing in this case, the agreement had not yet been ratified and signed. Pay and benefit increases pursuant to that tentative agreement, however, had been effected.

[2] The name "Al Greene" is spelled "Al Green" in Respondent's brief. But the record establishes that the correct spelling is Al Greene.

[3] Referring to the collective-bargaining negotiations that were under way at the time.

[4] Greene did not deny the substance of these conversations with Eisenberg and Maines.

Horstman said that Greene responded stating that she deserved a raise but his hands were tied while they were negotiating. Horstman further testified that, when she again asked for a raise, Greene said, "[I]f you want a raise decertify the Union and then you'll get your raise."[5]

Eisenberg further testified that Greene took her out to lunch sometime in early April 1980. She told him that staff members were unhappy about not getting increases and that Greene replied that he was aware of it and that he was sorry about it, but that there was nothing he could do. According to Eisenberg, Greene further stated that he had warned all of them before they voted that once a union came in it would not be Al Greene negotiating with Carol Eisenberg, but the Ithaca Typographical Union representative talking to a Gannett representative from Rochester. Greene then said, "Don't you realize money is in the budget if you decertify." Eisenberg testified further that Greene told her she should find out what it meant to come to impasse.

Greene testified concerning the conversations with Horstman and Eisenberg on the topic of decertification. Greene's memory was bad with regard to the conversation with Horstman, testifying that he did not recall who initiated the conversation and that he could not remember any specific conversation. He also said he could not recall how the topic of decertification came up. He said he had a standard answer when people started talking about decertification and he recited that standard answer. He said his standard answer was, "It was up to the newsroom." Greene testified that he did recall a conversation with Eisenberg in which she said it was clear, from the Company's attitude, that they wanted the newsroom to decertify. He told her that it was up to the newsroom and said that there was no other discussion.

Greene said he remembered the conversation with Eisenberg in which they talked about the Union and what was happening in the Union and about raises for the people. He said Eisenberg wanted to know if there were room in the budget for raises and he said there was. Greene admitted stating, "I said my hands were tied and I couldn't do anything." Greene further testified that Eisenberg then said it was clear the Company wanted the newsroom to decertify but Greene denied saying that if they would decertify that they would be able to get their raises.[6]

D. *Mileage Reimbursement*

The employees of Respondent who use their own automobiles in connection with their work were reimbursed a mileage rate which was increased on occasion. Such increases were published by Respondent by placing a notice on the employee bulletin board.

Employee John Huenneke testified that in February 1980, upon learning that the advertising department had been given an increase in the mileage rate, but not the newsroom employees, he told Terry Hopkins, publisher, that the newsroom employees were being treated discriminatorily. Hopkins responded that the Company did not want to break the law; that the Company and the Union were involved in contract negotiations; that she felt mileage reimbursement was a subject for bargaining; and that the Company could not change the rate for the newsroom employees at that time.[7] Huenneke's testimony was not controverted. I credit it.

E. *Discussion and Conclusions*

That Respondent's decision to freeze wages of the newsroom employees was made prior to the 10(b) period is not in issue. The fact that Respondent refused to grant merit increases to the newsroom employees from that date (except increases granted in September 1980 pursuant to the tentative agreement) because of union negotiations is not in issue. That the Union in November 1979 notified Respondent that it had no objection to its granting pay increases to employees in the unit according to past practice is also not in issue.

Contrary to the contention of Respondent, the record substantiates a past practice of granting increases to employees in the newsroom annually, although not necessarily on anniversary dates (the testimony of the witnesses and the payroll sheets received in evidence). Accordingly, I do not agree with Respondent that it was in a "damned if you do, damned if you don't" situation with respect to granting merit increases during negotiations.[8] As in *General Motors Acceptance Corporation*, 196 NLRB 137 (1972), enfd. 476 F.2d 850 (1st Cir. 1973), Respondent had a longstanding policy of evaluating employee performance and rewarding such performance with wage increases. Such a practice was an existing form of compensation, and a term and condition of employment regularly expected by the employees. And even though an element of discretion predicated upon prior merit review was exercised by Respondent with respect to the unit employees after Al Greene became in charge, it did not make it any less a past policy of Respondent. Accordingly, Respondent could have continued its past policy, especially in view of the acquiescence of the Union, and not have violated the law. Instead, because of the negotiations with the Union, Respondent suspended merit increases which it would otherwise have given to its employees.[9]

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[5] Horstman stated that she did not bring up the decertification and that Greene did.

[6] With respect to the testimony of the conversations between Greene and the employees discussed above, I credit the employees' version and not Greene's. As stated above, Greene's memory was poor on specifics. He spoke hesitantly and, on occasion, upon further questioning he either revealed more or gave a different version. Each employee testified in a clear and convincing manner, unhesitantly and consistently. Moreover, Greene testified that he had no regular system to evaluate employees, but rather, when somebody's work was really "sparkling," he decided to give him or her an increase. In the latter regard, Greene's testimony is contradicted both by the payroll sheets of newer employees and the testimony of Maines and Eisenberg concerning statements made by Greene at the time they were hired. Greene said that 5 out of the 27 employees "sparkled" in June 1979, and therefore received merit increases. The payroll sheets reveal that nine employees must have "sparkled" inasmuch as nine employees were granted increases in early June 1979.

[7] The mileage rate for advertising and newsroom departments was increased from 13-1/2 cents to 14-1/2 cents per mile on May 30, 1979. On January 22, 1980, the mileage rate for the advertising department was increased from 15-1/2 cents per mile to 16-1/2 cents. Thus, the advertising department received two mileage rate increases after May 30, 1979, which were not received by the newsroom department.

[8] The Union's request in November that Respondent grant those increases should have relieved Respondent's doubts of legality.

In this case Respondent's conduct included a statement by Managing Editor Greene to at least two employees which, at best, inferred that the employees would receive increases if they decertified the Union inasmuch as there was money for such increase in the budget. By its conduct, Respondent, in effect, placed full responsibility on the Union for the employees' failure to receive their merit increases. The message conveyed to the employees was clear—to obtain their scheduled merit increases they first had to abandon the Union. *General Motors Acceptance Corporation, supra.*

I consider Respondent's conduct as being equivalent to Respondent's conduct in *General Motors Acceptance Corporation, supra,* wherein the Board stated, "The evil of the Respondent's actions was further compounded by the Respondent's coercive poll by which it sought to present evidence of employee dissatisfaction with the Union."

I conclude that Respondent's attempts to decertify the Union, by withholding merit increases and stating that they would receive them if they decertified, interfered with, restrained, and coerced employees in the free exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

I find, further, Respondent discriminatorily discontinued the practice of periodic merit increases and denied employees increases during the 10(b) period,[10] which increases would have been granted to these employees absent the Union, because the newsroom employees selected the Union as their collective-bargaining representative, thereby discouraging union membership by placing the blame for the discontinued merit increases on the Union, in violation of Section 8(a)(3) and (1) of the Act. I find also that by refusing to grant an increase in the mileage reimbursement rate for newsroom employees, while granting such an increase to advertising department employees even though there is an established past practice of giving such increases, Respondent violated Section 8(a)(3) and (1) of the Act.

I also find that the statements made by Al Greene to the effect that, if the employees decertified the Union they would receive raises, constitute interference, restraint, and coercion of employees in the free exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, by discriminatorily denying merit increases to newsroom employees and by discriminatorily refusing to raise the mileage allowance for newsroom employees because the newsroom employees selected the Union as their collective-bargaining representative, thereby discouraging membership in the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent committed certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies and purposes of the Act. I shall recommend that, in addition to posting a notice to employees, Respondent make whole those newsroom employees for any loss of wages and benefits they may have suffered because of Respondent's discriminatory failure to grant merit increases and mileage rate increases after September 28, 1979.[11] Such merit increases and mileage rate increases shall be paid as prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]

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[9] The testimony of witnesses indicated that Greene would have given several of the unit employees merit increases but for the negotiations that were then being conducted. In addition, there is uncontroverted evidence that Respondent paid new hires more after the 6-month increase than it did to unit employees, thus, in effect, penalizing the more senior employees for having voted for the Union.

[10] Each individual denial of a merit increase during the 10(b) period constitutes a violation of the Act although the initial decision with respect to the policy of denials was made and disclosed prior to the 10(b) period. *Pease Company,* 251 NLRB 540 (1980); *General Motors Acceptance Corporation, supra.*

[11] All conduct prior to that date comes within the proscription of Sec. 10(b) of the Act.

Memphis Furniture Manufacturing Co. *and* **Memphis Truckers Association, Petitioner.** Case 26–RC–6180

November 27, 1981

DECISION AND DIRECTION OF ELECTION

By Members Fanning, Jenkins, and Zimmerman

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on August 27, 1980, before Hearing Officer Melvin L. Ford. Following the hearing, this case was transferred to the National Labor Relations Board in Washington, D.C., for decision, pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended. Thereafter, the Petitioner and the Intervenor[1] filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the briefs, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Petitioner, by petition of March 13, 1980, seeks to sever from the existing production and maintenance unit currently represented by the Intervenor a unit of over-the-road truckdrivers of the Employer. The Intervenor opposes the requested severance on several grounds: First, that the Petitioner is not a labor organization within the meaning of the Act; second, that the Petitioner should not be certified as representative because it would discriminate against black employees and perpetuate unlawful privileges of white employees; and, third, that the unit sought is not an appropriate unit for severance from the existing overall bargaining unit. We find no merit in the Intervenor's positions.

The Employer is a manufacturer of furniture located in Memphis, Tennessee, employing approximately 1,000 employees. The Intervenor was certified in 1978 to represent an overall bargaining unit including all production and maintenance employees and local and over-the-road truckdrivers. As indicated above, the initial collective-bargaining agreement expired as of March 12, 1980. At the time of hearing it did not appear that a new contract had been executed.[2]

The Employer employs 16 over-the-road truckdrivers, who deliver furniture manufactured by the Employer. These truckdrivers are dispatched from the "truck shop," located several blocks from the Employer's manufacturing plant and warehouse. Truckdrivers spend 95 percent of their time away from the plant, do no plant work, do not load their trucks, have no contact with production and maintenance employees, and have only occasional contact with truck shop mechanics. Their hours differ from those of production and maintenance employees and they are not supervised by production and maintenance supervisors. They are generally dispatched by telephone and come to the truck shop to pick up their loads, choosing from the available bills of lading laid out for their inspection. Over-the-road truckdrivers are paid by mileage, whereas production and maintenance employees, including local drivers and "city switchmen," are paid hourly. Unlike local drivers, over-the-road truckdrivers are subject to regulations of the Department of Transportation, including required physical examinations and limits on the amount of time devoted to driving within a given period. Based on the foregoing factors, we find that over-the-road truckdrivers employed by the Employer constitute a homogeneous, functionally distinct group such as the Board has traditionally accorded the right of self-determination, notwithstanding a history of bargaining on a broader basis. See *Wright City Display Manufacturing Company, a Subsidiary of Permaneer Corporation (Delaware)*, 183 NLRB 881 (1970); *Downington Paper Co., a Division of Sonoco Products Company*, 192 NLRB 310 (1971).[3]

259 NLRB No. 61

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[1] United Furniture Workers of America Local 282, AFL–CIO, herein the Intervenor, was permitted to intervene on the basis of its contractual representation pursuant to certification of a unit of the Employer's employees, including over-the-road truckdrivers. An initial contract expired as of March 12, 1980, and the parties have stipulated that there is no contract bar to this proceeding to sever over-the-road truckdrivers.

[2] In its brief dated September 18, 1980, the Intervenor contends that the parties are abiding by an unsigned contract covering the certified unit including over-the-road truckdrivers.

[3] We would distinguish the cases cited by the Intervenor: *Rockingham Poultry Marketing Cooperative, Inc.*, 174 NLRB 1278 (1969), where the over-the-road drivers performed in substantial respects duties similar to those of other drivers not sought, were at times transferred to production jobs, and in some instances were subject to common supervision, and *Los Angeles Herald-Examiner, Division of the Hearst Corporation*, 200 NLRB 475 (1972), which involved a unit of local drivers in the circulation department found to have a clear history of bargaining on a broader basis despite a period of separate representation pursuant to a stipulated consent election.

Concerning the contention that the Petitioner is not a labor organization within the meaning of the Act, we note that the Petitioner was formed for the purpose of representing employees in bargaining with their employer concerning wages, hours, and terms and conditions of employment. Accordingly, we find that the Petitioner is a labor organization within the meaning of the Act. We do not find controlling the fact that the Association has no history of representing truckdrivers, though established for that express purpose. See *Friden Calculating Machine Co., Inc., and Marchant Calculators, Inc.*, 110 NLRB 1618, 1619 (1954).

With respect to the Intervenor's concern that the Petitioner, if certified, is unlikely to represent black employees fairly and equally, the Board does not consider a contention of that sort before certification. See *Pioneer Bus Company, Inc.*, 140 NLRB 54, 56 (1962). In the event the Petitioner is certified and then abuses its certification by failing to represent all unit employees fairly, the Board will then consider a motion to revoke the certification.[4]

Our colleague emphasizes the invidious discrimination "apparent in this case" and would have the evidence in that regard considered *before* certification. This is, of course, consistent with our colleague's dissent in *Handy Andy, Inc.*, 228 NLRB 447, 457 (1977), wherein a Board majority concluded, at 455: ". . . that our statutory function of eliminating invidious discrimination by labor organizations is best served by scrutinizing their activities when they are subject to our adversary procedures and remedial orders." The Board there went on to say that it had long used unfair labor practice procedures rather than representation procedures to consider allegations of invidious discrimination, as a result of which "the duty of fair representation has become the touchstone of the Board's concern with invidious discrimination by unions." If the Union here succeeds in being certified, it will thereafter be appropriate to consider whether it is fairly representing all members of the unit.

We find, therefore, that the Employer's over-the-road truckdrivers may, if they so desire, constitute a separate appropriate unit for the purposes of collective bargaining, and we shall therefore direct an election among the employees in the following voting group:

> All over-the-road truckdrivers of the Employer at its plant in Memphis, Tennessee, excluding mechanics, mechanics' helpers, local drivers, city switchmen, all other employees, and supervisors as defined by the Act.

We shall make no final unit determination at this time, but shall be guided in part by the desires of the employees as expressed in the election hereinafter directed. If a majority of those in the voting group vote for the Petitioner, they will be taken to have indicated their desire to constitute a separate appropriate unit, and the Regional Director conducting the election will issue a Certification of Representative to the Petitioner for the unit described above, which the Board, in such circumstances, finds to be appropriate for purposes of collective bargaining. In the event that a majority do not vote for the Petitioner, these employees shall remain a part of the existing unit and the Regional Director will issue a Certification of Results of Election to such effect.

[Direction of Election[5] omitted from publication.]

MEMBER JENKINS, dissenting:

Contrary to my colleagues, I would dismiss the instant petition for severance of the over-the-road truckdrivers from the existing unit. The attempted severance is a thinly disguised and racially discriminatory ploy designed to install and perpetuate a system of segregation in the Employer's workplace and thus to divide the existing bargaining unit along racial classifications.

The facts in this regard reveal that the Intervenor, a predominantly black local union, has since 1978 represented a certified unit of the Employer's work force consisting of approximately 1,000 employees. The present unit, which includes over-the-road truckdrivers and other employees of the Employer's trucking division as well as production and maintenance employees, is likewise predominantly black. In contrast, the unit sought in the instant petition consists of 16 employees, 12 of whom are white. The Petitioner is a local unaffiliated organization with a grand total of 12 members—not coincidentally, the 12 white truckdrivers employed by the Employer. The Petitioner was formed in March 1980 and at the time of the hearing had held four meetings. None of the black truckdrivers whom Petitioner seeks to represent was informed of or invited to attend these meetings.

Under these circumstances, I am unwilling to join my colleagues' direction of election in a unit so patently discriminatory that the results would amount to a segregation of the work force.[6] The

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[4] The Intervenor also contends that the Petitioner is a sham union and that the role of a "management" law firm in the Petitioner's formation suggests financial assistance, presumably by the Employer. The Intervenor views the Petitioner as consisting of 12 white, antiunion employees who have already rejected representation by the Teamsters and who are really intent upon nonrepresentation, thus relegating the 4 black drivers to production jobs. This argument is also a post-certification issue.

[5] [*Excelsior* footnote omitted from publication.]

[6] My colleagues rely on the fact that we have, in the past, allowed severance of similar units. However, aside from the factual differences be-

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blatant exclusion of the black over-the-road truckdrivers from membership or participation in the Petitioner can leave no doubt that that their exclusion was purposeful. For the Board, an agency of the United States Government, to grant its imprimatur to such an organization is to countenance a manifest injustice and a breach of constitutional requirements. I will have no part of any such action.

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tween those cases and here, whether we might allow a similar unit under different circumstances is not relevant. What is important is that the Board must not countenance the invidious discrimination apparent in this case.

United Steelworkers of America, AFL-CIO, CLC, Local 1981 ***and*** **Major Safe Company, Inc.** Case 21-CB-7449 and 21-CB-7610

November 27, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 29, 1981, Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, United Steelworkers of America, AFL-CIO, CLC, Local 1981, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and we intend to carry out the Order of the Board and abide by the following:

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act by trying, fining, suspending, or otherwise disciplining them because of their giving testimony adverse to the Union's position in arbitration proceedings before an arbitrator under a collective-bargaining agreement.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act or impair the integrity of the arbitration procedures of the collective-bargaining agreement.

WE WILL rescind the fine assessed against, and the suspension of, Gabriel Torres and expunge from our records all reference to such fine and suspension.

WE WILL reimburse Gabriel Torres for any amount he may have paid on such fine with interest from the date of such payment.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, LOCAL 1981

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This matter was heard by me in Los Angeles, California, on May 19, 1981. The charge in Case 21-CB-7449 was filed by Major Safe Company, Inc., herein called Major Safe or the Company, on August 15, 1980, and served on United Steelworkers of America, AFL-CIO, CLC, Local 1981, herein called Respondent, on August 18, 1980. The charge in Case 21-CB-7610 was filed by Major Safe on January 12, 1981, and served on Respondent on January 13, 1981. The complaint, which issued on February 25, 1981, alleges that Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended, herein called the Act.

The principal issue herein is whether Respondent violated the Act by threatening employee Ruben Campos with intraunion discipline if he testified on behalf of the Company in a grievance proceeding and by holding an intraunion trial of employee Gabriel Torres and subsequently suspending and fining him because he testified on behalf of the Company in an arbitration proceeding.

Upon the entire record including my observation of the demeanor of the witnesses, and after due consideration of the post-hearing briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Major Safe, a California corporation with an office and place of business in Los Angeles, California, has been engaged in the manufacturing of safes. Major Safe, in the course and conduct of its business operations, annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside the State of California.

The complaint alleges, Respondent admits, and I find that Major Safe is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that Respondent is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent and Major Safe Company are parties to a collective-bargaining agreement which provides for a multistep grievance and arbitration procedure. On June 13, 1980,[1] Cesar Melgar, an employee of Major Safe, received a written warning and a 1 day suspension for violating a company rule by reading a newspaper in the bathroom during working hours. Melgar filed a grievance on June 16 protesting the warning and suspension.

The step 1 grievance meeting was skipped. Following step 2 and 3 meetings, a step 4 grievance meeting was held on July 23. Between the third and fourth step meetings, Jerrold Bellenger, director of industrial relations for the Company, asked employee Ruben Campos to testify on behalf of the Company.[2] Shortly thereafter, according to Campos, Jose Diaz, Respondent's unit chairman at Major Safe, asked Campos if he were going to be a witness against a brother and if he knew what the outcome would be. Diaz said if Campos did not tell the truth he could be punished or fined. However, in Campos' prehearing affidavit, he stated that Diaz said that Campos should state in the grievance meeting that he had seen nothing and knew nothing, that if Campos were a witness against Melgar the Union could punish or fine him.

Present for the Company at the July 23 step 4 meeting were Bellenger, Donald Wagner, vice president of manufacturing, and Donald Aldridge, plant manager. Present for Respondent were Tony Torres, International representative, Wesley Guajardo, business representative, Miguel Garcia, treasurer, and Jose Diaz, Salvador Serna, and Jose Campos, unit committeemen. The Company called Campos as a witness. When Tony Torres began questioning Campos in English, with Garcia translating into Spanish, Torres stated words to the effect that Campos could be disciplined on fined for giving false testimony against a brother.[3] Torres then proceeded to read from Respondent's International constitution a subsection which makes a member subject to discipline for "slandering or willfully wronging a member of the International Union." Bellenger said he thought Torres was intimidating the witness and asked him to cease the statement regarding discipline. Torres refused and Bellenger called a temporary halt to the meeting.

On October 16, a hearing was held before an arbitrator on the Melgar grievance. Gabriel Torres testified as a witness for the Company. During the course of the arbitration hearing, Respondent and the Company reached a settlement which provided that the written warning and all references thereto be removed from Melgar's personnel file and that a half day's pay be restored to Melgar.[4]

On October 22, Melgar filed an intraunion charge against Gabriel Torres alleging that Torres had violated certain specific sections of the International union constitution by falsely testifying at the arbitration hearing. Thereafter, Gabriel Torres was notified by letter that the charge had been filed and the trial scheduled for December 4. The trial was held as scheduled on December 4. Gabriel Torres did not attend. Melgar did attend and testify. On December 4, the intraunion trial committee found Torres guilty as charged and recommended that he be fined $600 and his membership in Respondent be suspended for 6 months for giving false testimony. On December 11, the general membership of Respondent adopted the trial committee's recommendation. Thereafter, Gabriel Torres was notified of the finding and of his right to appeal. However, he did not file an appeal.

B. *Conclusion*

The General Counsel contends that Respondent violated the Act by Diaz threatening Campos with discipline if he testified on behalf of the Company. In its answer, Respondent denies that Diaz is an agent of Respondent but did not pursue this position in its post-hearing brief. The record establishes that, as unit chairman, Diaz is responsible for enforcing the collective-bargaining agreement and is required to report to Respondent any infraction or violations of the agreement of which he is aware. He handles grievances on behalf of Respondent and, in accordance with the provisions of the collective-bargaining agreement, he is excused from work to do so without loss of pay. In these circumstances, I find that Diaz is an agent of Respondent. *Local Lodge Number 5, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Regor Construction Company, Inc.)*, 249 NLRB 840, 848 (1980).

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[1] All dates herein are in 1980 unless otherwise indicated.

[2] Campos, Gabriel Torres, and at least one or two other employees were present in the bathroom at the time of the alleged reading incident.

[3] Bellenger testified that Torres said Campos could be punished or fined if he said anything "bad" about a brother. However, Torres, Campos, and two other witnesses testified that Torres spoke in terms of "false" testimony or lying. I credit these latter witnesses that Torres spoke of false testimony.

[4] According to Bellenger, a basis for the settlement was that the Company revise its rules regarding reading on company time so that it was not overly broad as the arbitrator deemed the present rule to be. Torres denied that the arbitraton commented that the rule was overly broad or that changing the rule was part of the basis of the settlement. According to him, the arbitrator suggested a settlement because of conflicting testimony.

However, in view of the conflict between Campos' testimony and his prehearing affidavit, I further find that Campos is not a reliable witness in this regard. I therefore find that the evidence is insufficient to establish that Diaz threatened Campos in violation of the Act.[5]

The complaint alleges that Respondent violated the Act by subjecting Gabriel Torres to an internal disciplinary trial and by imposing court collectible fines on Torres and suspending him from membership in Respondent for a period of 6 months. Respondent contends that its trial of Gabriel Torres and the fine and suspension resulting therefrom were proper since Torres was afforded all the procedural and substantive safeguards required under the Labor-Management Reporting and Disclosure Act.

The General Counsel argues that it is unlawful for Respondent to make a determination as to whether an employee gave false testimony in a grievance arbitration proceeding and that the mere entertaining of the charge, the trial, and resulting discipline are violative of Section 8(b)(1)(A) of the Act.

The General Counsel's argument is supported by Board law. It is well established that, although under the proviso to Section 8(b)(1)(A), a labor organization may in certain circumstances fine an employee-member for violating union rules relating to the acquisition or retention of membership, the proviso does not permit such intraunion disciplinary action for every infraction of intraunion rules particularly where such intraunion action infringes upon employees' Section 7 rights. The Board has found that subjecting an employee-member to an internal union trial proceeding and imposing disciplinary sanctions for testifying adverse to the Union's position infringes upon employees' Section 7 rights. *Freight Drivers and Helpers Local Union No. 557, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Liberty Transfer Company, Inc.)*, 218 NLRB 1117 (1975); *Cannery Warehousemen, Food Processors, Drivers and Helpers Local Union No. 788, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Independent (Marston Ball, an Individual)*, 190 NLRB 24 (1971). The Board has further found that such intraunion disciplinary action is no less an infringement upon employees' protected rights because it purports to be based on the giving of false testimony. As stated by the administrative law judge in *Liberty Transfer, supra* at 1121, "[A] determination of that sort [as to the falsity of the testimony] seems scarcely one to be entrusted to the biased judgment of the Union against whose interests the testimony was given."

Therefore, I find that Respondent violated Section 8(b)(1)(A) of the Act by trying, fining, and suspending Gabriel Torres because he testified adverse to Respondent's position[6] in an arbitration hearing. I further conclude that such conduct has impaired the integrity of the contractual arbitration procedure and, accordingly, I find that Respondent thereby violated Section 8(b)(3) of the Act. *Liberty Transfer, supra; Marston Ball, supra.*

CONCLUSIONS OF LAW

1. Major Safe Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By bringing to trial, suspending, and fining employee Gabriel Torres because he cooperated with the Employer in connection with the grievance arbitration procedure, Respondent has restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act in violation of the provisions of Section 8(b)(1)(A) of the Act; and impaired the integrity of the arbitration clause in the collective-bargaining agreement, thereby violating Sections 8(d) and 8(b)(3) of the Act.

4. By engaging in the aforesaid conduct, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. To remedy the coercive and restraining effect upon all employee-members by the trial procedure and the resulting fine against, and suspension of, Gabriel Torres, it is recommended that Respondent be required to rescind the fine against, and suspension of, Gabriel Torres, to expunge from its records all references to the fine and suspension, and to notify all members of the rescission of such fine and suspension and of their right to testify in arbitration proceedings under the collective-bargaining agreement without fear of being charged, tried, fined, or suspended for doing so, such notices to be posted at Respondent's office and hall and at Major Safe Company's place of business providing the latter is willing.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, United Steelworkers of America, AFL-CIO, CLC, Local 1981, its officers, agents, and representatives, shall:

1. Cease and desist from:

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[5] In reaching this conclusion, I have fully considered the statements made by Campos in his pre-hearing affidavit and the General Counsel's argument that I should find the statements therein to be true.

[6] I reject Respondent's position that the trial committee was totally disinterested, apparently based on a contention that this grievance was only for Gabriel Torres' benefit and that Respondent has no stake in the outcome. The issue was clearly one of union regularity, a position that Tony Torres certainly made evident by his conduct toward Campos during the fourth step grievance meeting.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Restraining and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act by trying, fining, or otherwise disciplining its members because they gave testimony adverse to the Union's position in arbitration proceedings under a collective-bargaining agreement, and by such conduct thereby impairing the integrity of arbitration procedures under a collective-bargaining agreement.

(b) In any like or related manner restraining and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, or refusing to bargain with an employer in violation of Sections 8(d) and 8(b)(3) of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Rescind the fine against and suspension of Gabriel Torres and expunge from Respondent's records all reference to the fine and suspension, and, if such fine has been paid, make reimbursement to Gabriel Torres the amount of the payment with interest as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).

(b) Post in Respondent's business offices and meeting halls, copies of the attached notice, in both English and Spanish, marked "Appendix."[8] Copies of said notice, in both English and Spanish, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Copies shall be posted in conspicuous places, within clear view of all persons entering Respondent's hall. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material. Upon request of the Regional Director, Respondent shall supply him with a sufficient number of signed copies for posting by Major Safe Company if desired by them.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges any violation of the Act not specifically found herein.

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Texaco Oil Company *and* **Robert G. Ravert** *and* **Michael L. Wergin.** Cases 27-CA-6776 and 27-CA-6776-2

November 30, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On April 20, 1981, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, as modified herein, and to adopt her recommended Order, as modified.

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(3) of the Act when it terminated the accident and sickness (A and S) benefits of the six discriminatees on January 8, 1980,[3] the first day of the strike. However, for the reasons stated herein, we disagree with the Administrative Law Judge's recommended remedy as to four of the six individuals.[4] While the Administrative Law Judge correctly determined that these four discriminatees should be reimbursed for benefits lost under Respondent's A and S plan beginning on January 8, 1980, we hereby modify her findings as to which date their respective entitlements ended.

Peter J. Gottfried

Employee Gottfried suffered from chronic rheumatoid arthritis. In December 1979, Gottfried received treatment from a rheumatologist in California while on vacation. Gottfried received permission from Respondent's personnel director by telephone to remain in California on sick leave in order to finish these treatments. Upon his return to Wyoming on January 6 or 7, Gottfried informed Respondent that he was going to consult his local physician before returning to work. However, Gottfried did not see his physician until January 30, approximately 3 weeks later. At that time, Gottfried received an injection (gold salts therapy) and was told by his physician that he could return to work when he "felt like it." Gottfried testified that he felt well enough to work on February 11, and that he began to picket at that time.

The Administrative Law Judge found Gottfried's testimony that he was available for work on February 11 to be dispositive of the issue of what date Gottfried's eligibility for A and S benefits ended. However, it appears that Gottfried may have been medically able to work before that time, possibly following his January 30 doctor's appointment. Furthermore, Respondent may be correct that Gottfried unnecessarily waited 3 weeks to see his doctor, and that his chronic condition would not have prevented him from working shortly after his return to Wyoming in early January. We therefore leave to the compliance stage the question of which date Gottfried was medically able to return to work.

Michael L. Wergin

At the beginning of the strike, Wergin was on sick leave because of a knee injury. He was subsequently released by his doctor on February 7, and began picketing on February 21.

The Administrative Law Judge found that there was no indication that Wergin was ready to work immediately after his release or prior to his commencement of picketing. She therefore concluded that Wergin's entitlement to A and S benefits ended on February 21, the first day that he picketed. However, under *E. L. Wiegand Division, Emerson Electric Co., supra*, a discriminatee is not entitled to recover A and S benefits for longer than the period of his disability. Wergin's doctor released Wergin to return to work on February 7. We therefore find that Wergin's entitlement to benefits ended on February 7, the date of his medical release.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[2] We note that, while Respondent has excepted to the Administrative Law Judge's finding that it is an Illinois corporation, Respondent has not indicated in which State it is actually incorporated.

[3] All dates are in 1980, unless otherwise noted.

[4] We adopt the Administrative Law Judge's recommended remedy as to William B. Noell and John Vin.

Member Jenkins agrees with the findings herein as to the remedy for the reasons set forth in his dissent in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), enfd. as modified 650 F.2d 463 (3d Cir. 1981).

Member Zimmerman finds it unnecessary to reach the remedial issue set forth in *Emerson Electric Co., supra*, since the result in this case is the same under either the majority or dissenting approach.

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James T. Lake

Lake was placed on sick leave in December 1979, due to back problems, and received treatments from Respondent's doctor at the Casper facility. When the strike began, Lake stopped going in for treatments because he did not wish to cross the picket line. Lake did not seek treatment elsewhere, but remained at home and used a heating pad, as the doctor had instructed. Lake testified that he could have returned to work "sometime after the 20th of January," and that he had begun picketing at that time. Approximately a week earlier, on January 13, Lake had visited the picket line in his car, gotten out, and spoken with several of the picketers.

The Administrative Law Judge found that Lake's eligibility ended on January 13, because the combination of Lake's failure to continue his treatment at the facility and his January 13 visit to the picket line constituted public support of the strike which disqualified him from further A and S benefits. However, we find that under *Emerson Electric Co., supra*, Lake's actions were not a sufficient manifestation of public support to deny him his entitlement to continued A and S benefits. First, a failure to go to the facility for treatments is not an "affirmative" demonstration of support for the strike, as is required in *Emerson Electric Co.*[5] Second, Lake's testimony established that he did not carry a picket sign, and that his visit to the picket line was social; therefore, it does not establish that Lake supported the strike. Since there is no other evidence of strike support prior to Lake's recovery, we reject the Administrative Law Judge's conclusion that Lake's January 13 visit to the picket line disqualified him from further A and S benefits. As the evidence here is insufficient to make a final determination, we leave to the compliance stage the question of whether Lake was medically able to return to work shortly after January 20, as he testified, or at an earlier time.

Robert Ravert

At the beginning of the strike, Ravert was on sick leave with three broken ribs and a fractured shoulder blade. He received a work release from a local doctor on March 24.

The Administrative Law Judge concluded that the only clear evidence of Ravert's ability to return to work was his March 24 work release. She therefore concluded that Ravert's eligibility should end as of that date. However, it appears from the record that Ravert may have been medically able to return to work before the time that he obtained the release from his doctor. Ravert's own testimony suggests that Ravert may not have seen his doctor for several weeks prior to picking up the release, and that he may have picked up the release on March 24 as a matter of convenience because the strike was ending. Thus, we leave to the compliance stage the question of when Ravert was medically able to return to work.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Texaco Oil Company, Casper, Wyoming, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

Substitute the following for paragraph 2(a):

"(a) Make whole the employees listed in the section of this Decision entitled 'The Remedy,' in the manner set forth therein, as modified by the Board's Decision, by paying to each whatever sickness and disability or occupational illness and injury benefits were due them during the period January 8, 1980, to April 1, 1980, with interest."

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: This case was heard in Casper, Wyoming, on December 17, 1980.[1] Charges were filed on May 10 by Michael L. Wergin and on June 2 by Robert G. Ravert. A complaint was issued July 25 alleging that Texaco Oil Company, herein called the Company or Respondent, interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by Section 7 of the Act by, on or about January 8, suspending sickness and disability payments to five employees; and that by engaging in such conduct and acts because of the Company's employees' membership in and activities on behalf of the Union, Respondent did discriminate and is discriminating against its employees for the purpose of discouraging membership in a union in violation of Section 8(a)(3) and (1) of the Act. Respondent admits in its answer that certain sick and disability payments were terminated, but denies that such action was unlawful or in any way resulted in a violation of the National Labor Relations Act, as amended, herein called the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which were filed on behalf of the General Counsel and the Company on or about January 19, 1981, have been carefully considered.

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[5] We note in this regard that any attempt by Lake to continue his treatments would likely have been futile; Robert Ravert, another of the six discriminatees, attempted to enter the facility for his medical treatments during the strike, and was refused entry by Respondent.

[1] All dates hereinafter are in 1980 unless otherwise indicated.

Upon the entire record, including especially my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company is an Illinois corporation with an office and place of business in Casper, Wyoming, herein called the Casper refinery, which is engaged in the processing, nonretail sale, and distribution of petroleum and related products. During the course and conduct of its business at Casper, the Company annually sells and distributes goods and materials valued in excess of $50,000 to points and places outside the State of Wyoming. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Oil, Chemical and Atomic Workers International Union (OCAW), and its Local No. 2-230, herein individually and jointly referred to as the Union, are admitted to be, and I find that they are, labor orgenizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union and Respondent have, since the 1930's, maintained a bargaining relationship. The Union represents a unit of approximately 160 employees. On January 8, at approximately 3 p.m., an economic strike commenced at the refinery and lasted until March 30, when the employees began returning to work at 11 p.m.[2]

On the day the strike commenced, the Company informed the Union that accident and sickness benefits were being terminated when the strike began.

B. *Provisions of Applicable Benefit Plans*

Article XV of the applicable collective-bargaining agreement provides that, if a work stoppage, defined as covered by the agreement, occurs, "[A]ll obligations imposed upon the parties to this Labor Agreement will be suspended with the commencement of such strike and shall continue to be suspended, unless and until it is mutually agreeable to both parties to reimpose said obligations." The contract further provides in article VIII, section 2, that the accident and sickness benefit plan is to be incorporated into and made a part of the collective-bargaining agreement subject to all the provisions of the plan which will determine "all the questions arising under and in connection with the plans, except that the Company agrees that it will not voluntarily discontinue, change or modify such PLANS during the term of this Agreement in such a way as to decrease the benefits under said PLANS to any employee covered by this Agreement."

The details of the plan itself are contained in a booklet entitled "Accident and Sick Benefit Plan."[3] An employee qualifies for accident and sick benefit payments after 1 year of employment. The amount of benefits received is dependent upon the completed years of service. The plan encompasses all regular employees of Texaco who are located within the United States,[4] who are absent from work because of illness or accident. The individuals involved in this case were all described as receiving benefits for nonoccupational illness or injury. They had been receiving payments under the plan before the strike commenced and had their accident and sick benefits terminated at the commencement of the strike. Those employees are: Peter J. Gottfried, Michael L. Wergin, William B. Noell, John Vin, James T. Lake, and Robert G. Ravert. It appears from the record that these were the only unit members who were receiving accident and sickness benefits at the commencement of the strike. All other employees in the unit apparently participated in the strike.[5]

The contract negotiation meeting of January 8, 1980, was memorialized by the Company in a memorandum submitted as Respondent's Exhibit, and contains the following statements:

> Upon commencement of a strike, all A & S benefits will be discontinued, except in those cases involving industrial accident or injury. A & S benefits will be continued to those employees who are disabled due to industrial injury until medically released by their doctors or until expiration of their benefits in accordance with the Plan's benefit schedule, whichever occurs first.

C. *The Recipients of Accident and Sickness Benefits*

1. Peter J. Gottfried

Gottfried, a union member, had an ongoing chronic illness, rheumatoid arthritis. In December 1979, while vacationing in California, he sought treatment from a rheumatologist, a physician who specializes in this disease.[6] On or about December 22, Gottfried contacted F. M. Chaney, the personnel director of Respondent's Casper facility, an admitted supervisor. Chaney instructed Gottfried to pursue his consultations with the specialist; to follow the prescribed course of treatment; and to take all the time necessary. On or about December 26 or December 28, 1979, Gottfried again called Chaney and informed him he would be unable to finish the prescribed course of treatment within the allotted vacation time and would have to be placed on sick leave, which was permitted by the Company. Gottfried remained in California receiving the treatments prescribed by the rheumatologist until January 6 or 7, when he returned to Casper and resumed treatments under his own physician. Upon his return to Casper, he telephoned the Company and asked to speak to Chaney, who was unavailable; therefore, he spoke to a Mr. Mathis and informed him that he was going to consult his local physician prior to returning to work. Gottfried believes the telephone conversation occurred on or about January 7. Gottfried saw his personal physician in Casper on January 30, and received another treatment which was apparently an injection, described as gold salts therapy, and was told he was responding well to the treatment. His physician informed him that he could return to work when he "felt like it."[7]

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[2] It is unrefuted that the strike was an economic strike occasioned by the failure of Respondent and the Union to reach agreement during negotiations which commenced pursuant to a provision in the contract for reopening the agreement.

[3] Only the accident and sickness benefit plan is involved in the instant proceeding.

[4] With a stated exception not herein pertinent.

[5] There is no evidence indicating that any other hourly employees were not represented by any union or were represented by a bargaining agent other than the OCAW. Furthermore, there was no indication as to whether any unrepresented or supervisory employees were eligible for accident and sickness benefits and did or did not receive any payments under the plan.

[6] It is unrefuted that there are no rheumatologists in Casper, Wyoming.

Shortly after the strike commenced, Gottfried again tried to contact Chaney telephonically to tell him about the medical treatment, but was unsuccessful. Gottfried decided that, because of the strike, there was no use in continuing his attempts to contact Chaney; he did not think it was necessary until he had received sufficient information from his own physician to relate to the Company a more definitive indication of his medical status.

Gottfried received payments for sickness and disability under the plan administered by Respondent until January 8, when all payments terminated. Gottfried did not protest to Texaco when his accident and sickness benefits were terminated in January at the commencement of the strike because he did not think it would do any good. Gottfried also did not attempt to make any reports after his unsuccessful attempt to call Chaney. Gottfried's failure to report was done with the admitted knowledge that the Company had an absentee policy but he does not interpret that policy as requiring day-to-day reporting while an employee is on sick leave. During the week of February 11, Gottfried felt well enough to take part in the strike and he commenced picketing. The picketing was engaged in pursuant to his doctor's instructions, who told him to go back to work or to assume picket duty when he felt like it. As soon as Gottfried felt well enough to go back to work, he actively supported the strike, feeling it was an obligation. Gottfried testified that he conscientiously could never cross a picket line, he would have to show some support for the strike. Gottfried has never crossed a picket line.

Respondent, in its brief, argues that there was no significant difference in Gottfried's arthritic condition from the time he went on vacation to his return to Wyoming on January 8, and, therefore, he should be considered ready to return to work and not eligible for accident and sickness pay. This argument is considered to be without merit. Respondent unrefutedly paid Gottfried accident and sickness benefits until the strike commenced. The obligations to ascertain Gottfried's ability to return to work and his willingness to do so remained the same, and it cannot now be argued that he never qualified for accident and sickness payments if Respondent had never previously questioned the propriety of his receiving such benefits, as demonstrated by its willingness to pay accident and sickness payments until the strike commenced. Accordingly, Gottfried's testimony that he was available for work on February 11 will be considered dispositive of when he was eligible to return to work, and his failure to do so will be construed as an affirmative showing of support for the strike. Respondent admitted that it never inquired if Gottfried supported the strike.

2. Michael L. Wergin

Wergin, a union member, commenced employment with Texaco in 1971. On or about the evening of January 6, he went on sick leave because he injured a knee. He underwent knee surgery. On or about February 7,[8] he was released by his doctor. Approximately 2 weeks later, he commenced picketing. Wergin received sickness and disability payments for the period preceding the commencement of the strike, which were terminated on January 8. He did not receive any payments for the period subsequent to the commencement of the strike. Wergin admitted that he did not report to work after he was released from the doctor because he decided to honor the picket line and to support the strike. He did not report his release for work to the Company at the time received because of the strike and his decision to participate therein.[9]

Wergin began picketing on or about February 21 and he continued to picket for the duration of the strike whenever his turn came up in the picketing rotation. Also during the strike, Wergin found a regular job, which he currently holds, at Anexter Mine Supply. The date he started working for Anexter Mine Supply is not a matter of record. There is no indication that he was ready to work immediately after his release on or about February 7 or prior to his commencement of picketing on or about February 21. Accordingly, his change of employment to Anexter Mine Supply is not found to demonstrate overt support for the strike prior to February 21 when he actively began to picket.

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[7] Gottfried had informed the Company on the day of the strike, when he returned from California, that he had to have an appointment with his own doctor to undergo the treatment recommended by the specialist in California. There was no indication as to why the appointment was held several weeks after his return, whether it was pursuant to doctor's instructions or caused by other factors. Respondent seeks to infer that the delay was occasioned by Gottfried's assumption that he was on strike and there was no need to rush until the strike was over. This inference is insupportable because there was no evidence to indicate that Gottfried knew that the strike would last until January 30.

[8] The witness stated it was either February 7 or 10 that he was released by his doctor.

[9] Wergin is one of the Charging Parties. He signed a charge that was prepared for him, apparently by some union personnel. These facts are inadequate to support a finding that the filing of the charge by Wergin or any other individual was in contravention of the strike settlement agreement which the Union executed and contained a provision for withdrawal of all unfair labor practice charges by the Union. There was no showing that the Union did not withdraw all charges it previously filed, pursuant to the agreement, or that any of its activities on behalf of Wergin were not consonant with its duties of fair representation to its members or were in contravention of the strike settlement agreement.

3. William B. Noell

Noell, a current employee of Texaco, has been an employee of Respondent for 34 years. Noell, a union member, underwent an operation in November, the results of which led to the determination that he had cancer and he underwent therapy for that illness. The doctor released him to return to work on March 24; however, he never joined the picketing or even visited the picket line on the advice of his doctor who informed him that he should concentrate on his serious illness and stay away from the strike and the plant until she advised differently. He was never requested by the Union to picket. He did receive strike benefits as did all the other employees, including those discussed herein. He did not report for work when he was released because he decided to honor the picket line and support the strike. Noell has supported every strike that occurred at Respondent since his employment in 1950.

During the course of his illness and the treatment prescribed therefor, Noell kept in contact with the Company's nurse, Wareen Pierce. Sometimes the nurse called him and sometimes he called the nurse. He believes the contact was more or less out of her friendship with him. Respondent contends that the calls were made consonant with the Company's policy of keeping them informed of an employee's medical condition during his disability. Respondent argues that the obligation to keep the Company informed remains in effect during the strike and that an individual employee's failure to abide by that obligation was arguably an indicia of support for the strike. This argument will be considered hereinafter. The Company never inquired if Noell did support the strike.

4. John Vin

Vin, a union member, was also a long-term employee of Texaco, commencing his employment in September 1950. On January 8, he was on sick leave. Initially, his illness was the flu, but when he went to the doctor they found that he needed a cataract operation which was performed on December 13, 1979. He was still on sick leave on January 8. He was able to go back to work sometime after January 8, but did not return to his job because of the strike. When he was released by his doctor sometime in the latter part of January to return to work, he commenced picketing. He telephoned the nurse, since he could not cross the picket line, to inform the Company that he had been released by his doctor and could return to work. He does not recall when he called the nurse.[10]

Inasmuch as Vin and counsel for the General Counsel had the most appropriate access to Vin's medical records, and the Company had records which may have recorded his reporting of the release for work, and all failed to demonstrate the extent of any entitlement to accident and sickness benefits subsequent to January 8, it is concluded that his entitlement to such benefits after January 8, if any, should be determined at the compliance stage of these proceedings.

5. James T. Lake

Lake, a union member, was placed on sick leave sometime in the latter part of December due to low back pain. He was being treated by the Company's doctor. The treatment consisted of some unspecified sound treatments at the Company's facility in Casper, Wyoming, plus following the doctor's directions, which included staying at home and using a heating pad until he felt like working. He received accident and sickness benefits until January 8 when they stopped. Lake was not notified by the Company that the benefits would be terminated when the strike commenced. After January 8, he was not released by the doctor. When the strike commenced, he did not go to the plant to continue the treatments, and he did not call the nurse who was administering the treatments prior to the strike or any other individual at Respondent's facility. Lake stated he stopped going in for treatments because he did not want to cross the picket line. He did not inform the Company of his decision nor did he seek approval from the Union to cross the picket line to continue receiving treatments. The Company never called Lake to ask if he supported the strike. Lake stated that, if he made any assumptions about the Company's attitude, it was that they did not care what he did if he were on strike. Accordingly, he just stayed home with his heating pad and did not seek treatment elsewhere because he did not consult another doctor who could direct him to a place where he could continue the treatments.

Lake opined that he could have returned to work sometime after January 20. He began picketing sometime after January 20. Prior to January 20, sometime shortly after the strike commenced, he did stop by the picket line in his car. He does not recall, though, if he got out of his car; he thinks he probably did. He did not carry a picket sign, but he did talk to several of the picketers. He believes that the visit was approximately a week before January 20, which would be about January 13. Lake did receive the $150 check as part of the strike settlement as did all the other employees involved herein.

It is concluded that Lake's failure to continue seeking treatment by refusing to cross the picket line cojoined with his appearance at the picket line on or about January 13, where he stood, he believes, outside his vehicle and talked with some of the picketers, constituted public support of the strike activities, and constituted, as of January 13, a manifestation of public support for the strike sufficient to disqualify him from receipt of accident and sickness benefits after January 13. It is therefore concluded that Lake is entitled to receipt of accident and sickness benefits he would otherwise receive from January 8 through January 13, had it not been for the activities of other unit employees.

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[10] The witness was confused as to the exact time the release was obtained, testifying initially that there was a release sometime around December 18, 1979, but since the cataract operation was December 13, 1979, and he stated he was released from the hospital December 16, 1979, it appears unlikely that he was ready to return to work on December 18, 1979, and failed to do so. Inasmuch as Respondent filled out documents indicating that accident and sickness benefits were due and owing through January 8, it is concluded that the witness' later testimony that the doctor approved his return to work sometime in the latter part of January when he commenced picketing is most probably accurate.

6. Robert G. Ravert

Ravert had worked for the Company approximately 13-1/2 years and had been a union member for the entire duration of his employment by Respondent. On November 3, he was involved in an accident away from work where he suffered three broken ribs and a fractured shoulder blade. Accident and sickness benefits were paid by Respondent from November 3 through January 8, 1980. Since January 2 or 3, he was receiving treatments almost daily thereafter from the nurse at Respondent's facility, until January 8, when the strike commenced. He did receive a treatment on January 8 and noted that the strike had begun when he was leaving the premises after receiving the treatment.

Ravert requested permission from the Union to continue receiving the treatments from Respondent, and the Union granted his request. When Ravert went to Respondent's facility to continue receiving treatments, a gateman and guard stopped him, telephoned someone at the facility, and refused to permit him to enter. This refusal on the part of Respondent's employees to permit Ravert to enter for a continuation of treatment requires that his termination of treatments during the strike be considered differently from Lake's actions, where he never attempted to continue treatments and was not denied access to the facility.

Ravert did visit the picket line once, at an unspecified date, but it was not shown that he got out of the car or in any way demonstrated public support for the strike.

Ravert was continuing medical treatment sometime after the strike commenced from a Dr. Roussalis, who gave him a return to work release dated March 24, 1980. The reason the release to return to work was obtained that day was that Ravert's wife had an appointment with the doctor on that day, so he went along to obtain the release. He was unclear whether it was given to Respondent at any time thereafter. Ravert did not participate in the picketing before or after March 24, 1980. It was stipulated that Ravert's personnel file contained two payroll authorization forms for leaves of absence and separation. The first form was dated December 14, 1979, and indicated that he was granted full accident and sickness benefits from November through December 31, 1979, with the date of return to work unknown.

The second payroll authorization form, dated January 17, stated, "[C]ontinue full accident and sickness benefits from 1-1-80 through 3:00 p.m. 1-8-80; employee on strike at 3:00 p.m., 1-8-80," and "date of return to work unknown." The record is unclear as to whether Ravert remained physically disabled from working during the duration of the strike. However, the personnel records clearly demonstrate that his benefits were terminated because of the strike activities of other employees. It is also clear that Respondent at no time throughout the duration of the strike inquired when Ravert would be able to return to his duties and refrained from making such a determination and did not state any reasons for its failure to do so. The failure of Respondent to permit Ravert on the premises to continue treatments precluded by its own actions the Company from having a fair assessment by its own medical staff as to when Ravert would be ready to return to work. Accordingly, the only clear evidence of record that Ravert was released to return to work was dated March 24, and it is found that entitlement to accident and sickness benefits terminated on March 24, 1980.

Ravert, like Wergin, also filed a charge concerning his loss of accident and sickness benefits. Ravert stated that he felt that he should have been paid his premiums and was inquiring about the propriety of the termination of such benefits. One of the individuals he talked to was Ralph W. Newman, chairman of the workmen's committee for the Local of the Union. As was the case with Wergin, there was no clear showing that the Union recruited Ravert or otherwise acted improperly so as to abrogate any of the employees' rights to seek redress through the instant proceeding. In fact, Newman credibly testified, that during the negotiations of the strike settlement, the Union stated that it was willing to withdraw the charges alleging unfair labor practices by Respondent for failure to pay accident and sickness benefits, but stated that they would continue to assist the membership if they wished to file charges alleging violation of the Act for Respondent's failure to pay them their accident and sickness benefits.[11]

The strike settlement agreement executed March 29, 1980, between Respondent and the Union states as follows:

> It is further understood that: (1) Each party will dismiss any and all litigation now pending against the other or its agents, i.e., injunctions, damage suits, etc. (including arbitrations, unfair labor practice charges, lawsuits and grievances related to any of the benefit plans); (2) that such dismissal will be at each party's own cost; and (3) that it is agreed that no new litigation growing out of or related to the strike will be filed.

The strike settlement agreement further provides, under the section entitled "Accident and Sickness Benefits":

> It is understood that employees who are unable to report to work due to sickness or accident which commenced after the strike began will be eligible

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[11] A memorandum memorializing the negotiation meeting for strike settlement dated March 24, 1980, states as follows:

> The Union stated that they cannot bargain away an employee's individual rights for a $150 lump-sum payment. If an employee, on an individual basis, wished to file an NLRB charge or grievance on the A & S benefits lost during the work stoppage, would an employee have the right to do so? Management advised the Union that any employee on an individual basis could do so by law. It must be pointed out, however, that the Company would take a dim view of our bargaining relationship if any faction of the Union, local or international, were involved in such a complaint after the culmination of an agreement. Management would want this understood before any agreement is reached. Upon signing the agreement, the Union would be precluded from representation in any form or manner.

Newman stated that the Union was not representing these people, but was assisting them and that Newman was at the hearing on his own and not as a union representative. As the memorandum indicates, the individual employees retain the right to file charges which they have done so in this proceeding, and the evidence does not adequately show that there was any basis for making a finding as to whether the Union did or did not abide by the strike settlement agreement as reflected in the memorandum quoted above.

> for A & S benefits beginning with the termination of the strike, provided satisfactory evidence of disability is established, except that the first scheduled work day after the strike ends will serve as the customary 1-day waiting period in accordance with the terms of the Company's Accident and Sick Benefit Plan. In addition, for employees who were disabled before the strike began and were receiving A & S benefits, such benefits shall be resumed at the time the strike is officially discontinued if satisfactory evidence of continuing disability is established.

This document was signed March 29, 1980, by A. K. Sherer, acting plant manager, the chairman of the workmen's committee, Ralph Newman, the president of Local 2-230, John J. Kennedy, the International representative, Ronald D. Holloway, and a workmen's committee of four individuals. As Administrative Law Judge Ricci found in his Decision in *Emerson Electric*,[12] a contention that the settlement agreement requires dismissal of the instant complaint is without merit for the public right supersedes the private agreement. Furthermore, the language of the agreement does not clearly abrogate the rights of union members or other employees from filing charges. There is no explicit waiver of these rights.

D. *Discussion and Conclusions*

The Board, in *Emerson Electric Co., supra*, held that termination of sickness and accident benefits to employees who were physically unable to work on and after the date the strike commenced because other employees went out on strike, immediately upon commencement of the strike, was violative of the Act on the basis of the reasons given by the then Chairman Fanning's dissent in *Southwestern Electric Power Company*, 216 NLRB 522, 523 (1975), which states as follows:

> The Respondent takes the simplistic position that, as wages "under the law" are not continued for strikers, they are not continued for those on continuing sick pay unless the recipients disavow the strike. In essence, my colleagues agree. This ignores Section 7 and the right of an employee to join in or refrain from concerted activity. Granted, these employees on sick leave were entitled to no wages once their excused absences expired and they failed to return to work. It is a far cry for this Board to require that they disavow legal strike action by their Union during their sick leave in order to receive their sick pay. Not only is it contrary to the statute, but it lacks support in Board precedent. Cases where the Board has sanctioned the discharge of presumed strikers in the context of strikes in violation of no-strike provisions are inapplicable.
>
> In short, these employees had a Section 7 right to refrain from declaring their position on this strike while they were medically excused. That they exhibited some strike support after medical release, and testified that if physically able they would have joined the strike, is irrelevant in my view. To the extent, however, that some evidenced strike support by visiting the picket line and/or picketing before medical release, I would limit the amount of continued sick pay to the period ending with the date of such supportive action.

In overruling the inconsistent holdings of *Southwestern Electric Power Company, supra*, the Board stated, in *Emerson Electric Co.*:

> Accordingly, we now hold that for an employer to be justified in terminating any disability benefits to employees who are unable to work at the start of a strike it must show that it has acquired information which indicates that the employee whose benefits are to be terminated has affirmatively acted to show public support for the strike. [246 NLRB at 1144.]

The fact that the Company herein determined to terminate all accident and sickness benefits prior to the commencement of the strike does not abrogate the efficacy of the *Emerson Electric* case decision nor does it result in a determination that the decision was for a proper motive and therefore cannot be found violative of Section 8(a)(3) of the Act. As then Board Member Fanning indicated in his dissent in *Southwestern Electric Power Company* , the employee has the right to determine if he was going to join his counion members in their decision to withhold their services by joining in the strike. An individual who is on sick leave prior to the commencement of the strike and continues to be disabled to perform his work duties cannot be said to have ceased his work in connection with a current labor dispute and consequently cannot be considered a striker.[13]

As the Court recognized in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 255, 256 (1939):

> The conduct thus protected is lawful conduct. Congress also recognized the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands.

Therefore, it is concluded that the six employees named above did not cease work as strikers, but were deemed unable to work due to sickness and disability and, until they were afforded an opportunity to exercise their right to determine if they were going to cease work or continue work, the presumption on the part of Respondent that they exercised their right of choice or would be treated as if they had exercised their right of choice deprives them of their options guaranteed under Section 7 to join or refrain from joining others in protected activity. An individual who is receiving sickness or disability payments when a strike commences, by definition, is not ceasing to withhold services as are the strikers, and therefore must be afforded the protection of Section 7 to exercise his option of joining or refraining from joining the strikers. By terminating the sickness and disability payments, Respondent in fact presumed such an election, based on the actions of the other employees.

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[12] *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), citing *National Licorice Company* v. *N.L.R.B.*, 309 U.S. 350 (1940); *Amalgamated Utility Workers (C.I.O.)* v. *Consolidated Edison Co. of New York*, 309 U.S. 261 (1940); *Agwilines, Inc.* v. *N.L.R.B.*, 87 F.2d 146 (5th Cir. 1936); *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332 (1944); and *Harold A. Boire* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America* [*Pilot Motor Freight Carriers, Inc.*], 479 F.2d 778 (5th Cir. 1973).

[13] Since individuals who have not announced their support for the Union who were on sick or disability leave prior to and continuing during the strike cannot be said to have voluntarily determined to withhold their services and to strike, the cases dealing with the cessation or continuation of benefits to strikers are held inapplicable.

The fact that in the instant case Respondent notified all employees that their benefits would be terminated at the commencement of the strike does not present a situation so distinguishable from *Emerson Electric* as to warrant the application of a different standard of behavior warranting a different result. In the instant situation, the motivating factor for the termination of the payments was the strike. Work would have been scheduled for all hourly employees except for the strike. Respondent, admittedly, did not ascertain whether all employees supported the strike. Furthermore, Respondent failed to demonstrate that the situation had such a potential for violence or that the strikers' conduct was so egregious as to warrant abrogation of the normal protections afforded under Section 7 of the Act. Furthermore, even if some of the strikers' activities were shown to be egregious, that would have been subsequent to the deprivation of the benefits and also is deemed irrelevant in the instant situation since the workers could not be termed to be strikers until their position regarding the strike was ascertained or they publicly demonstrated their support for the strike. There was no showing that the strikers or the Union caused Respondent any concern that the continuation of sickness and disability payments would have resulted in the lengthening of the strike or caused objectionable activity. Accordingly, it is concluded that Respondent has failed to present a valid business reason for abrogating these employees' rights to election under Section 7 to join or refrain from joining the strike for valid business reasons that outweigh the injury done to these employees by denying them such an election. It is also concluded that there is a direct link between the decision not to schedule work, not to pay sickness and disability payments to these employees solely because of the strike, which is a protected concerted activity.

Initially, Respondent argues that under the Texaco accident and sickness benefit fund, which was negotiated into the labor agreement, Texaco has reserved the right to terminate accident and sickness benefits and to require the employee to come forward and present satisfactory evidence of entitlement to such benefits. The notice posted at the plant and distributed to all the employees provides, as pertinent:

> 1. If you are unable to report for work as a result of accident, illness or for any other reason, you must call your supervisor, or the Night Foreman, when applicable, as early as possible and give the reason for the absence, the expected duration of the absence, and any other information the supervisor may need to plan for coverage for your vacant shift.
>
> 2. If you are unable to contact your supervisor or the Night Foreman, you may contact the Employee Relations Department. If you are unable to contact any of these, you must leave a number where you may be reached.
>
> 3. You should personally report your absence unless you are physically unable to do so. If you are unable to make the call yourself, your spouse or other family member may call for you following the procedure outlined in 1. and 2. above.
>
> 4. Failure to report an absence, or failure to properly notify supervision, will result in the absence being considered as AWOL.

At the inception of the various illnesses of the six employees here under consideration, they abided by the reporting of absence procedures as outlined in the above-quoted memorandum, which is Respondent's Exhibit 1. There is no showing regarding a frequency of reporting requirement being imposed by the supervisors or other individuals to whom the initial reports were given.

The argument that the negotiation of accident and sickness benefits into the agreement permitted obviating such terms of the provision in the benefit plan[14] is unpersuasive. The rules governing the plan provide:

> 4. Illness or accident occurring when an employee is not on duty will not serve to disqualify such employee for benefits under this plan except where such illness or accident occurs while he or she is on leave of absence granted for military service or leave of absence granted for personal business or layoff or vacation.
>
> * * * * *
>
> 12. This plan is entirely voluntary on the part of the Company and benefits hereunder shall not be subject to assignment, garnishment, attachment, or execution. Neither shall this Plan be construed to give any employee the right to be retained in the service of the Company or entitle him or her to benefits hereunder after his or her separation from service.
>
> 13. In the application of this Plan, the records of the Company shall be conclusive in determining an employee's length of service, salary, and wages.
>
> 14. The decision of the Company shall be final and conclusive with respect to every question which may arise relating to either the interpretation or administration of this Plan.

All employees are covered by the plan, and the rules do not create special exceptions for strikes or strikers.

That the Union agreed to article VIII, section 2, of the applicable agreement prior to seeking reopening of the contract does not denote an express waiver of employee rights to accident and sickness benefits. That section of the contract provides that the accident and sickness benefit plan is incorporated "and made a part of this Agreement subject to all the provisions of the Plans which we will determine all the questions arising under it in connection with the Plans, except that the Company agrees it will not voluntarily discontinue, change or modify such Plans during the term of this Agreement in such a way as to decrease the benefits under said Plans to any employee covered by this Agreement."

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[14] Jt. Exh. 5.

The Company's position that this provision is a waiver of employees' rights because the protections of the agreement were abrogated by the request for reopening and the strike pursuant to the reopener clause is unpersuasive. It is well established that any waiver of rights protected by Section 7 of the Act must be clearly and explicitly expressed. And there was no showing that such clear explicit expression had been agreed to by the Union. The Company acknowledges that, if any of the six employees involved herein called the Company and disavowed the strike, the entitlement to benefits may have been preserved. The *Emerson Electric* decision expressly discontinued this requirement which Respondent now seeks to reinstitute.

It is further found that the Company's argument that the failure of the employees to keep the Company informed as to their status on disability was in contravention of company policy, that the company policy was a proper requirement that the Union bargained away, and that the failure to meet this bargained-away requirement made it a matter of the Company's right to terminate the accident and sickness benefits and to refuse to pay them after the failure to declare they were disabled at the commencement of the strike is unpersuasive. As previously indicated, the company policy does not clearly describe the frequency of such reporting but does state that such reporting is necessary for coverage of vacant shifts. During the strike, the need for continued reporting may have been obviated under the provisions of section 1 of the notice posted by the Company and the fact that the Company has not established a clearly expressed procedure for notifying the Company in the event of a continuing absence in any or all of the cases here under consideration, it cannot be assumed that in each of the cases here involved the employee failed to comply with the company policy. In this proceeding, it was shown that all six employees totally qualified to receive accident and sickness benefits. There was no clear showing that there is a set procedure for the retention of eligibility in the event of a strike under the reporting of absence policy or otherwise, that was explicitly violated by all or any of the six employees whose benefits were terminated.

In fact, the Company did not choose to suspend the accident and sickness benefit plan as to all employees, as previously indicated; it terminated the accident and sickness benefit plan only to those employees whose injuries were not industrial injuries. As a practical matter, the decision in *Emerson Electric* does not prevent the Company, as indicated in the contract, from terminating accident and sickness benefits during the strike.[15] The Board's decision, rather, requires the Company to follow a certain procedure to insure the protection of Section 7 rights prior to making the determination regarding the individual employees' qualification for these benefits. According to the testimony of Floyd M. Chaney, the Company made its decision to terminate the benefits to the six employees predicated upon the assumption that the employees supported the strike. It was this basis for the termination of a particular employee's benefits, i.e., the assumption that they supported the strike, that was found objectionable in the *Emerson Electric* decision.

Respondent also argues that to require the Company to continue paying the strikers accident and sickness benefits would require the Company to finance the strike. This argument is not persuasive because *Emerson Electric* only requires the Company to ascertain if the employees receiving accident and sickness benefits do, in fact, support the strike. The fact that the Company could pick and choose whom it wishes to retain as beneficiaries under the accident and sickness benefit plan as indicated by its statement made January 8 that it would continue paying a certain class of employee beneficiaries demonstrates that it could similarly ascertain which employees were in fact supporters of the strike rather than assuming that all employees did, in fact, support the strike. The failure to ascertain what the employees' positions were with regard to the strike, cojoined with Chaney's admission that if an individual wished to return to work he would permit them to return to work, and considering that these employees could not be considered willfully withholding services while deemed medically unable to work, or until they publicly demonstrated support for the strike, leads to the imposing of sanctions because other employees in the unit went out on strike, an action found violative of the Act in the *Emerson Electric* decision. Inasmuch as the *Emerson Electric* and *Southwestern Electric* cases found the employees have a Section 7 right to refrain from revealing their strike sympathies when sick or disabled, there must be a clear, unmistakable, and unequivocal waiver of such right to refrain from revealing their sympathies. See, for example, *Keller-Crescent Company, a Division of Mosler*, 217 NLRB 685 (1975), enforcement denied 538 F.2d 1291 (7th Cir. 1976).

That Respondent indicated that the Union may discipline a member if they acted to hinder a strike does not, even absent a union-security provision in the collective-bargaining agreement, infer that the employees who join the Union did so voluntarily and, therefore, were inferentially in support of the strike. The Board, in the *Emerson Electric* decision, specifically overruled this reasoning in the *Southwestern Electric Power Company* decision. As then Chairman Fanning noted in his dissent in the above-quoted portion, "it is a far cry for this Board to require that they disavow legal strike action by their union during their sick leave in order to receive their sick pay." For that reason, the Board, in *Emerson Electric, supra*, requires the employer to first acquire information indicative of the employees' public support for the strike prior to the termination of sickness and disability benefits.

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[15] As provided in art. XV of the agreement, "should the union exercise its right to strike as provided under 2(b) above, all obligations imposed upon the parties to this Labor Agreement will be suspended with the commencement of such strike and shall continue to be suspended, unless and until it is mutually agreeable to both parties to reimpose said obligations."

The argument by Respondent that the history of 100-percent support of the membership previously in other strikes of the bargaining unit's decision to strike, cojoined with the admission by the six employees involved herein that they would have honored the picket line had they not been sick or disabled, and the fact that work was available but these employees did not seek it, does not modify or abrogate the requirements of *Emerson Electric*.[16] As indicated above, the violation of the Act as found in *Emerson Electric* is the termination of accident and sickness benefits to employees who were found to be unable to work at the commencement of the strike because other employees actively struck based upon the determination that the employees whose benefits were terminated were assumed to have ratified or supported the strike. This assumption, as admitted in the record, violates the employees' Section 7 rights to refrain from announcing their position with regard to a strike. For the above reasons, I find that Respondent violated Section 8(a)(3) and (1) of the Act by discontinuing sickness and disability benefits for the six employees from January 8 to the dates set forth above.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, found to constitute unfair labor practices, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union and its Local No. 2-230 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act by informing employees that it was withholding payment of sickness and disability and occupational illness and injury benefits during a strike, and withholding such payments from the employees named below in "The Remedy" section of this Decision for periods when these employees were not participants in the strike.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully withheld sickness disability, occupational illness, and injury benefit payments from the six employees listed during a strike at times when they were not strike participants, these employees should be reimbursed for benefits lost under these plans from January 8, 1980, the date the strike began, when these benefit payments were discontinued, until the dates shown next to the names of the respective employees: Peter J. Gottfried, February 11, 1980; Michael L. Wergin, February 21, 1980; William B. Noell, March 24, 1980; James T. Lake, January 13, 1980; Robert G. Ravert, March 24, 1980; and John Vin, Undetermined.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

The Respondent, Texaco Oil Company, Casper, Wyoming, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withholding or announcing the withholding of sickness, disability, occupational illness, and injury benefits from employees during a strike for the purpose of coercing them or other employees in the exercise of their rights to belong to a union and engage in other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Make whole the employees listed in the section of this Decision entitled "The Remedy," in the manner set forth therein, by paying to each whatever sickness and disability or occupational illness and injury benefits were due them during the period January 8, 1980, to April 1, 1980, with interest, provided that no such payment shall be due for the periods subsequent to any employee's active participation in strike activity or public support thereof.

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[16] Respondent argues that certain representations by the Union should be binding on the employees on sickness and disability leave including the fact that they did not protest the termination of the payments and that the six employees were scheduled for picket duty. These arguments overlook the fact that the Union, in its failure to protest, cannot be construed as explicitly waiving any rights and the fact that the Union scheduled the six employees in question for picket duty was done at a time preceding their ascertaining who was on sickness and disability at the time of the strike but was done weeks preceding the strike. This argument also overlooks the uncontroverted testimony that once it was learned that an employee in the unit was considered disabled or sick, or otherwise unable to work, the employee was explicitly not scheduled for picket duty nor was he required to engage in picket duty because such requirement was considered too dangerous for his safety, and the medical determination of his disability or sickness was to be respected and was, in fact, respected by the Union.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Preserve and make available to the Board or its agents, upon request, all records necessary to analyze the amount due in the effectuation of this remedial order.

(c) Post at the Respondent's place of business in Casper, Wyoming, copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 27, in writing, within 20 days from the date of Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

> WE WILL NOT withhold or announce that we will withhold payment of sickness and disability and occupational illness and injury benefits from you during a strike to discourage you or our other employees from belonging to a union or from engaging in other protected concerted activities.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the National Labor Relations Act, as amended.

WE WILL make the following employees whole, with interest, for sickness and disability or occupational illness and injury benefit payments due them from the time such payments were withheld until their recovery and active participation in strike activity or the resumption of benefit payments, whichever is earlier:

Peter J. Gottfried	James T. Lake
Michael L. Wergin	Robert G. Ravert
William B. Noell	John Vin

TEXACO OIL COMPANY

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[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Magnesium Casting Company, Inc. *and* **United Electrical, Radio and Machine Workers of America (UE) Local 262.** Case 1-CA-16886

November 30, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 15, 1980, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The facts, as more fully set forth by the Administrative Law Judge, show that Respondent hired Lawrence Thomas as a die-cast machine operator in October 1978. In March 1979, Thomas was the leader of a brief work stoppage. In addition. Thomas openly distributed union literature at Respondent's plant. Throughout the spring and early summer of 1979, Thomas requested a transfer to the die maintenance department. Respondent granted Thomas' request and transferred him in July 1979. Respondent laid off Thomas on November 27, 1979. The layoff occurred only 1 day after Thomas engaged in protected activity by again distributing leaflets to Respondent's employees.

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board stated that in 8(a)(3) discharge cases the General Counsel must first "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" and "[o]nce this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."

Here, the evidence produced by the General Counsel, and cited by the Administrative Law Judge, warrants an inference that Thomas' protected conduct caused his discharge. Thus, Thomas' open union activity, the precipitous nature of the layoff, and Respondent's earlier unlawful conduct lend support to establishing the General Counsel's *prima facie* case. Nonetheless, we find that Respondent rebutted the General Counsel's evidence and met its burden, under *Wright Line*, of demonstrating that the layoff would have occurred even absent Thomas' protected conduct. As recited more fully by the Administrative Law Judge, Respondent, in support of its economic defense, clearly established that: (1) Thomas received a requested transfer subsequent to his protected activities in March 1979; (2) the first shift in the die maintenance department where Thomas worked had regularly been staffed by one employee who was senior to Thomas; (3) there was a need for a layoff in die maintenance and Respondent, since June 1979, had been laying off employees. In fact, Thomas was only 1 of 33 employees laid off during Respondent's reduction of its production and maintenance work force; (4) the layoff was made in conformity with preexisting and customary standards; and (5) no one was hired to replace Thomas.[2]

The Administrative Law Judge concluded that "the sum of Respondent's economic evidence is impressive." Nevertheless, the Administrative Law Judge concluded that Respondent's asserted defense was "pretextual."

In *Limestone Apparel Corp.*, 255 NLRB 722 (1981), we noted that "a finding of pretext necessarily means that the reasons of the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel."

Here, it is beyond dispute that Respondent's proffered economic reasons for the layoff, in fact, existed. Indeed, the Administrative Law Judge stated that "[t]he evidence establishes the need for a layoff in die maintenance." As noted, Respondent presented compellng and substantial evidence that economic conditions forced a significant cutback in its production and maintenance work force.[3]

Contrary to the Administrative Law Judge, we cannot conclude that the economic reasons were not relied upon by Respondent in deciding to lay off Thomas. Neither specific evidence adduced by

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Later, in April 1980, a promotion created a vacancy in the die maintenance department. The parties stipulated that Thomas, in April 1980, received a *bona fide*, unconditional offer of reinstatement, which he declined.

[3] Before Thomas' transfer, the die maintenance department was staffed by one worker per shift. At the time of the transfer, the department had a backlog in its work. However, when Thomas' layoff occurred, the backlog had diminished. Richard Courtois, the senior die maintenance employee who worked with Thomas on the first shift, confirmed that it was "not busy at all" in the die maintenance department at the time of Thomas' layoff.

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the General Counsel[4] nor the record as a whole warrants a finding that Respondent's economic reasons were not genuine and served only to mask Respondent's antiunion reasons. Respondent specifically established the need for a layoff in the die maintenance department—where Thomas was the least senior and least experienced employee.

Further, as previously noted, Thomas engaged in substantial protected activities in March 1979. Additionally, though not specifically alluded to by the Administrative Law Judge, Thomas' leafletting of November 26 did not constitute the first time he enaged in such activity. Rather, Thomas acknowledged that, after March 1979, he had leafletted and posted union notices on six or seven occasions at Respondent's gate as well as in the shop. However, his employment was not adversely affected by his earlier protected activities and, in fact, he subsequently received the transfer he had requested. This factor, to an extent, undercuts the General Counsel's contention that Respondent was motivated by antipathy to Thomas' protected activities, and bolsters Respondent's economic defense.

The General Counsel has the burden of proving, by a preponderance of the credited evidence, that a respondent acted on the basis of improper motivation in disciplining or discharging an alleged discriminatee. In light of Respondent's unrebutted showing that legitimate business considerations caused it to lay off Thomas, the General Counsel failed to carry the burden of proof, and thus the complaint must be dismissed as to the alleged 8(a)(3) violation in the layoff of Thomas.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Magnesium Casting Company, Inc., Hyde Park, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(a), reletter subsequent paragraphs accordingly, and substitute the following for paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Delete paragraphs 2(a) and (b), and reletter the subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT tell you to keep a low profile regarding the exercise of any of the rights described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you because you engage, or refuse to engage, in any of the protected activities described at the top of this notice.

MAGNESIUM CASTING COMPANY, INC.

DECISION

NORMAN ZANKEL, Administrative Law Judge: This case was heard before me on June 24 and 25, 1980 in Boston, Massachusetts.

Upon a charge filed on November 29, 1979,[1] by United Electrical, Radio and Machine Workers of America (UE) Local 262 (the Union), Robert S. Fuchs, Regional Director for Region 1 of the National Labor Relations Board, issued a complaint and notice of hearing on January 18, 1980, against Magnesium Casting Company, Inc. (Respondent).[2]

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[4] Unlike the Administrative Law Judge, we find no basis in the record for concluding that Respondent's reasons for selecting November 27 as the date for Thomas' layoff were "unconvincing." The Administrative Law Judge surmised that Respondent's permitting the need for layoff in die maintenance to become "critical" would demonstrate a lack of "business acumen" by Respondent's officials. However, it was not shown that Thomas' layoff was decided upon or implemented in a fashion or manner different from Respondent's other numerous layoffs. We would not—on the basis that it showed a lack of "business acumen"—question the date selected by Respondent for the layoff.

[5] We will also substitute a narrow cease-and-desist order for the broad one in the recommended Order (see *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979)), and will conform the notice accordingly.

[1] All dates hereinafter are 1979 unless otherwise indicated.

The complaint alleges that Respondent engaged in violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act). Specifically, it is alleged that Respondent interfered with, restrained, and coerced its employees by warning an employee, Lawrence Thomas, to keep a "low profile" in his union activities, and discriminatorily laid off Thomas on November 27.

Respondent filed a timely answer to the complaint. The answer admitted certain matters but denied the substantive allegations and that Respondent committed any unfair labor practice.

All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and meet material evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. I have carefully considered the contents of the briefs filed on behalf of the General Counsel and Respondent.

Upon consideration of the entire record and the briefs, and my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, a Massachusetts corporation, maintained its principal office and place of business in Hyde Park, Massachusetts, at all material times. At that location, Respondent, at all material times, has been engaged in the manufacture, sale, and distribution of castings, electrical fixtures, and related products.

In the course of its business, Respondent caused large quantities of metal used by it in its manufacturing process to be purchased and transported in interstate commerce from and through various States of the United States other than Massachusetts. During the calendar year immediately preceding issuance of the complaint, Respondent derived gross revenue in excess of $50,000 from the sales of castings, electrical fixtures and related products which it manufactured.[3]

Respondent admits, the record reflects, and I find it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The parties agree, the record reflects, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Thomas began working for Respondent on October 2, 1978. He worked continuously until November 27, 1979. On the latter date, Thomas was laid off.

Thomas worked as a die-cast machine operator until July 1979. He was then transferred, at his request, to a die maintenance job.

As a die-cast machine operator, Thomas was paid $4.69 per hour, plus an incentive rate of 125 percent. He received a $5-per-hour wage rate upon transfer. Thomas' wage rate was $5.43 per hour at the time of his layoff.

There is a distinction between die-*cast* maintenance and die maintenance. The former involves operation of die-cast machines. The latter job requires an employee to work on the dies which are placed into the die-cast machines. Thus, die maintenance work includes such functions as changing, repairing, painting, cleaning, and storing dies.

For at least 2 years before the incidents herein, only one or two employees regularly had been assigned to work in the die maintenance department. In February, a third employee, Gartman, was added to that department. Gartman worked in that department until the week ending July 22. Gartman then quit.

Throughout the spring and early summer, Thomas made several requests of Respondent's personnel manager, Ray Nichols, for transfer into die maintenance. Thomas was transferred to replace Gartman.

In March, Thomas was a leader of a brief work stoppage of the die-cast maintenance employees. Those employees stopped working to protest a change in Respondent's computation of the incentive rate and elimination of relief personnel. Thomas was a spokesman for the employees who stopped work. He met with Die-Cast Manager Mal Emack to discuss the problems.

On January 5, 1978, a Board complaint issued against Respondent. The complaint alleges Respondent had engaged in unfair labor practices in violation of Section 8(a)(1), (3), (4), and (5) of the Act. A hearing was conducted by Administrative Law Judge Abraham Frank. On November 20, 1979, Administrative Law Judge Frank issued his decision. Respondent was found to have violated the Act by engaging in unlawful interrogation; threatening employees with plant closure, discharge, and other economic reprisals; creating impressions that employees' union activities were under surveillance by Respondent; suggesting to employees that they testify in Respondent's interest at a Board proceeding; threatening employees with severe punishment if they attended a Board hearing; coercively directing employees not to sign union authorization cards; soliciting employees not to sign union cards or attend union meetings; promising economic benefits contingent on defeat of the Union's organizational efforts; promulgating and maintaining an unlawful no-solicitation-distribution rule and discriminatorily implementing it; discriminatorily discharging two leading union adherents one of whom was the principal initiator of union activity; discriminatorily suspending employees; discriminatorily giving employees less remunerative work; and denying them overtime.

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[2] The caption of an earlier case (250 NLRB 692 (1980)) bears the designation "Inc." in the employer's name. The pleadings in the instant case omit the corporate reference. Nonetheless, Respondent herein clearly is the same party as respondent in the matter decided by the Board. Assuming the earlier case caption more directly identifies Respondent, I hereby amend the name of Respondent in the instant case to read "Magnesium Casting Company, Inc."

[3] The parties stipulated to the dollar volume of Respondent's business by way of a post-trial written stipulation which is hereby received in evidence as ALJ Exh. 1.

Administrative Law Judge Frank's findings and conclusions have been affirmed by the Board.[4] Thus, the Board issued a cease-and-desist order addressed to the above violations and provided a remedy for the various instances of discriminatory conduct. Additionally, the Board ordered Respondent to recognize and bargain with the Union as exclusive representative of Respondent's production and maintenance employees. Further, the Board issued a broad proscriptive cease-and-desist order.

On November 26, Thomas, two union organizers and Leonard Lamkin distributed leaflets to employees coming to work.[5] Those leaflets announced the issuance of Administrative Law Judge Frank's decision.

Thomas testified that Plant Manager Harry C. Thornton drove by the gate during Thomas' leafleting activity on November 26. Thornton testified he did not recall seeing Thomas at the gate that day. This testimonial conflict needs no resolution. The testimony of Union Organizer Philip Mamber remains uncontradicted that Thornton and other supervisors passed through the gate when Thomas was engaged in distributing the Union's literature. Mamber's testimony is that he saw Supervisors Gangini and Herb Davis, in addition to Thornton at the gate that morning. There is evidence that Thomas met and spoke with Mamber at various times at the gate since March. Thomas solicited other employees' signatures on union authorization cards. However, that activity was negligible. He testified he signed up only three or four employees. (The Union's organizing campaign took place in 1977. See 250 NLRB 692.) This was before Thomas began to work for Respondent. Nonetheless, Thomas was outspoken at departmental meetings in his pursuit of improved safety, health, and wage issues. Nichols presided at those meetings.

B. *Interference, Restraint, and Coercion*

1. Facts[6]

It is alleged that, sometime in June, Nichols interfered with, restrained, and coerced employees by telling an employee he should keep a low profile regarding his union activities.

This allegation emanates from one of the conversations between Thomas and Nichols during which they discussed the possibility of Thomas' transfer. Specifically, Thomas testified that he and Nichols discussed those possibilities sometime in June. According to Thomas, Nichols told Thomas that transfer possibilities were good, but Thornton and Emack had reservations about Thomas being a troublemaker. Thomas asserted Nichols said, "[I]t would be in his [Thomas'] best interest if he [Thomas] were to keep a low profile regarding union activities." Further, Thomas testified Nichols said he would deny making such a statement. Finally, Thomas claimed Nichols explained the term "troublemaker" referred to Thomas' various conversations with Mamber at the plant gate.

Nichols testified he spoke with Thomas in June concerning the transfer. Nichols appeared as a witness on behalf of Respondent. He recalled speaking with Thomas in June concerning the transfer. The complete text of Nichols' testimony regarding the alleged unlawful comment follows:

> Q. (By Mr. Corcoran): Did you ever tell Mr. Thomas that the possibility for a transfer looked good but that Emack and Thornton had reservations about moving a troublemaker into die maintenance and that it was in Thomas' best interest to keep a low profile regarding union activities?
>
> A. Not *really*. Nobody's ever mentioned anything about being a troublemaker. He [Thomas] was never known as a troublemaker. [Emphasis supplied.]
>
> Q. Did you ever say *that* to Mr.—[Emphasis supplied].
>
> A. No, I didn't.
>
> Q. And you never told Mr. Thomas that you deny ever having said *that*? [Emphasis supplied.]
>
> A. No.

I credit Thomas. His account of the June conversation was direct, forthright, comprehensive, and inherently consistent. He narrated the substance of that conversation with ease and in response to the general question, "[W]hat happened next and when?" Regarding credibility, Thomas' response to my question about the subject conversation was impressive. Specifically, I asked whether Thomas had responded to Nichols' alleged unlawful motivation. Thomas answered he told Nichols that "as long as I did my job I had the right to associate with whatever people I wanted to and get involved in whatever kind of activities I felt was important to do." I consider this response entirely consistent with Thomas' description of what was said by Nichols. It bears the mark of probity. Clearly, Thomas is a vigorous union proponent. The response he claimed he gave Nichols may be expected from one whose union advocacy has been challenged. Moreover, Nichols, who testified after Thomas, was not asked to deny that Thomas responded to the alleged unlawful remark or to give a different version of Thomas' response. Thus, Thomas' account is uncontradicted.

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[4] 250 NLRB 692. At the hearing, I denied the General Counsel's request that I take official notice of Administrative Law Judge Frank's decision. On July 17, 1980, after the instant hearing closed, the Board issued its Decision and Order upon Administrative Law Judge Frank's decision. In her post-hearing brief, counsel for the General Counsel renewed her former requests. It is now proper for me to take official notice of the prior case. *Delchamps, Inc.*, 234 NLRB 262 (1978); *West Point Manufacturing Company, Wellington Mill Division*, 142 NLRB 1161, fn. 3 (1963); *Plant City Welding and Tank Company*, 123 NLRB 1146, 1150 (1959).

[5] Judge Frank found Lamkin was "the employee primarily responsible for initiating the Union's organizational drive." The Board adopted Administrative Law Judge Frank's conclusion that Lamkin had been discriminatorily discharged. Thus, the Board ordered that Lamkin (among others) be offered immediate and full reinstatement and be made whole for all losses incurred as a result of the discriminatory discharge.

[6] The recitation of facts relevant to the allegations of independent 8(a)(1) violations and those pertaining to Thomas' alleged discriminatory layoff are a composite of factual stipulations, unrefuted oral testimony, supporting documents and other undisputed evidence. For the sake of brevity, only those facts deemed material are set forth. Not every bit of evidence is discussed. Nonetheless, I have considered all of it together with all arguments of counsel. Omitted matter is considered irrelevant or superfluous.

I find Nichols vague, equivocal, and selective in his testimony of the June conversation with Thomas. Thus, as the above transcript abstract shows, Nichols answered "not really" to a multifaceted question regarding the conversation. Nichols' response then only was directed toward whether he made reference to Thomas as a troublemaker. Next, Respondent's counsel asked, "Did you ever say *that* to Mr.—"(Emphasis supplied.) Nichols' reply, "No, I didn't," is rendered meaningless because he prevented counsel from completing the question by interrupting him and because the ambiguity appearing by virtue of the italicized word creates uncertainty as to just what it is that Nichols sought to deny. Finally, Nichols ended his testimony of the conversation with a plain self-serving denial. Even the final denial was in response to a rather ambiguous question.

In its totality, Nichols' testimony of the subject conversation falls short of controverting the more lucid and straightforward version of Thomas. Indeed, careful scrutiny of Nichols' account shows he did not explicitly deny he made the alleged "low profile" comment.

In crediting Thomas over Nichols, I am not unmindful of evidence tending to show discrepancies in Thomas' testimony. Most noteworthy is Thomas' initial assertion that the only time he distributed leaflets at Respondent's gate was on November 26. During Thomas' cross-examination, he conceded his pretrial affidavit reflects he had engaged in such distribution "on six or seven occasions . . . since March. . . ." I consider this testimonial variation of slight value. It does not detract from Thomas' overall credibility. A trier of fact is not required to believe the entirety of a witness' testimony. *Maximum Precision Metal Products, Inc., Renault Stamping Ltd.*, 236 NLRB 1417 (1978). The stark specific differences in the respective presentations of Thomas and Nichols regarding the June conversation is the more accurate indicator of the relative veracity of those witnesses.

Finally, I find it plausible and likely that Nichols made the remarks attributed to him. The June conversation centered around Thomas' previous transfer requests. At the time of the conversation, Gartman, whom Thomas replaced, was still employed. Thus, whether Thomas would be transferred was still in doubt. During cross-examination, Nichols was asked whether he saw Thomas at the gate speaking with Mamber. Nichols answered, "There's a very good possibility, yes." All these circumstances make it probable Nichols would have counseled Thomas in the manner asserted by the General Counsel. Nichols virtually admitted knowledge of, and concern for, Thomas' association with Mamber. This conclusion is enhanced by reference to the Board decision of which I have taken official notice. In the earlier case, Nichols was found to have unlawfully created an impression that the employees' union activities were under surveillance. Though not dispositive of the issue, I consider Nichols' previous unlawful conduct a relevant factor in assessing his conduct herein. The Board left undisputed Administrative Law Judge Frank's conclusion that Nichols promoted Respondent's course of conduct which was held by the Board to be egregious. Such predisposition indicates that Nichols, subjectively, understood that vigorous pursuit of union activities by employees might hinder their employment opportunities. In this context, it is logical that he would have cautioned Thomas in the manner depicted by Thomas.

Upon all the foregoing, I find that, sometime in June, Nichols told Thomas he should keep a low profile regarding his union activities.

2. Analysis

The question presented by the independent 8(a)(1) allegation is whether Nichols' remark reasonably tends to have a proscribed effect. *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975); *Impact Die Casting Corporation*, 199 NLRB 268, 271 (1972). Thomas' response to Nichols reflects he was unshaken by what Nichols said. However, Thomas' reaction is irrelevant. *El Rancho Market*, 235 NLRB 468, 471 (1978).

I conclude Nichols' words impart fear that Thomas might not be granted his requested transfer because he was active on behalf of the Union. The clear implication of Nichols' comment is that continued union activities by Thomas would prevent or impede his transfer. In *Fetzer Broadcasting Company*, 227 NLRB 1377, 1380 (1977), an employer was held to have violated Section 8(a)(1) when its plant manager warned nonstriking employees they "would just be jeopardizing [themselves]" by associating with strikers or pickets. Herein, Nichols issued an analogous warning. In effect, he was warning Thomas his transfer request was in jeopardy because of his union activities. The evidence shows that, at that time, Nichols knew Thomas' union activities consisted of association with Mamber at Respondent's gate. Thus, it is virtually inescapable that Nichols' words connote a fear and apprehension that continued union activity could be detrimental to Thomas' request for transfer. Nichols' status as a supervisor and agent of Respondent is undisputed. Accordingly, his activities are imputable to Respondent.

Upon the foregoing, I find that Respondent violated Section 8(a)(1) of the Act by Nichols' telling Thomas, sometime in June, he should keep a low profile regarding his union activities.

C. *Thomas' Layoff*

1. Facts

During the morning of November 27, Emack walked through the die maintenance department. Thomas and employee Richard Courtois, Sr., were present. Courtois had been in Respondent's employ for 26 years. He had been a die maintenance employee for the past 19 years. Since his transfer into die maintenance, Thomas was being trained by Courtois.

While in the die maintenance department, Emack remarked die maintenance employees were not busy and there was not enough work to do.

After lunch on November 27, Thomas was called into Emack's office. There, Emack told Thomas he was laid off. Thomas testified, without contradiction, he asked

Emack if he could work the remainder of that week. According to Thomas, Emack rejected that suggestion. Thomas testified that Emack, instead, said his terminal checks had already been prepared. Emack indicated Thomas could leave the premises immediately, but would be paid for a full day's work.

Respondent's records reveal the existence of a heavy backlog of die maintenance work in July. As noted, Gartman quit his die maintenance job during that month. Undisputedly, Thomas had been a competent worker. His transfer request was outstanding. Apparently, the combination of these factors resulted in his transfer to the die maintenance department.

Before Thomas' transfer, Respondent began to reduce its work force. Thus, between May and November 27, the total employee complement in the production and maintenance unit was reduced from 246 to 158 employees. Thirty-three employees had been laid off between June 28 and November 27.

The amount of work required in the die maintenance department is directly proportional to that available in the die-cast department. From May through November there was a steady decline in die-cast man-hours worked. During that time, those man-hours were reduced from 1,776 per week to 717 man-hours per week.

Concurrently, the number of hours the die-cast machines were operating was reduced. Those hours were reduced to less than 600 per week from 931 hours during the week ending May 6. They sharply dropped from an average of 851 hours per week in May, to 802 hours per week in June, to 735 hours per week in July, to 623 hours per week in August, to 615 hours per week in September, to 543 hours per week in October, and to 471 hours per week in November.

On October 12, seven die-cast machine operators were laid off. At that time, a backlog of die maintenance work existed. Courtois and Thomas worked in die maintenance on the first shift. Keith Mohammed worked in die maintenance on the second shift. Courtois' seniority was the greatest. Next, came Mohammed.[7]

Thornton testified he knew of the slowdown in die-cast operations. Thornton regularly monitored Respondent's inventory. Based on his observations, Thornton "recommended" to his supervisors and departmental managers that they effectuate an increase or decrease in production. It was left to the subordinate managerial officials to implement Thornton's recommendations in the way most appropriate to them.

According to Thornton, it was not until November 26 that he personally saw the full extent of the reduction in die maintenance backlog. Thornton testified the reduction was at "a critical stage." On that date, Thornton instructed Emack to reduce the overhead in die maintenance. There is no direct evidence that Thornton specifically directed Emack on the way this should be done.

Emack made the decision to lay off Thomas. Emack testified that layoffs are made on seniority when all other factors are equal. In essence, Emack's determination who should be laid off are based on his personal judgment of overall competence of the employees. He engages in no prescribed review of records. Thus, Emack testified, "I have a pretty good idea of who the best man is."

Emack decided to lay off Thomas after consideration of abilities and length of employment of the employees in die maintenance. He particularly used the following factors as to Thomas: (a) the greater departmental seniority of both Courtois and Mohammed, (b) the fact Mohammed was the sole second-shift die maintenance employee, and (c) the fact Thomas was still in the learning stages of die maintenance work and functioned as Courtois' helper. Emack testified a review of these elements made Thomas "the logical man to go."

The record reflects Thomas had not been replaced. Only Courtois and Mohammed worked in die maintenance after Thomas' layoff until April 1980. Then, Mohammed was promoted to foreman in die-cast maintenance. Thomas was then offered reinstatement to replace Mohammed. Thomas declined. Since then, Courtois remained the only die maintenance employee.

2. Analysis

Respondent contends Thomas was laid off solely due to lack of die maintenance work. The General Counsel claims the asserted reason for the layoff is pretextual. Resolution of these positions is governed by the following applicable legal principles.

The General Counsel must prove certain elements to establish a *prima facie* case of discrimination. Those elements are that (1) the affected employee had engaged in activity protected by the Act, (2) the Employer had knowledge of that activity, (3) the adverse personnel action imposed upon the employee was motivated by union animus, and (4) that the discipline had the effect of encouraging or discouraging membership in a labor organization. The General Counsel has the burden of proving his case by a preponderance of the evidence. *Gonic Manufacturing Company, Division of Hampshire Woolen Company*, 141 NLRB 201, 209 (1963).

The 8(a)(1) violations support findings of unlawful motivation. I have found that Respondent violated Section 8(a)(1) when Nichols told Thomas to keep a low profile in his union activities. Assuming I am in error in that finding, 8(a)(1) violations are not necessarily a requirement of an 8(a)(3) finding. "Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such case . . . the trier of fact may infer motive from the total circumstances proved. . . . If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—at least where . . . the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966). The *Shattuck Denn* principle was quoted with approval by the Board in *Best Products Company, Inc.*, 236 NLRB 1024, 1025 (1978).

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[7] There is evidence that two other individuals were working in die maintenance on the first shift immediately preceding, and on the day of, Thomas' layoff. I conclude that fact tangential, inasmuch as I credit Respondent's claim they were working there temporarily to set up shelving and their performance of regular die maintenance functions merely was incidental to the reason for the temporary assignment.

Support for a finding of unlawful motivation "is augmented [when] the explanation of the [employer's conduct] offered by the Respondent [does] not stand up under scrutiny." *N.L.R.B.* v. *Bird Mach. Co.*, 161 F.2d 589, 592 (1st Cir. 1947).

The instant allegation requires me to determine, from the totality of evidence, whether the asserted reason for Thomas' layoff actually motivated it. *Signal Delivery Service, Inc.*, 226 NLRB 843 (1976).

Undeniably, there is ample record evidence Thomas had been engaged in a variety of protected activity. Thus, he was a leader of the walkout in March and a spokesman for other employees, he was vocal regarding working conditions during departmental meetings, and, finally, he engaged in distribution of leaflets on behalf of the Union on November 26. In any event, Respondent does not seriously argue an evidentiary failure of this *prima facie* element.

Respondent's knowledge of Thomas' protected activity is disputed. Emack and Thornton disclaimed they saw Thomas leafleting on November 26. Thomas and Mamber testified Thornton went through the gate during the leafleting. I credit them. When asked whether he saw Thomas at the gate on November 26, Thornton was equivocal. He responded, "I do not recall seeing him [Thomas] at the gate." There was only one gate to Respondent's plant. Given Respondent's concern over the union activities of its employees manifested by its earlier violations (250 NLRB 692), it is unlikely the leafleting activities of November 26 and the participants in it would have gone unnoticed. Accordingly, I infer Respondent had direct knowledge of Thomas' leafleting activities on November 26.

Assuming, *arguendo*, Thornton is credited, there is other evidence of Respondent's knowledge. Thus, other supervisors, such as Gangini, passed through the gate during the leafleting. Gangini was Thomas' immediate supervisor. Gangini did not testify at the hearing. In these circumstances, it is reasonable to infer, as I do, that Gangini's testimony would have been adverse to Respondent had he testified. *Interstate Circuit, Inc., et al.* v. *United States*, 306 U.S. 208 (1939); *Monahan Ford Corporation of Flushing*, 173 NLRB 204 (1968); *Crow Cravel Co.*, 168 NLRB 1040, 1047 (1967).

As to knowledge, the parties have focused their arguments on the November 26 activities. However, my conclusions are predicated on the entire record. I cannot isolate Thomas' earlier activities. Accordingly, I further conclude that Nichols' unlawful remark to Thomas in June is additional evidence that Respondent knew of Thomas' union activities. Still further evidence of Thomas' protected activities exists by virtue of Emack's participation in a conversation with Thomas as spokesman for the other employees who walked out in March and also from Thomas' vocal expressions concerning working conditions in Nichols' presence, during departmental meetings.

I conclude that the General Counsel has established the requisite element of antiunion hostility. Two bases are present for this conclusion. First, I have found Nichols' statement that Thomas should keep a low profile a violation of the Act. Second, Administrative Law Judge Frank's decision, approved by the Board in 250 NLRB 692, is replete with evidence of animus. The Board will take official notice of its own prior decisions which involve the same parties and similar issues. *Moulton Manufacturing Company*, 152 NLRB 196, 207 (1965). Thus, I take official notice the Board has approved Administrative Law Judge Frank's findings. Moreover, the Board agreed with Administrative Law Judge Frank's conclusion the unfair labor practices committed by Respondent warranted a broad cease-and-desist order. There is no evidence in the instant record to show any alteration in Respondent's position regarding union activities of its employees from that exhibited in the cases before Administrative Law Judge Frank.

The General Counsel's claim that Respondent's defense is a pretext poses a close question. Respondent's able counsel adduced considerable evidence in support of Respondent's economic defense. That unrefuted evidence includes impressive elements of proof. Additionally, there are other significant factors which militate in favor of finding merit to Respondent's contentions:

(a) Thus, though Thomas was an employee leader during the March work stoppage, Respondent later granted his transfer request. This reduces the strength of an inference that Respondent was motivated by antipathy toward protected activities.

(b) Historically, the first shift in the die maintenance department regularly was staffed by Courtois as the only employee working there. This fact supports Respondent's claim that no more than one employee was needed during a period of reduced backlog.

(c) The evidence establishes the need for a layoff in die maintenance. Since June, Respondent engaged in a program of staff reduction. The backlog in die maintenance which existed at Thomas' transfer virtually had been diminished. Thomas was only 1 of 33 employees laid off during the implementation of the overall program to reduce the production and maintenance work force. Indeed, the General Counsel concedes the existence of Respondent's premise of staff reduction.

(d) The decision that Thomas would be the employee to be laid off apparently was made in conformity with preexisting and customary standards. Thus, where competency was not in question, seniority governed layoffs. Undeniably, Thomas was both the least senior and experienced die maintenance employee.

(e) No one was hired to replace Thomas. This fact lends support to Respondent's claim that the reduced workload in die maintenance necessitated a layoff.

(f) When Mohammed was promoted, Thomas was offered reinstatement. This fact has some slight impact upon the existence of Respondent's animus.

(g) Respondent was consistent. No attempt has been made to provide a variety (shifting) of reasons for its action against Thomas. At his terminal interview, Thomas was advised by Emack that his layoff was for lack of work. Also, Emack told Thomas he might be recalled if business improved. The documentary evidence (payroll change form) confirms Emack's testimony in this regard. That document contains notations that the layoff was attributed to lack of work and confirms Emack's remark concerning potential for recall.

Viewed in isolation, the sum of Respondent's economic evidence is impressive. It shows the existence of a need to reduce die maintenance overhead. Further, Respondent's evidence shows such a need was dictated by a general decline in Respondent's production requirements. Arguably, then, the layoff in the die maintenance department simply was a continuation of the layoff pattern in progress since May. In these circumstances, the selection of Thomas for layoff could be a natural consequence.

However, the situation does not rest on the foregoing discussion. The validity of the economic defense is not to be determined by such superficial analysis. Thus, Respondent's evidence must be assessed together with that presented by the General Counsel. If such examination reflects the existence of valid business reasons for the layoff but nonetheless reasonably demonstrates that a substantial and motivating ground for Thomas' layoff was his protected activity, the General Counsel should prevail. *Dilene Answering Service, Inc.*, 222 NLRB 462 (1976); *KBM Electronics, Inc., t/a Carsounds*, 218 NLRB 1352, 1358 (1975); *N.L.R.B.* v. *Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953).

Evaluation of the record, in its totality, persuades me the General Counsel should prevail. In reaching this conclusion, I am particularly influenced by the following considerations:

(1) Thomas' layoff was precipitous. It followed Thomas' November 26 leafleting by only 1 day. Coincidence in protected activity and adverse personnel actions against employees is a strong factor supporting an inference of unlawful motivation. *McGraw-Edison Company* v. *N.L.R.B.*, 419 F.2d 67 (8th Cir. 1969); *N.L.R.B.* v. *Harry F. Berggren & Sons, Inc.*, 406 F.2d 239, 245 (8th Cir. 1969), cert. denied 396 U.S. 823.

(2) The reason propounded by Thornton and Emack for selecting November 27 as the layoff date is unconvincing. Each of these managerial officials impressed me as responsible and alert officials. Thus, characteristically, Thornton signified he regularly monitored the production and maintenance workload. He described the situation in the die maintenance department as "critical" on November 26. It is illogical that Thornton permitted the die maintenance department to deteriorate to the deplorable condition he asserted. I find this circumstance contrary to the apparent business acumen otherwise demonstrated by Thornton. It suggests that the asserted discovery of the severe conditions in the die maintenance department on November 26 (the very day of Thomas' leafleting) is a fabrication. Moreover, the failure to grant Thomas' request to complete his workweek is unexplained.

(3) Respondent has not satisfactorily explained why the date of November 27 had been selected for Thomas' layoff. As already noted, I have found it implausible that the die maintenance workload was not more accurately observed before November 26. Respondent's brief asserts that a layoff in that department was "inevitable" since October 12. On this date, several die-cast machine operators had been laid off. In this context, I find there has been no satisfactory explanation for a 6-week delay in effectuating Thomas' layoff.

(4) Respondent displayed an adverse reaction to Thomas' protected activities. Nichols' June "low-profile" remark, found unlawful, reflects Respondent's predisposition to interfere with the exercise of his Section 7 rights. Thomas' first overt exercise of those rights after Nichols made his comment was on November 26. Respondent's reaction was swift. In all the circumstances, I find Nichols' remark interrelated with the layoff.

(5) Respondent has a propensity to violate the Act. The Board's decision in 250 NLRB 692, involving Respondent and the instant Charging Party, may be considered herein. Indeed, I consider it unrealistic to ignore Respondent's past misconduct. I have accorded it some, but not dispositive, weight. *Metlox Manufacturing Company*, 225 NLRB 1317, 1325 (1976); *Tama Meat Packing Corp.*, 230 NLRB 116 (1977).

(6) Thomas was the only employee currently at work whose union activity was notorious. Mamber was assisted in the November 26 distribution of literature by Thomas and former employee Lamkin. At that time, Administrative Law Judge Frank had declared Respondent violated the Act, in part, by having earlier discharged Lamkin.[8] I consider Thomas' open association with the Union and Lamkin on November 26 somewhat significant in establishing Respondent's true motivation for Thomas' layoff. It is circumstantial evidence which provides some insight to the impetus for Respondent's precipitous conduct.

In sum, I conclude the record sufficiently demonstrates the asserted defense is pretextual. It follows the reason ascribed by Respondent for Thomas' layoff is unlawful. *Keller Manufacturing Company, Inc.*, 237 NLRB 712, 717 (1978) (as to Alice Meyers). Accordingly, I find the record contains a preponderance of evidence to show that Thomas' November 27 layoff was in violation of Section 8(a)(3) and (1) of the Act.

Further, I conclude the consequence of Thomas' layoff reasonably has the proscribed effect of discouraging employee union activity. The layoff, having occurred only 1 day after Thomas distributed union literature, surely signaled to other employees the potential risks of freely expressing union sympathies. This is precisely the inhibiting effect the Act is designed to protect against.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act when Nichols, its personnel manager, told Thomas, its

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[8] In 250 NLRB 692, the Board left Administrative Law Judge Frank's determination undisputed.

employee, to keep a low profile regarding his union activities in June 1979.

4. By laying off Lawrence Thomas on November 27, 1979, Respondent discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(3) and (1) of the Act, I shall recommend it cease and desist from engaging in such conduct in the future and affirmatively take such action as will dissipate the effects of its unfair labor practices.

Because Thomas' November 27 layoff has been found unlawful, the Order shall require Respondent to offer him full and immediate reinstatement to his former or substantially equivalent job, without prejudice to his seniority or other rights and privileges; and to make him whole for any loss of earnings he may have suffered as a result of the discrimination by payment of a sum equal to that which he would have earned, absent the discrimination, to the date of Respondent's offer of reinstatement. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

As previously noted, the Board (250 NLRB 692) held Respondent engaged in such extensive and egregious unfair labor practices as warranted a broad cease-and-desist order. The events of the earlier cases occurred more than 1 year before those litigated herein. As earlier noted, no evidence was adduced to show Respondent's labor relations posture had changed before Thomas' layoff. Thornton, Emack, and Nichols were all Respondent's supervisors during the earlier ligitated matters. Each was involved, directly or indirectly, in the activities which the Board has held unlawful.

Herein, I have found that Respondent has once again committed an independent 8(a)(1) violation. Also, it has been found Thomas' layoff is another example of Respondent's continued discriminatory treatment of its employees.

The events herein cannot be judged in isolation. I view Thomas' leafleting activity as an extension of the organizational efforts of 1978 as fully described in Administrative Law Judge Frank's decision. That decision was the subject of the leaflet distributed by Thomas.

Herein, there simply is no basis to find Respondent has recanted from its previous strenuous and illegal opposition to its employees' union activity. Indeed, the swift layoff imposed on Thomas reflects the continuing vitality of Respondent's aversion to free exercise of Section 7 rights. As shown hereinabove, Respondent's warning to Thomas and his subsequent layoff are further evidence of its complete disregard for employees' statutory rights. This is especially true when coupled with the Board's determination in 250 NLRB 692.[9] Moreover, the repetitious character of the discriminatory conduct found unlawful in the instant matter punctuates the need to eliminate future recurrences. Accordingly, I conclude it is necessary that the Order herein be coextensive with the degree of past misconduct and the threat of prospective reiteration.

The demonstrated proclivity to violate the Act warrants a broad proscriptive order. Thus, the Order shall require Respondent to refrain from, in any other manner, interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Upon the above findings of fact, conclusions of law, the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Magnesium Casting Company, Inc., Hyde Park, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against its employees for engaging in union or other activity protected by the Act.

(b) Telling its employees to keep a low profile regarding their union activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights might be affected by a lawful union-security agreement in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer Lawrence Thomas immediate and full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges,[11] and make him whole in the manner described above in the section entitled "The Remedy" for any loss of pay or other benefits suffered by reason of his discriminatory layoff on November 27, 1979.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and interest due under the terms of this Order.

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[9] See *Brooks Cameras, Inc.*, 250 NLRB 820 (1980).

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] If it is determined the reinstatement offer made to Thomas upon Mohammed's promotion in April 1980 was *bona fide*, no additional offer of reinstatement need be made and the backpay hereunder shall be computed in accordance with the Board's procedures in such cases. Similarly, if the reinstatement offer was *bona fide* the next-to-last paragraph of the notice attached hereto as an Appendix should be deleted and the following paragraph substituted:

> "WE HAVE OFFERED LAWRENCE THOMAS reinstatement to his former or substantially equivalent job with us, without loss of seniority or other rights, privileges and benefits; and we will make him whole, with interest, for all loss of pay and other benefits he suffered as a result of his discriminatory layoff on November 27, 1979."

(c) Post at its Hyde Park, Massachusetts, location copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Puerto Rico Hotel Association *and* Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO

San Juan Hotel Corporation, d/b/a El San Juan Hotel and El Conquistador Hotel; The Puerto Rico Hotel Corporation d/b/a The Palace Hotel *and* Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO

Hilton International Company d/b/a Caribe Hilton Hotel *and* Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO

Condado Holiday Inn *and* Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO

Hilton International Company d/b/a La Concha Hotel-Condado Beach Hotel *and* Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO. Cases 24-CA-4109, 24-CA-4193, 24-CA-4110, 24-CA-4190, 24-CA-4305, and 24-CA-4306

December 1, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On March 16, 1981, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, Respondents, the General Counsel, and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Puerto Rico Hotel Association; San Juan Hotel Corporation, d/b/a El San Juan Hotel and El Conquistador Hotel; The Puerto Rico Hotel Corporation d/b/a The Palace Hotel; Hilton International Company d/b/a Caribe Hilton Hotel; Condado Holiday Inn; and Hilton International Company d/b/a La Concha Hotel-Condado Beach Hotel, all of San Juan, Puerto Rico, their officers, agents, successors, and assigns shall take the action set forth in the said recommended Order.[3]

DECISION

JAMES F. MORTON, Administrative Law Judge: These consolidated cases were heard by me between April 21 and May 16, 1980, in San Juan, Puerto Rico.

Based on unfair labor practice charges filed by Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO (herein called the Union), the amended complaints allege violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act). The principal issue in these cases, precisely stated, is whether the band leaders and the leaders of the smaller groups of musicians who perform in the large hotels in Puerto Rico on a steady engagement basis[1] are supervisors employed by the hotels to direct their musicians-employees or whether these leaders are independent contractors who themselves, and not the hotels, are the employers of these musicians. At the hearing, the parties referred to this issue more concisely as whether the musicians were independent contractors or employees of the hotels. On the premise that the musicians involved have been employees within the meaning of Section 2(3) of the Act of the respective hotels and have been supervised by leaders who are part of the hotels' management structures, the General Counsel set forth in the consolidated complaint the allegations summarized below. All the Respondents challenge the validity of that premise and urge dismissal of the complaint on the ground that none of the musicians are hotel employees. The other issues and the respective positions of the parties thereon are now discussed. The

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[1] The Charging Party and Respondents Hilton International Company d/b/a Caribe Hilton Hotel, and Hilton International Company d/b/a La Concha Hotel-Condado Beach Hotel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] For the reasons stated by the Administrative Law Judge in his Decision, we agree that the regular engagement musicians employed by the Respondent hotels are employees of said hotels within the meaning of Sec. 2(3) of the Act, and that the leaders of such musicians are supervisors within the meaning of Sec. 2(11) of the Act. In this regard we note the following specific incidents of the exercise of control over the musicians by the hotels which were not specifically noted by the Administrative Law Judge: the granting of "ledger privileges" whereby musicians could obtain food and beverages by signing the check and having the cost deducted from their paychecks; the granting of a 25-percent discount on purchases made by musicians; granting a leave of absence to a musician because of illness; imposing deductions on musicians as a result of absences; and paying for advertisements for musical groups currently performing.

[3] Because of the large number of Spanish-speaking persons employed by the Respondent hotels, we hereby direct that the notices to be posted pursuant hereto be posted in both English and Spanish.

[1] An engagement is said to be "steady" when done for 5 or more days in 1 week or for 2 or more days in each of 2 or more weeks. Anything less is said to be a "single engagement."

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Union's positions throughout are the same as the General Counsel's.

The General Counsel alleges that Respondent, Puerto Rico Hotel Association (herein called the Respondent Association) in the course of bargaining collectively with the Union *vis-a-vis* a renewal contract covering the unit of musicians employed on a steady basis by, *inter alia*, the Caribe Hilton Hotel, the El San Juan Hotel, the El Conquistador Hotel, The Palace Hotel, the Condado Holiday Inn and lastly the La Concha Hotel-Condado Beach Hotel, acted in derogation of the Union's representative status and in violation of Section 8(a)(1) and (5) of the Act by:

> (a) conditioning further collective bargaining at various times, upon the Union's conceding that the musicians in the unit are not hotel employees,
>
> (b) suspending bargaining at another point because the Union had filed unfair labor practice charges with the Board's regional office against the Respondent Association,
>
> (c) changing unilaterally the wording of the recognitional clause of the renewal collective bargaining contract after agreement thereon had been reached, and
>
> (d) encouraging its member hotels to use types of form contracts when employing musicians so as to make it appear that the musicians are not employees of the respective hotels.

The Respondent Association and its member-hotels contend that, even if it were found that the musicians are employees of the hotels, the 8(a)(1) and (5) allegations of the complaint against the Respondent Association should still be dismissed on the ground that:

> (a) the unit of musicians is inappropriate as historically the group negotiations included all the leaders whom General Counsel would exclude as supervisors and as the leaders also actively participated in the Union's internal affairs.
>
> (b) the Union never represented an uncoerced majority of musicians because the Union operated a *de facto* closed shop whereby no musician could perform in any hotel in Puerto Rico unless he first had joined the Union.

The General Counsel further alleges that Respondents El San Juan Hotel, El Conquistador Hotel, and The Palace Hotel, as a single enterprise, violated Section 8(a)(1) and (5) by their untimely withdrawal from the collective bargaining that had been underway between the Respondent Association as their joint bargaining representative and the Union respecting the musicians' unit involved herein and by thereafter refusing to bargain collectively with the Union. These three hotels, by their joint counsel, deny that they ever designated the Respondent Association as their representative for the purpose of collective bargaining and thus aver that they never withdrew in an untimely manner from any negotiations.

The General Counsel also contends that Respondents Caribe Hilton Hotel, Condado Holiday Inn, and La Concha Hotel-Condado Beach Hotel, in violation of Section 8(a)(1) and (5) of the Act, executed contracts with leaders of musicians employed respectively by them, which contracts purport to classify those musician employees as employees solely of the leaders who also are purported therein to be "independent contractors."

The General Counsel separately asserts that one of the Respondent hotels, the Caribe Hilton Hotel, also violated Section 8(a)(1) and (3) of the Act by having, through its supervisor, Band Leader Jose Juan Pinero, discharged Pedro Chiclana, a musician in its employ, because of his activities on behalf of the Union and in order to discourage membership in the Union. In addition, Respondent Caribe Hilton Hotel is alleged to have violated Section 8(a)(1) of the Act by having, through Pinero, (a) threatened musicians to induce them to refrain from supporting the Union, (b) created the impression that their union activities were under surveillance, and (c) engaged in other independent acts, as specified in the consolidated complaint. Respondent Caribe Hilton Hotel avers that Chiclana was never in its employ and seeks dismissal of these allegations on that basis. Alternatively it contends that Pinero's termination of Chiclana's employment was unrelated to any union considerations and that the absence of proof of unlawful discrimination requires dismissal of the allegation involving Section 8(a)(1) and (3). It also seeks dismissal of the allegations of the independent 8(a)(1) violations on the ground that the record evidence does not support any findings of such violations.

I have considered the entire record in these cases,[2] the demeanor of the witnesses at the hearing and the briefs filed by the parties. Based on these considerations, I make the following:

FINDINGS OF FACT

I. THE PARTIES

The Respondent Association was incorporated in 1950 as a nonprofit association to promote the business interests and welfare of hotels in Puerto Rico, to promote legislation on their behalf, to promote tourism, to promulgate matters of interest to persons engaged in the hotel and restaurant business, and to do "any and all things . . . to effect objects." There is no express statement in its articles of incorporation or its bylaws authorizing it to negotiate collective-bargaining agreements for its member hotels.[3] Nevertheless, the General Counsel asserts that the Respondent Association has in fact represented its member hotels in a multiemployer unit in the course of its dealing with the Union over the years as the representative of the musician employees of these hotels. The merits of that contention and the determination as to whether the Respondent Association or any of its member hotels is an employer as defined in Section 2(2) of the Act *vis-a-vis* the musicians involved in these cases must await a consideration of the relevant evidence, set out below. The hotels involved in these cases each have gross annual revenues exceeding $500,000, principally cater to tourists or commercial guests, and purchase items each year which are valued at more than $50,000 and which are delivered to the respective hotels directly from outside Puerto Rico.

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[2] After the hearing had closed and in accordance with the procedure set on the last day of the hearing, counsel for the General Counsel submitted to me a copy of an affidavit sworn to in the course of an earlier case, by the general manager of the El San Juan Hotel. Counsel for the El San Juan Corporation objects to the affidavit being in evidence. That affidavit had at a previous point in the hearing been marked for identification as G.C. Exh. 112 and was offered in evidence then by the General Counsel to insure that the record in this case would contain in its entirety the contents of par. 12 thereof. The General Counsel, however, had immediately thereafter withdrawn G.C. Exh. 112 when it was obvious that the hotel's general manager had just read the whole of that paragraph into the record. I shall sustain the objection as apparently the affidavit is now being offered for a broader purpose than was contemplated when the general manager was available as a witness. G.C. Exh. 112 is being placed in the file containing the rejected exhibits.

Pursuant to the arrangements also established on the last day of the hearing, I shall take administrative notice of secs. 3141 and 3143 of Title 13 of the laws of Puerto Rico and shall receive in evidence copies thereof as G.C. Exh. 138. Further administrative notice will also be taken of secs. 3119 and 3411 and copies thereof are received in evidence as Resp. Assoc. Exh. 60.

The San Juan Hotel Corporation is a corporation organized under the laws of Puerto Rico. It owns and operates the El San Juan Hotel in Carolina, Puerto Rico, and the El Conquistador Hotel in Fajardo, Puerto Rico. The Puerto Rico Hotel Corporation is a corporation formed under the laws of Puerto Rico; it owns and operates The Palace Hotel in Carolina, Puerto Rico. Louis Puro is the principal stockholder of both the San Juan Hotel Corporation and the Puerto Rico Hotel Corporation. These corporations, through Puro, formulate and administer a common labor relations policy and comprise a single business enterprise.

Hilton International Company is a Puerto Rico corporation which owns and operates the Caribe Hilton Hotel in San Juan, Puerto Rico, and also a complex known as the La Concha Hotel-Condado Beach Hotel on Ashford Avenue, San Juan.

Condado Holiday Inn is a corporation organized under the laws of Puerto Rico and it owns and operates a hotel under its corporate name on Ashford Avenue in San Juan.

The Union was founded in 1938 to advance the interests of the professional musicians in Puerto Rico. It affiliated with the International Federation of Musicians, AFL-CIO, in 1951. Respondents challenge its status as a labor organization within the definition of Section 2(5) of the Act based on their view that the musicians are not employees of the hotels and also based on the alleged improper involvement into the Union's internal affairs by the leaders. That issue is discussed and resolved, *infra.*

II. THE ALLEGED UNLAWFUL REFUSALS TO BARGAIN

A. *The Class AA Hotels and Their Use of Musicians*

As of the date of the hearing the Respondent Association had about 28 member hotels of which about 9 had gambling casinos. Those 9 have been referred to in the record in this case at various times as Class AA hotels. The General Counsel alleges that the Class AA hotels have bargained collectively through the Respondent Association with the Union. Six of those Class AA hotels are named in the caption above—the Caribe Hilton, El San Juan, El Conquistador, Palace, Condado Holiday Inn, and La Concha-Condado Beach Hotels. The other three Class AA hotels, Dupont Plaza, Cerromar, and Dorado Beach, had been part of this proceeding but they have been severed as parties.

The responsibility for providing food, beverages, and entertainment in the nightclub rooms and lounges of the Class AA hotels belongs to the food and beverage managers of the respective hotels. Each such club room or lounge is directly supervised by a maitre d'. Some hotels refer to the maitre d' as the room manager or the floor manager. In a typical large nightclub room, the maitre d' is assisted by head waiters who in turn oversee the work of the waiters and busboys in that room. The maitre d' also must insure that musical entertainment is provided in his room as required by the contract between the hotel and the musical group engaged to perform there. The maitre d' is responsible for maintaining the ambiance of the room and for insuring that the customers there are promptly and properly served and entertained. In the typical clubroom, an orchestra directed by its leader and comprised of himself and nine other musicians plays soft music as background during the dinner hour. After dinner, a star performer—usually a well-known singer from the mainland United States—appears to entertain. The 10-piece orchestra, with some modifications discussed below, accompanies the performer using sheet music furnished by that performer and plays in the style required by that performer or the performer's manager. After the performer has completed his show, the 10-piece orchestra plays dance music. The maitre d' does not select the music or the musicians and does not monitor their individual performances. Instead, the leader of the group, who is also at times termed the conductor or the director, is the one who directs the musicians, decides the tempo of the music, and the instruments to be played. The maitre d' can ask the leader to lower the volume of the music if, in the judgment of the maitre d', the orchestra is playing too loud and such requests are routinely honored.[4] The matter as to volume surfaces normally during the dinner hour when sometimes patrons have difficulty conversing when the background music is played too loud. The maitre d' can stop the music in order to speed up the service of food and can also send the musicians home before normal quitting time in those situations where virtually all the patrons have left the room. There are also occasions when the start of the show by the star performer may be delayed in order to accommodate a late arriving group of patrons. This could occur when a cruise ship is late in arriving and a large party on that ship is expected in the room. In such an instance, the food and beverage manager will notify the leader that the opening of the show is being delayed and the orchestra continues to play background music until the show is ready to begin. Musicians are compensated in accordance with the contract between the Respondent Association and the Union for any overtime hours they work. Their normal workweek consists of a 6-day, 28-hour week.

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[3] A nonprofit organization known as the Metropolitan Hotel Association of Puerto Rico, Inc., was formed in 1960 to foster the best interests of its member hotels (which include the Caribe Hilton, Condado Holiday Inn, and apparently all the other large hotels in Puerto Rico) and "to serve as collective bargaining agent" for its members "with all local unions and groups of employees." The Metropolitan Hotel Association has negotiated contracts for its member hotels involving classifications, e.g., culinary workers, as to which there is no dispute concerning employee status.

[4] A leader testified that he always chooses to honor such requests. He had been asked on cross-examination whether he was free to honor or reject such requests.

The Class AA hotels also have cocktail lounges each under the direction of a maitre d'. There, groups of two or three or sometimes more musicians play. Some of the Class AA hotels also engage musicians to play at a poolside lounge during the daytime. The contracts between the Union and the Respondent Association require Class AA hotels to have a minimum number of musicians as specified therein; e.g., their 1975–78 agreement provided that the Caribe Hilton and five other hotels of comparable size shall each "employ a minimum of (18) eighteen musicians during the entire year." This "guaranteed group" included leaders.

B. *The Contractual Arrangements Between the Hotels and the Leaders*

Up until the end of the strike on April 30, 1979, as discussed *infra*, all of the local musicians in Puerto Rico, including leaders, were members of the Union. All other musicians are generally referred to as "travelers" and, except for the five members of the Pat Mills group discussed below, they have been members of sister AFM locals.

The hotels in Puerto Rico routinely used a variation of the printed AFM Form B contract which has blanks to be filled in. In practice in Puerto Rico, those forms have not been filled out meticulously but usually with just enough data to satisfy the signatories; e.g., the group's name, the total amount of their weekly compensation, the date the engagement begins, and sometimes the room where the group is to play.

The total weekly compensation has been referred to at times in the record in this case as "lump sum." That sum is not the total amount of the contract as the term of the contract is for all practical purposes indefinite. In addition, the weekly total does not include compensation for overtime hours worked by the musicians each week or other extra compensation. The total weekly compensation in most cases is calculated according to the formula set out in the contract between the Respondent Association and the Union. This requires that each musician shall be paid a minimum salary for the normal 6-day workweek. That minimum is termed "scale." The leader of each group receives twice the minimum salary or "double scale." Assuming "scale" is $200 and a group is comprised of a quartet, the total weekly compensation excluding overtime and other extras would be $1,000 dollars. The leader of the quartet gets double the scale or $400 and each of the three musicians, called sidemen, receive $200. On occasion the hotels and the musicians will use the services of a booking agent. In those situations, the booking agents' commissions, usually 10 percent, are added on to the total compensation to be paid to the musicians; those commissions are paid by the hotel, not the musical groups.

More recently, certain hotels have been using "personal services" contracts or contracts different in form from those that had been used in past. The General Counsel alleges that the use of those "personal services contracts" or variations thereof is unlawful insofar as they purport to identify the leader as an independent contractor or assert that the musicians are not employees of the hotels. The hotels now using those new form contracts are the Caribe Hilton, the Condado Holiday Inn, the El San Juan, El Conquistador, and The Palace.

C. *Administrative and Other Policies of the Hotels Towards Musicians*

The contracts between the Respondent Association and the Union, discussed in more detail *infra*, have required the Class AA hotels to deduct from the gross weekly earnings of each musician performing at the respective hotels social security taxes, unemployment taxes, workers' compensation contributions, and also income taxes for Puerto Rico. Musicians have routinely filed unemployment claims when out of work in which they have named the Class AA hotels as their employers since the hotels have made the employer contributions on their behalf to the Commonwealth of Puerto Rico.

The contracts between the Respondent Association and the Union also require the hotels to provide free meals to the musicians. The musicians use ID cards furnished to them by the hotels to gain entrance to the employees' cafeterias and for other purposes; e.g., use of employee parking facilities.

A memorandum of understanding signed by representatives of the Respondent Association and the Union on April 30, 1979, states that the hotels provide administrative services to assist the band leaders as the leaders do not have the means or the personnel to undertake the task of deducting and transmitting, *inter alia*, social security taxes. As noted herein, some of the hotels have in 1979 and 1980 attempted to have the leaders make the payments of workers' compensation premiums directly to the Commonwealth for their respective groups.

The hotels, as required by the provisions of the contracts between the Respondent Association and the Union and by virtue of the laws of the Commonwealth of Puerto Rico, are required to furnish the musicians with paid holidays, paid vacations, and sick leave pay.

The hotels have extensive personnel procedures applicable to individuals whose employment status is not in dispute; e.g., maids, porters, and maintenance employees. These employees fill out job application forms, undergo orientation training, are issued employee manuals and copies of rules and regulations governing their employ, punch timecards, and follow detailed grievance procedures. All the foregoing procedures are not generally applicable to musicians performing at the hotels. Further, a musician who is unable to perform due to sickness is expected to furnish a competent replacement. In that regard, the Union's president testified that he has occasionally filled in as a replacement. The hotel pays the regular musician not the replacement. It appears that musicians have made arrangements among themselves to "cover" each other in emergencies.

The Class AA hotels use different internal accounting procedures. Some, such as the El San Juan, charge the weekly disbursements made to the musicians to accounts-payable ledgers while other hotels record such contributions as part of their employee payroll accounts. For budgetary purposes also these moneys are assessed against the sums allocated for the operating cost of the room where the musicians perform or against the overall dining/entertainment budget. One of the witnesses called by the Respondent Association testified that the music presented by the hotels is part of the overall entertainment package that the Class AA hotels provide for guests and that the hotels make decisions as to what restrictions are to be put on the musicians' movements. Another witness called by the Respondent Association stated in this regard that some hotels impose restrictions on the use by musicians of the public areas of the hotels and that most hotels discourage the use by musicians of casinos and bars as the musicians are "on a duty state . . . what they [are] employed for."

A considerable part of the record in this case pertains to the functions performed by the musicians in the respective hotels over the years. The significant testimony thereon is set down below for each hotel:

1. Condado Holiday Inn

The general manager of the Condado Holiday Inn testified that he frequently meets with the band leaders on his own to discuss market trends and to discuss the responses furnished by guests on questionnaires they have completed. The general manager also testified that the two principal areas of concern he has discussed with the band leaders are lulls in the music and complaints that the music is too loud.

One of the General Counsel's witnesses testified that he had been hired by a group leader at this hotel in 1977 to play piano. In 1979 he was asked by the hotel's food and beverage manager to take over that group. He took over the group as leader and hired another musician. That group played at this hotel until March 1980. While playing under the former leader, he earned "scale" and was also given, by his former leader, an extra $20 a week to compensate him for special musical arrangements he prepared for the group. He has used the ID card given him by the hotel not only to collect his weekly pay check but also to get employee discounts. That card has a notation on it that it is the property of the hotel.

The Respondent Association called the hotel's director of personnel to describe at length procedures followed in hiring through its personnel department employees whose status is not disputed; e.g., maids. His testimony indicated that the details of the hiring procedure, orientation, steps, etc., as set out above are applicable. Such employees must furnish health and good conduct certificates; such certificates are not required to be furnished by musicians. The personnel director further testified that ID cards are issued to construction contractors, subcontractors who are engaged to perform refurbishing work in the hotel, and concessionairies or stores located in the hotel.

One of the General Counsel's witnesses, Angel Pena, testified that he has been a member of the Union for over 35 years and has for many of those years led a 15-piece orchestra known as Lito Pena and his Pan American Orchestra. That orchestra performed in the single engagement field, e.g., at a private party, and has also performed on television. In 1976, Pena contracted with the hotel to lead a 10-piece orchestra on a steady engagement basis in its large dining room. Of the 15 musicians in the Pan American Orchestra, he retained only 6. The 10-piece orchestra, during the time it played at the hotel, was known simply as the Lito Pena and His Orchestra. Pena testified that it was necessary for him to change the whole style and character of his music in order to accommodate the mood of the room in the hotel in which his group played. Thus, while his 15-piece Pan American Orchestra played vibrant Latin-American music, his 10-piece hotel orchestra played soft dinner-dance music and accompanied star performers on sheet music provided by those performers in the manner required by those performers. Pena testified that the style of the music played by his 15-piece Pan American group and that played by his 10-piece hotel orchestra were diametrically opposed as he had to adjust his own style to "the needs" of the hotel. During the years he played at the Condado Holiday Inn, he always complied with the requests of the maitre d' to provide special music to please a guest. Pena testified that on one occasion he objected to the fact that one of the star performers had required him to use a particular individual as the drummer of his 10-piece group. Pena stated that he found that individual's performance unacceptable but the complaints he made thereon went unheeded and he was required to retain that drummer as part of the 10-piece orchestra.

In the off season for tourists, Pena has had to reduce his 10-piece group to 8 musicians; he laid off 2 of the musicians and recalled them when the next tourist season began, in December. He and all his musicians, while performing at the Condado Holiday Inn, received salaries in excess of the minimum scale provided for in the Association-Union contract. Whenever a star performer required additional musicians, the hotel sent Pena a memorandum to that effect; Pena then obtained the necessary extra musicians whose salaries were paid by the hotel and were not deducted from the weekly sum stated in Pena's contract with the hotel.

The Union's president testified that all 10-piece hotel orchestras sound identical and they all play the same type dinner-dance music. One of the leaders called by the Respondent Association as a witness, Jose Juan Pinero, testified that his group plays the same style whether in the hotel or elsewhere.

As of the date of the hearing, there were four quartets playing at the lounges in the Condado Holiday Inn. Three of these groups had been there about 3 years; the fourth had been there 3 months. The leaders of two of those groups had, sometime after April 30, 1979, and pursuant to the hotel's request, obtained employer-numbers from the Commonwealth of Puerto Rico's tax office. One of those leaders now receives a disbursement weekly from the hotel and issues his own checks to the musicians in his group while remitting withholding taxes and other moneys deducted from their gross earnings to the appropriate tax authorities. Apparently, however, the hotel still makes contributions on behalf of all musicians in the hotel to the pension fund established pursuant to the Union-Respondent Association contract.

The hotels use records kept and furnished by the leaders to calculate, *inter alia*, overtime earnings of the musicians in each group. In that regard, the General Counsel placed in evidence a document with the heading, "Inter-office Correspondence" on the letterhead of the Condado Holiday Inn. That document contained instructions directing leaders to submit written notice of overtime earnings due so that delays in payroll processing would be avoided.

The general manager of the Condado Holiday Inn testified that he once resolved a dispute between a leader of a musical group at his hotel and the casino manager there. He talked with these two persons and with hotel security employees to find out what the problems between those two individuals were. He determined that it was essentially a personality clash and he testified he was successful in smoothing out the differences between those two individuals so that he did not lose the services of either. He testified further that a similar situation had occurred previously between the leader of that musical group and with the hotel's food and beverage manager and that problem had surfaced when the group leader, to the annoyance of that manager, began to sit out the last musical set instead of singing as scheduled. The general manager apparently was successful in persuading that group leader to perform throughout the last musical set.

2. Caribe Hilton Hotel

Roberto Lugo, vice president of Respondent Hilton International Company, d/b/a Caribe Hilton Hotel, engages the musical groups who have performed on a more or less permanent basis at this hotel. In doing so, Lugo has dealt with Felix Alegria, a booking agent. Alegria's commissions have been paid by the Caribe Hilton and have been calculated as a percentage of the total earnings of the musicians in each of the groups engaged. The commissions are added on to the contract between the hotel and the group leader. One of those groups had been led for many years by Miguel Miranda. At one point, Miranda had hired a fourth trumpet player in place of a vocalist and had taken it upon himself to leave the bandstand before the last set was finished. Alegria then advised Miranda that the Caribe Hilton management found that the fourth trumpet player was not needed, that he was to be replaced by a singer, that Miranda was to remain on the bandstand during the hours scheduled, and that he was to comply strictly with the schedule set by the hotel except when the maitre d' ordered him to cease playing. Miranda was further advised that the hotel's management wanted Miranda to supervise the musicians and to be present at all rehearsals.

Another group Lugo engaged through Alegria has been led by Jose Juan Pinero. On December 4, 1979, an official of the hotel wrote Pinero, who then held the "honorary title" of musical director for the hotel, on "interoffice correspondence" to make "a concerted effort to appreciably reduce the volume of [his] music" and that the hotel will "make periodic checks to ascertain improvement." One musician in this group testified he was instructed by Pinero to discontinue the use of amplification equipment as the hotel's management was dissatisfied with the volume and quality of the sound it produced. Pinero stated in his testimony that he ordered the musician to discontinue the use of that equipment on his own.

Testimony was adduced by the General Counsel that, on one occasion, Pinero left for vacation but the remainder of the group continued to play in his absence and that there was no change in the overall presentation. Incidentally, it appears that Pinero has approved vacation requests for members in his group but must obtain the approval of the hotel's general manager before taking his own vacation.

Several years ago, a musician brought a civil action against the Caribe Hilton for damages pertaining to a personal injury he allegedly suffered as a result of the hotel's negligence. In contesting that suit, the attorney for the hotel provided by the insurance company which insured the hotel against the suit prepared an affidavit which was signed by a hotel official. That affidavit, used as a defense in that suit, related that the plaintiff musician, as a hotel employee, was covered by the workers' compensation act and that he was injured "in the course of his employment" with the hotel. The hotel's comptroller at that time testified that, pursuant to the guidance of the attorney furnished by the insurance company, he stated in his affidavit that he, the comptroller, was fully in power to supervise, direct, and control the services provided by plaintiff musician as well as the means and the details connected with the rendering of musical services. The General Counsel adduced other testimony to the effect that one of the musicians in Pinero's group was told by the hotel's maitre d' that, as a hotel employee, he was to abide by the hotel's rules governing his right to bring guests on to the hotel premises. On another occasion, the maitre d' instructed that musician to see to it that the rear curtain did not remain open during the dinner hour.

The General Counsel adduced testimony to the effect that, on one occasion, the Caribe Hilton hotel had a problem with one musician in the 10-piece orchestra of the hotel and the hotel thus instructed the leader to replace the individual forthwith. It appears however that that individual was not let go immediately.

It is undisputed that the specific rules and regulations governing porters, maids, and all other such employees are not applicable to the musicians at the Caribe Hilton, that the musicians were paid by the checks drawn by the hotel using computerized payroll operations, and that the earnings of the musicians are charged for cost-analyses purposes to those departments—food beverages and casino—responsible for the entertainment of guests.

3. La Concha Hotel—Condado Beach Hotel

The General Counsel placed in evidence copies of 16 interoffice memorandums by this hotel's food and beverage manager and by other staff officials which are addressed to leaders of musical groups performing there, or to accounting department heads concerning those musical groups. Typical of these memorandums was a memorandum of May 3, 1977, by the food and service manager to three separate musical groups advising them that "[C]ommencing Friday, May 6, 1977, please comply with the following schedule at Mi Sitio lounge." The memorandum then notified one group that it will play on Wednesday through Friday 5 p.m. to 9:30 p.m. and that it will have "Tuesday off"; another group was scheduled to play on Tuesdays from 9:30 p.m. to 2 a.m., from Wednesday to Sunday from 10 p.m. to 2:30 a.m. and that it would have "Monday off." Other memorandums reflected that one group's hours were being reduced by 2 hours because of a "lack of business" and that another group was notified that there was a change in the rooms in which it would play and in their "work schedule" as reflected therein. On another occasion, a musical group was advised that its services would be required on an overtime basis for 1-1/2 hours at a cocktail party 8 days hence; the hotel's comptroller was simultaneously instructed to remunerate the group accordingly.

The Respondent Association developed testimony from the hotel's executive assistant manager who had been promoted to that post from the position of food and beverage manager that he did not screen musicians for hiring or impose on them their style of playing and that he does not direct them in any of the technical aspects of their musical performances. The Respondent Association also called as its witness a dancer, Marcello Palacios, who stated that he heads a group of six dancers who perform at the hotel and that he also pays three musicians who accompany his dancers. Palacios testified on cross-examination that, for the first 4 months, the overall group of 10 performed at the hotel beginning in December 1977, he paid all 10. However, from early 1978 and until the week preceding the hearing in this case, the hotel had paid these musicians directly. In rebuttal, the General Counsel's witness, Jose Torres, testified that he was the leader of the group of musicians who played as part of that Flamenco dance group and that the hotel's general manager had, on one occasion, told him that Palacios had no authority to "dismiss him" but that only the hotel's manager could do so. The hotel on April 24, 1980, advised Torres that his services would no longer be needed as of May 10, 1980, because of a change in the dance program and as the hotel "would not contract anymore musicians for that presentation."

4. El San Juan Hotel

When the strike began in 1979 and for over 10 years previously, the El San Juan Hotel had a group of 10 musicians playing at its Tropicana Club Room. Eduado Gerena testified for the General Counsel that he was hired as a first saxophonist in December 1972 by Anselmo Sacacas, the leader then of that orchestra. In 1976, Sacacas retired and he was replaced as leader of the Tropicana Club band by Jesus Caunedo. The rest of the orchestra was unchanged except that Caunedo hired a pianist as a replacement for Sacacas who had been the pianist. Another musician testified that he had joined that group at this hotel in 1962 as a trumpet player and that Sacacas was the leader for about 15 years. A third musician, also a trumpet player, joined the group in 1966 and has, in recent years, replaced Caunedo as leader whenever Caunedo took a vacation. He stated that, throughout the years he performed with this group at the hotel, there was no essential change in the group's performance.

In common parlance, a large group that plays in the main entertainment room of a Class AA hotel, such as the El San Juan, is sometimes referred to as the "house band."

Leaders at the El San Juan maintain records of the overtime hours worked by members of their respective groups and also as to which members are entitled to additional compensation by reason of their having played more than one instrument during a performance; i.e., pay for "doubling." The hotel's general manager testified that he has to trust these reports of these leaders. Counsel for Respondent El San Juan developed testimony that the contract between the hotel and the group leader contained a "lump sum" amount of money. This figure was the total weekly cost to the hotel of the regular salaries of the members of a group and of the agent's commission fee. It was not the total contractual sum as the length of the contract was for all practical purposes indefinite and it did not include "doubling" costs or overtime costs or moneys paid to extra musicians hired by the leader at the direction of the hotel. In that regard, the testimony is clear that, on occasion, it was necessary to augment the usual 10-piece band with extra musicians as required by a star attraction. The leader hired the extra musicians but their salaries were paid by the hotel which also deducted therefrom the usual taxes. It appears that here, also, the hotel relied on the leader's judgment inselecting the musicians and in setting the gross weekly earnings of the extra musicians so engaged.

The General Counsel proffered other testimony and exhibits to establish that the hotel's management issued memorandums to a leader whereby he was instructed to advise the musicians in his group that they are not to place their instruments against the walls of the hotel and that they are not to go into the kitchen to get coffee but are to use the employee cafeteria instead. The leader of the group and also the hotel's maitre d' informed the musicians that they are not to "warm up" in the dining area but that they should tune their instruments in the room provided for them in the hotel. Gerena testified that his group was "frequently" told by the maitre d' to lower the volume of the music to obtain a subdued sound.

The General Counsel also called the hotel's general manager as a witness. He testified that he had signed an affidavit submitted during the investigation of the underlying unfair labor practice charge in this case and that his affidavit related that the hotel "had 15 regular employee musicians who are paid directly by the hotel . . . 13 of whom performed at the Tropicana Club room and

2 performed at the Right Knight room." Respondent El San Juan Hotel called its president, its vice president for finance, its general manager, its personnel director, and also accounting supervisors as witnesses. They testified that the only instruction given the maitre d' as far as the musicians are concerned is to make sure that a musical group performs according to the contract between the leader and the hotel, that each musical group is paid a lump sum which is charged to accounts payable and not to payroll, that the hotel's personnel department does not maintain any personnel file for any musician appearing at the hotel whereas it does maintain such files for maids and all of its other regular employees and that the musicians do not have to comply with regulations established for the hotel's regular employees, e.g., those requiring employees to punch time cards. Its data processing manager, when asked a preliminary question respecting the way "sidemen," i.e., the musicians, were paid, stated that they "get paid like the rest of the employees."

5. Other Class AA hotels

The complaints in these consolidated cases identify the Respondent Association and the six Class AA hotels discussed above as the actual Respondents. Testimony was adduced at the hearing respecting the operations of other Class AA hotels *vis-a-vis* the musicians in order to throw further light on the employee versus independent contractor issue and as such evidence pertains to other issues; e.g., the appropriateness of the unit.

The food and service manager of the Dupont Plaza Hotel, a Class AA hotel, testified that he selects musical groups by evaluating whether their style fits in with the ambiance of the room to which he assigns the group. He prepares the working schedules for all musical groups of that hotel. Each group normally performs as per the hours set in the contracts between the Respondent Association and the Union; i.e., on a 6-day, 28-hour week basis. The food and service manager at the Dupont Plaza assigns these groups to perform in designated rooms or lounges. On one occasion, a leader of a group in the Parado 30 lounge used a female trumpet player who in the judgment of the food and service manager did not dress appropriately for that lounge and who, in his judgment, should be replaced by a saxophone player. He spoke directly to the trumpet player about improving her appearance and advised the leader that he had 30 days to improve the group's performance. When the trumpet player's performance did not improve, the group resigned. The food and service manager approves all vacation requests made by musicians performing at the Dupont Plaza. In 1979, members of one musical group asked to take their vacations all at the same time; this would necessitate the hotel's engaging a new group to substitute for them. Their request was denied and instead they were required to take their vacations on an individual basis with each member having to furnish a substitute for himself during the period he was away. On February 29, 1980, the food and service manager issued a memorandum setting forth "rules and regulations" for musicians; these included instructions that the musicians list their repertoire which should be updated periodically, that the musicians must not consume liquor "on premises while working," that they should follow the instructions of the lounge manager and inform him of all changes, lateness, new equipment, etc. One of the musical groups played for over 4 years in one of the Dupont Plaza lounges before the food and service manager shifted that group to perform at another lounge.

A predecessor Class AA hotel, the Hyatt Puerto Rico, issued nine rules in 1973 governing the conduct of its musicians—one of which provided for "immediate dismissal for . . . intoxication."

Another hotel, the Holiday Inn at Isla Verda, had completed in March 1977, a questionnaire sent in by a bank to verify "the employment" of the musician named therein who was seeking a loan. In responding to the questionnaire the hotel's personnel manager noted that prospects for that musician's continued employment at the hotel were good. He testified that he based this answer on the fact that the term of the musicians contract was indefinite. In 1978, the personnel manager of that hotel wrote a letter on behalf of a musician in which he referred to the musician as an employee who works for the hotel. The testimony of the Isla Verda's hotel personnel manager was to the effect that a group of six musicians had played there for 7 years and that their leader is paid on a "lump sum" pursuant to his request. It was not made clear whether that leader received an advance on his contract or payment of the total of the respective weekly gross earnings of the musicians in his group or payment for the total of their respective weekly net earnings; i.e., after income, social security, and other taxes had been deducted by the hotel.

The General Counsel called a witness who testified that, in 1979, he had played in an orchestra in a Class AA hotel, the Cerromar. While there, the musicians in that orchestra had changed their uniform attire from a black jacket to rust colored jacket pursuant to the request of the hotel's manager and that the hotel paid for those new "uniforms." On one occasion, the maitre d' of the room in which the orchestra played restricted the musicians from smoking while near the bandstand.

A leader called by the General Counsel testified that his group had been playing at the Dorado Beach Hotel for 3 years, that the hotel's food and beverage manager prepares the schedules as to hours and locations which are followed by his group, that the maitre d' of the room in which his group plays has told them, at various times, to play softer, and that the maitre d' "might" let them go home early if the lounge is "empty."

D. *History of the Contract Negotiations Between the Union and the Respondent Association*

In September 1961, Abraham Pena, who was president of the Union from 1961 to 1977, approached the then president of the Respondent Association and requested that negotiations for a collective-bargaining agreement covering the musicians who work in hotels in Puerto Rico which had gambling casinos should begin. His proposal was accepted. Pena had obtained from other AFM locals copies of agreements they had so that he could borrow some of the language from those agreements in the course of his negotiating meetings with the Respondent Association. The first such meetings took place in 1961. They were attended by representatives from each of the hotels plus four or five lawyers as their respective counsel. Agreement was reached and the agreement was apparently reduced to writing; however, neither the original of the 1961 agreement nor a copy of it is now in existence.

A new round of negotiations took place in 1964. By then three new hotels with casinos (Ponce de Leon, Sheridan, and the Americana) had opened. Pena testified that the representatives of the Respondent Association made it clear that it was representing in those negotiations all the hotels which had casinos. Another 3-year agreement was reached on December 19, 1964, to be effective from December 1, 1964, to November 30, 1967. Copies of schedules A and B referred to therein were not located; it appears that they were similar to schedules A and B annexed to the 1967–70 contract, discussed in detail below. The 1964–67 contract contained a recognition clause which stated that "the hotels recognized the [Union] as the exclusive collective bargaining representatives of all musicians employed by the hotels." There were 13 hotels[5] referred to therein as "employers of musicians."

A copy of the written contract for the period 1967–70 was received in evidence. It recites that it is the collective-bargaining agreement between the Union and the Respondent Association, bargaining for all its members listed therein; i.e., Caribe Hilton, Puerto Rico Hilton, San Jeronimo Hilton, La Concha, Condado Beach, Americana, El Flamboyan, El San Juan, Dorado Beach, Conquistador, Dorado Hilton, Miramar Hilton, and Ponce International. The agreement provided that it was to be applicable "to the classifications of employees listed in . . . attached . . . Schedule (A) and also to conductors, featured instrumental musicians and orchestras employed within the premises of the hotel whose services are rendered in connection with entertainment and dancing, under the supervision of the hotel's executives managing its facilities," all of whom were referred to therein collectively as "musicians." Schedule A annexed to that agreement contained "wage scales, hours of employment and working conditions" for the steady engagement of musicians. By the terms of the 1967–70 agreement the hotels recognized the Union as the exclusive bargaining representative of all musicians within the hotels. This language is different from the language of the recognition clause in the previous contract. The then president of the Respondent Association testified that he proposed the change as he did not want the musicians to be characterized therein as employees of the hotels. He stated that the Union's president, Pena, did not care which way the contract read, apparently because the change did not in Pena's view, interfere with his ability to represent the musicians. Other relevant provisions of that 1967–70 contract required (a) the hotels to make appropriate deductions in payments of social security taxes and unemployment contributions to the pertinent government agencies, (b) the hotels to keep a minimum number of local musicians under contract as set out in schedule B therein, (c) that the Union's constitution and bylaws and those of its International were incorporated into the agreement to be extent permitted by law, and (d) that the agreement shall be in effect from December 1, 1967–November 30, 1971. The agreement was signed by the respective presidents of the Union and of the Respondent Association; officers of each of the hotels signed copies of the agreement to verify that they "ratified" it. Schedule A, annexed to that contract, provided *inter alia*, that nothing therein shall prohibit "any" (AFM) members from contracting for a higher price, that members must receive at least 20 minutes rest per hour, that an orchestra's day off may not be changed without the Union's consent, that musicians must be paid for rehearsals called by the hotels, that a musician who plays more than one instrument in an orchestra shall receive additional payment therefor (this is termed a doubling charge), that the musicians shall be served hot meals by the hotel and shall receive vacation pay as specified therein, that each hotel shall make contributions to the AFM pension welfare fund and that each hotel shall provide an air-conditioned room for use by musicians during intermissions. The minimum wage scale in the 1967 contract provided that a musician in the first year would receive $114 for a 6-day week consisting of 28 hours of performing, that the leader of the musical group would receive double that amount, that overtime would be paid at the rate of $6 an hour and rehearsals at the rate of $4.05 an hour. Each year thereafter under the contract, the weekly minimum was raised $6 so that in 1971 a musician received a minimum of $132 for a week.

In 1967, a disagreement arose respecting the application of the vacation clause in the agreement. On behalf of the Union, Pena wrote a letter to the hotels indicating that they must schedule vacations for each group of musicians so that the whole group would be off during the same period and that the hotels were not to schedule vacations for musicians on an individual basis. The president then of the Respondent Association, Roberto Lugo, wrote Pena that he was writing on behalf of all hotels and objected to the attempt by the Union to interfere with a matter "obviously . . . within the scope of the management prerogative" and to the Union's effort to unilaterally amend the agreed-upon contract language. Lugo further related that he had told the Union that because of their "operational needs," hotels desired to "retain the flexibility to grant vacations to musicians as they see fit." Lugo concluded his letter to the Union by stating that the Respondent Association considered Pena's letter to the hotels as "void."

Aside from few areas of minor disagreements such as that pertaining to the schedule of vacations, the relations between the Union and the Respondent Association until most recently were characterized by witnesses for the General Counsel and also for the Respondent Association as harmonious.

On December 15, 1971, a renewal contract from December 1971 to November 20, 1975, was signed by the Union and the Respondent Association. The form and contents of that contract closely parallel the prior agreements; "the minimum wage" scale as of the last year of the 1971-75 contract was $202 for each musician for the standard 6-day, 28-hour workweek. Another 3-year contract for the period December 1, 1975, to November 30, 1978, was reached on January 27, 1976. The law firm which represented the Respondent Association at the hearing made its first appearance as its representative when it participated in the bargaining that gave rise to that contract. The format and contents were substantially the same as those of the prior contracts except for the minimum wage rates. The member hotels as listed therein were the Americana, Caribe Hilton, Condado Holiday Inn, El San Juan, Hyatt Puerto Rico, Puerto Rico Sheridan, Cerromar, Dorado Beach, and El Conquistador. In this contract, the musicians received an additional holiday—San Juan Bautista Day Eve. The scale for musicians in 1978 was $238. That 1975-78 agreement stated that the hotels retain the sole authority to change orchestra personnel in case of misconduct.

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[5] Caribe Hilton, El San Juan, La Concha, Condado Beach, Americana of San Juan, San Jeronimo Hilton, Puerto Rico Sheridan, El Convento, El Flamboyan, Dorado Beach, Dorado Hilton, Miramar Hilton, and Ponce International.

A new contract was signed in 1979. There is a dispute, *inter alia*, as to whether that signed contract reflects accurately the terms actually agreed upon in the negotiations. Nevertheless the signed contract effective by its terms from April 1979 for a 3-year period closely tracts prior agreements. The current contract is captioned "Agreement" and not "Collective Bargaining Agreement" as were the prior contracts; "wage rates" are now termed "compensation scales." The current contract no longer simply states that the hotels shall make the appropriate deductions (from the earnings of the musicians) and remit the required payments to the pertinent government agencies as before. Instead it provides that the hotels are now doing these things "on behalf of the band conductors." The current contract contains a grievance-arbitration clause. Schedules A and B annexed thereto are similar in format to the schedules annexed to the earlier agreements. For example, both provide for a 20-minute rest each hour for the musicians. The doubling charge has been increased to $5; another holiday was added as was a sick leave clause, termed an "incentive clause." The "scale" for musicians was increased to $248 and will be $282 in 1981.

E. *Background to the 1979 Negotiations*

In the 1960's, the number of Class AA hotels in Puerto Rico grew and reached a climax around 1970. In the 1970's, some of these Class AA hotels closed, others were taken over by an agency of the Commonwealth of Puerto Rico, and others were consolidated. Still others were sold to new management. Other changes were made. Thus, Condado Holiday Inn no longer imported highly paid entertainers to attract guests but found it more productive to provide a more informal atmosphere in its entertainment functions. It has done away with its 10-piece orchestra and now has numerous musical groups playing in its rooms in an effort to attract a stable local following. The El San Juan Hotel still uses headliners from the mainland as attractions but the accompaniment for those entertainers is now taped. The El San Juan no longer uses the standard 10-piece orchestra.

By 1977, union membership had numbered about 2,700; however, only about 125 of these worked in the Class AA hotels. Of the Union's overall membership, only 25 percent performed on a full-time basis, that is, in symphony orchestras, on a single-engagement basis, or in hotels. The great majority of the Union's members perform on a part-time basis. All professional musicians in Puerto Rico had been until sometime in 1979 members of the Union for one or all of the following reasons: (a) it was the accepted wisdom that a performer had to belong to the Union in order to work, (b) it was necessary in order to promote the status of professional musicians' attempts to upgrade their profession, and (c) union membership was essential to enhance the status of the Puerto Rican musician especially in relation to the professional musician coming from the mainland. In actual practice, it appears that no one gave much thought to the reason for joining the Union. It seems that, if a musician were accepted by his peers as a professional, he was readily admitted to union membership and was thus assured of being paid "scale" whenever he played.

In the course of the hearing, the parties alluded regularly to the "Pat Mills" case. That case is discussed in detail below. It appears that it was the result of that case that the Union, on advice of its International's counsel, decided to press in the course of the most recent contract negotiations to have the local musicians declared to be employees of the hotels and that this declaration was to be expressly incorporated into the contract.

A brief look at the Pat Mills case will help put those negotiations in better perspective. Based on a secondary boycott charge filed by Pat Mills doing business as Pat Mills and Company, a complaint had issued against the Union. The hearing was held in December 1978. The Board issued its decision on December 5, 1979.[6] The decision indicates that in July 1978 the El San Juan Hotel contracted, through a booking agent in New York City, to bring down to perform in the El San Juan Hotel Pat Mills and Company for a 4-week engagement. That group consisted of Pat Mills, her husband, and five other musicians and a lighting operator and was nonunion. At the hearing in the instant case, the General Counsel referred to the Pat Mills group as "travelers" who are not covered by the collective-bargaining agreement between the Union and the Respondent Association. At the hearing in the Pat Mills case, the General Counsel contended that Pat Mills and her husband were self-employed persons under Section 2(6) and (7) and Section 8 of the Act. Based on the uncontroverted testimony of Pat Mills at the hearing in that case that she and her husband were individual proprietors with an office in West Nyack, New York, and that they provide musical services outside the State of New York in excess of $50,000 a year, they were found to be self-employed. The Union had argued in that case that its threat to strike the El San Juan Hotel was aimed at a lawful object, that is, the preservation of unit work. Administrative Law Judge Plaine held, however, that its real object was to force Pat Mills and others in her company to join the Union's sister local in New York City and that the Union's threat thus violated the Act as alleged.

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[6] 246 NLRB 129 (1980).

For reasons not clear but apparently related to some of the issues in the Pat Mills case, the Union decided to seek separate negotiations in December 1978 with the Class AA hotels in Puerto Rico and also to obtain express language in the collective-bargaining agreement that the local musicians were employees of the hotels, subject to a union-security clause, entitled to representation by stewards and also to receive sick leave pay. As discussed below, the Pat Mills case has a bearing on the language used in the recognition clause of the 1979-81 contract.

F. *The Most Recent Negotiations*

The Union's president, Angel Nater, testified that in September 1978 he told the executive director, Miguel Domenech, of the Respondent Association that the Union wanted to negotiate individually with the hotels involved in this case and that Domenech responded in effect that the hotels wanted the Respondent Association to act as their joint representative. It appears that Nater himself conducted the Union's negotiations directly with an advisory group in the background. The Union's advisory group consisted of three individuals, one of whom was Juan Pinero, who also had been the Union's vice president. Pinero, as discussed below in another section, is alleged in this case to be a supervisor employed by the Caribe Hilton Hotel.

On September 28, 1978, Domenech wrote Nater to state that the contract "which established working conditions for the contracting of musicians" will expire on November 30, 1978, and therein he asked Nater to set forth the Union's demands, an obvious invitation to the Union to begin negotiations for a renewal contract. Domenech wrote the Union on October 17 to note that he had not received a written reply to his September 28 letter and he stated therein that, instead, Nater had left two telephone messages which appeared to be in conflict with each other—in one, Nater reportedly said that the Union would negotiate with each hotel individually and, in the later call, Nater reportedly indicated that the Union would forward its demands to Respondent Association on or about October 15, 1978. Nater responded by letter of October 19, and enclosed with it a list of what the parties termed the Union's "non economic" demands. On November 3, Domenech wrote Nater asking that the Union's "economic demands" be made as soon as possible. On October 2, representatives from hotels belonging to the Respondent Association had met and drafted a "Mutual aid and protection agreement" which recited that these hotels "desired to continue engaging in collective bargaining negotiations with the Union on a multiemployer basis." The draft further recites that the Respondent Association's board of directors was empowered to "establish a labor relations policy" for the musicians. That mutual pact referred to the possibility of a "whipsaw strike against one of the employers" and to a lockout response thereto.

On November 10, 1978, the Union set forth its economic and noneconomic demands in Nater's letter to Domenech. By letter of November 17, Domenech replied that the noneconomic demands were completely unacceptable; he stated that the members of Respondent Association "do not employ musicians," that Respondent Association has always rejected the Union's proposals "to have the hotels incorporate musicians into their regular work force," and that the musicians are "employees of leaders." Domenech noted that the Respondent Association and the Union have always discussed "certain minimum wage" scalee for musicians to work at the "member hotels." Domenech also observed in that letter that the Union's proposals respecting those minimum (wage) scales were "to say the least unrealistic," and he suggested that the Union "present realistic proposals." Also, on November 17, the mutual aid protection agreement referred to above was signed *inter alia* by representatives of the Caribe Hilton Hotel, Condado Holiday Inn, LaConcha-Condado Beach, and by Sam Sweitzer for El San Juan Hotel.

On November 27, 1978, Sam Sweitzer, the president of El San Juan Hotel, wrote the Union stating that he was writing on behalf of El San Juan, the El Conquistador, and the Palace Hotels. These hotels are owned by one individual, Louis Puro. Sweitzer stated in that letter that these hotels deny the statement in the "collective bargaining agreement" for the period December 1, 1975, to November 30, 1978 (which covered the musicians at those three hotels), that the services of those musicians are "under the supervision of the hotels" and its executive managing its facilities. Sweitzer wrote that these three hotels were not employers of the musicians and that they "refused to recognize the Union or to bargain with it for any type of labor contract covering musicians who perform in these hotels." He concluded his letter with the statement that the El San Juan, El Conquistador, and the Palace Hotel have advised the Respondent Association of their dissent from certain parts of the Respondent Association's letter to the Union dated November 17, 1978.

The first negotiation meeting for a renewal contract for 1979 took place on November 28, 1978, and was attended by the Union's president, Nater, and by the Respondent Association's president, Juan Santoni, its executive director, and two members of the law firm representing the Respondent Association. Nater testified that the Respondent Association's representatives told him then that the Union's demands included matters that implied that the parties were negotiating a collective-bargaining agreement. Nater testified that he thereupon responded that was exactly what the Respondent Association and the Union had been doing since 1961. Nater, in his testimony, characterized the Respondent Association's position as analogous to that of a "half pregnant" woman in that, from Nater's viewpoint, the Respondent Association was engaged in collective bargaining while, at the same time, denying it. The Respondent Association's representatives stated at those negotiations that it was amenable to Nater's suggestion that the National Labor Relations Board resolve their controversy as to whether the hotels employ musicians. The Respondent Association also observed that it is aware of the increased cost of living and that its position in adjusting the earnings of the musicians should not be in variance with adjustments that "may be directly agreed upon by the different hotels with the orchestras leaders performing under contract in their facilities." (There was no testimony that any of the member hotels had direct discussions with the leaders thereon from then and until the Union and the Respondent Association ultimately reached a new agreement, as discussed below.)

The Union then filed an unfair labor practice charge with Region 24 of the Board. On December 7, its president, Nater, wrote Domenech and enclosed with his letter the Union's new contract proposals. The enclosed documents omitted reference to a "collective bargaining agreement" and simply referred to this "agreement." The proposals therein recited that they shall be applicable to the classification of employees listed in the "wage scale, hours of employment and working conditions" attached thereto as schedule A and to those who are "employed within the premises of the hotel whose services are rendered into the connection with the entertainment and dancing, all of whom will be [therein] collectively referred to as "musicians"—and that "all such musicians shall be in the bargaining unit covered by this agreement." Among the provisions sought by the Union as set forth in the proposed agreement were a union-shop clause, a grievance and arbitration clause, a no-lockout clause, a clause for free parking facilities, additional paid holidays, 12 days sick leave each year, a clause providing for payment of a Christmas bonus, coverage for family medical expenses, a no-subcontracting-out clause, and provisions for an increase in the weekly wage scale to $353 in the last of a 3-year contract.

Nater met with the Respondent Association's representatives and its legal counsel on December 8, 1978. Nater testified at the hearing that, to get the negotiations going then, he signed a letter prepared by the Respondent Association whereby Nater acknowledged that he has "reached the moral conviction that the position assumed by (the Respondent Associaton) in relation to the issue of whether or not the musicians are employees of the hotels is reasonable" and that the Union was willing not to insist on "integrating the musicians as part of the [hotel] labor force" provided agreement could be reached on a commercial compulsory arbitration clause in the contract in order to protect the musicians adequately.

In late December 1978, when the 1975-78 agreement was scheduled to expire, the Union agreed in a meeting with representatives for the Respondent Association, which was also attended by officials from the Puerto Rican Conciliation and Arbitration Bureau, to continue bargaining without calling a strike.

On December 31, 1978, Nater and other union representatives met with Louis Puro at his office in the El San Juan Hotel and informed him in effect that the November 27 letter the Union received from Sam Sweitzer on behalf of the El San Juan Hotel, the El Conquistador, and the Palace Hotel was an untimely attempt to avoid associationwide bargaining. Nater said that Puro told him that he was willing to "deal with the hotel association" and that, on Puro's general assurance that things would be all right, the Union decided not to go on strike at the El San Juan hotel.

Nater testified that on January 8, 1979, he was advised by the Respondent Association's attorneys that the Union had to withdraw its unfair labor practice charge before negotiations could resume and that the Respondent Association continued to assert that the hotels were not the employers of the musicians. Nater informed them that the hotels were in fact the employers of the musicians; he testified that, nevertheless and in order to be able to negotiate, he accepted the Respondent Association's demands.

On January 15, when the Union and the Respondent Association met again, Nater advised the Respondent Association that he had not yet withdrawn the unfair labor practice charge. He was then given a letter by the Respondent Association and was requested to sign it. He did so. The letter recited that he had agreed on January 8 that musicians are not employees of the hotels and that consequently the Union agreed to withdraw the unfair labor practice charge it had filed.

On January 22, 1979, the Respondent Association presented Nater with another document and requested that he sign that one. He did so. That document recited that the hotels had made deductions including social security taxes from the compensation paid musicians as an administrative service to band leaders who do not have the means and personnel to undertake those tasks.

The next meeting was held on January 23. Present for the Association were its president, Juan Santoni, its executive director, Miguel Domenech, its attorney, Milagro Soto, and two hotel officials, Roberto Lugo and Arne Orenstein. For the Union were its president, Nater, its treasurer, and a trustee. The Respondent Association presented its draft of the agreement. Nater and Santoni on behalf of the respective parties initialed a number of clauses on that draft to indicate their agreement as to those clauses. The recognition clause as so approved read "the hotels recognize the Union as the exclusive representative of all musicians performing within the hotel." (The General Counsel contends that subsequently the Respondent Association unilaterally inserted the letters "AFM" before the word "musicians" in that clause to suggest that the Union had agreed to represent only union members; the Respondent Association asserts that the clause was in fact later modified by agreement.) On February 15, the Union and the Respondent Association met. The parties reached agreement respecting a "fondo incentive" whereby the hotels would contribute to a fund a certain amount of money each month for musicians to compensate them for days lost because of illness and to provide an incentive for a musician not to feign illness and to perform although not perfectly well. Under this clause, each musician would receive at the end of each year the balance of the money credited to him in that fund. The Union asserts that the hotel in essence granted their demand for sick leave pay. The parties reached agreement on a number of other items including increased earnings, or other type pay raises, on the number of vacation days and they also agreed that travelers shall not be part of the contract. Roberto Lugo signed a memorandum on behalf of the Respondent Association on February 15, as did Nater for the Union, which sets out those areas of agreement. No reference is made in that memorandum as to the insertion of the letters "AFM" in the recognition clause of the contract.

Counsel for the Respondent Association, Maria Soto, explained how those letters came to be included in the final draft of the agreement. She testified that she attended the February 15 meeting and that, after Lugo and Nater signed the memorandum of agreement, she had a discussion with Nater respecting problem areas in obtaining ratification from the board of directors of the Respondent Association. The notes she had made while at that meeting were then received in evidence. These reflect that Nater indicated that "all musicians was not accepted but AFM was in order to prevent a repetition of the Pat Mills case." The Respondent Association's executive director, Domenech, was unable to recall any of the particulars of the conversation between Soto and Nater; he testified that there was general acceptance of the language changes. Earlier in the hearing, Attorney Soto had observed that the Respondent Association did not make the reference to "AFM" musicians to change the makeup of the group covered by the contract as at that time all of the local musicians were members of the Union.

It is undisputed that both the members of the Respondent Association and the Union had to ratify the agreement before it would go into effect.

G. *The Union's Ratification Meeting*

Although the Union had over 3,000 members, only about 150 worked in the hotels, a number of whom were leaders. On February 19, 1979, about 100 of the members who performed in the hotels attended a union meeting to vote on whether to ratify or reject the agreement reached between Respondent Association and the Union on February 15. Objections were voiced at the union meeting based on the failure of the agreement to guarantee that a 10-piece orchestra would continue to perform at the Condado Holiday Inn, and the fact that the provisions of the contract were not retroactive to the effective date of the contract and to the amount of the increases provided for in the weekly earnings of the musicians. The contract was rejected. A strike vote was proposed. Jose Juan Pinero, a band leader at the Caribe Hilton Hotel whom the General Counsel contends is a supervisor there, was present at the meeting and voiced objections to certain members being allowed to participate in the voting. Another individual, James Stevens, also alleged to have been an agent of a member hotel, objected to a strike vote. The membership nevertheless voted to strike, which began on February 19. It lasted until April 20, 1979, when the respective presidents of the Respondent Association and the Union apparently resolved their differences as discussed below.

H. *The 1979–81 Contract*

In the middle of April, Nater called the Respondent Association's office and asked to meet with its president, Juan Santoni. This call led to a meeting between Nater and Santoni on April 18 in Santoni's apartment. Santoni informed Nater that all the Respondent Association's prior offers had been withdrawn. Nater observed that there were three matters that had created the impasse, referring to the (1) guarantees that the hotels would have specified minimum numbers of employees, (2) salaries, and (3) retroactivity of the contract. Santoni said that the hotels had been able to function by having "hired nonunion members and foreign musicians." Nevertheless, Santoni said that he would try to get the Respondent Association's board of directors to accept the Union's proposals respecting the guaranteed number of musicians to be used by the Class AA hotels. They discussed the retroactivity issue and other matters. When the discussion ended, Santoni arranged a meeting with the Respondent Association's board of directors to review the points he and Nater had discussed.

On April 19, Nater came to the offices of the attorneys for the Respondent Association. After discussing the provisions of the incentive fund clause, i.e., that relating to benefits for sick leave, used and unused, and discussing the clause guaranteeing the use of the minimum number of musicians, Nater and Santoni signed "an agreement in principle" adopting the agreements reached on February 15 and on seven further points, including those pertaining to the guaranteed number of musicians, salary scales, and retroactivity. There was no reference therein to the language of the recognition clause. On April 27, Nater received from the Respondent Association a final draft of the agreement dated April 30, 1979, to be effective as of April 19, 1979, for a 3-year period. The recognition clause therein stated that "the hotels recognized the Union as the exclusive representative of all AFM musicians performing within the hotels." Nater apparently took no notice then of the letters AFM. He stated that he did notice then a discrepancy with respect to the amount of the contributions for the sick leave provisions. He called those figures to the attention of the Respondent Association's representatives and these were corrected. On April 30, he and Santoni signed the contract and the strike ended.

On August 7, 1979, a meeting of various members of the Respondent Association was held respecting questions as to whether the contractual provisions relating to their guaranteeing the use of a specified minimum number of musicians required them to have a minimum number of AFM musicians or whether the minimum number pertained to both union and nonunion musicians. (It appears that, at that time, a number of musicians had been dropped from union membership.) The Respondent Association's counsel advised its member hotels then that the minimum guarantee applied to all musicians, regardless of union membership; he further advised the hotels that they cannot establish a distinction between musicians that belong to the Union and those who did not and that the hotels "for all purposes do not even inquire whether the musicians are or are not Union musicians."

I. *Further Discussion Between the Union and the Owner of the El San Juan, El Conquistador, and Palace Hotels*

Louis Puro owns these three hotels and actively participates in their operations. He has controlled the El San Juan Hotel for 19 years, the El Conquistador for 15 years, and the Palace Hotel for 2 years.

The Union's president, Nater, testified that on April 30, 1979, he met with Puro and Samuel Sweitzer, president of the El San Juan Hotel. Nater said that Sweitzer had told him that he had read the proposals sent him by the attorney for the Respondent Association and that he believed they were acceptable. According to Nater, Puro then said that he did not know about that but, after further discussion, Puro agreed to guarantee that the El San Juan and the Palace would jointly use a minimum of 18 musicians. Nater related that he and Puro discussed the employment of nine musicians, a matter now the subject of a separate civil action in Puerto Rico.

J. *Use of Personal Services Contracts*

It is undisputed that the Respondent Association has recommended that its member hotels use a new form of contract to be signed by them with their leaders which states that the leader is the employer of the musicians not the hotels. It is also clear that the Condado Holiday Inn, the Caribe Hilton, El San Juan, El Conquistador, and the Palace hotels have, since the execution of the last agreement, been using that form of contract or one similar to it.[7]

III. ANALYSIS OF EVIDENCE AS TO ALLEGED REFUSALS TO BARGAIN

A. *The Employee vs. Independent Contractor Issue*

The parties in their respective briefs have discussed the guidelines I am to use in deciding whether or not the steady engagement musicians in Class AA hotels are employees as defined in the Act or are excluded thereform as independent contractors. It will be helpful to state those guidelines. Thus, the common law agency test must be applied.[8] Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the ends to be achieved but also the means to be used to achieve such ends.[9] All of the facts must be analyzed in applying the test.[10] Each case is determined on its own facts.[11] It is the right, not the exercise of control, that is important.[12] The test applies to individuals who may be supervisors as well as to those who may be employees.[13] While the test may be simple to state, it is not easy to apply.[14]

Respective counsel for the Respondents considered and discussed the relevant factors set out in Restatement of Agency 2d, §220, in applying the common law agency test to the facts in the instant case. This approach seems to me to be a sound one as it permits a detailed consideration of those factors in conjunction with the comments provided in the Restatement. My evaluation of the evidence in the context of those factors, as discussed below, does not accord with the arguments they urge, however.

I am aware that the applicable common law agency test was developed in tort cases to decide issues as to the liability of a master where a negligent act was committed by an individual, other than one of his regular servants, whom he had used in performing a service for him. On that premise, it would seem that my determination in this case should be based on the very same concept. That is, a steady engagement musician in a Class AA hotel would be an employee covered by the Act if that hotel were held to be liable for a negligent act by that musician during a performance at the hotel and which caused injury to a patron; conversely, if the hotel were exonerated from liability for such negligence by the musician, the musician would be an independent contractor.[15] That may be an awkward way to view the issue but I believe that it does put the specific issue in its proper legal perspective. That is not to say, however, that my determination must be identical to the results of such a tort action. The Restatement of Agency, 2d, observes that where the inference to be drawn from the relevant facts (as to whether or not an independent contractor or a master-servant relationship exists) is clear, the court should decide the matter as purely a legal issue; if the inference to be drawn is not so clear, the issue should be submitted to the jury for a factual determination pursuant to appropriate instructions. In the instant case, I do not think it can be said as a matter of law that the inference to be drawn from the testimony respecting the status of the musicians as employees or as independent contractors is clear. Rather, and as is evident from the discussion below, I think that reasonable men may differ thereon. Consequently, the issue involves a factual determination.[16] In deliberating on the question, I have considered the factors viewed by the Restatement as appropriate for that purpose. These are now discussed according to the headings used in the Restatement:

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[7] The Caribe Hilton has used the services of a booking agent, Jimmy Stevens, to handle the bookkeeping and the disbursement of paychecks to musicians. Thus, it pays Stevens each week a lump sum of the total of the moneys due the musicians and gives him its records as to the hours they worked, including overtime. The payment to Stevens also includes a commission for himself. Stevens then draws checks on his own account to pay the musicians each week and transmits taxes and other required deductions to the appropriate authorities.

[8] *N.L.R.B.* v. *United Insurance Company of America*, 390 U.S. 254 (1968). In that case, the Court discussed its holding in *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), where it had approved the Board's holding that the Act had been intended to cover "employees in the conventional as well as the legal sense . . ." as "the primary consideration" was whether the purpose of the Act would be effectuated by providing tothe individuals whose status was in dispute (i.e., newsboys alleged to be independent contractors) the protection guaranteed by the Act. The Court further observed that since the issuance of the decision in that case, the *Hearst* case, the Act itself was amended to reflect the intent of Congress that the common law agency test would control in determining whether individuals are employees or independent contractors.

[9] *Deaton Truck Lines, Inc.*, 143 NLRB 1372 (1963).

[10] *Yellow Cab Company*, 229 NLRB 1329, 1332 (1977).

[11] *Georgia Pacific Corporation*, 249 NLRB 1388 (1980).

[12] *Nevada Resort Association; Summa Corporation, d/b/a Castaways Hotel, et al.*, 250 NLRB 626 (1980).

[13] *Deaton Truck Lines, Inc., supra.*

[14] *N.L.R.B.* v. *Hearst Publication, supra.*

[15] The same rationale would apply to a leader of a musical group at a Class AA hotel. The issue then would be whether he was a supervisory employee or an independent contractor. Cf. *Deaton Truck Lines, supra.*

[16] In *N.L.R.B.* v. *United Insurance Co. of America, et al.*, 390 U.S. 254 (1968), the Court viewed the employee vs. independent contractor issue as essentially factual and on that basis affirmed the Board's holding.

1. Extent of control

The Respondents stress the fact that none of the hotels' top or middle management officials—the general manager, the food and beverage manager, and so on—have the technical competence to direct a band with respect to tempo and other musical attributes. The General Counsel and the Charging Party places considerable weight on the testimony that the managers of the Class AA hotels insist on a particular dinner-dance style of music to blend in with the character that these hotels strive to achieve for purposes of attracting patronage and on other testimony that the hotels possess and exercise significant control over the musicians in scheduling their workhours and overtime, in changing work locations, in regulating the volume of the music, and in the conduct and appearance of the musicians.

The comment set out in the Restatement states that the right of control needed to establish the relation of master and servant may be very attenuated, that in some cases there may be an understanding that an employer shall not exercise control, citing as an example the status of a full-time cook as a servant, although it is understood that the employer will exercise no control over the cooking. On that basis and because of the nature of the evidence presented, I give more weight to the areas relied on by the General Counsel. The hotel management sets the ambiance of the room and, through subordinates, including the respective maitre d's, the preparation and service of food and beverages is blended with the decor of the room and the entertainment provided therein to achieve a unified object—to provide a delightful evening for its guests. The testimony of a witness called by the Respondent Association is worthy of note in that regard. Jimmy Stevens, a bandleader-booking agent-entrepreneur with many years of experience in Puerto Rico, stated the maitre d' of a room where music is provided to accompany food and beverage service is "the boss of his room [and] coordinates the elements that go towards a successful presentation of food and entertainment [and he] has full operational authority within his specific room." Testimony of other witnesses which I credit further establishes that the maitre d' can and does direct leaders to lower the volume of the music if he considers it too loud to permit guests to talk while eating. The maitre d' can stop the music to speed up service, he can instruct the leader to have the musical group work overtime, and he occasionally has the band play a particular style of music to appeal to a party of guests; e.g., he will call for Mexican music should he feel that it will please guests from that country. One of the very experienced leaders was asked on cross-examination whether he could choose not to follow the maitre d's request for him to play a certain type of music. He answered with a smile and the statement that he always chose to play as the maitre d' had requested. I have no doubt from the overall testimony that the bandleaders are delighted to receive such requests, that they frequently select certain songs to appeal to an ethnic group dining at one of the tables in the room, and that they invite guests to suggest the songs to be played. I also have no doubt that they would never consider refusing to comply with a maitre d's wishes.

The record is replete in this case with examples of the control exercised by a Class AA hotel *vis-a-vis* the musicians. It schedules the days and hours of work of the musicians, assigns them to the rooms in which they perform, approves the vacation requests of the leaders and not infrequently also those of the sidemen in their groups, restricts them from using the gambling casino between musical sets, directs them to rehearse with featured performers and schedules their hours of rehearsal, prohibits them from leaving their musical instruments against a wall, requires them to wear appropriate attire to fit in with the ambiance of the room, reduces the number of musicians in a group where feasible in its judgment, insists on a leader remaining on the bandstand to accept applause, and so on. The hotels control the style of the music as they require soft background music during dinner, livelier dancing music afterwards, followed by playing sheet music for featured performers, and in the late hours more dance music. One leader testified that he had a 15-piece orchestra which played vibrant Latin-American music on club dates; i.e., a one-night concert or the like. When he began as a leader of a band in a Class AA hotel, he kept only six of the musicians and had to hire four others. In addition, he had to modify his musical style so that it became indistinguishable from the style played by all other 10-piece hotel bands in Puerto Rico.

Respondents argue that the contracts between the hotels and the leaders in essence provide for all the foregoing. As I understand it, they are asserting that, because the band is performing in accordance with the contract its leader signed with the hotel, the musicians are contractors whose skills make them independent. That is not all that is to be evaluated. The Restatement clearly indicates that what is being evaluated is the relationship of the parties arising out of their agreement. No one suggests that the master-servant relationship as viewed in modern agency law retains the elements of serfdom out of which the common law principle evolved. It is assumed that the relationship is a consensual one and that the agreement could well be in writing. The matter before me is, as the Restatement indicates, the determination as to the nature of the relationship.

Respecting the element of control, the Respondents point to record testimony that the leaders do the hiring and firing of sidemen in their respective groups, that the musicians do not file the standard employment application forms at the hotels' personnel offices as do individuals seeking jobs as porters, desk clerks, and so on and that musicians are not given orientation training or detailed rules regulating their work duties as are maids, maintenance employees, and the like. That testimony is of relevance on the ultimate issue, as observed below, but the fact that the hotels closely control the work environs of certain classifications does not mean that I must disregard the extent of control hotels possess over the group whose status is in dispute, simply because the control is not of equal magnitude.

Let me close the discussion under this factor by observing that the Class AA hotels do possess considerable control over the details of the work environs of the musicians in this case.

2. Engaged in a distinct occupation

All the parties acknowledge that the musicians performing in the Class AA hotels are highly skilled and are in a clearly distinct occupation. The significance of this factor may not be as great today as it was in the early common law when servants were assigned to unskilled tasks and entrepreneurs performed the skilled work. In that regard, the Restatement notes that modern technological developments are having an impact on agency law. Thus, the Restatement observes that the captain of a ship can disregard the orders of the ship's owner and still the owner will be liable for the captain's negligence in controlling the ship. In view of this, I am inclined to give less weight to the fact that the musicians have a distinct occupation than to the element of control, discussed above.

3. Whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision

The comment provided in the Restatement as to this factor is not, in my view, too helpful in deciding the issue posed in the instant case. The Restatement notes that area custom is a factor and then qualifies that observation by pointing out that skilled employees who resent interference are still servants if regularly employed, referring for example to cooks and gardeners. On the other hand, the Restatement observes that an individual employed for a specific job would not be a servant. It seems to me the emphasis is as much if not more on tenure than area custom.

Insofar as tenure is a consideration hereunder, the testimony discloses that, while the written contracts are for specific periods, they often are renewed and on frequent occasions, for year after year. In effect then the tenure is generally indefinite and often for many years.

4. The skills required

The musicians in this case are highly skilled and it is rare for an official of the hotel to impose his views on a leader respecting the performance of the group although there have been situations where a food and beverage manager has insisted on and obtained changes in the makeup of a group to satisfy his wish for a different musicial style or format.

5. The supplier of the instrumentalities, tools, and workplace

The Restatement comments that the fact that an individual supplies his own tools is some evidence that he is not a servant whereas, if he uses his employer's tools, it is normally understood that he will follow the owner's direction in their use and that indicates that the owner is a master. In the instant case, the musicians furnish their own instruments to a great extent, e.g., the saxophone and other small pieces, but the hotel furnishes the piano and often the sound-amplifying system. The leaders own and use their own sheet music; when performing with a featured star performer, the musicians use sheet music provided by the manager of the star performer.

Respecting the locale of the workplace, the hotels obviously provide the rooms in which the musicians perform. For that matter, the hotels set aside rooms to be used by the musicians during their rest periods. The Restatement, relative to this factor, contains an illustrative example. It states that coal miners who furnish their own helpers and their own explosives, but who are furnished with the larger machines and the means of ingress and egress by the owner of the mine who pays them for each ton of coal mined, are servants of the mine owner. That illustration suggests the analogy that, as the hotels in the instant case furnish the rooms where the musicians play, the piano and the amplification system which comprise the larger pieces of equipment, and the means of ingress and egress and as the hotels pay the musicians on an hourly basis, the musicians are servants within the meaning of the common law agency rules.

6. The length of the engagement

As noted above, the length of an engagement is normally indefinite insofar as the steady engagement musicians are concerned. Some groups have been with the same hotel for many years. It appears too that more than a few of the musicians have worked steadily for many years at one or another of the Class AA hotels in Puerto Rico.

7. Method of payment

Respondents have characterized the method used by the hotels to pay the musicians as "lump sum" payments. The method used is in fact virtually identical to the way an employee is paid. Regular weekly paychecks less the usual deductions are issued. The so-called lump sum figure set out in the Form B contract in essence establishes the regular weekly salary of each group member and does not cover overtime pay or other extras. My concept of a lump sum payment is one in which an owner pays a builder a total amount for a project at its inception or completion or at specific stages and no accounting is kept by the owner as to hours worked by the workers engaged by the builders, their rates of pay, and so on.

About the only area where the method of payments between a hotel and a musician can be said to be analogous to that between an owner-builder, as described above, pertains to the practice in Puerto Rico whereby musicians cover for each other in emergencies. On those occasions, it appears that the hotels and, for that matter, the leaders are not aware of the substitution until a group is ready to perform on a particular night. The hotels keep no record of such substitutes but treat the matter just as if the regular musician had appeared. This exception is a consideration. It also highlights the normal procedures which, *inter alia*, involve a musician showing his ID card at a payroll window each week to collect his paycheck.

The contract between a leader and a hotel occasionally provides the payment of a specified commission to a booking agent. That commission is not deducted from the so-called lump sum for the musicians but is paid by the hotel directly to the booking agent.

Respondents urge that little weight be given to the fact that hotels deduct income tax and other sums from the weekly paychecks of the musicians as it contends that the laws of the Commonwealth of Puerto Rico and the provisions of the collective-bargaining agreements between the Union and the Respondent Association require that such deductions be made. The General Counsel disputes the assertion that Puerto Rican law expressly requires the hotels to make such deductions. On that point, it appears that a leader could obligate himself under Puerto Rican law to deduct such moneys and transmit them to the local tax authorities but he would first have to obtain an "employer" number from the tax officials and follow the requisite regulations not detailed in the record in this case. It is evident, however, that this procedure is not a practical one. The Respondent Association's own proposal during the last negotiations with the Union provided that the hotels would make such deductions on behalf of the leaders because the leaders do not have the facilities to handle those details.

With respect to the argument put forth by Respondents as to the reason why the hotels have made tax and other deductions from the musicians' weekly paychecks, it seems to me that I should accord significant weight to the fact that, for all practical purposes, the hotels are obligated to deduct and transmit such moneys and even more weight to the fact that the hotels have for years obligated themselves to do so under the provisions of the collective-bargaining agreements between the Union and the Respondent Association.

8. Whether the work is a part of the regular business of the employer

Respondents contend in the briefs they filed that the main primary business of the hotels in this case is to furnish lodging, not music. I am not sure that that statement is entirely accurate. The Class AA hotels in Puerto Rico are hardly wayside inns where weary travelers may find rest at night. Their distinguishing feature is that they operate gambling casinos and, in conjunction therewith, appeal to tourists by offering food, beverages, and musical entertainment. In that context, it seems clear that the work performed by the musicians is part of the regular business of the hotels.

9. The belief of the parties

The nature of the negotiations between the Union and the Association for many years in executing collective-bargaining agreements pertaining to wages, hours, and other terms and conditions of employment, the internal operations of the Respondent Association insofar as they pertain to its dealingswith the Union, including the fact that the member hotels entered into a mutual aid and protection pact to guard against whipsaw tactics by the Union, the use of conciliation services by the Respondent Association and the Union; the language used by hotel officials in directing musicians, in contesting civil actions brought by musicians, in responding to inquiries from banks and from local agencies—all these point strongly to a belief by the parties that a master-servant relationship existed. It is true that whenever this belief surfaced, the Respondent Association denied that the hotels were employers of the musicians. Also, the Union's president did sign a statement prepared by the Respondent Association which provided that the parties agreed that the hotels were not employers of musicians.

I think that more weight should be given to their acts rather than to their conclusionary denials or admissions in determining what they actually accepted as to the nature of the relationship of the hotels *vis-a-vis* the musicians.

10. Whether the principal is in business

The Restatement does not provide any comment as to this factor. Presumably, this factor refers to the likelihood that one who is not in a regular business, e.g., an owner of a house, normally enters into contracts with independent contractors as to house maintenance and does not normally hire employees to perform such work. That factor has no bearing on the issue in this case.

11. Other factors

Section 220(2) states that the foregoing 10 factors, among others, are to be considered in resolving the agency issue. In this section I will discuss those aspects of the evidence which do not fall readily under any of the above 10 listed factors.

(a) *Comparison of working conditions*

Respondents note that there are significant differences between the working conditions applicable to the musicians and to individuals whom it concedes to be regular hotel employees; e.g., maids, desk clerks. I suppose that differences must exist in order for the issue in this case to be raised. Voluminous testimony and numerous exhibits in evidence demonstrate these differences, and also a number of similarities in the way the hotels dealt with the musicians and with individuals they view as employees. The differences in great part had to do with personnel procedures in that applicants for jobs as porters filled out personnel forms, and were interviewed and hired by personnel department officials and then were given orientation training, job training and booklets containing rules and regulations; musicians were not given any of these forms or booklets and obviously already had competence in their particular area. The similarities may, however, be entitled to greater weight. Thus, the leaders of musical groups were often the recipients of interoffice memoranda which indicated that they were part of the supervisory structure of the hotels. Also, the records kept by the leaders as to regular hours worked by musicians, overtime hours, and as to "doubling" moneys due are akin to duties traditionally performed by a supervisor. Further the musicians were given ID cards by the hotels, free meals in the employee cafeterias, employee discounts, and so on.

(b) *Use of the Form B contract*

Another miscellaneous area involves the language and use of the Form B contract. The General Counsel stresses the language therein that refers to the hotel as an employer. The record evidence is clear however that the only parts of that form that ever meant anything were the weekly salaries, the starting date of an engagement, and the signature lines.

(c) *The Association's legal status*

The Respondent Association notes that its own articles of incorporation and bylaws contain no provision whereby it is authorized to negotiate collective-bargaining agreements. I am not sure I understand the import of that observation; the doctrine of *ultra vires* is used to prevent corporate acts but not to excuse them. In any event, I attach significant weight to the provisions of the mutual aid pact drafted by the Respondent Association.

(d) *Entrepreneurial risk*

The Restatement, strangely, does not refer to entrepreneurial risk in determining whether one is a servant or an independent contractor. In any event, the musician in the instant case is an hourly wage earner protected by unemployment and disability insurance with provision for sick days and allowances for a vacation. The hotels even assume liability if his musical instrument is stolen from the musician's room. There is virtually no risk of pecuniary loss for a Class AA hotel musician, in the ordinary business sense.

(e) *The "Pat Mills" case*

In a decision issued in 1979, the Board found that the leaders of a musical group that performed at one of the Class AA hotels, the El San Juan, were self-employed persons.[17] That case was referred to by the parties at the hearing before me as the "Pat Mills" case as the name of the musical group in that case consisted of Pat Mills and Peter LaJeunesse, d/b/a Pat Mills and Company. In that case, as discussed above, the Pat Mills group came from New York to put on a show at the El San Juan and were forced to leave by the Union, the Charging Party in the instant case, when it threatened to call a strike among its members performing at the El San Juan hotel. There was no issue raised in that case as to the independent contractor status of the Pat Mills group. The Union admitted that the leaders of that group were self-employed persons. It sought to defend on the ground that its object was purely work preservation; however, it was held that the evidence showed that the Union violated Section 8(b)(4)(ii)(A) and (B) and Section 8(e).

Counsel for Respondent El San Juan stated in his brief, relative to another point, that all musical groups are self-employed whether they perform on a single engagement basis (i.e., one-night shows, also called a club date) or a steady engagement basis (as do the musicians in the Class AA hotels). He observes that a steady engagement is simply an extended club date.

The question that concerned me is whether the General Counsel could contend, as he did successfully in the Pat Mills case, that the musical group there was engaged by the Hotel El San Juan on an independent contractor basis and still argue before me that the regular musical groups are employees. The short answer is that he can as it is settled law that each case turns on its own facts. In that regard, I note that there are some apparent differences between the Pat Mills group and the Puerto Rican musicians involved in the instant case and that, in any event, the independent contractor issue was not litigated in the Pat Mills case.

It is my finding, after weighing all of the relevant facts in this case in the light of the guidelines set out by the Restatement, that there exists an employer-employee relationship between the Class AA hotels and the musicians involved in this case, rather than that of an independent contractor arrangement. The attributes of the status of these musicians *vis-a-vis* the hotels are closely akin to those of individuals who concededly are hotel employees, despite the obvious lack of any real community of interest between the musicians and those employees. Further, the long history of collective bargaining, the significant areas of control possessed and exercised by the hotels over the musicians, the close integration of their work with the hotels' operations and functions, the fact that the musicians run virtually no risk of pecuniary loss, the fact that the leaders of the musical groups perform functions substantially equivalent to a first-line supervisor in charge of a departmental unit of skilled individuals, and the other points noted above—all persuade me that a master-servant relationship exists, as contemplated by the common law rules of agency, between the musicians and the Class AA hotels in this case. In accordance with established principles, the musicians are thus found to be employees as defined in Section 2(3) of the Act and not independent contractors. I further find that the leaders of the musical groups in this case, *inter alia*, responsibly direct the work of the musicians and that they are thus supervisors as defined in Section 2(11) of the Act.

B. *The Appropriate Unit*

There are three matters to be considered in determining the scope of the appropriate unit. The first relates to the General Counsel's contention that three of the Class AA hotels attempted to withdraw from the association, wide unit in an untimely manner; the second involves the claim of the Respondent Association that the leaders' historical inclusion in the unit rendered it inappropriate; the third has to do with defining the overall scope of the unit.

The complaint alleges that the appropriate unit consists of all steady engagement musicians employed by the hotel members of the Respondent Association exclusive of bandleaders and independent contractors. The General Counsel contends that Respondents El San Juan hotel, El Conquistador Hotel, and The Palace Hotel were members of the Association for purposes of bargaining collectively with the Union and that they sought to withdraw from that unit after negotiations for a renewal contract were well underway. These three Respondents, through counsel, have asserted that they were not members of the Association and hence that they have no obligations as to anyone with respect to the unit alleged in the complaint. The evidence is clear that these hotels are commonly owned and controlled and administer a common labor relations policy. In that regard, their representatives (principally Louis Puro and Sam Schweitzer) have signed contracts negotiated by the Respondent Association and the Union covering steady engagement musicians and had aligned themselves with officials of other Class AA hotels in formulating and implementing a mutual aid and protection pact designed to counter any whipsaw tactics that the Union might attempt. These three hotels made no effort to withdraw from the unit until after the Union had, as requested by the Respondent Association, presented its list of bargaining demands. Moreover, Puro made it clear before the strike began that he would follow the Association's lead and he made it clear too when the strike ended that the contract negotiated with the Association was acceptable to him and he even agreed to the minimum number of musicians his hotels would use. I thus find that, at all times material to this case, Respondents El San Juan, El Conquistador, and The Palace were part of the Associationwide unit for purposes of collective bargaining with the Union.[18] Their refusal to honor the commitments made on their behalf by the Respondent Association constitute unlawful bargaining.[19]

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[17] *Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO (Pat Mills, d/b/a Pat Mills and Company)*, 246 NLRB 782 (1979).

The next consideration involves the fact that for years the bandleaders were part of the recognized unit. Respondents contend that their inclusion compels a finding that the unit is inappropriate. I note that the unit placement of leaders was never an issue in the negotiations. To invalidate the substantial impact of those negotiations now after so many years, especially where it is well settled that the inclusion of supervisors in a unit does not render it inappropriate,[20] would undermine the stability reached in that whole area. Rather, the exclusion now of the leaders is appropriate as either party to the negotiations may opt, at any time, to exclude them without destroying the employee unit itself.[21]

The third matter to be considered pertains to the scope of the unit. In the complaint, it was alleged that the musicians employed by all 34 hotel members of the Respondent Association constitute an appropriate unit. The issue was more closely defined in the course of the hearing as the parties addressed themselves to the specific question as to the musicians employed by the Class AA hotels in Puerto Rico and the related contract negotiations. More specifically the signatory hotels to the mutual aid and protection pact in late 1978 and the participation of the Class AA hotels in negotiating through the Respondent Association establish the scope of the overall unit—all steady engagement musicians employed by the Class AA hotels in Puerto Rico excluding leaders, independent contractors, travelers, and all other employees.

C. *The Union's Majority Status*

The Respondent Association has denied that the Union has represented an uncoerced majority of the unit employees, noting in that regard that the Union had never been certified by the Board as their bargaining representative and that some of the musicians had joined the Union years ago because, in their view, no musician would work with them if they did not join the Union. It appears too that some of these musicians, and others, were of the view that the Union enhanced their status as musicians. Throughout the course of the negotiations in 1979, all the musicians in the unit involved herein were members of the Union. It was not until after the strike was over that some musicians resigned from the Union or were dropped from its membership rolls because of their failure to remain current in their payment of dues to the Union.

I see no basis to conclude that the Union did not represent an uncoerced majority. The evidence is clear that at all material times the Union has been the choice of the majority of the unit musicians. I had some pause by reason of the involvement of supervisory personnel, i.e., the leaders, in union affairs, but it is evident that the unit employees rejected the efforts of the leaders to block a strike. Union membership by leaders does not *per se* impair the Union's majority status.[22]

D. *Alleged Unlawful Conditions Imposed by the Respondent Association as to Continuation or Resumption of Collective Bargaining*

The Respondent Association maintains that it never expressly conditioned bargaining with the Union on its first withdrawing unfair labor practice charges or on its conceding that the musicians are not hotel employees. The Respondent Association nevertheless acknowledges that the status of the musicians as hotel employees was a threshold issue that had, by necessity, to be solved before bargaining could continue. While the Respondent Association's agents may not have stated that view *in haec verba* during the actual negotiations, there is no question that it insisted that the Union in essence must acknowledge that the unit employees were without the protection of the Act before any raise in wages or related matters could be considered or discussed. In view of the finding above that the musicians are employees of the hotels entitled to the protection of the Act, the actions of the Respondent Association and its member hotels in conditioning bargaining as indicated herein constituted unlawful refusals to bargain collectively with the Union.

The Respondent Association, Respondent Caribe Hilton, Respondent Condado Holiday Inn, and Respondent El San Juan, El Conquistador, and Palace all promoted the use of various forms of personal service contracts to be signed by the Class AA hotels and leaders of musical groups. In and of themselves those form contracts could not be violative of the Act as they represent, in the context of this case, simply arrangements between employers and their supervisory personnel. What is improper, however, is the acknowledged purpose of those personal service contracts. Their use was promulgated and obviously used and known in the music industry in Puerto Rico in furtherance of the position of the hotels that they are not employers of the musicians performing in the hotels. Simply stated, the personal service contracts were adopted and used to make it clear to all, including the employees themselves, that the hotels would not bargain collectively with the Union respecting the wage rates and other terms of employment of the hotel musicians. In effect, the use of the personal service contracts was but a variation of the method by which these Respondents unlawfully refused to bargain with the Union, as found above.[23] I shall, however, dismiss the allegation that the hotels' use of such personal service contracts constituted unlawful unilateral changes as the subject matter is not one requiring collective bargaining. Insofar as the personal service contracts pertain solely to arrangements among supervisory personnel, the Union would have no right to bargain thereon; insofar as they purport to deny that the musicians are hotel employees, the Union's bargaining cannot change that fact. While it is true as the General Counsel argues that the changes in the methods of paying musicians as contemplated by those personal services contracts constitute unilateral changes as to which bargaining should be required, those changes were but incidental to the basic violation found. The greater encompasses the lesser.

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[18] *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB 1093 (1979); *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958).

[19] *Wm. Chalson & Co., Inc.*, 252 NLRB 25 (1980); *L. B. Priester & Son, Inc.*, 252 NLRB 236 (1980). See also *Teckwal Corp.*, 253 NLRB 187 (1980).

[20] *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641, et al.*, 417 U.S. 790, fn. 3 (1974).

[21] *Federal Compress & Warehouse Company* v. *N.L.R.B.*, 398 F.2d 631 (6th Cir. 1968).

[22] Cf. *Industry Products Company*, 251 NLRB 1380 (1980). See also *Florida Power and Light Co., supra.*

E. *Alleged Unilateral Change in Language of the Recognition Clause*

There was considerable dispute at the hearing as to whether the Respondent Association had unilaterally inserted the letters AFM in the recognition clause of the 1979-81 contract before it was signed. Thus, the Union's president testified that he had never agreed to that insertion and was not aware that those letters had been inserted into the final draft of the contract when he signed it. Counsel for the Respondent Association, Soto, testified that her notes at a negotiating session in February 1979 reflect that the Union's president and the Respondent Association's executive director reached agreement on a number of items which they then initialed and that, sometime later that day, the Union had agreed with the Respondent Association that the Union's contract would not apply to groups such as the Pat Mills group. (It appears that that the Respondent Association's members were concerned that somehow the 1978 contract might enable the Union to do legally what the Board had enjoined it from doing as a result of the Pat Mills case, discussed above.) The Union acknowledges that the contract does not cover such groups as Pat Mills, either because they are "travelers" or "independent contractors" but it maintains still that it never expressly agreed to the insertion of the letters, AFM, in the recognition clause. The Respondent Association notes that in the final drafts of prior contracts minor language insertions have been made to reflect informal understandings. It appears that neither side is contending that the parties agreed that the contract was a members-only contract.[24]

While the evidence is that the parties did not expressly agree to the insertion of the letters AFM, I find that the evidence is insufficient to establish that the Respondent Association unilaterally changed the agreed-upon contractual language by inserting those letters prior to final signature. The insertion was consistent with the intent of the parties, however informal the agreement was thereon. Similar modifications of minor points have been done before. I am not persuaded that the fact that the Union's president did not, when he signed the final draft of the contract, consciously assent to the use of that insertion, requires a finding that he did not assent to its use. In short, the Union and the Association reached an informal agreement as to the scope of the recognition clause, the Association sometime later made a change to reflect that agreement as has been the practice in the past, and the Union signed the document without objection. That does not add up to an unlawful unilateral change, notwithstanding that, at first blush, the recognition clause could easily be misread to indicate that the parties had signed a members-only contract.

IV. THE ALLEGED DISCRIMINATORY DISCHARGE OF PEDRO CHICLANA BY RESPONDENT CARIBE HILTON AND ALLEGED INDEPENDENT VIOLATIONS OF SECTION 8(A)(1) OF THE ACT

A. *The Relevant Testimony and Related Credibility Resolutions*

1. General background

The General Counsel alleges that the Respondent Caribe Hilton, by its supervisor, Bandleader Jose Juan Pinero, discharged its musician employee, Pedro Chiclana, because of his activities as a member of the Union and interfered with the Section 7 rights of its musician employees by reason of other conduct by Pinero, discussed in more detail below. The Respondent denies that Pinero is a supervisor in its employ and contends that, even if he were, none of his actions were violative of the Act.

Pedro Chiclana began working at the Caribe Hilton hotel on December 20, 1971, as a saxophonist and as a flutist. From about 1973 or 1974, he performed at the Club Caribe in the Caribe Hilton hotel under the leadership of Jose Juan Pinero as part of a group known as Pijuan and his sextet. He had been a member of the

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[23] As no evidence was offered that the La Concha-Condado Beach complex used such personal service contracts, the General Counsel's motion, made in its brief, to withdraw the complaint allegation thereon, is granted.

[24] One of the officials of the Respondent Association testified that he had expressed the opinion to other officials of the Association that the letters, AFM, indicated that the contract applied only to musicians who were members of the Union. On advice of counsel, the Association concedes that the contract covers hotel musicians, regardless of union membership.

Union for many years as had Pinero. For that matter, Pinero had been much more active in union affairs than Chiclana had been. Pinero had, for a 2-year period, held the position as vice president of the Union and had also been a member of an advisory council to the Union's president.

2. Alleged independent violations of Section 8(a)(1)

In February 1979, about 100 members of the Union gathered at its meeting hall to vote on contract ratification. The contract was rejected. A strike vote was then scheduled to be taken. Pinero protested and spoke out against the Union's calling a strike. In the absence of any evidence thereon, I assume that Chiclana took no active part one way or the other at that meeting. The strike vote was taken and, as a result, an immediate strike was authorized.

Chiclana testified that, after the strike vote was taken and while he was in the driveway outside the building in which the vote had been taken, Pinero approached him and others who were in the Pijuan sextet. Chiclana testified that Pinero said to them then that he did not want them on the picket line and that they were to meet with him later that evening in the musicians' room in the Caribe Hilton hotel. One of the other members of the Pijuan sextet at that time, Hector Negron, also testified at the hearing. However, he made no reference to such a meeting in the driveway that day. Pinero testified that he never had given any order to Chiclana to refrain from picketing; Pinero did not refer to any meeting of his sextet in the building's driveway, as Chiclana had. Although Pinero's denial is summary in nature and Chiclana's account is detailed, I am not persuaded, especially as Negron failed to corroborate Chiclana's testimony on the point, that the General Counsel has shown affirmatively that Pinero issued an instruction to members of his sextet on the day of the strike vote to refrain from picketing. Pinero's denial is thus credited.

Chiclana further testified that, when he arrived at the Caribe Hilton later that night, there were several pickets outside. He said that one of them recognized him as a member of the Pijuan sextet and pulled him onto the picket line. Chiclana related that, about 20 minutes later, Pinero arrived at the hotel and that, when he saw Chiclana on the picket line, he told Chiclana that he did not want to see him on the picket line. Chiclana further stated that after about 2 hours he noticed that he and a few other musicians were the only ones from the Caribe Hilton who were on the picket line then and that he decided to go into the hotel. He testified that he left the picket line and that, as he entered the musicians' room, he heard Pinero arguing with a union delegate, Chico Rivera, telling Rivera that he, Pinero, did not have to order his musicians to go outside; i.e., join the strike. Chiclana said that the leader of another group performing at the Caribe Hilton, namely, Mario Ortiz, intervened and suggested that everyone should go outside to discuss the matter on the picket line. Chiclana said that most of the musicians went outside to the picket line.

Pinero testified that he had told the union delegate that evening that he was in no hurry to get on the picket line but that later everyone did go out. Pinero said that he too "went out in the picket line" where he observed that one placard referred to him as "rat." Pinero denied ever expressly instructing members of his sextet to refrain from picketing. In view of the confusion respecting the precise sequence of events, the excitement caused by the first strike among musicians in the hotel industry in Puerto Rico and the fact that no witnesses were offered by the General Counsel to corroborate Chiclana's statements that the members of the sextet were ordered by Pinero not to picket, I am not satisfied that the General Counsel has sustained his burden of proving affirmatively that Chiclana's version is more credible than Pinero's denials.[25] In that regard, I note that a union delegate named Rivera testified at the hearing but on a point entirely distinct from any argument with Pinero, as recounted by Chiclana.

During the strike of the hotels' musicians, the Pijuan sextet (with some minor changes, e.g., the singer was replaced) performed at a television studio located adjacent to the Caribe Hilton. Chiclana continued to perform there with the sextet, notwithstanding that during those same months he was doing picketing duty at the hotels Sometime before the strike ended Pinero resigned from membership in the Union. The sextet, including Chiclana, resumed performing at the Caribe Hilton when the strike ended.

The General Counsel presented three witnesses, including Chiclana, who testified that, at a meeting in the musicians' room at the Caribe Hilton shortly after the strike ended in late April 1979, a union official sought to collect "taxes"; i.e., working dues to be paid to the union. At that meeting, according to these witnesses, Pinero said that he himself had discontinued paying "taxes" to the Union and that he wanted the musicians in his group also to stop paying "taxes." Pinero's testimony was general in nature and in essence was a statement that he never engaged in any action, as alleged in the complaint, that he had interfered with the musicians' right to pay "taxes" to the Union. Pinero acknowledged that there had been a meeting pertaining to the payment of taxes but did not elaborate on it. I credit the accounts of the General Counsel's witnesses as they were substantially consistent and detailed, in contrast to the summary nature of Pinero's version.

3. Chiclana's discharge

During the strike, the Pijuan sextet (with a different singer) began performing as part of an early evening television show. It continued with that show after the strike ended when it resumed playing at the Club Caribe in the Caribe Hilton hotel.

On June 27, 1979, Chiclana arrived at the television studio just prior to the start of the show featuring the Pijuan sextet. While he was chatting in the parking lot with some friends, Pinero drove in and a few minutes later walked by Chiclana and told him abruptly to go inside. Chiclana testified that whenever Pinero is in a mood, such as he was that day, his musicians "can't even breathe" for fear of being made the object of his wrath. In any event, it is undisputed that, soon after the sextet settled down to rehearse prior to the start of the show, a shouting match took place between Pinero and Chiclana. It is not entirely clear to me but I do not think the General Counsel is asserting that Respondent Caribe Hilton prearranged such a confrontation in order to have an excuse to discharge Chiclana. If somehow there is such a contention, I reject it as the event had the hallmark of an unanticipated confrontation between an unusually tense leader and a sideman, somewhat more relaxed in nature until, as unquestionably happened, Pinero ordered him to put on the appropriate attire. At that point, the only question was which one became the more excitable. The parties spent considerable time attempting to show which one of the participants was principally at fault. In my view it makes no difference as the argument was purely personal in nature and had nothing to do with Chiclana's membership in the Union. For that matter, it appears that Chiclana was at that time delinquent in his dues payments to the Union and had not, at that point, been involved in any union activities, other than his having picketed months previously along with many other musicians, including it seems other members of the Pijuan sextet. In any event, Pinero and Chiclana calmed down in time for the start of the TV show. At its conclusion, Pinero walked from the studio to the Caribe Hilton hotel which was nearby and where he composed a letter giving Chiclana 2 weeks' termination notice "in compliance with [Chiclana's] request." He gave this letter to Chiclana later on June 27.

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[25] For the same reason, I am unable to credit Chiclana's further testimony that, on the same day of the strike, Pinero saw him on the picket line at the Caribe Hilton and told him to leave. Chiclana testified that, as a result, he moved to a picket line outside another hotel.

Chiclana took the letter to the Union's office the next day, paid his dues delinquencies, and obtained the assistance of a union official in drafting a response. On that same day, June 28, Chiclana gave Pinero a letter signed by him, Chiclana, which stated that Pinero's letter of June 27 was "completely erroneous."

Pinero read the letter. Chiclana testified that Pinero then told him that the letter was not prepared by Chiclana but was done by the Union and that he (Pinero) assumed that Chiclana had paid his taxes to the Union. Pinero testified that he simply told Chiclana that the Union's secretary had written the letter for him and Chiclana acknowledged that this was true.

On July 5, Pinero advised Chiclana that he was adhering to his decision to terminate Chiclana upon the completion of the 2 weeks' notification period; i.e., July 11. Chiclana testified that Pinero then told him in a loud voice to go look for another job and that he, Chiclana, told Pinero not to raise his voice. Thereupon, according to Chiclana, Pinero put his finger on Chiclana's chest and ordered him to be quiet. Pinero's account of that incident is that he saw Chiclana apparently "bragging" to other musicians and that he then spoke to Chiclana privately to urge him to let things quiet down and "to leave the door open." Pinero testified that Chiclana nevertheless called him vile names and asked him to step outside, apparently to settle the matter by fighting. On July 6, Pinero handed Chiclana a letter which related that he, Pinero, was adhering to his determination to discharge Chiclana as of July 11. The letter noted that "there does not exist any regulation at union level (or elsewhere) that forces" a leader to keep a person who is unable to comply "with the most elementary rules of ethics, discipline etc." The letter ended by Pinero's advising Chiclana that he has by his demeanor and language "ruined all chances of staying with the group."

Chiclana further testified that, upon the completion of the performance at the Club Caribe on July 11, Pinero told him that he was a good musician and that the other musicians wanted Pinero to give him another chance but that it was, in effect, necessary for Pinero to go through with his discharge of Chiclana because this was the "best example" to show that the Union's strike had been a "failure" and that the contract the Union had reached with the Association was also a "failure."

Pinero testified that on Chiclana's last day of employment he told Chiclana that he was sorry about it, that this was a hard lesson for him (Chiclana), and that perhaps some day Chiclana could return to the group when his behavior improved. Pinero said that Chiclana responded by saying he disagreed with Pinero and by assuring Pinero that he would be back to work the next day. (It appears that for several nights thereafter Chiclana did come to the Club Caribe lounge to sit near the sextet but he has not played with it since.)

In his pre-trial affidavit, Pinero related that he had stated that the fact that Chiclana had gone to the Union had created "more antagonism." At the hearing, he stated that this was true.

The General Counsel has failed to persuade me that Chiclana's account of his conversation with Pinero on the last night he worked with the Pijuan sextet was more credible than Pinero's account. It seems unlikely to me that Pinero would first have stated in writing, as he did, that Chiclana had by his behavior toward him (Pinero) ruined forever his chances of continuing with the sextet and then say, in effect, to Chiclana that he would have kept him as part of the group but for the fact that Chiclana had gone to the Union. Pinero's version is consistent with the preceding events. The impact of Pinero's statement that Chiclana's having gone to the Union had created "more antagonism" is discussed below in the following subsection.

It is undisputed that Chiclana was the first musician that Pinero has fired and that, since July 11, 1974, Chiclana has not performed at the Caribe Hilton hotel.

The General Counsel also proffered evidence respecting the status of Pinero as a supervisor for the Caribe Hilton Hotel. In good part, this testimony has been set out above in section III, under the subsection for the Caribe Hilton. In addition, the following data was submitted. In 1978, the hotel's managing director had a meeting of all the hotel's musicians and informed them that Pinero had been promoted to the position of musical director by the hotel's general manager and that refreshments were then served. Pinero testified that this was an honorary title. He received records from the leader of the 10-piece orchestra at that hotel pertaining to hours worked by the musicians in that group and turned those notes in to the hotel's controller for payroll processing. Pinero, according to one musician in his group, instructed him to stop going to the casino, as did the maitre d' of the room in which they played. On one occasion, Chiclana was given a device by Pinero which, when inserted in the mouthpiece of the saxophone, amplified the sound. According to Chiclana, Pinero directed him to cease using it and told Chiclana that the hotel wanted its use discontinued because it created too loud a sound which was not in keeping with the style of music desired. Pinero testified that the discontinuance of the device was his own decision. Pinero is given free parking space by the hotel; the musicians pay the same fee for parking as do other individuals; e.g., maintenance workers, whom all parties concede are statutory employees.

The Respondent Caribe Hilton offered testimony that Pinero was an independent contractor. Thus, Pinero testified that he arranges his own music and does not use stock arrangements which can be purchased at a music store. He rehearses his group each Saturday and decides what music will be played. He takes his group on cruises and on television assignments and generally takes his vacation from the hotel at the same time he lets his group go on vacation. In that regard, only he, Pinero, seeks approval from the food and beverage manager as to when to take his vacation but the musicians in his group deal only with him, Pinero, and not with the hotel's food and beverage manager. When the sextet vacations, Pinero arranges for a group to substitute for them at the hotel and pays that group himself. Pinero testified that he decides the amounts to be paid. The record does not disclose how long or how frequent are the vacation periods but, presumably, they are taken in accordance with the vacation provisions of the contract between the Respondent Association and the Union.

B. *Analysis as to Alleged Discrimination and Interference*

1. The alleged discriminatory discharge of Chiclana

The credited testimony establishes that on June 27, 1979, Chiclana and Pinero got into a heated argument which was unrelated to the Union and which resulted in Pinero's giving Chiclana notice that his employment would be terminated 2 weeks hence. In that interval, they had more arguments of a personal nature. Pinero made it clear that he viewed Chiclana's behavior as outrageous and discharged Chiclana at the end of the 2-week period. The foregoing discloses no evidentiary basis to support a finding that Chiclana was discharged for his union activities. The General Counsel contends that, in any event, Pinero's concession that Chiclana's having gone to the Union created "more antagonism" establishes that Chiclana's discharge was based on unlawful discriminatory motivation. I disagree. That statement must be taken in context. In that regard, the testimony of the General Counsel's own witnesses was that Pinero was a high-strung individual who could not brook the slightest challenge to his authority. The General Counsel further adduced evidence that Chiclana stood up to Pinero's attempts to intimidate him and that, in doing so, Chiclana referred to Pinero in vulgar terms. Whether or not he was justified in doing so is not my concern. There is no question but that Pinero was outraged by Chiclana's behavior. Pinero testified that Chiclana, in effect, "bragged" that Pinero could not discharge him. Chiclana's own conduct after his discharge suggests that Pinero's testimony on that point was accurate. In these circumstances, I infer that Pinero's comment that Chiclana's having gone to the Union for aid in retaining his job had created "more antagonism" referred not to discriminatory motivation but simply to Pinero's apparent belief that Chiclana was willfully disobeying him and that Chiclana was flaunting his contempt for Pinero in part because he, Chiclana, was assured of the Union's support. To take the phrase "more antagonism" out of context as clear evidence of unlawful discrimination would require me to ignore all the relevant evidence to the contrary. I find that the evidence is insufficient to establish that Chiclana's termination of employment was discriminatorily motivated.

2. The alleged independent violations of Section 8(a)(1)

The complaint alleges that on June 28, 1979, Pinero as a supervisory employee of Respondent Caribe Hilton had created the impression that the Respondent was engaging in surveillance of the union activities of its musician employees. In support thereof, the General Counsel submitted testimony that, when Chiclana handed him the letter dated June 28, that a union official helped him prepare, Pinero told him that the letter was prepared by a union official he named. If that were the only relevant evidence, there might be merit to the allegation. There is, however, evidence in the record that Pinero had been a vice president of the Union for 2 years and had been a member of its advisory council. Presumably, Chiclana as a long-time union member knew this. In that context, I more easily conclude that Pinero's statement did not create the impression of surveillance of union activities but simply revealed that Pinero was familiar with the respective styles in which Chiclana and the named union official communicated and that Pinero wanted Chiclana to know that he could not claim credit for it. I find no merit in the allegation that the Respondent Caribe Hilton had thereby created the impression that it was engaging in surveillance of union activities.

The General Counsel also asserts that Pinero's remark to Chiclana on July 11, as discussed in detail above, that the fact that Chiclana had gone to the Union for assistance created "more antagonism" independently violated Section 8(a)(1). In context with the surrounding events, as considered above, the statement was not violative of the Act in any way.

There is a separate allegation in the complaint that Pinero's orders to members of the Pijuan sextet at the outset of the strike to refrain from picketing constituted a violation of Section 8(a)(1). Based on the credibility resolutions made, as set out above, I find that that allegation is without merit.

Lastly, the General Counsel contends that the statements by Pinero on two occasions to musician employees of the Caribe Hilton hotel that they were not to pay "taxes" to the Union were violative of Section 8(a)(1). I credited the General Counsel's witnesses as to only the second occasion, in June 1979.

I have also found above that the musicians in this case, including Pinero are employees of the Class AA hotels. I now further find that Pinero was a supervisor of the Respondent Caribe Hilton, as defined in Section 2(11) of the Act. Specifically, the evidence demonstrates that Pinero held the title of musical director of the Caribe Hilton hotel as given him by the hotel's manager at a cocktail party held to announce the event, that in his duties at the hotel he received communications in writing from the hotel's food and beverage manager on "inter-office" memorandum which pertained to the supervison of the musician emoloyees, that he collected and transmitted to the hotel's payroll section various records needed to compute the paychecks of the respective musicians, that he distributed to individual musicians paychecks drawn by the hotel to the order of each musician, that he responsibly directed the musicians in his group in the interest of the hotel's goal to offer food, beverages, dancing, atmosphere, and service to its clientel and that he possessed and exercised the authority to hire and discharge musicians performing with the Pijuan sextet at the Club Caribe in the hotel. It is apparent that Pinero meets at least one of the statutory criteria set out in Section 2(11) and thus is a supervisor as so defined.

I thus conclude that the Respondent Caribe Hilton violated Section 8(a)(1) when Pinero told the musicians in June 1979 not to pay their "taxes" to the Union. I find no merit as to the allegation that he had made substantially the same comment in April 1979 as there is no credible evidence thereon.

CONCLUSIONS OF LAW

1. Puerto Rico Hotel Association, Hilton International Company d/b/a Caribe Hilton Hotel, Hilton International Company d/b/a La Concha Hotel-Condado Beach Hotel, Condado Holiday Inn, San Juan Hotel Corporation d/b/a El San Juan Hotel and El Conquistador Hotel, and the Puerto Rico Hotel Corporation d/b/a The Palace Hotel, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All musicians employed by Class AA hotels excluding travelers, independent contractors, all other employees, leaders and all other supervisors as defined in the Act, comprise a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been and is now the exclusive representative of the employees employed in the unit described above in paragraph 3 for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By having refused, since on or about January 8, 1979 to bargain collectively with the above-named labor organization in that it insisted, as a threshold issue in bargaining, that this labor organization admit that the employees in the unit it represents are not employees of the Class AA hotels and in connection therewith by insisting that the labor organization withdraw unfair labor practice charges it had filed which asserted that the unit employees are employees of these hotels, the Respondent Puerto Rico Hotel Association has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. The Respondent Puerto Rico Hotel Association and the following Respondents whom it represents for purposes of collective bargaining: Hilton International Company d/b/a Caribe Hilton Hotel, Condado Holiday Inn, San Juan Hotel Corporation d/b/a El San Juan Hotel and El Conquisdator Hotel, and The Puerto Rico Hotel Corporation d/b/a The Palace Hotel have, since on or about June 18, 1979, refused and are refusing to bargain collectively with the above-named labor organization by promoting the use of and using personal service contracts with leaders of musical groups of employees of Class AA hotels in Puerto Rico in furtherance of its unlawful disclaimer that the said musicians employees are employees of the Class AA hotels.

7. The Respondents San Juan Hotel Corporation d/b/a El San Juan Hotel and El Conquistador Hotel, and the Puerto Rico Hotel Corporation d/b/a The Palace Hotel have refused and continue to refuse since on or about November 27, 1978, to bargain collectively in that they have stated then they no longer recognize the Union as the bargaining agent of their musician employees and also sought to withdraw the authority they issued to the Respondent Puerto Rico Hotel Association to negotiate a renewal contract with the above-named organization vis-a-vis the unit of employees described above in paragraph 3 despite the fact that, at that time, the renewal contract negotiations were substantially underway and in that the said Respondents have failed and refused and are failing and refusing to honor the collective-bargaining agreement reached on about April 30, 1979, between the said labor organization with the Respondent Puerto Rico Hotel Association notwithstanding that said Respondents have reached agreement with the said labor organization as to the minimum number of musicians to be employed by them and the said Respondents by the foregoing conduct have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

8. The Respondent Puerto Rico Hotel Associaton did not, in violation of the Act, unilaterally change the agreed-upon recognition clause of its current agreement with the above-named labor organization.

9. The Respondent Hilton International Company, d/b/a Caribe Hilton Hotel, did not, in violation of the Act, (a) discharge its employee Pedro Chiclana because of his activities on behalf of the above-named labor organization, (b) create the impression that it engaged in the surveillance of activities of employees on behalf of that labor organization, (c) impliedly warn employees against supporting that labor organization, (d) direct its musician employees not to strike or picket, (e) instruct its musicians in April 1979 not to pay working dues to the

Union but it has interfered with, restrained, and coerced its emoloyees with respect to their rights under Section 7 of the Act by having, through its supervisor, Juan Pinero, instructed its musician employees in June 1979 that they are not to pay working dues to the said labor organization and thus the Respondent thereby violated Section 8(a)(1) of the Act.

10. The Respondents Puerto Rico Hotel Association, San Juan Hotel Corporation d/b/a El San Juan Hotel and El Conquistador, The Puerto Hotel Corporation d/b/a The Palace Hotel, Hilton International Company d/b/a Caribe Hilton Hotel, and Condado Holiday Inn, did not in violation of Section 8(a)(1) or (5) of the Act unilaterally change the terms and conditions of employment of its musician employees by promoting the use of, or by using, personal service contracts with their respective supervisors.

11. By the refusals to bargain collectively with the Union as set out above in paragraph 5, 6, and 7, the Respondents named therein have interfered with, restrained, and coerced and are interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act and thereby have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

12. The activities of each Respondent set forth above, occurring in connection with its operations also described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and the Commonwealth of Puerto Rico and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I find it necessary to order that they cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act. Those Respondent hotels found to have separately violated the Act will be ordered to post the notice to be signed by the Association in addition to the notices remedying the violations they committed as the areas found to be violative are overlapping. Those Class AA hotels not otherwise involved will not be ordered to post notices as copies of the Association's notice will be sent to the Union's office where all employees in the unit will have the opportunity to read it.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[26]

I. Respondent Puerto Rico Hotel Association, herein called the Association, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO, by insisting that the officials of the Union state or acknowledge in writing that musicians employed by the Class AA hotels in Puerto Rico are not employees of those hotels entitled to the rights guaranteed them under Section 7 of the Act or by requiring the Union to withdraw unfair labor practice charges it filed to protect those rights.

(b) Refusing to bargain collectively with the Union by promoting the use of personal service contracts by Class AA hotels whereby hotel supervisors who lead and direct musician employees purport to be the employers of those musicians in derogation of the Union's status as exclusive collective-bargaining representatives of those employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its principal office copies of the attached notice marked "Appendix A."[27] Copies of this notice, on forms to be provided by the Regional Director for Region 24, after being signed by a duly authorized representative of the Association, shall be conspicuously posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in all places where notices to all employees are customarily posted.

(b) Return to the Regional Director as many additional copies of Appendix A, signed as indicated above, in order to allow for the further posting of those signed notices on the premises of those of the other Respondents in this case, as provided for below and to allow also for the Regional Director to forward to the Union three signed copies for posting at the Union's premises if it chooses to do so.

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

II. Respondent San Juan Hotel Corporation d/b/a El San Juan Hotel and El Conquistador Hotel and Respondent The Puerto Rico Hotel Corporation d/b/a The Palace Hotel, San Juan, Puerto Rico, their officers, agents, successors, and assigns, herein jointly called San Juan *et al.*, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union by withdrawing recognition from it as the exclusive representative of a multiemployer unit consisting of, among others, musicians in the employ of those three hotels and by attempting to withdraw from Respondent Association the authority to negotiate a renewal contract with the Union covering, *inter alia*, musicians employed by Respondent San Juan, *et al.* after the Union has submitted its bargaining demands for that contract renewal.

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[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[27] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Refusing to bargain collectively with the Union by using personal service contracts with its leaders who supervise its musician employees which purport to identify those leaders as the employers of the musicians in derogation of the Union's status as the exclusive bargaining representative of those musician employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request by the Union, sign the collective-bargaining agreement reached between the Association and the Union on about April 30, 1979.

(b) Post the attached notice marked "Appendix B"[28] on the premises of the El San Juan, El Conquistador, and The Palace Hotels. Copies of this notice, on forms to be provided by the Regional Director for Region 24, after being duly signed by an authorized representative or representatives for Respondent El San Juan *et al.*, shall be conspicuously posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in all places at these three hotels where notices to employees are customarily posted. Post also signed copies of Appendix A at these same locations and under the same conditions, immediately upon receiving such copies from the Regional Director for Region 24.

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

III. Respondent Hilton International Company, d/b/a Caribe Hilton Hotel, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Using personal service contract forms in employing or in retaining musicians in its employ and whereby its supervisors who lead those musicians are purported to be the employers of those employees, in derogation of the Union's status as their exclusive bargaining representative.

(b) Directing its musician employees not to pay working dues to the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees respecting the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Post the attached notice marked "Appendix C"[29] on its premises. Copies of this notice, on forms to be provided by the Regional Director for Region 24, after being duly signed by an authorized representative, shall be conspicuously posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, at all places where notices to its employees are customarily posted. Post also signed copies of Appendix A at these same locations and under the same conditions immediately upon receiving such copies from the Regional Director for Region 24.

(b) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IV. Respondent Condado Holiday Inn, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Using personal service contract forms in employing or retaining musicians in its employ and whereby its supervisors who lead musicians are purported to be the employers of those employees, in derogation of the Union's status as their exclusive bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees respecting the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Post the attached notice marked "Appendix D"[30] on its premises. Copies of the notice, on forms provided by the Regional Director for Region 24, after being duly signed by an authorized representative, shall be conspicuously posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, at all places where notices to employees are customarily posted. Post also signed copies of Appendix A at these same locations and under the same conditions immediately upon receiving signed copies of that notice from the Regional Director.

(b) Notify the Regional Director what steps have been taken to comply herewith.

IT IS RECOMMENDED that the allegations of the complaint as amended that Respondent Caribe Hilton violated Section 8(a)(1) and (3) of the Act by reason of the discharge of Pedro Chiclana be, and they hereby are, dismissed, as are the alleged independent violations of Section 8(a)(1) found above to be without merit.

IT IS ALSO RECOMMENDED that the allegation that Respondent Association, in violation of Section 8(a)(1) and (5) of the Act, reneged upon the agreement reached with the Union by inserting letters AFM in the recognition clause of that agreement in an attempt to limit its application to members of the Union only, or as a unilateral act, is dismissed.

IT IS ALSO RECOMMENDED that the allegation that Respondent Association unilaterally changed working conditions of its musician employees in violation of Section 8(a)(5) of the Act by executing personal service contracts with its supervisors is dismissed.

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[28] See fn. 27, *supra.*

[29] See fn. 27, *supra.*

[30] See fn. 27, *supra.*

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT require Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO, to state, in writing or otherwise, that steady engagement musicians employed by Class AA hotels in the Commonwealth of Puerto Rico are not employees entitled to the rights guaranteed under Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT promote the use of personal service contract forms whereby these hotels purport to treat their musician employees as employees of their leaders as it has been found by the National Labor Relations Board that these musicians are employees of those hotels.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce these musician employees in the exercise of the rights guaranteed them by Section 7 of the Act.

PUERTO RICO HOTEL ASSOCIATION

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Federation de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO, by withdrawing recognition from it as the exclusive representative for purposes of collective bargaining of the musicians who are our employees or by attempting to withdraw during negotiations from the multiemployer bargaining unit in which we are represented by the Puerto Rico Hotel Association.

WE WILL NOT use personal service contract forms whereby our musician employees are purported not to be our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our musician employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL, upon request by the above-named Union, sign the collective-bargaining agreements agreed upon between the Union and the Association and effective as of April 20, 1979.

SAN JUAN HOTEL CORPORATION, D/B/A
EL SAN JUAN HOTEL AND EL CONQUISTADOR HOTEL; THE PUERTO RICO HOTEL
CORPORATION D/B/A THE PALACE HOTEL

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT use personal service contract forms in which our musician employees are purported to be employees of their leaders and not our employees.

WE WILL NOT direct our musician employees to refrain from paying their working dues to Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our musician employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

HILTON INTERNATIONAL COMPANY D/B/A
CARIBE HILTON HOTEL

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT use personal service contract forms in which our musician employees are purported to be employees of their leaders and not our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our musician employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

CONDADO HOLIDAY INN

Cardinal Systems, a Division of Hospitality Motor Inns, Inc., d/b/a Cummins Component Plant *and* Hotel and Restaurant Employees and Bartenders Union, Local No. 58, AFL-CIO *and* Naomi Joyce Thompson. Cases 25-CA-11597, 25-CA-11838, and 25-CA-11795

December 2, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 16, 1981, Administrative Law Judge Henry L. Jalette issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs and Respondent filed a brief in answer to the General Counsel's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

The Remedy

As we have found that Respondent violated Section 8(a)(1) of the Act by soliciting employees to revoke dues-checkoff authorizations, we shall adopt the Administrative Law Judge's recommended cease-and-desist provision with respect to this violation. The General Counsel excepts to the Administrative Law Judge's refusal to order an additional remedy requiring Respondent to remit dues to the Union on behalf of those employees who were unlawfully solicited to revoke their dues-checkoff authorizations. We find merit to the General Counsel's exception.[4]

As more fully described by the Administrative Law Judge, the credited testimony establishes that Respondent's cafeteria manager, Marge Cox, approached employees on frequent occasions and urged these employees to submit to Respondent written notices revealing whether or not they desired to continue to maintain their dues-checkoff authorizations. During the course of these solicitations Cox made disparaging remarks to one employee about the "——Union" and approached another employee a second time after that employee's initial written indication that she desired to maintain her dues-checkoff authorization. Following Cox's solicitations, several employees tendered revocations of their previously executed authorizations. Inasmuch as Cox approached some employees who had never made any inquiries whatsoever regarding their dues obligations, the only reasonable inference to be drawn is that, absent Cox's unlawful solicitation, these employees would likely

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[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] The General Counsel has excepted to the Administrative Law Judge's finding and conclusion that Respondent did not engage in conduct amounting to solicitation of employees to engage in surveillance of employees' union activities. He contends that the credited testimony of employee Wagner establishes that Cafeteria Manager Marge Cox, in addition to interrogating Wagner about events occurring at union meetings already held, as found by the Administrative Law Judge, also solicited Wagner *before union* meetings to let Cox know what transpired at such meetings. We find merit to the General Counsel's exception. Thus, the record clearly establishes that Wagner testified to more than one conversation with Cox, including a conversation before any union meetings were held. Wagner's credited testimony in this regard indicates that Cox asked Wagner "to let her know what went on at the Union meetings." Such conduct clearly constitutes a solicitation to engage in surveillance of employees' union activities in violation of Sec. 8(a)(1) of the Act. *Daniel Construction Company, a Division of Daniel International Corporation*, 241 NLRB 336 (1979).

In addition, the General Counsel excepts to the Administrative Law Judge's failure to find and conclude that Respondent's cafeteria manager, Cox, falsely signed the name of a unit employee to a showing-of-interest statement accompanying a decertification petition in violation of Sec. 8(a)(1). We agree. Although the Administrative Law Judge credited the testimony of employee Hiten that she observed Marge Cox sign the name of employee Peggy Cox to a showing-of-interest statement to be submitted with a decertification petition, he declined to specifically find, based on signature comparisons, that the name of Peggy Cox on the showing-of-interest statement was forged. However, in view of the Administrative Law Judge's crediting of Hiten's testimony that Marge Cox falsely signed Peggy Cox's name in Hiten's presence to the showing-of-interest statement, we find the Administrative Law Judge's hesitancy unwarranted. Accordingly, we conclude that Respondent additionally violated Sec. 8(a)(1) of the Act by virtue of Marge Cox's signing of an employee's name, while in the presence of another employee, on the showing-of-interest statement seeking the Union's removal as bargaining representative. We have modified the Administrative Law Judge's recommended Order to reflect these additional violations.

Finally the General Counsel has excepted to the Administrative Law Judge's failure to include a broad cease-and-desist order herein. It is the Board's policy that such an order is warranted only when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' fundamental statutory rights. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). With respect to the instant case, we find that a broad order is not warranted.

[4] Member Fanning agrees with the Administrative Law Judge that requiring Respondent to remit dues on behalf of the union members it unlawfully solicited to revoke checkoff is inconsistent with our holding that an employer may unilaterally discontinue checkoff following expiration of a collective-bargaining agreement. See *Finger Lakes Plumbing & Heating Co., Inc.*, 253 NLRB 406 (1980); *Peerless Roofing Co., Ltd.*, 247 NLRB 500 (1980). Because Respondent could lawfully discontinue checkoff without revocation, its solicitation of revocations could not have unlawfully caused any monetary loss to the Union. Moreover, the members remain liable to the Union for their dues regardless of whether or not Respondent deducts those dues from wages. In those cases which the majority relies upon, the obligation itself arose from an unlawfully created relationship.

have continued to maintain in effect their dues-checkoff authorizations. In any event, since Cox's conduct makes it impossible to ascertain with absolute certainty whether the solicited employees would have voluntarily maintained their authorizations, any doubts resulting from the illegal conduct should be resolved against the responsible party.

In ordering this additional remedy, we find Respondent's unlawful solicitation analogous to those instances in which we have ordered reimbursement of union dues where employees have been unlawfully influenced or coerced by their employers into paying dues, joining a union, or maintaining their union membership. See *Haven Manor Health Related Facility*, 226 NLRB 329 (1976); *R. L. Sweet Lumber Company*, 207 NLRB 529, 539–540 (1973). As in those cases, a cease-and-desist order, standing alone, is insufficient to return the parties to the status quo existing prior to the commission of the unfair labor practice and, thus, reimbursement to the Union of dues lost herein as a result of Respondent's unfair labor practice is necessary and proper to effectuate the purposes and policies of the Act.[5] Accordingly, in addition to the remedy provided by the Administrative Law Judge, we shall order Respondent to reimburse the Union for any dues lost by the Union with regard to those employees unlawfully solicited.[6]

Amended Conclusions of Law

Substitute the following for Conclusion of Law 6:

"6. By soliciting employees to engage in surveillance of employees' union activities, by falsely signing the name of an employee to a statement seeking the Union's removal as bargaining representative, by questioning employees about their union sentiments or activities and their cooperation with the National Labor Relations Board in the processing of cases in a manner and under circumstances tending to coerce employees in the exercise of Section 7 rights, by creating the impression that the union activities of the employees were under surveillance, by promises of higher wages, improved working conditions, or other benefits, by threats of a reduction in hours if employees selected the Union in an election, by assisting employees in the filing of a decertification petition, by soliciting employees to revoke dues-checkoff authorizations, by prohibiting employees from talking about the Union on nonworking time, and by threats to discharge employees for cooperating with the National Labor Relations Board, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Cardinal Systems, a Division of Hospitality Motor Inns, Inc., d/b/a Cummins Component Plant, Walesboro, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraphs accordingly:

"(c) Soliciting employees to engage in surveillance of employees' union activities."

2. Insert the following as paragraph 1(g) and reletter the subsequent paragraphs accordingly:

"(g) Falsely signing the name of an employee to a statement seeking the Union's removal as bargaining representative."

3. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Reimburse Hotel and Restaurant Employees and Bartenders Union, Local No. 58, AFL–CIO, all union dues not tendered to the Union by employees solicited to revoke their dues-checkoff authorizations, with interest thereon."

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[5] We find unpersuasive Member Fanning's assertion that Respondent's unlawful solicitation could not have caused any monetary loss to the Union because, under Sec. 8(a)(5) of the Act, Respondent could lawfully discontinue dues checkoff without employee revocation following contract expiration. In our view, Respondent's statutory right unilaterally to discontinue checkoff at contract expiration bears no causal relationship to whether or not unlawfully solicited employees would, in fact, have voluntarily maintained those authorizations in the absence of Respondent's unlawful conduct. Thus, while we agree that Respondent lawfully could have discontinued the contractual checkoff mechanism for all unit employees upon expiration of the contract without first securing individual revocations, the evidence indicates that Respondent *instead* chose to solicit employees individually to express in writing their intentions concerning continued checkoff deductions and apparently continued to honor such deductions for those employees who did not tender such a revocation. Accordingly, in these circumstances, the Union may in fact have suffered monetary loss as a result of the revocations unlawfully solicited by Respondent. In the absence of Respondent's unlawful conduct, the Union would likely have continued to receive dues through the checkoff mechanism on behalf of those employees unlawfully solicited by Respondent. Therefore, in our view, a remedy requiring remittance of dues to the Union lost as a likely result of Respondent's unlawful solicitation properly returns the parties to the *status quo ante* existing prior to Respondent's unlawful conduct.

[6] As the record does not reveal whether the unlawfully solicited employees otherwise continued to tender dues to the Union apart from the checkoff mechanism, we shall leave the determination of the amounts actually lost by the Union, if any, to the compliance stage of these proceedings. Further, we will limit such reimbursement as applicable to only those employees who made no specific inquiries to Respondent regarding their dues obligations prior to Respondent's solicitations. Of course, reimbursement will be ordered only with respect to those employees who in fact otherwise had a dues obligation to the Union.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the payments for break periods and the holiday pay for Christmas 1979 due based on the formula set forth therein.

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT question employees about their union sentiments or activities or their cooperation with the National Labor Relation Board in the processing of cases.

WE WILL NOT create the impression that we are keeping your union activities under surveillance by telling employees we will find out what happens at union meetings.

WE WILL NOT solicit employees to engage in surveillance of employees' union activities.

WE WILL NOT promise higher wages, improved working conditions, or other benefits, in order to induce you to withdraw your support from Hotel and Restaurant Employees and Bartenders Union, Local No. 58, AFL-CIO.

WE WILL NOT threaten you with a reduction in hours of work if you select Hotel and Restaurant Employees and Bartenders Union, Local No. 58, AFL-CIO, as your representative in an election to be conducted by the National Labor Relations Board.

WE WILL NOT assist you in filing a petition to decertify Hotel and Restaurant Employees and Bartenders Union, Local No. 58, AFL-CIO.

WE WILL NOT falsely sign the name of an employee to a statement seeking the removal of Hotel and Restaurant Employees and Bartenders Union, Local No. 58, AFL-CIO, as bargaining representative.

WE WILL NOT solicit you to revoke the dues-checkoff authorizations on behalf of Hotel and Restaurant Employees and Bartenders Union, Local No. 58, AFL-CIO.

WE WILL NOT prohibit you from talking about the Union on nonworking time.

WE WILL NOT threaten to discharge employees for cooperating with the National Labor Relations Board.

WE WILL NOT refuse to recognize and bargain with the above-named Union as the representative of our employees in the appropriate unit. The appropriate unit is:

> All full-time and regular part-time employees employed at our food service operations at the Cummins Engine Company facility in Walesboro, Indiana, exclusive of all clerical employees, all confidential employees, all professional employees, all guards and supervisors as defined in the Act.

WE WILL NOT make changes in working conditions with regard to clocking out for breaks or payment of holiday pay without notice no, or consultation with, the above-named Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL, upon request, meet and bargain with the above-named Union in the appropriate unit described above concerning rates of pay, wages, hours of work, and conditions of employment of our employees and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make Lois Wagner and Mike Ferguson whole for any loss of pay they may have suffered by reason of our change in the practice with regard to clocking out for breaks.

WE WILL make all our employees whole who were otherwise entitled to payment of holiday pay for the Christmas 1979 holiday season by payment to them of 4 days of holiday pay, with interest thereon.

WE WILL remit to Hotel and Restaurant Employees and Bartenders Union, Local No. 58, AFL-CIO, all union dues not tendered to the Union by employees solicited to revoke their dues-checkoff authorizations, with interest thereon.

CARDINAL SYSTEMS, A DIVISION OF
HOSPITALITY MOTOR INNS, INC.,
D/B/A CUMMINS COMPONENT PLANT

DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Administrative Law Judge: This proceeding involves allegations that Cardinal Systems, a Division of Hospitality Motor Inns, Inc., d/b/a Cummins Component Plant (Respondent) violated Section 8(a)(1), (3), and (5) of the Act. The proceeding is based on a charge filed by the Hotel and Restaurant Employees and

Bartenders Union, Local No. 58, AFL-CIO (the Union) in Case 25-CA-11597 on November 30, 1979, which charge was amended on January 3, 1980. Complaint thereon issued on January 8, 1980, which complaint was amended on May 14 and 27, 1980. On January 30, 1980, a charge was filed by Naomi Thompson in Case 25-CA-11795. That charge was amended on March 6, 1980, and complaint issued on March 7, 1980. On February 6, 1980, the Union filed the charge in Case 25-CA-11838, and on March 19, 1980, complaint issued thereon with an order consolidating Cases 25-CA-11795 and 25-CA-11597. On June 5 and 6 and September 15 and 16, 1980, hearing was held in Columbus, Indiana.

Upon the entire record,[1] including my observation of the witnesses, and after due consideration of the briefs of the parties, I hereby make the following:

FINDINGS OF FACT

I. THE FACTUAL SETTING

Respondent is an Ohio corporation with its principal office at Mayfield, Ohio, and facilities in the States of Ohio and Indiana, including a facility at the Cummins Component Plant of Cummins Engine Company in Walesboro, Indiana (the facility involved herein), where it is engaged in providing food services to employees of Cummins.[2] At all times material herein, either as west area food manager or regional manager of food support, Frank Klassen was the supervisor primarily responsible for the operation of a number of Respondent's cafeterias, including the Walesboro cafeteria. Marge Cox was manager of the Walesboro cafeteria.

On June 28, 1973, the Union was certified as bargaining representative of Respondent's employees who worked at the cafeteria at the Walesboro plant. The last contract between Respondent and the Union was entered into on December 7, 1976, effective to December 7, 1979.

On October 1, 1979, a petition signed by employee Linda Young was filed in Case 25-RD-646.

On October 23, 1979, the parties entered into a consent election agreement and pursuant thereto an election was scheduled for November 30, 1979.

On the morning of November 30, the Union filed the charge in Case 25-CA-11597, and by reason thereof the ballots cast in the election later that day were impounded. On January 25, 1980, the Regional Director dismissed the petition in Case 25-RD-646, and on April 9, 1980, the Board affirmed the dismissal action.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introductory Statements*

The complaints herein allege that Respondent engaged in a number of unfair labor practices before and after the filing of the RD petition, including encouraging and assisting employees in the preparation and filing of the petition and refusing to meet and bargain with the Union. In support thereof, testimony was adduced attributing a number of unlawful remarks to Cox over a period of several months, and a substantial part of the case depends on her credibility. Klassen's credibility is also at issue, but he is not alleged to have engaged in unfair labor practices to the same extent as Cox.

A threshold issue then, is who is to be credited. In my judgment, in most instances of conflict, the General Counsel's witnesses are to be credited. In general, alleged discriminatee Thompson being the exception, I can see no motive for the General Counsel's witnesses to lie. Essentially, the record discloses employees aggrieved over poor union representation with their grievances in such regard being encouraged by Respondent. Thus, the General Counsel's witnesses, again with the exception of Thompson, signed the petition to decertify the Union and revoke their dues-checkoff authorizations. In these circumstances, and granted that they may have been aggrieved at Respondent about working conditions, I am persuaded that their testimony was not the product of interest or bias.

The same may not be said for Respondent's witnesses. They clearly had an interest in the outcome of the proceeding. Linda Young was strongly opposed to the Union. Marge Cox' conduct was in issue, as was Klassen's. On the matter of demeanor, Marge Cox was not impressive. Her answers to questions were evasive and she clearly did not answer truthfully when confronted with General Counsel's Exhibit 44, a sheet of her scribblings.

On the basis of the foregoing, I credit the General Counsel's witnesses generally except where it appears to me they were mistaken. I do not credit Respondent's witnesses generally. In those instances where I do, I rely on circumstances which tend to support their testimony.

B. *Case 25-CA-11597*

1. The independent 8(a)(1) violation

Paragraphs 5(a), (b), and (c) of the complaint allege that in late July, August, and September 1979, Marge Cox interrogated employees about union activities, solicited employees to engage in surveillance, and created the impression of surveillance. In support of these allegations, the General Counsel adduced the testimony of Lois Wagner that in early August, Cox asked her "How do you feel about the Union thing?" Cox then discussed the fact that the union contract was expiring in December and added that "If you do not vote for your contract in December we can get you more money." She also asked Wagner if she was a good union member. Wagner testified further that in late August, September, October, or November, Cox would ask her after there had been a union meeting what went on at the meeting, whether her name had been brought up, and whether contract proposals had been discussed. When Wagner told Cox that she could not give her any information, Cox told her she would find somebody else that would.

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[1] The original exhibits were misplaced and never reached me. Duplicate exhibits were substituted except for G.C. Exhs. 47 and 49. The General Counsel conceded by letter dated December 10, 1980, which is hereby made part of the record that the absence of Exhs. 47 and 49 was not significant in terms of analysis of the issues.

[2] Jurisdiction is not in issue. The complaint alleges, Respondent admits, and I find that Respondent meets the Board's standards for the assertion of jurisdiction.

Cox did not specifically deny having the conversations with Wagner which Wagner described, and, contrary to Respondent's contentions, I find that in asking Wagner how she felt about the Union, whether she was a good union member, and what went on at the union meetings, Cox engaged in unlawful interrogation. Her questions had no legitimate purpose and occurred in the context of other unfair labor practices as set forth below, including an implied promise of benefit. In the circumstances, such questioning would have a tendency to coerce the employee in the exercise of Section 7 rights and was violative of Section 8(a)(1) of the Act.

The allegation in paragraph 5(b) that in asking Wagner about what happened at union meetings Cox solicited an employee to engage in surveillance is found lacking in merit. As I construe Wagner's testimony, Cox was engaging in interrogation. However, in telling Wagner that she would find somebody else that would tell her what happened, I find that Cox created the impression of surveillance as alleged in paragraph 5(c).

Paragraph 5(d) of the complaint alleges that in late July or early August 1979, Marge Cox told employees that Respondent could "buy off" the Union and thereby remove it as the employees' collective-bargaining agent. The allegation is based on the testimony of Naomi Thompson that Cox remarked to her that the people who owned Cardinal now had enough money "to buy and sell the union . . . they even had enough money . . . to buy the Empire State Building."

I credit Thompson's testimony, but I find the remark not to be violative of the Act. I construe the remark as a boast of Respondent's economic strength and not as a suggestion that Respondent would "buy off" the Union.

Paragraph 5(e) of the complaint alleges that Marge Cox in late July and August 1979, made promises of benefits if employees rejected the Union. In support of this allegation, the General Counsel adduced the testimony of Wagner, described earlier, when Cox interrogated Wagner and told her "If you do not vote for your contract in December, we can get you more money."

I credit this testimony and find an unlawful promise of higher wages.

Wagner testified that Cox had told her on various occasions that she thought the employees could make more money if they did not have a union. I credit Wagner and find such remarks to constitute implied promises of higher wages in violation of Section 8(a)(1) of the Act.

Employee Mike Ferguson testified that maybe a month before the filing of the RD petition Cox said she would like to see the Union out. She said the working conditions would be a lot better with the Union out. I credit Ferguson and find Cox's remark to constitute an unlawful promise of improved working conditions in violation of Section 8(a)(1) of the Act.

Paragraphs 5(f), (g), (h), (i), and (j) allege, in effect, that Respondent assisted and encouraged employees in the filing of the petition in Case 25-RD-646. The allegations are based essentially on the testiony of Sue Hiten.

Hiten is a former employee of Respondent who was employed from October 1976 to January 1980 when she quit.[3] According to Hiten, she had several conversations with Marge Cox in which Cox remarked that the Union was not doing anything for the employees and she (Cox) could do nothing for them as long as the Union was there.

In mid-August, Klassen held a meeting of employees assertedly to advise them that the Company had been notified by the Union of a dues increase. (Apparently all, or most, of the employees had authorized dues checkoff.)

Klassen testified that the employees were upset at the news and said they could not understand since the Union was not doing anything for them.

Hiten testified that a few days before September 26, she talked to Klassen about how she could go about getting rid of the Union. She testified he told her to contact the National Labor Relations Board and he would get her the telephone number. Hiten said she was later given the number, but she could not recall whether Cox or Klassen gave it to her.

On September 26, on reporting to work, Marge Cox asked Hiten if she had called the NLRB and Hiten said she had but no one was there. They then went to Cox's office and Hiten called Indianapolis and asked to be billed on her home phone as Cox suggested. Cox told her Klassen would reimburse her. (Hiten testified Klassen later paid her $3.) On September 28, Hiten came to work with the NLRB petition form. She testified that she showed it to Cox and told her she did not know how to fill it out. Cox suggested they go to the Company's office (located some distance from the cafeteria). They did, and there they met with Klassen, and Hiten filled out the petition with information supplied by Klassen. Item 1 of the form specifies the purpose of the petition which Hiten had checked as certification of representative and Klassen corrected that to withdrawal of union-shop authority (which was also incorrect). Before they left, Klassen's secretary weighed the material and placed postage on an envelope. The petition was not ready for mailing because it was not signed. Hiten had told Klassen she would not sign it because of a matter pending before the Union in which she was involved and Cox had suggested that Linda Young would sign.

Cox and Hiten returned to the cafeteria and there Hiten prepared a statement to be signed by employees to be submitted with the petition as a showing of interest. She remarked to Cox that she would have to get Peggy Cox, Marge Cox's daughter statement and an employee of Respondent, to sign the showing of interest and Cox said she would sign for her and she did. Hiten left Cox's office and obtained the signatures of two employees, then she returned to the office where she obtained Young's signature and turned over to Young both the showing of interest statement and the petition which Young signed. Hiten never saw the papers again.

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[3] In November 1977 Hiten was fired, but was reinstated in August 1978, without backpay, as a result of grievance proceedings.

That evening, on the second shift, employees Lois Wagner, Mike Ferguson, and Naomi Thompson were asked to sign the showing of interest statement by Young, in the presence of Ann Walsh, a manager-trainee and alleged supervisor. Wagner and Ferguson signed, but Thompson refused. (Earlier that day, Wagner had received a call from Cox in which Cox asked her if she was going to sign. Wagner said she did not know and Cox said she and Ferguson might as well sign because "we" have signatures anyway.)

As noted above, on October 1, 1979, the RD petition was filed.

The foregoing is Hiten's descripton of the preparation and filing of the RD petition. Her testimony is contradicted in most of the essential particulars. Thus, Cox denied she accompanied Hiten to Klassen's office or that she signed her daughter's name. She testified that she did not know about the RD petition until it was over with. Peggy Cox testified that she signed the showing-of-interest statement at the request of Hiten. Klassen also denied that Cox accompanied Hiten to his office and that he reimbursed Hiten for a telephone call. Becky Van Natta also denied that Cox accompanied Hiten to the office and that she placed postage on an envelope for the petition. According to Linda Young, she and Hiten started the RD petition. Hiten got her information about the Board from her father and Young, and Hiten went into Cox's office to call the Board.

As can be seen except as to the fact that Hiten initially inquired about how to go about decertifying the Union, there is a sharp conflict as to the preparation and filing of the petition and the procurement of the showing-of-interest statement, a conflict that can only be explained as the result of consciously false testimony. The protagonists are Hiten on the one hand and Marge and Peggy Cox, Klassen, Young, and Van Natta on the other. If the test were one of numbers, Hiten could not be credited. I credit Hiten. Contrary to Respondent's assertions, I can conceive of no motive for Hiten to lie. True, she may have been aggrieved against Respondent over loss of wages during the period between her discharge in 1978 and her reinstatement and Respondent's failure to pay holiday pay in the 1979 Christmas season; yet, she admitted that she initiated the process which led to the filing of the RD petition, a fact she would likely have concealed if she were embarked on fabricating a story about Respondent's participation in the process. Moreover, the details in her description of Respondent's participation in the process lend credence to her testimony. Such details as the forgery of Peggy Cox's name,[5] the telephone bill, the postage stamp, while supportive of a finding of assistance, were not all necessary. The role of Marge Cox alone was sufficient.[6] For these reasons, plus the fact that Respondent's witnesses had more motive to lie than Hiten, and my conviction that Marge Cox, in particular, was not a credible witness, I credit Hiten.

In light of the foregoing, I conclude and find that Marge Cox's conduct as described by Hiten and Wagner, Klassen's payment of the telephone bill and providing the postage for the RD petition, constituted unlawful assistance and encouragement in the filing of the RD petition and that Respondent thereby violated Section 8(a)(1) of the Act. In making this finding, I do not rely on such ministerial aid as Klassen or Cox may have provided in giving Hiten the Board's telephone number, nor in Klassen's assistance in helping Hiten correctly fill out the RD petition. I will therefore dismiss paragraph 5(h) of the complaint.

Paragraph 5(j) of the complaint alleges that Respondent violated Section 8(a)(1) of the Act by the conduct of one Ann Walsh in directing employees to sign the RD petition. The evidence that Ann Walsh engaged in unlawful conduct is very sketchy. In any event, I conclude and find that Walsh, who was a manager trainee, was not a supervisor within the meaning of Section 2(13) of the Act, nor did Respondent hold her out as an agent. Accordingly, I shall dismiss paragraph 5(j) of the complaint.

Paragraphs 5(k), (l), and (n) allege that Marge Cox threatened employees with a reduction in hours of work, changes in working conditions, and unspecified reprisals if they continued to support the Union. In support of these allegations, the General Counsel adduced testimony by employee Lois Wagner that after a union meeting on November 17 Cox was angry with her about a remark Wagner had made at the union meeting about Cox. In the conversation they had, Cox told Wagner that, if the Union got back in, there would be an awful lot of changes made. The General Counsel also adverts to testimony by employee Rocille Bennett that, prior to a union meeting in November, Cox told her that if she voted for the Union Bennett would get her hours cut and would not get a raise. Hiten testified to a similar threat after the RD election on November 30, wherein Cox told her if the Union got back in her hours would be cut and it would be rough on the employees.

The statements attributed to Cox are clearly unlawful threats. I credit Wagner, Bennett, and Hiten, for reasons earlier given, and I find that by such statements Respondent violated Section 8(a)(1) of the Act.

Paragraph 5(m) of the complaint alleges that in mid-April 1980 Cox promised increased rates of pay and adherence to a collective-bargaining agreement if employees selected another union to represent them. It appears that, sometime in early 1980, Peggy Cox and Linda Young undertook to obtain representation by a Teamsters Union. During a period of sick leave, Wagner received phone calls from Marge Cox in one of which Cox told Wagner about the activity on behalf of the Teamsters, and, one day after Wagner had returned to work, Marge Cox told her that Peggy Cox would run the Union, that it would be run right, and that they would go by the contract. She also said that if Cummins took over the cafeteria the employees would be taken over by

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[5] To resolve credibility on the issue of the alleged forged signature, I was asked to compare the writing of Peggy Cox name on G.C. Exh. 4 with specimens of her handwriting. The name Peggy Cox appears to be an easy one to forge and I am hesitant to base a finding on my comparison, but were a comparison essential, I would find that the name of Peggy Cox on G.C. Exh. 4 was forged.

[6] In this connection, Wagner's testimony that Cox had called her and asked if she were going to sign the showing-of-interest statement and Cox's saying Wagner and Ferguson might as well sign because "we" have signatures anyway was undenied and credited.

Cummins and if they were represented by the Teamsters Union they would make more money.

I credit Wagner and find that Cox's remarks constituted unlawful promises of benefit in violation of Section 8(a)(1) of the Act.

Paragraphs 5(o), (p), and (q) of the complaint are somewhat interrelated and involve allegations of unlawful conduct by Marge Cox in connection with the hearing which was then scheduled in the instant case.

According to Lois Wagner, on May 7, 1980, she mentioned to Linda Young that she had given her pay stubs to the labor relations lawyer. Shortly thereafter, Cox called Wagner and asked her why she had given her pay stubs to the union man. She told Wagner that Young had told her Wagner had done so and that he came to her house regularly. Wagner told Cox she had given the pay stubs to a Board attorney and Cox said, "Where are all these questions coming from?" According to Wagner, Cox ranted and raved to the point that Wagner hung up.

On May 9, Cox called again and complained about the charges (apparently those against her) and asked Wagner if she could explain them to her. Cox also told Wagner, "[W]e could get fired for calling back and forth to each other." (Wagner had been calling Bennett, about what is not clear.)

On May 12, according to Rocille Bennett, Cox told her and Sally Holland, that she did not want the girls to be talking over the telephone about the Union. She did not want the employees to call one another. She said she did not want the first-shift employees to be talking to the second-shift employees.

Holland testified on behalf of Respondent, but she was never specifically asked either by Respondent or the General Counsel as to whether she had ever been present at a conversation such as Bennett described. Thus, she neither contradicted nor corroborated Bennett. As I deem Bennett to be a credible witness, I credit her testimony and find that Cox's remarks to employees that they were not to call one another and that first-shift employees were not to talk to second-shift employees were directed to conversations which related either to matters of concern among the employees in connection with the hearing herein or to union activities, in either case matters protected by Section 7 of the Act, that such remarks constituted a prohibition against employees exercising Section 7 rights on nonworking time, and that Respondent thereby violated Section 8(a)(1) of the Act.

I do not find that in telling Wagner that she knew about her giving her pay stubs to the union man Cox created the impression that Wagner's protected activities were being kept under surveillance, because Cox told Wagner that Young had informed her and Wagner had herself told Young. I do find, however, that her interrogation of Wagner about where all the questions were coming from and her demand that Wagner explain the charges to her were unlawful. Employees' knowledge of, and participation in, matters involving the processing of unfair labor practice charges are protected by Section 7 of the Act, and it appears too evident to require discussion that a supervisor's intrusive questioning about such matters will tend to coerce employees into refraining from becoming involved. This is particularly true when the questioning is by the supervisor who is alleged to have engaged in unlawful conduct.

2. The refusal to bargain

Paragraph 7 of the complaint alleges that Respondent violated Section 8(a)(5) of the Act by engaging in individual bargaining with its employees. The General Counsel has not adverted to which acts and conduct of Respondent he is relying on for this allegation. In my judgment, none of the conduct heretofore described constituted individual bargaining.

Paragraph 7 of the complaint also alleges that Respondent sought to undermine the Union by conduct described above and thereby violated Section 8(a)(5) of the Act. This allegation is disposed of below in connection with the refusal-to-bargain allegation in Case 25-CA-11838.

C. *Case 25-CA-11795*

1. Alleged interference, restraint, and coericon

The complaint in Case 25-CA-11795 alleges that, on or about December 20, Marge Cox threatened its employees with discharge or other reprisals if they cooperated with the Board and gave testimony under the Act. This allegation is based on the testimony of Lois Wagner that on December 18 Cox had talked to the Board and, when she came to work, she was very angry and she said, "If I find out who went to that damn Labor Board, I'll fire them on the spot." Two days later, Cox was still upset over her experience and she repeated her remarks about firing somebody if she found out who it was.

Respondent's defense to Wagner's testimony is that it should not be credited because, according to Wagner's own testimony, employee Mike Ferguson was present when Cox first made her remarks and he did not corroborate Wagner. Ferguson testified and was not examined about this conversation. Thus, he neither corroborated nor contradicted Wagner. In the circumstances, as Cox was not a reliable witness and did not deny this specific conversation, I credit Wagner. I find the remarks of Cox were unlawful threats and violative of Section 8(a)(1) of the Act.

2. The alleged discrimination against Naomi Thompson

Naomi Thompson was employed by Respondent in July 1977. She was discharged in November 1977, but was reinstated in August 1978, pursuant to arbitration. Prior to September 25, 1979, Thompson worked 5 hours per day on the second shift, 5 days per week. On September 25, she was advised that, effective September 28, her hours were being reduced to 4 hours per day because of a decrease in sales. Because she deemed 4 hours per day insufficient to warrant continuing to work, Thompson quit on October 1.

The General Counsel contends that Thompson's hours of work were reduced because of her union activities and that her quitting was, in law, a constructive discharge. As to her union activities, he adverted to the fact that Thompson was one of only two employees (the other was Ferguson) to wear a union button in September and to her activity in removing a notice from the bulletin board relative to Saturday work, a matter about which she felt aggrieved, and her sending a copy to the Union. Thompson testified that Cox was upset about Thompson's removal of the notice and that she told her if she ever took anything off the bulletin board again she would fire her. Employees Hiten and Wagner testified that Cox also mentioned to them that Thompson had removed a notice from the bulletin board. According to Hiten, Cox told her that anyone caught taking anything off the bulletin board and sending it to the Union would be fired. Wagner also testified that Cox referred to the notice being sent to the Union.

According to Respondent, because of the many inconsistencies in the record on this point, Hiten and Wagner cannot be credited. Whatever merit there might be to Respondent's argument, it is overshadowed by the fact that Cox never denied any of the statements attributed to her by Thompson, Hiten, and Wagner relative to the removal of the notice. Rather, she was asked if she were upset by Thompson's action and had any problems with the notice leaving the cafeteria. Such questions and her answers were pointless. In the absence of denials, I credit Thompson, Hiten, and Wagner.

The foregoing supports a finding of animus against Thompson, but more than that is needed to establish that her hours of work were unlawfully reduced. There must be some evidence that the reduction in hours was motivated by the union activity. In this case, Respondent has asserted that the reduction was attributable to a negative trend in sales and profits. In this connection, the record indicates that on September 10 Klassen sent a memorandum to Cox suggesting a reduction of hours on the second shift. There is no evidence to support an inference that this memorandum was motivated by anything other than economic considerations. Cox did not act on the memorandum until September 25, and the General Counsel argues that the negative trend referred to in Klassen's memorandum had ended by September 25 so that a reduction was no longer necessary. I have reviewed Respondent's weekly operating reports and I find the data therein inconclusive on the issue of the necessity for a reduction in hours. The total number of hours worked each week appeared to vary from week to week, as did productivity figures and percent of profit, and it is difficult to see any significant difference in the figures before September 25 and after. In my judgment, on the data before me, whether a reduction in hours on the second shift was necessary was a business judgment and the evidence of animus against Thompson is insufficient to overcome it. In reaching this conclusion, I rely on the September 10 memorandum and the fact that initially Cox undertook to reduce the hours of Wagner also. While she may have changed her mind later, the fact that she proposed the reduction supports the assertion that it was in response to the September 10 memorandum. Moreover, it cannot be overlooked that the reduction in hours under consideration was only 5 hours per week in a total of close to 300. I do not know how many employers could demonstrate through their books and records that such a reduction was economically justified, particularly in an operation with many variable factors that can affect productivity and profit. It is significant that there is no claim that Thompson's hours were given to anyone else on the second shift.

Apart from the foregoing, I am unable to accept the premise on which the allegation of constructive discharge is based; namely, that Cox reduced Thompson's hours of work 1 hour per day in the belief Thompson would quit. True, Thompson testified she had told Cox months earlier that she could not continue to work if she received less than 5 hours per day, and I credit her testimony over Cox's denial. Nevertheless, I find it difficult to believe that Cox recalled the statement several months later and undertook to reduce Thompson's hours to bring about her quitting.

In short, in my judgment, the evidence adduced by the General Counsel is insufficient to warrant an inference that Thompson's hours of work were reduced because of her union activities, and I shall dismiss the allegation that she was constructively discharged in violation of Section 8(a)(1) and (3) of the Act.

D. *Case 25-CA-11838*

1. Alleged interference, restraint, and coercion

The collective-bargaining agreement between the Union and Respondent provided for a checkoff of dues. In January, a number of employees delivered signed statements to Respondent stating that they no longer desired the deduction of dues from their wages. Sometime thereafter, Respondent discontinued deducting dues on behalf of such employees.

The complaint alleges that Marge Cox solicited employees to revoke their dues-checkoff authorizations, thereby violating Section 8(a)(1) of the Act. In support of the allegation, the General Counsel adduced testimony from Lois Wagner that, one night in early January, Cox came to her and said, "[Y]ou are supposed to fill out a god-damn paper if you want those damn Union dues taken out of your check again." Wagner asked Cox if she had a form. She did not, so Wagner found a sheet of paper and wrote that she wanted her dues deducted. Wagner testified that Cox did not urge her one way or the other, although she did mention that Bennett was the only one who was going to have her dues deducted.

Rocille Bennett testified that, shortly after the election, Cox had come to her and said that the Company had to know if she wanted her dues deducted or not. Bennett had signed a statement that she did, and in April 1980 Cox approached her again and said that the Company had lost Bennett's statement. Bennett signed another statement, but this time she stated that she did not want her dues deducted.

Although seven other employees had signed statements revoking their dues-checkoff authorizations, Wagner and Bennett were the only witnesses called by the General Counsel to testify about any solicitation by Cox. However, Respondent's own witness, Maxine Tharp, testified that she was approached by Marge Cox, and Linda Young described how Cox approached other employees. The issue, then, is not whether Cox did approach employees about dues deductions, but, rather, whether her doing so was violative of Section 8(a)(1) of the Act.

Respondent contends Cox's conduct was not violative of the Act because it was in response to employees' inquiries about whether they had to continue dues deductions, and in approaching employees Cox neither encouraged nor discouraged them in their decision. I find no merit in Respondent's position.

There is testimony both by Cox and Linda Young that the question of dues deductions was raised by employees (whether only by Young to Cox or Young, Hiten, and Peggy Cox is not clear). However, neither Wagner, Bennett, nor Tharp were shown to have approached Cox. It was Cox who initiated the subject. The fact that some employees had approached Cox gave her no license to approach employees who had not. By her doing so, Respondent violated Section 8(a)(1) of the Act. *Rock-Tenn Company*, 238 NLRB 403 (1978).

Moreover, Cox's conduct was not as innocent as Respondent claims. Her remarks to Wagner about the "goddamn Union" and her statement that all but Bennett had revoked were clear encouragement to revoke. In Bennett's case, Cox even undertook to solicit her a second time after she had declined to revoke earlier with no showing that there was any necessity to do so. For the foregoing reasons, I find that Respondent violated Section 8(a)(1) by soliciting employees to revoke their dues-checkoff authorizations.

Paragraph 5(b) of the complaint alleges that in January 1980 Marge Cox threatened employees with withholding of wage increases mandated by Federal law. The allegation is based on the testimony of Wagner that on some unspecified date in January 1980 Cox told Wagner that her attorney had told her that no one would receive the $3.10 per hour until after this (apparently meaning the instant matter) was settled on June 5. While Cox did not expressly deny making this remark, it is difficult to accept Wagner's testimony as an accurate description of what Cox said because the remark as she describes it makes little sense. In my judgment, a finding that the remark constituted an unlawful threat is not warranted.

2. The refusal to bargain

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by a number of unilateral acts and by refusing to meet and bargain.

a. *The unilateral conduct*

(1) Discontinuance of dues checkoff

Although the General Counsel has alleged the discontinuance of dues checkoff as unilateral conduct violative of Section 8(a)(5) of the Act, he has not addressed himself to the issue in his brief. In *Peerless Roofing Co., Ltd.*, 247 NLRB 500 (1980), the Board adopted conclusions of the administrative law judge that the unilateral discontinuance of dues checkoff after the expiration of a contract was not unlawful. I find the case to be controlling and shall dismiss the allegation.[7]

(2) Job bidding

The complaint alleges that Respondent ceased allowing its employees to bid on available full-time positions or to select shift preferences. The General Counsel did not advert to this allegation in his brief and I do not know on what evidence he relies for its support. As I am unaware of any, I shall dismiss the allegation.

(3) Paydays

The complaint alleges that on or about January 1, 1980, Respondent unilaterally changed paydays from a weekly basis to a biweekly basis. The record indicates that by letter dated November 13, 1979, well in advance of the proposed change, Respondent notified the Union it was planning such a change. The Union never responded to the letter either to object or to request a meeting. In the circumstances, it may be said to have acquiesced therein.

(4) Clocking out for breaks

The complaint alleges that since on or about August 6, 1979, Respondent unilaterally required its employees to clock out for breaks. However, the evidence adduced at the hearing was directed to a showing that such a requirement was imposed on employees in January 1980. Sometime in January 1980, Wagner was spoken to by Klassen and Cox relative to her conduct *vis-a-vis*, Cummins management personnel. According to Wagner, she was told in this meeting that from then on when she took a supper break, she was to clock in and out. Employee Ferguson testified he was also to clock out for breaks. Both Wagner and Ferguson testified that prior to this they took breaks on the clock and were paid.

Respondent contends that no changes were made in either Wagner's or Ferguson's hours of work or pay.

Unlike other issues in this case, the issue should be resolvable by an examination of Respondent's records. Unfortunately, the records (consisting of timecards and weekly operating reports) are not complete, nor are they easily decipherable. Nevertheless, it does appear from Ferguson's timecards that a change occurred in the matter of break periods and clocking out after the Christmas break. It appears from his timecard for the week ending January 11, 1980, that he began clocking out that week, although it is not entirely clear from an examination of his timecard because the timeclock did not work properly. The timecards for the week ending January 25 were missing, so that one cannot determine whether Ferguson did clock out. However, the timecard for the week ending February 1, 1980, clearly indicates he was clocking out. None of Ferguson's timecards before January 1980 indicates similar clock entries. Any doubt that a change occurred at the time, however, was removed by a review of the weekly operating reports which indicate that, beginning with the week ending January 1, Ferguson's hours of pay were reduced from 5 hours per day to 4-1/2 hours per day. How long this situation persisted is not entirely clear, because it appears that Ferguson's hours of work may heve been reduced sometime in March and he continued to receive pay for 4-1/2 hours. The matter is one of remedy which can be resolved in compliance.

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[7] See also *Finger Lakes Plumbing & Heating Co., Inc.*, 253 NLRB 406, fn. 4 (1980).

Wagner's timecards and her pay records also confirm her testimony. There were no "break" entries on her timecards before January 1980. In the week ending January 11, there is one handwritten "break" entry. Similarly, "break" entries appear for the weeks ending February 1, 8, and 22. Even more significant, and as was the case with Ferguson, although Wagner was clocking in and out at the same times as before, beginning with the week ending January 11, 1980, her hours of pay were reduced from 7 hours a day to 6-1/2 hours a day, a situation which persisted until the week ending May 2, 1980.

In short, Respondent's records corroborate the testimony of Wagner and Ferguson and clearly refute the assertion that no change occurred either in procedure or pay. Cox's testimony that the clocking out was begun at the behest of Wagner is not credited.

As noted earlier, this conduct is alleged to have constituted unilateral conduct violative of Section 8(a)(5) and (1) of the Act. It is clear the conduct represented a change in conditions of employment and that it was undertaken unilaterally. Although the contract had expired, it is settled law that upon expiration of a contract an employer is obligated to notify and bargain with the employees' collective-bargaining representative before it makes changes in conditions of employment. As Respondent did not do so, its conduct was violative of Section 8(a)(5) and (1) of the Act.

In his brief, the General Counsel argues that Respondent's policy relative to clocking in and out affected not only Wagner and Ferguson, but also first shift employees. As to first shift employees, he argues that they were asked to forgo their lunch breaks or be docked in pay. I reject the argument for lack of proof. No employee testified that he or she was required to forgo lunchbreaks or suffer a loss of pay, and the notation "no lunch" on certain timecards of first-shift employees is insufficient to support General Counsel's position.

(5) Reduction in hours

The complaint alleges that since on or about September 25, 1979, Respondent unilaterally reduced the hours of work of its employees. The record indicates that effective September 25, 1979, Naomi Thompson's hours of work were reduced from 5 hours to 4 hours per day without notice to the Union. In May 1980, Wagner's hours were reduced from 6-1/2 per day to 5-1/2 hours per day. Prior to the week ending May 16, 1980, Bennett had generally been paid for 7-1/2 hours per day (except for the weeks ending April 25 and May 2 and 9). By the week ending May 16, 1980, her hours had been reduced to 6 hours per day. Wagner testified that in May she was told that her hours of work were being reduced to 5-1/2 hours per day. The weekly operating reports confirm this, but the reduction appears to have lasted only 1 month. It appears that about the same time Ferguson's hours were reduced from 4-1/2 hours to 4 hours per day.

Respondent contends that these reductions in hours were not violative of the Act but were within its rights under the management rights clause of the agreement. Moreover, Respondent points out that reduction in hours had occurred in the past.

In my judgment, the reduction of hours shown to have occurred herein clearly fell within the scope of the management-rights clause which provided, in pertinent part: "The existing and continuing rights of management shall include, but not be limited to, the right to schedule operations and employees, hire, discipline, demote, or discharge for just cause; layoff employees for lack of work, manage, direct, and supervise its operations . . . ." Thus, the clause reserves to management such matters as scheduling operations and employees and the layoff of employees for lack of work, matters closely related to such a matter as a decision to reduce hours. In this connection, it is noted that article VII, section 1, which relates to hours of work provided that "Insofar as work is deemed necessary, the normal work week shall consist of five (5) days of eight (8) hours each . . . ." The phrase "Insofar as work is deemed necessary" appears clearly to vest in management the right to make the reductions in hours herein described.

On the basis of the foregoing, I find no merit to the allegation that the reductions in hours were violative of Section 8(a)(5) and (1) of the Act.

(6) Nonpayment of holiday pay

Article XII, section 1 of the contract which expired on December 7, 1979, provided for paid holidays on Christmas Eve Day, Christmas Day, New Year's Eve Day, and New Year's Day. On December 18, 1979, Respondent posted a notice that because of the upcoming layoff at Cummins Company it was forced to have a corresponding layoff, and that in accordance with company policy any employee on layoff for 3 or more consecutive days in conjunction with a holiday would not receive holiday pay.

The General Counsel contends that in not paying employees holiday pay as provided in the contract, Respondent engaged in unilateral conduct violative of Section 8(a)(5) and (1) of the Act. Although Respondent adverted to a company policy in its December 18 notice, no such policy was shown to exist and Respondent adverts to no contractual provision in defense of its conduct. Rather, it contends that its conduct was justified by overriding economic considerations. The argument borders on the frivolous. Respondent's situation before the holiday period in 1979 was precisely the same as in earlier years. The situation was different only in that *after* the regular holiday period Cummins contemplated a brief layoff. Thus, no need for a layoff of Respondent's employees until after the holiday period. By its notice, Respondent undertook to accelerate any layoff with no demonstrable purpose or saving other than the deprivation of holiday pay to employees who had been regularly employed. Such conduct clearly constituted a unilateral change in working conditions, and, as noted above, although the contract had expired, Respondent was obligated to notify and bargain with the Union before it changed existing conditions of employment. Accordingly, as it did not do so, its conduct was violative Section 8(a)(5) and (1) of the Act.

b. *The refusal to meet and bargain*

By letter dated October 2, 1979, the Union requested that Respondent meet with it for the purpose of negotiating a new agreement, suggesting a meeting date of October 22. Respondent did not reply to the letter.

By letter dated January 15, 1980, the Union again demanded that Respondent meet and bargain with it over a new agreement and also with regard to unilateral changes made by Respondent. By letter dated January 29, 1980, Respondent acknowledged receipt of the October 2, 1979, and January 15, 1980, requests and asserted a good-faith doubt that the Union represented its employees. There was no express refusal to meet, but the letter stated the Union's demand was being forwarded to counsel. No further reply was ever made. I construe Respondent's response to constitute a refusal to meet and bargain. The question is whether or not it had an obligation to do so.

The law is well settled that after the expiration of the certification year, a certified union enjoys a rebuttal presumption that its majority status continued. In order to overcome the presumption, an employer who questions the Union's majority status must affirmatively show either (1) that at the time of the refusal the Union in fact no longer enjoyed majority status, or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the Union's continued majority status. As to the second of these, i.e., good-faith doubt, two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations and it must not have been advanced for the purpose of gaining time in which to undermine the Union. *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970).

A threshold question is when Respondent's refusal to bargain occurred. The complaint alleges that it occurred on January 24, 1980. However, as noted above, the Union mailed a letter to Respondent requesting to meet and bargain on October 2, 1979, and Klassen admitted receipt of the letter within a day or two. It is undisputed that Respondent never responded to the request. No explanation was offered for such refusal, but it is evident when one considers Respondent's conduct after October 2, 1979, that its failure to respond was, in effect, a refusal to meet and bargain with the Union at that time, rather than at the later date of January 24. As a matter of fact, the refusal of January 24 only confirms the intent of Respondent's failure to respond in October. Accordingly, in determining whether there existed objective considerations to doubt the Union's majority status, inquiry must be addressed to the conditions which existed in the period on and after October 2, 1979.

The objective consideration relied on by Respondent for doubting the Union's majority status were, according to Klassen, the following:

1. None of the current employees were employees at the time of the first contract in 1973.

This is insufficient basis to question the Union's majority status as the Board has long held that turnover among employees cannot, by itself, be used as a basis for belief that a union has lost majority status since it is presumed new employees will support the Union in the same ratio as those whom they have replaced.[8] There was no rebuttal of that presumption here. To the contrary, all the employees employed at the time Respondent refused to bargain had joined the Union and authorized dues checkoff. True, union membership was required by the contract, but dues checkoff is voluntary and no employees had requested revocation of dues checkoff until after Respondent's refusal to bargain.

2. Receipt of a copy of the RD petition from the NLRB advising that 7 out of 10 employees wanted an election.

Initially, Klassen testified that he knew that 7 out of 10 employees had signed the showing of interest statement because he had received a copy from the Regional Office. However, after further examination, he admitted he was not certain that was so. He may very well have known how many employees had signed the showing of interest because of Cox's participation in the RD election and the showing of interest statement, as described above, but he would not normally receive such information from the Regional Office because that would not accord with Regional Office practice. In any event, Respondent could not rely on the RD petition and the showing of interest statement because of supervisory taint in the preparation of the petition and the showing of interest.

3. The absence of union activity, e.g., lack of union meetings, or contacts with Klassen relative to grievances.

On the matter of union meetings, it does not appear that any were being held in the period immediately preceding Respondent's refusal to bargain, but I fail to see how this demonstrates lack of employee support. The Union was a viable organization as shown by the fact that it had notified Respondent of a dues increase to be deducted from employee wages. On the matter of grievances, several employees had been reinstated pursuant to a grievance and arbitration proceeding in 1978, during the term of the contract. Moreover, until September 1979, the employees had a shop steward, Sally Holland, who, according to Cox, quit her job because she was pestered with too many complaints.

In short, the record does not support a finding of union inactivity such as to warrant Respondent questioning the Union's majority status.

4. At a meeting of employees in August, he had told employees that he had been notified by the Union of a dues increase from $5 to $7.50 per month and the employees had become upset and told him they did not know what they were paying dues for because the Union was doing nothing for them.

I fail to see how this supports a good-faith doubt of majority status. Significantly, however upset the employees were about the dues increase, no employee indicated at the meeting that he or she no longer wanted to be represented by the Union. (The employees may not have known at the time that they could rid themselves of the Union.) Employee Hiten did inquire about the matter in late September, but the true wishes of the employees cannot be ascertained by what happened thereafter because of Respondent's interference in the decertification process.

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[8] *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965).

5. On October 5, a union representative failed to meet with Klassen as agreed.

I fail to see how this relates to employee sentiment.

In short, the record does not support Respondent's assertion that there existed objective considerations to justify its questioning the Union's majority status. In reaching this conclusion, I have adverted to Respondent's unlawful conduct relative to the RD petition, but its unlawful conduct did not consist only in the unlawful assistance in the preparation of the RD petition. In addition, there was Cox's unlawful interrogation of Wagner in early August; Cox's promise of more money if the employees did not have a union; and Cox's remark to Ferguson that working conditions would be a lot better off with the Union out. Such remarks would tend to dissipate the Union's majority status and one of the conditions for the assertion of a good-faith doubt is that it is asserted in a context free of unfair labor practices.

Cox's interrogation of Wagner and her promises to Wagner and Ferguson may not seem sufficiently serious to deny employees an opportunity to vote on whether they still desire union representation, but Respondent's unlawful conduct did not end there. To the contrary, for a period of months, and in a variety of ways, Respondent had been guilty of unfair labor practices which demonstrate that its refusal to meet and bargain with the Union after its October 2 request was designed to gain time to undermine further whatever support remained for union representation. Thus, there are Cox's threats of a cut in hours if the Union won the RD election, the threat to discharge whoever went to the Board, the denial of holiday pay, the solicitation of revocations of dues checkoff, and the requirement that Wagner and Ferguson to clock out for breaks. Such unlawful conduct precludes Respondent from asserting any good-faith doubt of the Union's continued majority status.

On the basis of the foregoing, I find that by its acts of interference, restraint, and coercion designed to undermine the Union and erode its support among employees and by refusing since on or about October 2, 1979, to meet and bargain with the Union, Respondent has violated Section 8(a)(5) and (1) of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent as set forth above, occurring in connection with operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take appropriate and affirmative action designed to effectuate the policies of the Act. In particular, I shall recommend that Lois Wagner and Mike Ferguson be made whole for any wages lost by reason of Respondent's unilateral change relative to clocking out for breaks, and that all employees who otherwise fulfilled the requirements of holiday pay be made whole by payment to them for 4 days of holiday pay for the Christmas 1979 holiday period, with interest thereon in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977). As to Respondent's discontinuance of dues checkoff for those employees who were unlawfully solicited to revoke their authorizations, I shall not recommend that Respondent remit dues to the Union in light of *Peerless Roofing Co., Ltd.*, 247 NLRB 500 (1980).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel and Restaurant Employees and Bartenders Union, Local No. 58, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees of Respondent employed at its food service operation at the Cummins facility in Walesboro, Indiana, exclusive of all clerical employees, all confidential employees, all professional employees, all guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive representative of the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By its acts of interference, restraint, and coercion designed to undermine the Union and erode its support among employees, by its unilateral change in clocking out for breaks and failure to pay holiday pay, and by refusing to meet and bargain with the Union relative to rates of pay, wages, hours of work, and conditions of employment, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(5) and 2(6) and (7) of the Act.

6. By questioning employees about their union sentiments or activities and their cooperation with the National Labor Relations Board in the processing of cases in a manner and under circumstances tending to coerce employees in the exercise of Section 7 rights, by creating the impression that the union activities of the employees were under surveillance, by promises of higher wages, improved working conditions, or other benefits, by threats of a reduction in hours if the employees selected the Union in an election, by assisting employees in the filing of a decertification petition, by soliciting employees to revoke dues-checkoff authorizations, by prohibiting employees from talking about the Union on nonworking time, and by threats to discharge employees for cooper-

ating with the National Labor Relations Board, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

7. The General Counsel has failed to establish by a preponderance of the evidence that Respondent reduced the hours of work of Naomi Thompson because of her union activities and that she was by reason thereof constructively discharged.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, Cardinal Systems, a Division of Hospitality Motor Inns, Inc., d/b/a Cummins Component Plant, Walesboro, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about their union sentiments or activities, and their cooperation with the National Labor Relations Board in the processing of cases in a manner or under circumstances constituting interference with, and restraint and coercion of employees in the exercise of rights guaranteed by Section 7 of the Act.

(b) Creating the impression of surveillance of employees' union activities by telling employees it will find out what happens at union meetings.

(c) Promising employees higher wages, improved working conditions, or other benefits, in order to induce them to withdraw their support from the Union.

(d) Threatening employees with a reduction in hours of work if they selected the Union in an election to be conducted by the National Labor Relations Board.

(e) Assisting employees in the filing of a petition to decertify the Union.

(f) Soliciting employees to revoke dues-checkoff authorizations.

(g) Prohibiting employees from talking about the Union on nonworking time.

(h) Threatening to discharge employees for cooperating with the National Labor Relations Board.

(i) Refusing to bargain with the Union as the exclusive representative of its employees in the unit herein found appropriate by changing working conditions without notice to, or consultation with, the Union, with regard to clocking out for breaks, by failing to pay holiday pay, and by refusing to meet and bargain with regard to rates of pay, wages, hours of work, and conditions of employment.

(j) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the Act or to refrain from any and all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole Lois Wagner and Mike Ferguson by payment for break periods, with interest thereon.

(b) Make whole all employees otherwise entitled to holiday pay for the Christmas 1979 period by payment to them of the 4 days of holiday pay unlawfully withheld, with interest thereon.

(c) Upon request, meet and bargain with the Hotel and Restaurant Employees and Bartenders Union, Local No. 58, AFL-CIO, in the appropriate unit described above, with regard to rates of pay, wages, hours of work, and conditions of employment of its employees, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Post at its facility at Walesboro, Indiana, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 25, after being signed by a duly authorized representative of Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the allegations of the complaint found not to have been sustained by the evidence be dismissed.

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[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Better Building Supply Corp., and Evergreen Roofing, Inc., its alter ego *and* Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL–CIO. Cases 19–CA–11908 and 19–CA–12035

December 3, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 27, 1981, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Better Building Supply Corp., and Evergreen Roofing, Inc., Seattle, Washington, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order,[4] except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively with Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL–CIO, as the exclusive collective-bargaining representative of all employees in the following appropriate unit:

> All roofers and waterproofers employed by Better Building Supply Corp., Evergreen Roofing, Inc., and their subcontractors in the Washington Counties of Clallam, Jefferson, King, Kitsap, Mason and Snohomish; excluding professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to apply the terms and conditions of our collective-bargaining agreement with Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL–CIO, to all employees in the above-described bargaining unit, without the written consent of that Union.

WE WILL NOT refuse to bargain collectively with Local 54 of the United Slate, Tile and

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[1] Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We fully agree with the Administrative Law Judge's conclusion that Respondent Evergreen Roofing, Inc., violated Sec. 8(a)(5) by failing and refusing to apply to its employees the collective-bargaining agreement executed between Respondent Better Building Supply Corp. and the Charging Party Union. We note that, under the Supreme Court's decision in *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers, AFL–CIO*, 425 U.S. 800 (1976), the fact that two or more entities constitute a single employer is not dispositive of the issue of whether each is bound to the collective-bargaining agreements of the others. Rather, the test is whether, given the single-employer finding, the employees of the separate companies constitute the appropriate unit or whether the employees of each individual company constitute distinct and separate units. The criteria for finding a single employer are different from those for determining the appropriateness of the unit. *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76 (1977). In the present case, the operations of both Respondents and the work of their employees have been so intertwined as to render appropriate only a unit of employees of both Respondents and to preclude a finding of separate appropriate units.

[3] We adopt the Administrative Law Judge's recommended Order as modified by his errata of March 16, 1981.

[4] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

259 NLRB No. 63

Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, by refusing upon request to supply relevant information needed by it to represent employees in the above-described bargaining unit.

WE WILL NOT refuse to provide Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, with requested information that is relevant and necessary to the collective-bargaining process.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights under the National Labor Relations Act as set forth above.

WE WILL recognize and bargain collectively with Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, as the exclusive collective-bargaining representative of all employees in the above-described bargaining unit.

WE WILL apply the terms and conditions of our current collective-bargaining agreement with Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, to all employees in the above-described bargaining unit.

WE WILL provide Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, with any and all requested information that is relevant and necessary to the collective-bargaining process.

WE WILL make whole all employees for any losses sustained on or after May 7, 1979, by our failure to apply the terms and conditions of our collective-bargaining agreement with Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, to them, with interest.

BETTER BUILDING SUPPLY CORP.,
AND EVERGREEN ROOFING, INC., ITS
ALTER EGO

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Seattle, Washington, on July 10, 11, and 22 through 25, 1980. On December 28, 1979, the Regional Director for Region 19 of the National Labor Relations Board issued a complaint and notice of hearing in Case 19-CA-11908, based on an unfair labor practice charge filed on November 7, 1979, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq., herein called the Act. On February 27, 1980, the said Regional Director issued a complaint and notice of hearing in Case 19-CA-12035, based on an unfair labor practice charge filed on January 18, 1980, alleging additional violations of Section 8(a)(1) and (5) of the Act. Also on February 27, 1980, the Regional Director issued an order consolidating cases and notice of hearing, consolidating the two complaints for hearing and decision. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs filed on behalf of the parties, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Better Building Supply Corp., herein called Respondent BBS, and Evergreen Roofing, Inc., its *alter ego*,[1] herein called Respondent Evergreen, and herein collectively called Respondents, are each Washington State corporations, with an office and place of business at the same location in Seattle, Washington, where they are engaged as roofing contractors. There is no dispute regarding the dollar volume of Respondents' operations. Thus, it is admitted that, during the 12-month periods preceding issuance of each of the complaints, each of which is conceded to be a representative period, Respondents, in the course and conduct of their business operations, sold and shipped goods or provided services from within the State of Washington either directly to customers outside that State, or to customers within the State of Washington which, in turn, were themselves engaged in interstate commerce on some basis other than indirect inflow or outflow. During those same 12-month periods, Respondents, in the course and conduct of their business operations, purchased and caused to be transferred and delivered to their facilities within the State of Washington goods and materials valued in excess of $50,000 which originated from sources outside the State of Washington. Notwithstanding these admissions, Respondents denied the allegation that at all times material they have been a single integrated business enterprise and a single employer within the meaning of the Act, because they have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered common labor policy affecting employees of said operations; have shared common premises and facilities, common advertising, phone, sales, and purchasing; have provided services for and made sales, to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise. The record, however, supports the conclusion that at all times material Respondents have been a single integrated business enterprise and a single employer within the meaning of Section 2(2) of the Act.

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[1] As amended at the hearing.

Both Respondents were formed during the mid-1950's. So far as the record discloses, the stock of each has always been owned primarily, if not wholly, by Gerald Mylan and his immediate family. From its inception, Respondent Evergreen engaged in all facets of the roofing business, using what is referred to as the hot tar process for applying roofs.[2] Respondent BBS, however, remained dormant after its formation, conducting no operations and being only a corporate shell.

In the late 1960's or very early 1970's, Mylan decided to bid for roofing work on certain houses being remodeled under the sponsorship of the United States Department of Housing and Urban Development. Discovering that his success in this venture would be enhanced if he bid to do all remodeling work on those homes, he secured a general contractors license for Respondent BBS and commenced bidding under its name. Concomitantly, Respondent Evergreen ceased conducting operations, becoming dormant from 1971 to 1977. During that period, Respondent BBS became a party to two successive collective-bargaining agreements with Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, herein called the Union, the latest of which is still effective. These agreements covered all roofers and waterproofers in the six west Washington Counties of Clallam, Jefferson, King, Kitsap, Mason, and Snohomish.

Respondent BBS's operations, however, were not confined to the west Washington geographic area. It bid on and obtained work on Government projects as far from that area as Albuquerque, New Mexico, and Denver, Colorado. Moreover, commencing in approximately 1974 or 1975, Respondent BBS's operations began to involve principally performing roofing work on Government facilities, rather than general remodeling. Thus, Mylan testified:

> Q. When you were working as Better Building Supply and let's address about 1974 or 1975 now, did you get back into roofing work as such?
>
> A. Yes. When the HUD started to dissipate or dry up then we went into government work.
>
> Q. When you say government work, do you mean various government buildings?
>
> A. Yes.

On its income tax returns for calendar years 1978 and 1979, Respondent BBS listed its principal business activity as being a contractor and its product or service as being roofing.

The mid-1970's was also a period during which another development of significance began to emerge. Mylan testified that he and his son had begun experimenting with development of a polyester cold processing system for installing roofs.[3] This system was being phased in, to replace the hot tar system, by Respondent BBS when, in 1977 or 1978, the trust fund department, acting pursuant to Respondent BBS's collective-bargaining agreement with the Union, attached Respondent BBS's bond and bank account in connection with a dispute concerning payment of fringe benefits. This had the effect of effectively terminating Respondent BBS's operations in the six- county area of west Washington. Nevertheless, Mylan testified that Respondent BBS continued operations in Oregon until "'78 or early '79," when it engaged in "[c]old application of re-roofs." Moreover, Respondent BBS's Washington business license did not expire until June 30, 1980, shortly before commencement of the hearing in this matter.

Once Respondent BBS's bond had been attached, Mylan again activated Respondent Evergreen to complete conversion to the cold processing system and to contract for performing roofing working utilizing that system. Initially, Respondent Evergreen used employees to perform this work though ultimately it substituted what it contends are independent contractors for those employees in the west Washington area.[4] Respondent Evergreen has continued to employ employees outside of that area. For example, at the time of the hearing it had three crews working in the Portland, Oregon, area. Apparently, these three crews are performing the same type of work as had been performed by the crews employed by Respondent BBS in the Portland, Oregon, area.

With regard to the allegation that Respondents are a single employing entity, the factors to be considered in resolving whether two nominally separate and distinct business entities are a single employer, within the meaning of Section 2(2) of the Act, "are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership." *N.L.R.B.* v. *Don Burgess Construction Corporation, d/b/a Burgess Construction*, 596 F.2d 378, 384 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979); see also *N.L.R.B.* v. *Big Bear Supermarkets #3 and its alter ego Richard Holmes*, 640 F.2d 924 (9th Cir. 1980). Here, the stock of Respondents is held by Mylan and his immediate family. These individuals also serve as the only directors and officers of Respondents. Further, while Mylan has used different individuals to assign work to employees of Respondents, the history of each of them and the descriptions of how they operate demonstrate that he has retained and possessed control over their labor relations policies throughout their history. Indeed, in their brief, Respondents acknowledge that [i]t is undisputed that Better Building was, and Evergreen is, owned and operated by the Mylans and that common ownership and control are facts in this case."

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[2] Basically, this process consists of laying tar paper and then pouring hot tar over it.

[3] In essence, this process involves spraying cutback on the roof, then laying a polyester mat across it and then spraying more cutback over that.

[4] As will be discussed *infra*, the nature of the relationship between Respondent Evergreen and these contractors is the crux of the allegations of refusal to bargain in this matter. For present purposes, however, it suffices to note that Mylan admitted that these contractors perform the same work as had the roofing employees whom they succeeded and, further, while he equivocated at some points regarding the matter, that Mylan conceded that, after Respondent Evergreen had resumed operations, there had been a period of time when it had employed employees, as had Respondent BBS, to install roofs using the cold process system.

With respect to the existence of interrelated operations, it is true that Respondent BBS was licensed as a general contractor whereas Respondent Evergreen is licensed to perform only roofing work and, further, that Respondent Evergreen does its roofing work by means of the polyester cold process system. Yet, these hardly are differences of substance. For, as set forth above, Respondent BBS, however licensed, had been performing primarily roofing work after the HUD remodeling work had begun to "dissipate or dry up," and, as its income tax returns disclose, had been listing roofing as its primary business before it was completely deactivated following attachment of its bond.

Development of the cold process system, which Respondent Evergreen now uses, was instituted under the auspices of Respondent BBS and the commencment of phasing it in, to replace the hot tar system, had begun under Respondent BBS. In fact, so far as the record discloses, the reactivation of Respondent Evergreen had been occasioned exclusively by the attachment of Respondent BBS's bond which had the effect of preventing it from continuing operations in the west Washington area. There is no evidence showing that had that not happened, Respondent Evergreen would have been reactivated to handle contracts for performing the polyester cold process system of roofing. Rather, with Respondent BBS's bond attached, Mylan needed an entity to conduct that system of roofing and so reactivated Respondent Evergreen to do it. So far as the evidence shows, had Respondent BBS's bond not been attached, Mylan simply would have continued developing and phasing in the cold processing system under that entity. Indeed, should Respondent BBS obtain another business license and straighten out its bond problem, "there is nothing to prevent [Mylan] from retransferring [roofing operations] back to Respondent [BBS]." *Los Angeles Marine Hardware Co., a Division of Mission Marine Associates, Inc.; and California Marine Hardware Co., a Division of Mission Marine Associates, Inc.*, 235 NLRB 720, 732 (1978), enfd. 640 F.2d 1017 (9th Cir. 1981).

In these circumstances there is sufficient identity of operations, management, control of labor relations, and ownership to warrant the conclusion that Respondents are a single employer within the meaning of Section 2(2) of the Act. Therefore, I find that at all times material Respondents have been a single employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUE

As set forth above, Respondent Evergreen had been reactivated to continue developing the polyester cold processing system initiated by Mylan through Respondent BBS. The parties stipulated that since June 20, 1977, Respondent Evergreen has not considered itself bound by the collective-bargaining agreement to which Respondent BBS became a party. Moreover, Respondents have ignored the Union's requests that they do so. Aside from the argument that Respondents are separate employers, rejected above, Respondents base their refusal to continue honoring that agreement upon the relationship between Respondent Evergreen and the applicators—those who install the roofs.

As set forth above, when Respondent Evergreen resumed operations, it employed its own employees initially. However, within a short span of time, it changed the nature of that relationship so that some of the applicators were reclassified as subcontractors. They, then, retained other applicators to install the roofs, and Respondent Evergreen ceased employing its own employees. Inasmuch as this occurred more than 6 months prior to the filing of the charge in Case 19-CA-11908, there is no allegation that in making these changes Respondents violated the Act.

However, Mylan conceded that the subcontractors and the applicators whom they retained to install the roofs are performing the same type of work as had formerly been performed by Respondent Evergreen's employees prior to the relationship conversion. The General Counsel argues that, notwithstanding this conversion, the applicators doing the roofing work for Respondent Evergreen have remained its employees within the meaning of Section 2(3) of the Act, and, accordingly, that Respondent Evergreen has remained obligated to apply the terms of its collective-bargaining agreement with the Union to them. Conversely, Respondent argues, in essence, that the terms of the collective-bargaining agreement cannot be applied to these persons by Respondent Evergreen inasmuch as the conversion resulted in their becoming independent contractors within the meaning of Section 2(3) of the Act and separate employers within the meaning of Section 2(2) of the Act, with the result that the applicators employed by them are not employees of Respondent Evergreen. Consequently, the principal issue in this case is whether the applicators retained by the subcontractors[5] are employees only of the subcontractors or remain employees of Respondent Evergreen.

In addition, on January 2, 1980, the Union requested that Respondent provide it with a list of the names and addresses of the employees performing the roofing work, the hours worked by each of them, and the wages and fringe benefit contributions, if any, made on behalf of each one of them. In its letter the Union recites that its purpose in making the request "is to determine whether your employees are complying with our collective-bargaining agreement with respect to their obligation to join Roofers Local 54 and maintain their membership in the Union; and also to determine whether or not your firm has been complying with the collective-bargaining agreement by paying contractual wages and fringe benefits consistent with the agreement." It is undisputed that Respondent has not complied with that request. Thus, the General Counsel alleges that Respondent violated

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[5] It appears undisputed that those individuals who became subcontractors would be considered supervisors within the meaning of Sec. 2(11) of the Act even if Respondent Evergreen remained the employer of the applicators hired by them.

Section 8(a)(5) and (1) of the Act by disregarding the Union's request for this information.

IV. THE RELATIONSHIP BETWEEN RESPONDENTS AND THE APPLICATORS

Mylan, one former subcontractor (Walter L. Campbell), and two current subcontractors (M. Christopher Gardner, Jr., and Christopher Alessio Romei, who are jointly doing business as Fresh Air Roofing, a corporation) testified regarding the relationship between Respondent Evergreen, the subcontractors, and other applicators. Each of the subcontractors formed their own organizations, in some instances corporations, and obtained their own business licenses as contractors to perform, at least, roofing work. Respondents make no deductions or contributions for subcontractors or the applicators whom they retain to assist them in installing roofs. The subcontractors pay the wages of the applicators they hire. In essence, therefore, each of the subcontractors has established at least a nominally separate and distinct business enterprise.

As set forth above, Respondent Evergreen markets a polyester cold processing system of roofing, primarily for nonresidential structures. Contracts to perform this work are obtained for Respondent Evergreen by independent sales representatives, called ISR, individuals who have signed an Independent Sales Representative Agreement with Respondent Evergreen.[6] Under the terms of these agreements Respondent "Evergreen will pay a commission to the ISR at the rates currently published by the Company as amended from time to time, on all jobs sold by the ISR."

Having obtained these contracts Respondent Evergreen then selects the subcontractor who will be assigned to perform the specific work called for by each contract. So far as the record discloses, the subcontractors have no voice in determining the particular jobs to which they will be assigned. Nor, for that matter, does the subcontractor have any direct contact with customers, save in those instances, apparently rare, where the subcontractor has also sold a particular roofing job as an independent sales representative. All subcontractors testified that they could reject jobs that were assigned to them. However, the evidence discloses only a single specific instance where a subcontractor rejected a roofing job assigned by Respondent Evergreen—Romei testified that he had once turned down a job at the Aurora Drive-In Theatre because "I got dizzy up there . . . and I just didn't feel comfortable being there."

The system followed for performing roofing work is, of course, the polyester cold processing one which Respondent Evergreen has developed and which it markets. While subcontractors own their own pickup trucks and, at least in some instances, their own flatbed trucks, the crucial vehicle for performing the work under this system is the pumper rig developed by Mylan.[7] These rigs are leased to the subcontractors. However, the lease is not a written one and the subcontractors are charged but a dollar per year for the lease of one of these vehicles. When not in use, the rigs normally are parked at Respondent Evergreen yard. Moreover, Respondent Evergreen also provides Gardner and Romei with chase trucks that are used to transport roofing materials to jobsites. So far as the record discloses no rental is charged to them for the chase trucks. While subcontractors are obliged to furnish fuel for their own vehicles, Respondent Evergreen provides the fuel used for the rigs, either from a pump in its yard or by reimbursing the subcontractors for fuel purchased elsewhere. Furthermore, while subcontractors furnish the labor used to maintain the vehicles owned by Mylan or by Respondent Evergreen, the latter furnishes the materials needed and pays for any major maintenance work that must be performed on the rigs or chase trucks.

The materials used to perform the roofing work, i.e., rolls of polyester, cutback, mastic, and webbing, are supplied by Respondent Evergreen. It maintains locked areas at its yard for each of the subcontractors in which these materials are stored and which Respondent Evergreen replenishes periodically. Only in the event that, in effect, a subcontractor causes the loss of material through negligence or heedlessness is the subcontractor charged for the material. While the subcontractors provide their own tools used to perform roofing work, Campbell testified, without contradiction, that journeyman roofers are expected to provide their own handtools. There is no showing that the tools actually used by the subcontractors differed in any respect from what journeyman roofers normally use.

The employees who compose the crews used by Gardner, Romei, and other subcontractors are hired by and paid by the subcontractors at rates which they set. However, during their first year of operation, Gardner and Romei were the only two crewmembers working for Fresh Air, with the result that during that period they did not have the need to hire any employees. Moreover, the initial three person crew hired by Campbell had been working for Respondent Evergreen immediately before commencing work for Campbell. While he testified that he had had a choice as to whether or not to hire them, he acknowledged that Respondent Evergreen had told him to take them as his first crew. Finally, the record discloses evidence of a degree of more regular integration between employees who work for subcontractors and Respondent Evergreen. Thus, Mylan conceded that some or all of the employees hired to do work in Respondent Evergreen's yard alternate back and forth between employment with it and its subcontractors. He further agreed that in some cases Respondent Evergreen provides yardwork to tide over employees who normally do roofing work for Fresh Air in situations where roofing work is not available. In addition, there is evidence of at least one instance where Mylan switched an employee from the crew of one subcontractor to that of another. Thus, Campbell testified that Mylan had asked him (Campbell) to hire and train an employee who had been working around Respondent Evergreen's shop. According to Campbell, Mylan had said "in the beginning . . . that I was to take him for a couple of days and that Chris Romei was to take him for a couple of days" after 2 or 3 days of working for Campbell, the employee was switched to another crew, with Mylan telling Campbell that he was pulling the man off Campbell's crew and transferring him to that of another subcontractor.

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[6] Some of the subcontractors have signed such agreements with Respondent Evergreen, thereby enabling them to sell roofing projects, in addition to applying, roofs sold by others. However, as illustrated by Campbell's testimony that he had never signed such an agreement with Respondent Evergreen, it is not necessary for such an agreement to be signed in order for individuals to apply roofs as Respondent Evergreen's subcontractors.

[7] While both Campbell and Gardner agreed that roofs could be applied without the use of such a rig, the former testified that he had never done so and the latter testified, credibly, that it would not be commercially feasible, in the sense of competitive, to do so.

Until January 1980 Respondent Evergreen employed Charles R. Gordon as its superintendent. He distributed the roofing work to the subcontractors. From approximately November 1978 to the end of January 1980, a period during which Respondent Evergreen had considered those performing roofing work as subcontractors, Gordon testified that he had regularly gone to sites where subcontractors were working to check on their progress. Campbell testified, without contradiction, that on approximately 30 percent of the jobs which he had performed while working as a subcontractor for Respondent Evergreen, both Gordon and Mylan had come to the sites to check on the progress of the work being performed there. Moreover, Campbell also testified that, on approximately 20 to 25 percent of the total numbers of jobs which he had been assigned, Mylan or Gordon had given him instructions with regard to "prepping my jobs, prepping my work before I sprayed it, before I laid the roofing material down. Take a fire wall, for instance, up on a roof that has old roofing material on it that has to be repaired. . . . The acceptability of the work to Chuck or Jerry sometimes wasn't acceptable, the work itself and it had to be redone." Indeed, Gordon conceded that he also had checked the quality of the work after each job had been completed.

In January 1980 Gordon executed an Independent Sales Representative Agreement. However, in addition to continuing to distribute work to subcontractors, Gordon continues to go to jobsites to inspect the work of subcontractors and is paid to do so by Respondent Evergreen. Thus, while he does not spend as much time doing so now as had formally been the fact, his inspection visits to sites occupy a maximum of approximately 8 to 10 hours each week. He visits projects "as long as I have the time" and attempts to visit each job, while it is in progress, on at least one occasion. Moreover, he continues to inspect projects after they have been completed, although only in instances where problems have arisen in connection with them.

Subcontractors guarantee their work. However, that guarantee is not written and is given only to Respondent Evergreen, not to customers. Respondent Evergreen, itself, extends a 4-year warranty to oustomers on roofs which it contracts to install. If a defect in the work of a subcontractor is discovered, it is Respondent Evergreen, not the subcontractor who installed the roof, that is contacted by the customer. Gordon testified that if the subcontractor who did the work is still working for Respondent Evergreen, he dispatches that subcontractor to repair the problem. However, if that particular subcontractor is no longer doing work for Respondent Evergreen, then either Gordon or some other contractor makes the repairs. If the subcontractor who performed the work is still working for Respondent Evergreen and if someone else performs the repair work, then that subcontractor is backcharged for the cost of the repairs.

The method of computing the cost of a roofing job is based on the number of squares involved. A square is 10 by 10 feet. The rate charged per square is known as the par rate. It is Respondent Evergreen which sets the par rates for the various types of roofs that can be installed using the polyester cold processing system. The subcontractor, in turn, is awarded a flat percentage of that rate, by Respondent Evergreen, for installing the roof. Romei claimed that this percentage rate had been negotiated by Evergreen and by Fresh Air. However, his testimony in this respect was less than credible, being unsupported either by specific examples of such purported negotiations or by corroboration from other witnesses. Indeed, Mylan testified that Respondent Evergreen publishes a standard par sheet, which is updated from time to time and which shows the rate at which ISRs should bid the various types of roofs for application by the polyester cold prooessing system. According to Mylan that same standard par sheet is used by the subcontractors to determine, based on a percentage of the cost of the job, the rate at which the subcontractors will be remunerated.

Both Gardner and Romei testified that there had been occasions when, on arriving at the job, they had discovered that it had been underbid and that the rates set for performing the work were not sufficient. In that event, they testified that they would contact Respondent Evergreen, normally Gordon, and seek a readjustment. So far as the record discloses, however, final determination as to whether a readjustment will be permitted rests with Respondent Evergreen. While the two subcontractors testified that they had the right to refuse to perform a job if Respondent Evergreen refused to increase the amount that they would be paid for doing so, there is no evidence that they have ever done so. Moreover, there is no showing that situations involving underbidding or low bidding of jobs have ever arisen with any significant degree of frequency. Finally, it is worth noting, that, while Gardner and Romei are ostensibly both employed by Fresh Air Roofing, each of them submits separate bills for the work performed by his crew. So far as the record discloses Fresh Air, itself, does not submit a single bill for the total of work performed collectively by the crews of Romei and Gardner. In short, notwithstanding the existence of Fresh Air as an ostensibly independent entity, Respondents continue to deal separately and individually with Gardner and Romei.

Mylan and each of the subcontractors testified that the latter were free to seek work other than for Respondent Evergreen. However, both Campbell and Gardner testified that they had never done so. Romei testified equivocally with regard to this point. Initially, he claimed that he had attempted to get other work for Fresh Air[8] and that there had been a time when he had done work other than for Respondent Evergreen. Later, however, he acknowledged that he had performed such work prior to forming Fresh Air and that, since working as a subcontractor for Respondent Evergreen, all of his work had been performed at the behest of that firm. Indeed, it seems unlikely that subcontractors would be in a position to perform polyester cold process roofing installation work on their own, separate from Respondent Evergreen. For, Romei agreed that the rig was the heart of Respondent Evergreen's system of installing roofs. As noted above, Gardner testified that it would not be competitive to install roofs by the polyester cold processing system without the rigs. Yet, the rigs are stored at Respondent Evergreen's yard when not in use, and Gordon testified that he would not have authorized removal of the rig by a subcontractor to install a roof for a roofing company other than Respondent Evergreen.

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[8] A claim not corroborated by Gardner who is, after all, Romei's partner.

Respondents argue that the subcontractors are independent contractors, within the meaning of Section 2(3) of the Act, and, accordingly, that their crewmembers are their own employees and not those of Respondents, specifically Respondent Evergreen. Several factors are present which tend to support that contention. Thus, for example, the subcontractors have been established as nominally separate enterprises, in some cases having been incorporated, with their own business licenses. They have rented or purchased some of the vehicles and equipment which they use. They insure and pay for the fuel and other costs of these vehicles. They hire their own crew members, determine the rates of pay for those crewmembers, pay the crew, and make all necessary deductions and contributions on their behalf. They are free to work for firms other than Respondent Evergreen.

Yet the fact that subcontractors have established their own entities, hire, and pay their own helpers, own or lease their own vehicles which they insure and are, in theory, free to work for a number of companies does not compel the conclusion that an independent contractor relationship exists. See, e.g., *Seven-Up Bottling Company of Boston, Inc.* v. *N.L.R.B.*, 506 F.2d 596, 599-600 (1st Cir. 1974); *N.L.R.B.* v. *John Warner, d/b/a D.J.W. Cartage*, 587 F.2d 896, 900-901 (8th Cir. 1978). For the correct test for determining whether an employee or independent contractor relationship exists is rooted in whether or not a company, such as Respondent Evergreen, has control over the details and means by which work is to be performed. Thus, as the United States Court of Appeals for the Seventh Circuit stated in *N.L.R.B.* v. *Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir. 1948), cert. denied 335 U.S. 845:

> [T]he employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and . . . it is the right and not the exercise of control which is the determining element.

In this case, a preponderance of the evidence shows that, while Respondent Evergreen's subcontractors are accorded degree of independence, Respondent Evergreen controls the significant and crucial means by which subcontractors perform roofing work, with the result that the subcontractors operations are integrated fully into those of Respondent Evergreen and that the subcontractors lack the entrepreneurial ability normally arising from independent contractor status. Most obvious in this regard is Respondent Evergreen's control over the process to be followed by subcontractors in installing roofs. Respondent Evergreen does not simply retain subcontractors to install roofs by whatever means they deem most appropriate. Rather, Respondent Evergreen markets a specific system for installing roofs, the polyester cold processing system, and subcontractors are obliged to install roofs in accordance with that system. So far as the record discloses, subcontractors have no discretion in this regard and no ability to use some other method, for example, the hot tar process described in footnote 2, *supra*, for applying roofs. Consequently, they are not free to attempt to improve their profit by substituting a possibly less costly alternative system for the one specified by Respondent Evergreen.

It is Respondent Evergreen, specifically Gordon, who selects the particular projects on which subcontractors are assigned to work in the Seattle area. So far as the record discloses, subcontractors make no contribution to these decisions. Accordingly, the right of assignment to projects rests exclusively with Respondent Evergreen, thereby precluding subcontractors from any possibility of improving their situation through negotiation of better selection of assignments. Moreover, save for those seemingly rare instances where subcontractors have sold roof installations as independent sales representatives, they have no contact with customers regarding the prices at which the roofing work will be performed. Even in situations where the subcontractor sells the project as an independent sales representative, the commissions which subcontractors will receive are set by Respondent Evergreen, pursuant to the above-quoted provision from the Independent Sales Representative Agreement.

While subcontractors can and have sought changes in the rate of compensation for performing specific roofing projects, the evidence shows that such changes have been confined to situations where the projects have been underbid, for one reason or another, and, thus, cannot be performed at the cost contemplated when sold. Thus, these renegotiated changes do not originate from the subcontractors' desire to increase their profit margins, beyond that contemplated by Respondent Evergreen. Rather, they occur within the framework of Respondent Evergreen's unilaterally established price and cost structure and arise only, so far as the record shows, where independent sales representatives have failed to apply that structure properly to specific jobs. Moreover, there is no showing that these types of situations arise within any degree of regularity or frequency. In any event, so far as the record discloses, the ultimate determination as to whether to read just the prices of particular jobs rests solely with Respondent Evergreen. Although subcontractors testified that, in theory, they were free to reject projects if underestimated, in practice only single instance of rejection of a job by a subcontractor was provided and that particular rejection was for reason unrelated to the profitability of the particular job declined by Romei. Of course, in this area, "it is the actual practice which controls." *Queen City Paving Company*, 243 NLRB 71, fn. 6 (1979); see also *Seven-Up Bottling Company of Boston, supra*, 506 F.2d at 600.

In sum, therefore, Respondent Evergreen has exclusive control over the income of its subcontractors from work performed for it, having been the party in control of negotiations for roofing contracts with customers, having been the one to select the jobs which the subcontractors will perform, and having unilaterally determined the rates to be paid to the subcontractors for performing that work. Subcontractors are left in the position of having no contact with customers and "no opportunity for the negotiation of different rates" with them for performing roofing installations. *Lucky Stores, Inc.*, 243 NLRB 642, 644 (1979). "Decisions with respect to the line of products to be sold, the type of customer to be serviced, and, in general, the normal risk-taking ventures which distinguish the small businessman/independent contractor from an employee are, in this case, all made by [Respondent Evergreen]." *The Standard Oil Co. (of Ohio)*, 241 NLRB 1248, 1251 (1979).

As set forth above, in theory the subcontractors are free to perform roofing work other than for Respondent Evergreen. However, in practice, so far as the evidence discloses, none of them has ever done so, and, of course, it is the practice which is controlling in this area. *Queen City Paving Co., supra*. Moreover, it is unlikely that they would be able to install roofs using the polyester cold processing system independently of Respondent Evergreen. For the pumper rig is necessary to do so competitively and Gordon testified that he would not authorize the use of these rigs by subcontractors to, in effect, compete with Respondent Evergreen.[9] Nor is there any evidence that Respondent Evergreen would permit subcontractors to forgo accepting its assignments for roofing work in order to engage in other roofing work, independent of Respondent Evergreen. In any event, the performance of work for others than Respondent Evergreen would not, of itself, suffice to establish that an independent contractor relationship exists. See, e.g., *Carpet, Linoleum and Soft Tile Layers Local No. 1238 (Robert A. Arnold d/b/a Arnold's Carpet)*, 175 NLRB 332, 334 (1969).

While subcontractors are expected to repair or pay for any damage that they might cause to a customer's property, and to correct or pay for the correction of any deficiency in the roofing work they perform, of itself, this would not dictate conclusion that an independent contractor relationship exists. *Local No. 2265, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpet Center, Inc.)*, 170 NLRB 633, 634 (1968). Indeed, while subcontractors guarantee their work, that guarantee is a nonwritten one given only to Respondent Evergreen and not to the customers. The 4-year warranty that is extended to customers is one given by Respondent Evergreen. In the final analysis, it is to Respondent Evergreen, not to the subcontractors, that customers look for correction of deficiencies and for restitution of damages caused by subcontractors.

As noted above, the fact that subcontractors lease or purchase vehicles which they use in performing work for Respondent Evergreen is not determinative of the relationship to Respondent Evergreen. See *Brotherhood of Carpenters and Joiners (Carpet Center, Inc.), supra; Sheet Metal Workers Union Local 283, Sheet Metal Workers International Association, AFL-CIO (Thomas A. DeVol, d/b/a Tad's Service)*, 172 NLRB 652, 658 (1968). So far as the evidence discloses, even without these vehicles the subcontractors would still be able to install roofs using the polyester cold processing system. For, the vehicles that are crucial to that system are the pumper rigs. Those owned by Mylan and are furnished to the subcontractors at a nominal rental fee, at best, under an oral lease. Without these rigs, it is uncontradicted that it would not be competitive to install roofs using the polyester cold processing system. Moreover, in addition to the pumper rigs, Respondent Evergreen furnishes, apparently at no cost to the subcontractors, chase trucks which are used to transport the materials needed for performing the roofing work at no cost to the subcontractors. Thus, the essential vehicles used to install the roofing system, by means of the polyester cold processing system, and to transport materials to project sites are furnished by Respondent Evergreen to the subcontractors, virtually at no cost. And, as Gordon's testimony illustrates, control of those vehicles remains with Respondent Evergreen.

Respondent Evergreen also furnishes the material needed to install the roofs at no cost to the subcontractors. There is no evidence that subcontractors are free to substitute alternative, possibly cheaper, materials from other sources for that provided by Respondent Evergreen. Consequently, so far as the record discloses, the subcontractors are not able to increase profit by searching for and securing alternative sources for supplies. In effect, that is controlled exlusively by Respondent Evergreen. Although subcontractors are obliged to pay for materials damaged, lost, or used negligently, that does not appear to have been a significant occurrence and, in any event, it is not abnormal for employers to charge employees for negligent loss, damage, on use of materials. Accordingly, this factor does not dictate the existence of an independent contractor relationship.

Great emphasis is placed by Respondents on the fact that subcontractors select their own employees for hire, direct their work, and set their rates of compensation, which is paid by the subcontractors. Yet, close examination of these features shows that the independent judgment exercised by subcontractors in this area is not much diffenent, if at all, from that which is exercised by many supervisors. Thus, the nature of the work to be done is governed by the facts that Respondent Evergreen has

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[9] Although at least one subcontractor testified that he had purchased a flatbed truck for the purpose of developing his own rig, there is no evidence that he has made any further efforts, beyond the purchase of the vehicle, to do so. Moreover, there is no evidence that such a rig would be developed by that contractor within any forseeable period of time. In these circumstances, it is, at best, speculative that this subcontractor would develop his own rig to, in effect, compete with Respondent in using the polyester cold processing system in the future.

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contracted for the work and has determined the system to be utilized in performing it. Campbell's uncontradicted testimony illustrates that, in addition, Mylan and Gordon come to sites and give their own directions on a not insignificant number of occasions. Further, the wage rates of crewmembers selected by subcontractors are subject to the limitations of the amount that subcontractors will receive for performing the work. That amount, as found above, is established unilaterally by Respondent Evergreen. Finally, the ability to select crewmembers who will be hired is a supervisory function. Of itself, it does not dictate a conclusion that there is independent contractor status. In any event, the record here shows that Respondent Evergreen has been involved in this process. It has suggested that particular employees be used as crewmembers by subcontractors. On at least one occasion, it unilaterally has shifted an employee from one subcontractor's crew to that of another. When possible, it provides work in its yard for subcontractors' crewmembers when there is a shortage of roofing work for them to perform. In short, the record does not support the independence from Respondent Evergreen of subcontractors in the area of the employment of crewmembers that Respondent Evergreen seeks to portray. Moreover, it is significant that, rather than simply paying Fresh Air, as an entity, for the work which its crews perform, Respondent Evergreen pays Romei and Gardner separately for the work which each of their crews performs, thereby effectively disregarding the fact that they are nominally part of a single entity.

In these circumstances, I find that the subcontractors used by Respondent Evergreen are not independent contractors but rather, despite Respondent Evergreen's change in their nominal relationship, that an employer employee relation has continued to exist between the roofing crews and Respondent Evergreen. Inasmuch as Respondent Evergreen, as found above, in the same employer as Respondent BBS, the two constituting a single employer, and in view of the fact that the roofing crews have continued as its employees, I find that by failing to continue applying the terms of Respondent BBS's collective-bargaining agreement to these employees during the period on and after May 7, 1979, Respondents have violated Section 8(a)(5) and (1) of the Act. Moreover, by failing and refusing to provide the above-described information requested in the Union's January 1980 letter, which is information relative to the bargaining process, Respondents have further violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Better Building Supply Corp., and Evergreen Roofing, Inc., are each employers within the meaning of Section 2(2) of the Act, engaged in commerce and in businesses affecting commerce within the meaning of Section 2(6) and (7) of the Act, and, collectively, constitute a single employing enterprise and a single employer within the meaning of the Act.

2. Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, is labor organization within the meaning of Section 2(5) of the Act.

3. A unit appropriate for collective bargaining is:

> All roofers and waterproofers employed by Better Building Supply Corp., Evergreen Roofing, Inc., and their subcontractors employed in Clallam, Jefferson, King, Kitsap, Mason and Snohomish Counties, Washington; excluding professional employees, guards and supervisors as defined in the Act.

4. At all times material Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, has been the exclusive collective-bargaining representative of the employees in the above-described bargaining unit within the meaning of Section 9(a) of the Act.

5. By failing and refusing to continue recognizing Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, as the collective-bargaining representative of the employees in the above-described bargaining unit and by failing and refusing to apply the terms and conditions of the current collective-bargaining agreement to those employees, Better Building Supply Corp., and Evergreen Roofing, Inc., have unlawfully terminated and modified the terms and conditions of said collective-bargaining agreement before it could be reopened pursuant to its provisions, thereby violating Section 8(a)(5) and (1) of the Act.

6. By failing and refusing to provide Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, with requested information that is relevant and necessary to the collective-bargaining process, Better Building Supply Corp., and Evergreen Roofing, Inc., thereby violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Better Building Supply Corp., and Evergreen Roofing, Inc., have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom, and that they take certain affirmative action to effectuate the policies of the Act. Specifically, they shall be ordered to honor the terms of the current collective-bargaining agreement and to make whole all employees for any losses sustained by the failure to apply the terms and conditions of the collective-bargaining agreement to them on and after May 7, 1979, with interest to be paid on the amounts owing and to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), enforcement denied on different grounds 322 F.2d 913 (9th Cir. 1963).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER[10]

The Respondents, Better Building Supply Corp., and Evergreen Roofing, Inc., Seattle, Washington, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, as the exclusive bargaining representative of all employees in the bargaining unit heretofore found appropriate in Conclusion of Law 3, above.

(b) Failing and refusing to apply to all employees in the aforesaid bargaining unit all terms and conditions of the current collective-bargaining agreement, absent the express written consent of Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO.

(c) Refusing to bargain collectively by refusing, upon request, to supply relevant information needed by Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, to represent the employees in the aforesaid bargaining unit.

(d) Refusing to provide Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, to represent the employees in the aforesaid bargaining unit.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Upon request bargain collectively with Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, as the exclusive bargaining representative of all employees employed in the bargaining unit heretofore found appropriate in Conclusion of Law 3, above.

(b) Apply the terms and conditions of the current collective-bargaining agreement to all employees employed in the aforesaid contractual bargaining unit.

(c) Provide Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, with any and all requested information that is relevant and necessary to the collective-bargaining process.

(d) Make whole employees for any losses of pay or benefits which would have accrued to them on and after May 7, 1979, under the current collective-bargaining agreement but for the failure to apply the terms and conditions of that agreement to all employees employed in the aforesaid contractual bargaining unit on and after that date.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at their Seattle, Washington, facility copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by their authorized representative, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Better Building Supply Co., and Evergreen Roofing, Inc., to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Allied Workers Local 101 and Leonard Samuels and Walter Dickson *and* Northwestern Indiana Building and Construction Trades Council and Tonn and Blank, Inc.; Airo-Kool Cooling and Heating, Inc.; Allen's Construction Co., Inc.; Area Sheet Metal, Inc.; Continental Electric Co., Inc.; Wm. Hayden Contractor; Maris Roofing Co., Inc.; Mur's Electric Co.; Pyramid Mechanical Contractor, Inc.; Security Co., Inc.; Chester Dicksons d/b/a Dicksons Electric Co.; U.S. Dismantlement Corp.; and Mose Roberts d/b/a Roberts Wrecking Co. and Sheet Metal Workers International Association Local Union 303, AFL-CIO; Northwest Indiana and Vicinity District Council of the United Brotherhood of Carpenters and Joiners of America, Local 1005, AFL-CIO; International Brotherhood of Electrical Workers Local Union No. 697, AFL-CIO; Bricklayers and Allied Craftsmen Union Local No. 6 of Indiana, AFL-CIO; United Union of Roofers Waterproofers and Allied Workers, Local Union No. 26, AFL-CIO; Local #433 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Union), AFL-CIO; Cement Masons Local Union No. 406 (O.P. & C.M.I.A.), AFL-CIO; Glaziers' Local Union No. 82 of the Brotherhood of Painters, Decorators and Paperhangers of America, Gary and Vicinity (AFL-CIO); Laborers' Local No. 81, Laborers' International Union of North America, AFL-CIO; and Painters Local Union No. 8, Brotherhood of Painters, Decorators and Paperhangers of America, Gary, Indiana, AFL-CIO. Case 13-CD-297

December 3, 1981

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

This is proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Northwestern Indiana Building and Construction Trades Council, herein called the Charging Party, alleging that Allied Workers Local 101 and Leonard Samuels and Walter Dickson, herein called the Allied Workers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with the object of forcing or requiring Tonn and Blank, Inc., the general contractor, and its subcontractors, Airo-Kool Cooling and Heating, Inc.; Allen's Construction Co., Inc.; Area Sheet Metal, Inc.; Continental Electric Co., Inc.; Wm. Hayden Contractor; Maris Roofing Co., Inc.; Mur's Electric Co.; Pyramid Mechanical Contractor, Inc.; Security Co., Inc.; Chester Dicksons d/b/a Dicksons Electric Co.; U.S. Dismantlement Corp.; and Mose Roberts d/b/a Roberts Wrecking Co., herein collectively called the Employers, to assign certain work to employees represented by the Allied Workers rather than to employees represented by Sheet Metal Workers International Association Local Union 303, AFL-CIO; Northwest Indiana and Vicinity District Council of the United Brotherhood of Carpenters and Joiners of America, Local 1005, AFL-CIO; International Brotherhood of Electrical Workers Local Union No. 697, AFL-CIO; Bricklayers and Allied Craftsmen Union Local No. 6 of Indiana, AFL-CIO; United Union of Roofers, Waterproofers and Allied Workers, Local Union No. 26, AFL-CIO; Local #433 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Union), AFL-CIO; Cement Masons Local Union No. 406 (O.P. & C.M.I.A.), AFL-CIO; Glaziers' Local Union No. 82 of the Brotherhood of Painters, Decorators and Paperhangers of America, Gary and Vicinity (AFL-CIO); Laborers' Local No. 81, Laborers' International Union of North America, AFL-CIO; and Painters Local Union No. 8, Brotherhood of Painters, Decorators and Paperhangers of America, Gary, Indiana, AFL-CIO, herein collectively referred to as affiliates of the Charging Party.

Pursuant to notice a hearing was held before Hearing Officer Robert Perkovich on August 11 and 12, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employers and the Charging Party filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYERS

The parties stipulated, and we find, that the general contractor, an Indiana corporation, is engaged in the business of general construction. During the past 12 months, a representative period, the general contractor purchased materials from outside the State having a value in excess of $50,000. Therefore, we find that the general contractor is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties further stipulated and we find, that the subcontractors are employers

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within the meaning of Section 2(2) of the Act. Accordingly, we find that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Allied Workers and the Charging Party and its affiliates are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *The Work in Dispute*

The parties stipulated, and we find, that the work in dispute involves all construction rehabilitation work, including but not limited to painting, drywall, bricklaying, roofing, plumbing, heating and ventilating, demolition, carpentry, fencing, concrete work, electrical, and general labor work, being performed on apartment buildings and apartments at the construction site known as the West Gary Redevelopment Project in Gary, Indiana.

B. *Background and Facts of the Dispute*

The general contractor began work at the jobsite in May 1981.[1] Both the general contractor and its subcontractors assigned the work in dispute to employees who were represented by affiliates of the Charging Party. Cleven Allen, owner of Allen's Construction Co., Inc., one of the subcontractors, testified that on June 8 he was approached by the Allied Workers president, Leonard Samuels, and business agent, Walter Dickson. They asked Allen if he would hire some of their members. Allen stated that he had a contract with the Carpenters Union, an affiliate of the Charging Party, and that he knew nothing about the Allied Workers. Allen asked them what his obligations would be if he hired their members. Samuels and Dickson stated that he could pay them what the other subcontractors paid. William Hayden, the owner of Wm. Hayden Contractor, one of the subcontractors, testified that on June 9 he was likewise approached by Samuels and a couple of business agents for the Allied Workers. Samuels asked Hayden to hire some men, and Hayden replied that he did not need any. Immediately thereafter, pickets arrived at the jobsite with signs stating that "Tonn and Blank Was Unfair to Local 101 and the People of Gary." The pickets and that Hayden should hire members of the Allied Workers. The parties stipulated that the Allied Workers picketed the jobsite at least from June 20 through June 24. Witnesses at the hearing testified about further picketing by the Allied Workers on June 29 and 30 and on July 4. On June 29 and 30, the Allied Workers picketed the jobsite and threatened to kill the general contractor's superintendent, John Monaco, and carpenter Paul Carpenter, respectively. Various witnesses also testified about alleged acts of violence and physical threats by the picketers. According to Benjamin Thomas, president of Airo-Kool, a subcontractor, he told Samuels at some point during the picketing that he would place members of the Allied Workers on the job if they were qualified and if they joined the appropriate union affiliate of the Charging Party. Samuels stated that he would send Thomas a list of qualified people but that it did not matter if they were members of the Allied Workers as long as they were black. Thomas never received such a list from Samuels. Finally, Bruce Meyer, the general contractor's project manager, stated that he informed Samuels on August 1 that the general contractor was not interested in participating in a training program with the Allied Workers because it had not been certified by the Labor Department. Samuels replied that he wanted his members employed on the job and that inasmuch as the hiring situation had not been settled there would be more demonstrations at the site the following week.

C. *Contentions of the Parties*

The Employers and the Charging Party and its affiliates contend that the work in dispute was properly assigned to employees represented by the Charging Party's affiliates on the basis of collective-bargaining agreements, the Employers' assignments and past practices, area practice, relative skills, and efficiency and economy of operation.

The Allied Workers maintains that it represents black employees who have traditionally been discriminated against in the construction industry in Gary, and that inasmuch as its members are qualified they should be assigned 51 percent of the disputed work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

The record summarized above indicates that in June and July the president and business agents of the Allied Workers demanded that the general contractor and the subcontractors assign at least 50 percent of the disputed work to employees represented by the Allied Workers. The demands were refused, and the Allied Workers picketed the project and engaged in threats in furtherance of the demands. The parties have stipulated that no method existed for voluntarily resolving the dispute.

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[1] All dates hereafter refer to 1981.

Based on the foregoing, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there is no agreed-upon method for the voluntary adjustment of the work dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[2] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[3]

The following factors are relevant in making the determination of the dispute before us:

1. Certification and collective-bargaining agreements

There is no evidence to show that the Allied Workers or any of the affiliates of the Charging Party have been certified by the Board as representatives of employees performing the work in dispute. The general contractor and its subcontractors, however, have collective-bargaining agreements with the respective affiliates of the Charging Party. Neither the general contractor nor any of its subcontractors have a collective-bargaining agreement with the Allied Workers. We therefore find that the relevant collective-bargaining agreements favor awarding the work to employees represented by the affiliates of the Charging Party.

2. The Employers' assignments and past practices

The general contractor and the subcontractors, in accordance with their preference, assigned the work in dispute to employees represented by affiliates of the Charging Party. Further, all of the representatives of the general contractor and the subcontractors who testified stated that their consistent practice has been to assign such work to affiliates of the Charging Party. Accordingly, we find that both the Employers' assignments and past practices favor awarding the work to employees represented by the affiliates of the Charging Party.

3. Area practice

The evidence indicates that approximately 99.9 percent of the construction work in the Gary, Indiana, area is union work and that all of the union work is performed by affiliates of the Charging Party. Consequently, we find that the factor of area practice favors awarding the work in dispute to employees represented by the affiliates of the Charging Party.

4. Relative skills

The record discloses that the rehabilitation work being done at the project by the various trades requires greater skill than a regular construction job which begins from the ground up because of the selective replacement of materials and fixtures throughout the existing structures. Further, the project is a job issued by the Department of Housing and Urban Development and as such all apprentices on the job are required to be members of an apprenticeship program approved by the Department of Labor. Each of the local craft unions affiliated with the Charging Party has its own certified apprenticeship program in which the requisite skills to perform the disputed work are taught. Although the Laborers' Union does not send its members through an apprenticeship program, those involved in the demolition work were selected by the general contractor because of their skill and experience in that area. In contrast, there is no evidence to indicate that the Allied Workers members possess the skills necessary to perform all or any part of the work in dispute. The Allied Workers president testified that it has a training program for the construction trades but he was unable to describe the program and was unsure of its scope and reach. Further, any of the Allied Workers training programs which may exist are not certified. We find that this factor favors awarding the disputed work to employees represented by the affiliates of the Charging Party.

5. Efficiency and economy of operation

It appears from the record that employees represented by the affiliates of the Charging Party perform their work efficiently and that many of the subcontractors maintain permanent work crews which travel from job to job and work together for long periods of time. If any of the Employers are required to hire employees represented by the Allied Workers, they will have to lay off present employees. Accordingly, we find that the factors of efficiency and economy of operation also favor awarding the work to employees represented by the Charging Party's affiliates.

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[2] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[3] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the affiliates of the Charging Party are entitled to perform the work in dispute. We reach this conclusion relying on the Employers' collective-bargaining agreements, the Employers' assignments and past practices, area practice, relative skills, and efficiency and economy of operation. In making this determination, we are awarding the work in question to employees who are represented by the affiliates of the Charging Party, but not to those Unions or to their members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Tonn and Blank, Inc,; Airo-Kool Cooling and Heating, Inc.; Allen's Construction Co., Inc.; Area Sheet Metal, Inc.; Continental Electrical Co., Inc.; Wm. Hayden Contractor; Maris Roofing Co., Inc.; Mur's Electric Co.; Pyramid Mechanical Contractor, Inc.; Security Co., Inc.; Chester Dicksons d/b/a Dicksons Electric Co.; U.S. Dismantlement Corp.; and Mose Roberts d/b/a Roberts Wrecking Co., who are represented by Sheet Metal Workers International Association Local Union 303, AFL-CIO; Northwest Indiana and Vicinity District Council of the United Brotherhood of Carpenters and Joiners of America, Local 1005, AFL-CIO; International Brotherhood of Electrical Workers Local Union No. 697, AFL-CIO; Bricklayers and Allied Craftsmen Union Local No. 6 of Indiana, AFL-CIO; United Union of Roofers, Waterproofers and Allied Workers, Local Union No. 26, AFL-CIO; Local #433 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Union), AFL-CIO; Cement Masons Local Union No. 406 (O.P. & C.M.I.A.), AFL-CIO; Glaziers' Local Union No. 82 of the Brotherhood of Painters, Decorators and Paperhangers of America, Gary and Vicinity (AFL-CIO); Laborers' Local Union No. 81, Laborers' International Union of North America, AFL-CIO; and Painters Local Union No. 8, Brotherhood of Painters, Decorators and Paperhangers of America, Gary, Indiana, AFL-CIO, are entitled to perform all construction rehabilitation work at the West Gary Redevelopment Project in Gary, Indiana.

2. Allied Workers Local 101 and Leonard Samuels and Walter Dickson are not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Tonn and Blank, Inc.; Airo-Kool Cooling and Heating, Inc.; Allen's Construction Co., Inc.; Area Sheet Metal, Inc.; Continental Electric Co., Inc.; Wm. Hayden Contractor; Maris Roofing Co., Inc.; Mur's Electric Co.; Pyramid Mechanical Contractor, Inc.; Security Co., Inc.; Chester Dicksons d/b/a Dicksons Electric Co.; U.S. Dismantlement Corp.; and Mose Roberts d/b/a Roberts Wrecking Co., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Allied Workers Local 101 and Leonard Samuels and Walter Dickson shall notify the Regional Director for Region 13, in writing, whether or not it will refrain from forcing or requiring the Employers, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

Blue Cross of Kansas City, Inc. and Blue Shield of Kansas City, Inc. *and* Warehouse, Mail Order, Ice, Cold Storage, Soft Drink, Waste Paper, Distribution Workers, Egg Candlers, Miscellaneous Drivers and Helpers Local Union No. 838, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Petitioner. Case 17-RC-9071

December 3, 1981

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

By Members Fanning, Jenkins, and Zimmerman

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objections to an election held July 24, 1980,[1] and the Acting Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Acting Regional Director's findings and recommendations.[2]

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Warehouse, Mail Order, Ice, Cold Storage, Soft Drink, Waste Paper, Distribution Workers, Egg Candlers, Miscellaneous Drivers and Helpers Local Union No. 838, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

MEMBER JENKINS, dissenting:

My colleagues find nothing objectionable in the Employer's repeated warnings to employees about the possible harmful consequences of the Union's representing them in collective bargaining. Thus, they find the Employer's bargaining-from-scratch statements similar to statements found to be unobjectionable in two cases on which they rely in overruling the objection.[3] In my judgment, President Chernicky's statements in *C & K Coal Company* and General Manager Lew's statements in *Host International, Inc.*, do not rise to the level of the pattern of repeated references to loss of benefits present here, not only in President Willkie's statements but also in a leaflet circulated by the Employer on three different occasions.

In addition, I note that Willkie and the leaflets discussed the Employer's obligation to bargain in good faith and my colleagues adopt the Acting Regional Director's finding that Willkie expressed no intention of doing otherwise. However, it does not appear from the leaflets or Willkie's statements reported by the Acting Regional Director that the Employer assured the employees that it would bargain in good faith at the time it was making the statements in dispute here. But the Board has considered the presence of such assurances as a factor in evaluating the context surrounding such statements.[4]

In sum, I do not find that the Employer's statements here were limited to pointing out that bargaining does not automatically or necessarily lead to increases in benefits. Rather, in the entire context they represented a not very veiled warning to the employees to reject the Union or face the loss of existing benefits. Such objectionable conduct requires that the election be set aside and a new election be conducted.

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[1] In the absence of exceptions thereto, we adopt *pro forma* the Acting Regional Director's recommendations that Petitioner's Objections 1(b) and 1(c) be overruled.

[2] We have attached as an appendix that portion of the Acting Regional Director's report dealing with Petitioner's Objection 2(b), which alleges, *inter alia*, threats by the Employer of a loss of benefits. [Omitted from publication.] In adopting the Acting Regional Director's recommendation that this objection be overruled, we do not rely on *Ludwig Motor Corp.*, 222 NLRB 635 (1976). We also note that speech found to be protected by Sec. 8(c) from challenge as an unfair labor practice may nevertheless be found objectionable under the more restrictive standard for speech applicable in a representation election proceeding. *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786-87 (1962). Accordingly, we rely upon *C & K Coal Company*, 195 NLRB 1038 (1972), and *Host International, Inc.*, 195 NLRB 348 (1972), in which bargaining-from-scratch statements similar to those made by the Employer here were found to be unobjectionable.

Because we find the Employer's statements individually unobjectionable, we do not agree with our colleague that nonetheless cumulatively they are objectionable by virtue of their repetition. We note that in *Host International, Inc., supra*, the similar statements were made at two separate meetings, and in *C & K Coal Company, supra*, the similar statements were made at several points throughout an employee meeting. Neither do we find significant, as does our colleague, the fact that the Employer stated that it had the obligation to bargain in good faith, rather than expressly stating that it intended to bargain in good faith. *C & K Coal Company, supra.*

[3] *C & K Coal Company*, 195 NLRB 1038 (1972); *Host International, Inc.*, 195 NLRB 348 (1972).

[4] See, for example, *Ludwig Motor Corp.*, 222 NLRB 635 (1976).

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Arizona Public Service Company ***and*** **International Brotherhood of Electrical Workers, AFL-CIO, Local 387.** Case 28-CA-6600

December 3, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on August 17, 1981, by International Brotherhood of Electrical Workers, AFL-CIO, Local 387, herein called the Union, and duly served on Arizona Public Service Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on September 1, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that, since June 25, 1981, following a Board Decision and Order,[1] and at all times thereafter, Respondent has refused, and continues to date to refuse, to recognize and to bargain collectively with the Union as the exclusive bargaining representative of Respondent's Palo Verde, Arizona, nuclear power plant production and maintenance employees in the appropriate unit,[2] although the Union has requested and is requesting it to do so. On September 14, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 22, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 30, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits that the existing systemwide unit of certain of its production and maintenance employees constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act, and that the Union is the designated exclusive representative of its production and maintenance employees as set forth in successive collective-bargaining agreements. Respondent, however, stresses that these agreements do not include the Palo Verde production and maintenance employees, and denies that the Palo Verde employees may be part of the systemwide bargaining unit without first having an opportunity to vote in a self-determination election as to whether they wish to be included in that unit or to remain unrepresented.

In the Motion for Summary Judgment, the General Counsel argues that Respondent's answer attempts to relitigate issues that were raised and determined by the Board in the underlying representation cases. We agree with the General Counsel.

The record, including the record in the underlying representation cases, Cases 28-RM-394 and 28-UC-111, shows that, in December 1980, Respondent filed an RM petition seeking an election among its production and maintenance employees at its Palo Verde nuclear power plant, and that the Union filed a UC petition seeking a clarification of the existing systemwide production and maintenance unit to include the Palo Verde employees as an accretion to the systemwide unit. Following transfer of the cases to the Board by the Regional Director, on June 5, 1981, the Board issued a Decision and Order[3] in which it found that Respondent's Palo Verde production and maintenance employees were an accretion to the existing systemwide bargaining unit represented by the Union. The Board found that no question concerning representation of the Palo Verde employees existed, and therefore dismissed the petition in Case 28-RM-394.

On June 15, 1981, Respondent filed with the Board a motion for reconsideration of the Board's Decision and Order. On June 19, 1981, the Board issued an unpublished Order denying Respondent's motion. On July 1, 1981, Respondent filed with the

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[1] 256 NLRB 400 (1981).

[2] Official notice is taken of the record in the representation proceeding, Cases 28-RM-394 and 28-UC-111, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[3] 256 NLRB 400.

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Board a renewed motion for reconsideration of the Board's Decision and Order. On July 9, 1981, the Board issued an unpublished Order denying Respondent's renewed motion.

On June 24 and July 13, 1981, the Union requested Respondent to recognize it as the exclusive representative of the Palo Verde production and maintenance employees and to bargain collectively regarding those employees' rates of pay, wages, hours of employment, and other terms and conditions of employment. Respondent, by letters dated June 25 and July 20, 1981, refused to recognize and to bargain with the Union, and has continued to refuse to recognize and to bargain with the Union as the exclusive bargaining representative of its Palo Verde employees. Respondent asserts as reasons for its continued refusal to recognize and to bargain with the Union that the Board ignored acts which make the application of the accretion doctrine inappropriate in this case, that the Palo Verde employees constitute a new and distinct grouping, and that Board law requires that such employees be granted a self-determination election as to whether they wish to be represented by the Union or remain unrepresented—arguments previously presented to and considered by the Board. Thus, it appears that Respondent is attempting to raise in this proceeding issues which were raised and determined in the underlying representation cases.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Arizona corporation, is engaged as a public utility in the generation, transmission, distribution, and sale of electricity and natural gas. During the past 12-month period, which period is representative of its operations generally, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $250,000, and during the same period of time purchased goods and materials valued in excess of $50,000 which were transported in interstate commerce and delivered to its operations in the State of Arizona directly from suppliers located in States of the United States other than the State of Arizona.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, AFL-CIO, Local 387, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent throughout Respondent's systemwide operations.

2. The recognition

At all times material herein, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the unit described above, and has been recognized as such by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from April 1, 1980, to April 1, 1982.

3. The Board's Decision and Order

On June 5, 1981, the Board issued a Decision and Order,[5] finding, *inter alia*, that certain production and maintenance employees employed by Respondent at its Palo Verde, Arizona, nuclear power plant, which is currently in the process of being constructed, are an accretion to, and included in, the unit described above.

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[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5] 256 NLRB 400.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about June 24, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 25, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since June 25, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Arizona Public Service Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, AFL-CIO, Local 387, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Respondent throughout Respondent's systemwide operations constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been and now is the designated exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 25, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Arizona Public Service Company, Palo Verde, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, AFL-CIO, Local 387, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent throughout Respondent's systemwide operations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Palo Verde, Arizona, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, AFL-CIO, Local 387, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees employed by us throughout our systemwide operations.

ARIZONA PUBLIC SERVICE COMPANY

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Brooks Shoe Manufacturing Company, Inc. *and* **Belinda Geiman** *and* **Phyllis M. Shue** *and* **Morgan L. Dietz** *and* **United Food & Commercial Workers Union Local 1436, chartered by United Food & Commercial Workers International Union, AFL-CIO** *and* **Mary Ann Slothour.** Cases 4-CA-11202-1, 4-CA-11202-2, 4-CA-11202-3, 4-CA-11224, and 4-CA-11226

December 4, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 25, 1981, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

CONCLUSIONS OF LAW

1. Brooks Shoe Manufacturing Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers Union Local 1436, chartered by United Food & Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with discharge, layoff, plant closure, and other reprisals because of their interest in or activity on behalf of the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By stating that employees had been laid off because of their interest in or activity on behalf of

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The General Counsel excepted to the Administrative Law Judge's failure to make a number of specific findings. Except for the General Counsel's exceptions regarding threats that Elm Street employees would be laid off, or admissions that they had been laid off, because they supported the Union, we believe the findings requested by the General Counsel are implicit in the Administrative Law Judge's conclusion that Respondent interrogated employees concerning their interest in and activity on behalf of the Union, and threatened them with discharge, warehouse closure, and other reprisals. With respect to exceptions pertaining to statements about layoff, we find that, based on evidence discussed by the Administrative Law Judge, Respondent threatened employees with layoff because they supported the Union and stated that employees had been laid off because they supported the Union, thereby violating Sec. 8(a)(1) of the Act. We shall modify the Administrative Law Judge's recommended Order and notice accordingly.

Because the record fails to disclose a sufficient nexus between Supervisor O'Donnell's statement to employee Shue that she might be transferred back to West Chestnut and Shue's union activities, we find no merit in the General Counsel's exception that O'Donnell's statement violated Sec. 8(a)(1). The General Counsel notes that the conversation referred to in sec. III.B.1, par. 6, of the Administrative Law Judge's Decision occurred on July 15, 1980, rather than July 5, 1980, and we hereby correct this inadvertent error accordingly.

While we agree that the Administrative Law Judge correctly discredited the reasons advanced by Respondent for the discharges of the Elm Street employees, we decline to adopt his statement that employee punching of other employees' timecards is a common practice in industry.

Member Jenkins regards the Administrative Law Judge's reference to *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), to be inapposite. That decision concerns identifying the cause of discharge where a genuine lawful and a genuine unlawful reason exist. Where, as here, the asserted lawful reason is found to be a pretext, only one genuine reason remains—the unlawful one. To attempt to apply *Wright Line* in such a situation is futile, confusing, and misleading.

[2] The Administrative Law Judge failed to make conclusions of law based upon his findings. We make herein conclusions of law consistent with his findings of fact, as modified herein.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

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the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By interrogating employees concerning their interest in or activity on behalf of the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By discharging or otherwise discriminating against employees because of their interest in or activity on behalf of the Union, or any other labor organization, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has committed no other unfair labor practices.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Brooks Shoe Manufacturing Company, Inc., Hanover, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) Threatening employees with discharge, layoff, plant closure, and other reprisals because of their interest in or activity on behalf of the Union."

2. Insert the following as paragraph 1(c) and reletter the subsequent paragraphs accordingly:

"(c) Stating that employees had been laid off because of their interest in or activity on behalf of the Union."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against employees because of their interest in or activity on behalf of United Food & Commercial Workers Union Local 1436, chartered by United Food & Commercial Workers International Union, AFL-CIO.

WE WILL NOT interrogate employees about their interest in or activity on behalf of the Union.

WE WILL NOT threaten employees with discharge, layoff, plant closure, or other reprisals because of their interest in or activity on behalf of the Union.

WE WILL NOT state that employees were laid off because of their interest in or activity on behalf of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer full and immediate reinstatement to Mary Ann Slothour, Belinda Geiman, Phyllis Shue, and Morgan Dietz to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, and WE WILL make them whole for any losses they may have suffered as a result of the discrimination against them, with interest.

BROOKS SHOE MANUFACTURING COMPANY, INC.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on April 1 and 2, 1981, at York, Pennsylvania, upon the General Counsel's complaint which alleged generally that the Respondent terminated four employees on June 12 and 13, 1980,[1] because of their union activity in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* It is also alleged that, through Supervisor John O'Donnell, the Respondent committed various violations of Section 8(a)(1) of the Act.

The Respondent contends that the union activity played no part in the termination of the four employees—that they were "permanently laid off" because they had committed numerous violations of company rules including drinking alcoholic beverages on company premises, punching others' timecards, and low productivity. The Respondent generally denied that it committed any unfair labor practices.

Upon the record as a whole, including my observation of the witnesses and the briefs and arguments of counsel, I hereby make the following:

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[1] All dates are in 1980 unless otherwise indicated.

Findings of Fact and Conclusions of Law

I. JURISDICTION

Brooks Shoe Manufacturing Company, Inc. (herein the Respondent or the Company), is engaged in the distribution and sale primarily of athletic footwear. At its Hanover, Pennsylvania, facility the Respondent receives raw materials which it ships to companies in Puerto Rico and the Dominican Republic where the shoes are manufactured. The finished products are shipped to Hanover, and from there to customers throughout the United States and abroad.

In the course and conduct of its business, the Respondent annually receives at its Hanover facility products valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania, and annually ships directly to points outside the Commonwealth of Pennsylvania goods and products valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Food & Commercial Workers Union Local 1436, chartered by the United Food & Commercial Workers International Union, AFL-CIO (herein the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

As noted above, the primary business of the Respondent at its Hanover facility is to receive and ship raw materials and to receive and ship finished products. Running shoes, which account for about 80 percent of the Respondent's sales, are received and shipped from the West Chestnut Street warehouse. Other athletic shoes (basketball, baseball, all purpose, etc.) are received and shipped out of the Elm Street warehouse; and raw materials are received and shipped from the Factory Street facility (Titus warehouse).

During the times material here, there were more than 50 employees engaged in various warehousing duties—30 at the Titus building (most of whom were in rework), about 25 at West Chestnut, and about 5 to 8 at Elm Street.

Most of the West Chestnut and Elm Street employees were involved in processing orders for customers; however, there were a few who did rework on damaged shoes and made special order alterations.

In early spring, an organizational campaign began among the Respondent's employees. Authorization cards were signed and a representation petition was filed in Case 4-RC-14198. A hearing on that petition was held on May 30 followed by the Regional Director's Decision and Direction of Election, affirmed by the Board. An election was held on October 15 which resulted in a certification of no representative.

John O'Donnell, he testified, has worked for the Respondent off and on since 1938. Before May, and apparently for some years, O'Donnell was the West Chestnut warehouse foreman, in charge of the first, or day, shift. For about 1 month during the last of each calendar quarter, Bill Myers was the foreman of a smaller night shift. In addition, Myers was the foreman at the Elm Street warehouse.

Sometime in April the Respondent's senior management officials determined to shift O'Donnell and Myers, putting O'Donnell in charge of the Elm Street warehouse and Myers in charge of West Chestnut. Alan Carmel, the Company's general counsel and a member of the senior management committee, testified that this decision was based on their determination that Myers was a more effective supervisor than O'Donnell—that Myers' second shift crew at West Chestnut was more productive on an employee/hour basis than O'Donnell's. In fact, Carmel testified, "To be perfectly frank, John O'Donnell was not what you call the best supervisor in the world."

Myers testified that he was advised by a John Benowitz that the change was being made because management had discovered there was a lot of "drinking" going on at the West Chestnut warehouse.

Benowitz told O'Donnell about the change and that O'Donnell should pick five employees of his choice to transfer to the Elm Street warehouse; but, according to Myers, Benowitz told O'Donnell that he could not take any of Myers' employees.

The change was made in early May. But for about 2 weeks or so, three of the previous Elm Street employees stayed on to do special orders, rather than immediately transferring to West Chestnut. One of these was Rosalie Long, who testified that she soon observed a lot of drinking beer among the transferred employees, and a lot of "goofing off." When she asked why the others were standing around or sitting in their cars in the parking lot, and the like, she was told that there was "no work."

In any event, Long was motivated to contact Myers and to tell him about the drinking and goofing off and that if he did not transfer her immediately to West Chestnut Street she would quit. She was in fact transferred a few days later, apparently the last week in May.

The drinking observed by Long took place prior to O'Donnell going on vacation but, she testified, it was more pronounced during the week he was gone. The Saturday following Long's call, Myers in fact went to the Elm Street warehouse to see what was going on. At that time he noticed a receipt for a key dated May 17. That the Myers visit to the warehouse occurred on May 17 is generally consistent with the testimony of all the witnesses.[2]

Myers testified that he observed many beer cans in various trash containers throughout the warehouse as well as an old shoe in one of the trash cans. Myers attempted to contact Carmel as well as Jerry Turner, the Respondent's vice president and part owner, but was unable to do so. He did contact a fellow employee who joined him at the warehouse to verify the condition.

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[2] The dates of these events are unclear from the record; however, the consensus has the shift of employees in the first of May. During the middle of the month, O'Donnell took a 1-week vacation, returning to work on May 19.

The next Monday, Myers contacted Benowitz, whom he then heard place a telephone call to O'Donnell stating that the drinking had to stop or else all the warehouse employees would be eliminated, including their supervisor.

Myers went on to testify that following this, on many trips to the Elm Street warehouse for about 2 weeks or so, he saw no evidence of beer drinking. He next observed evidence of beer drinking in early June.

Carmel testified that on one occasion during the period following May 17 he drove by the Elm Street warehouse and saw Morgan Dietz sitting on the loading dock doing nothing and other employees just standing around. On another occasion he observed employees standing around not working.

Carmel further testified that, when he discussed the matter of Myers' inspection of the Elm Street warehouse on May 17 later with Turner and Benowitz, they wanted immediately to discharge all the Elm Street employees (but not, apparently, O'Donnell, or at least he did not so testify). Carmel argued that they should not be so precipitous and should further investigate. And he asked to see a copy of the company rules (Carmel had been with the Respondent only a short time) but was advised that there were no written rules. He then undertook to "codify," as he put it, the basic "common sense" rules of the Company which included not drinking on "company premises without prior approval of a corporate officer," and not punching other employees' timecards. These rules were reduced to writing and posted on June 12.

On June 12 Carmel and Myers made another inspection trip to the Elm Street warehouse. Carmel testified, "We know that Morgan and Larry Cline generally went to a particular bar for lunch . . . ." Thus they parked so that they could see Dietz and Cline en route. At precisely 11:57, by their watches, Dietz and Cline walked by, at a point two or three blocks from the warehouse. Carmel and Myers then went to the warehouse and on reviewing the timecards of Dietz and Cline noted that they reflected a lunch punchout of 11:57. They checked their respective watches with the timeclock and found them to be identical. Thus Carmel concluded that somebody must have punched the timecards for Dietz and Cline.

On Friday, June 13, Carmel and Myers went again to the Elm Street warehouse, arriving at or about 11:45, at which time they observed a number of employees in the parking lot, including Mary Ann Slothour (who, unknown to them, Carmel testified, had been terminated by O'Donnell the day before). According to the testimony of both Carmel and Myers they went in and looked at the timecards noting that each had punched out at 11:58.[3]

Carmel and Myers gathered the timecards and returned to the Titus Street building where Carmel wrote a letter of termination for each of the employees. They were then called over from Elm Street, given their paychecks, and the termination letter which stated in relevant part:

> This is to advise you that the company has decided to close the Elm Avenue facility as a full-time warehouse. We have determined that we can operate more efficiently by using this warehouse as a satellite operation of our West Chestnut Street warehouse. Our analysis of the situation shows that the productivity at Elm Avenue has been far below that of West Chestnut Street. We feel that this is due to the poor productivity of the employees at Elm Avenue as well as numerous violations of company rules by our Elm Avenue employees. Spot checks made by company officials have shown employees not working, punchings [sic] others time cards, as well as consuming alcoholic beverages on company premises.
>
> The effective date of the closing is Friday, June 13, 1980 at the close of business. All hourly employees of the Elm Avenue warehouse will be permanently laid off from the company.

As will be detailed below, in May, June, and July O'Donnell had several conversations with the various Elm Street employees during which it is alleged that he interrogated them, threatened them and created the impression of surveillance of their union activity. The basic substance of these conversations testified to by the General Counsel's witnesses was denied by O'Donnell. In most part, I discredit O'Donnell and find generally that the conversations occurred substantially as testified to by the General Counsel's witnesses. First, I found generally their demeanor more positive than O'Donnell's. Further, the witnesses for the General Counsel were generally more candid in admitting matters adverse to their interests than O'Donnell. The events as testified to by the General Counsel's witnesses are consistent with the overall pattern of activity and facts about which there was no dispute.

Finally, O'Donnell's testimony on some material facts is inherently unreliable and was specifically contradicted by other witnesses for the Respondent. For instance, he denied any knowledge of any drinking at the warehouse, claiming he first learned of this when Benowitz called on his return from vacation. Long testified that after a couple days working with O'Donnell's crew she observed things that were "just unbelievable"—including drinking. Even Carmel testified that individuals on O'Donnell's crew "have a reputation of drinking."

B. *Analysis and Concluding Findings*

1. The 8(a)(1) activity engaged in by John O'Donnell

Although the testimony I credit shows that O'Donnell did ask employees during early May whether they had signed authorization cards, and such is clearly interrogation in violation of Section 8(a)(1), it also appears that this was of little concern to him then. In fact according to Slothour he said it did not matter to him whether they got a union in or not.

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[3] Implicit in the testimony of Carmel and Myers is that somebody other than these employees punched out their timecards. However, also implicit in their testimony is that they immediately went from the parking lot, where they arrived at 11:45, to the timeclock. There is no explanation by them of why it took more than 13 minutes to do this. Nor did Carmel explain how it was that he did not learn of Slothour's layoff until later that day. She was one of the individuals he identified in the parking lot and thus he would have surely checked her timecard.

However, following O'Donnell's return from vacation in late May, and then following the representation case hearing on May 30, O'Donnell's statements to employees became more pointed.

Thus, on June 11 O'Donnell approached Slothour and stated that, "I was f— him up," and that Benowitz had called to say people would have to be laid off and the Company might shut down the Elm Street warehouse.

Morgan Dietz testified that in early May O'Donnell said to him, "I hear you are trying to get a union in?" Dietz said yes and O'Donnell asked him why. While Dietz did not put this very material statement in his investigatory affidavit, which seriously draws question to his credibility, it falls into the same category as the interrogation of others. And it is generally consistent with the overall pattern of action by O'Donnell. Thus, I conclude that it is more probable than not that the event occurred as testified to by Dietz.

Belinda Geiman testified that on at least three occasions, including June 12, O'Donnell told her that Slothour was "F— him up," was involved with the Union, and that he had laid her off for this reason.

And on July 5, Geiman saw O'Donnell at a local bar and asked him if they were laid off because of the Union. He said yes.

I found Geiman to be a believable witness. Her demeanor was positive and her answers, to sometimes difficult questions, were candid. Thus, I credit her testimony concerning what O'Donnell said about Slothour and the fact that employees were laid off because of their union activity. I discredit O'Donnell's general denials of these events.

Rodney Lau testified that O'Donnell was a "drinking buddy" of his, although he had not seen O'Donnell much lately. In early May O'Donnell asked Lau if he was involved in the Union. Lau said that he had signed an authorization card. This was overheard by Phyllis Shue (the wife of Lau), who testified that Lau said he did not want to talk about it. O'Donnell's statement was clearly interrogation and violative of Section 8(a)(1).

Shue further testified that, near the end of May, O'Donnell asked her if she was involved with the Union. She told him it was none of his business. He left, then returned stating he thought Slothour was behind it. And in early June O'Donnell told her and Geiman that Benowitz had called and said to get rid of a couple of people. He said he was going to get rid of Slothour because she was trying to get the "f— union in."

On July 6, Shue saw O'Donnell and asked if the employees were laid off because of the Union and he said they were. A similar conversation occurred between Shue and O'Donnell on July 15 where he, again in response to a question, said that they had been laid off because of the Union.

Based on the testimony I credit, I conclude that in May and early June the Respondent acting through its supervisor John O'Donnell did interrogate employees concerning their interest in and activity on behalf of the Union and threatened them with discharge, warehouse closure, and other reprisals.

In most cases O'Donnell prefaced his interrogation of employees by a comment such as "he heard the union was trying to get in" (Shue), or "I hear you are trying to get a union in" (Dietz). The General Counsel alleges that by such statements O'Donnell created the impression that he had engaged in surveillance of employees' union activity. I disagree. While O'Donnell surely interfered with employees' Section 7 rights, I do not believe that such prefatory statements would be construed by them as his having spied on their union activity.[4]

That O'Donnell happened to be in a bar on two occasions when employees were meeting with the union organizer is not alleged as surveillance or creating an impression of such. Nor do I think it was. From the record it appears that O'Donnell was a frequent visitor to bars in the Hanover area and such was known to employees. I cannot believe that their seeing him thus would lead them to suspect he was spying on their union activity.

2. The termination.

An employer may discharge an employee for any reason or no reason at all, unless motivated by the employee's union or other protected activity. Here, the General Counsel alleges, and has the burden of proving, that the Respondent terminated these employees because of their known union activity. However, where the General Counsel does establish *prima facie* that the terminations were the result of an unlawful motive, then the Respondent has the burden of coming forth with evidence to persuade that it acted lawfully. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980); that is, the Respondent must prove that absent the union activity it would have acted as it did.

While an employer may discharge employees for no reason, experience suggests that this in fact is not done—that employers do not capriciously discharge employees or discharge them for irrational reasons. Thus, where the asserted reason for discharging an employee is found unreasonable, it not only can be rejected, but also in such a circumstance the trier of fact can infer that which the respondent seeks to hide—the existence of an unlawful motive. *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966). Such, I conclude, is precisely the situation presented here.

All the Elm Street employees had signed authorization cards.[5] While employees at the other buildings were also involved in the union activity, those at Elm Street were the most active. Two of the three employee witnesses at the May 30 hearing were Mary Ann Slothour and Phyllis Shue. And, although O'Donnell claimed that he did not know of these employees' union activity, he did admit the two occasions he saw the employees at a local hotel.

Further, I credit the testimony of Slothour to the effect that O'Donnell asked her if she had signed a union card and she said she had; and the testimony of Geiman to the effect that O'Donnell told her to "keep her nose clean" and that Slothour had been "F— around with the union."

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[4] Compare *Nevada County Publishing Co., d/b/a "The Union"*, 251 NLRB 1030 (1980), where the interrogation occurred after each union meeting, the supervisor asking how the meeting had gone.

[5] For reasons unexplained on the record, neither Larry Cline nor Rodney Lau filed charges of unlawful discrimination nor were they included in the complaint.

Whether O'Donnell communicated his knowledge about his employees' union activity to higher management is not particularly material because higher management independently knew that some of the Elm Street employees, at least, were involved in the union activity as the result of their appearance at the May 30 hearing.

Finally, I credit the testimony of Shue that following the terminations, about July 6, at the Hamilton Hotel bar she asked O'Donnell if the Union had played a part in their terminations and he said it had. Geiman testified to a similar conversation. These factors alone establish *prima facie* that the terminations were motivated by the union activity of the employees.

Although the reasons asserted by the Respondent would generally be considered sufficient cause to terminate one or a group of employees, I conclude that, whatever these employees did, the Respondent seized upon their acts as a pretext to discharge a group of union sympathizers during an organizational campaign. The reasons advanced were a pretext and not the true motive.

The shift of supervisors between Elm Street and West Chestnut and the transfer of employees took place during the first of May. At the time, Slothour was off work with a hand injury. According to O'Donnell, not knowing whether she was going to return to work, inasmuch as she had not called, he decided to hire Geiman, who had asked him for a job on a couple of occasions when he saw her at a bar next door where he lives. Then a few days after the transfer, Slothour called asking for her job back. At this time O'Donnell contacted Myers and asked him to take her, but Myers refused, stating he did not have room on his crew. O'Donnell then put Slothour on. According to Carmel, O'Donnell did not have authorization from higher management to hire Geiman or Slothour.

O'Donnell testified that he laid off Slothour on June 12 because he had been contacted by Benowitz and told he had to lay off three employees. O'Donnell said he chose Slothour because she was the last employed, notwithstanding that she had been working before and was off only because of an injury. O'Donnell knew of Slothour's union activity, and that she had appeared on behalf of the Union at the representation hearing 2 weeks before. I believe that, when Benowitz contacted O'Donnell and advised him to lay off employees, O'Donnell took this command to discharge union activists and he complied by terminating Slothour. And this must have been known to higher management notwithstanding Carmel's denial.

The Respondent, however, changed strategy and determined to terminate the whole Elm Street crew. Thus, on June 12 Carmel wrote and had posted the company rules which in his letter of June 13 he stated the employees had violated.

Basically, the Respondent's argument is that because of the alleged violation of company rules—drinking beer, punching each others' timecards, and goofing off—it wanted to get rid of these particular employees. Since sales of athletic shoes are traditionally down in May and June, management determined the Elm Street warehouse could be closed as a full-time operation and be serviced on a part-time basis with West Chestnut Street employees. The Respondent does not contend that the reduced sales of athletic shoes caused the terminations. Rather, this provided the economic feasibility to get rid of employees who were breaching company rules and were unproductive.

The principal violation of company rules is the beer drinking while at work without authorization from management. That there was beer drinking is readily admitted by all the employees, though denied by O'Donnell. Drinking while at work is generally a serious matter; however, here such was clearly condoned, if not encouraged by supervision.

Myers testified that he and O'Donnell were switched because there had been drinking by the West Chestnut warehouse employees when under the supervision of O'Donnell. The fact that O'Donnell tolerated employees working for him to drink beer while on the job was known to management and particularly Benowitz who, rather than discharging O'Donnell or the employees in question, simply transferred O'Donnell. There is undenied testimony of an incident, known to Benowitz, when this basic crew, while working at West Ghestnut, took an evening break for drinking then returned to unload a truck, during which they continued to drink beer.

After the beer drinking was reported at the Elm Street facility shortly after O'Donnell and his crew arrived, all Benowitz did was to call O'Donnell and tell him that the drinking had better stop or else there would be discharges, including the supervisor. Higher management knew that beer drinking was condoned by O'Donnell, both at West Chestnut and Elm Street. Indeed, according to Carmel, the employees had a reputation for drinking. In such circumstances, it would be expected that management would at least talk to employees before discharging them for drinking on company premises. There is no evidence that anyone in supervision ever suggested to any of the Elm Street employees that they should not drink beer during the working day or on company premises. In these circumstances I discredit the Respondent's assertion that beer drinking was a significant matter.

Similar is the matter of punching timecards for others. While such is often a violation of company rules, such is fairly common in industry. Nevertheless, the Respondent could reasonably have a rule against one employee punching the timecard of another and could reasonably enforce such rule by discharge. However, here the Company had no rule prohibiting employees punching each others' timecards other than the "common sense" rule testified to by Carmel. Employees had not been advised that they should not do this or that to punch each others' timecards could result in discharge. Further, O'Donnell even, admits that on occasions he asked Dietz to punch the timecard of O'Donnell's daughter, who at the time was working at the Elm Street warehouse. And this was known to other Elm Street employees.

There is no showing by the Respondent that employees were not permitted to punch each others' timecards.

Thus, whatever conclusions Carmel may have drawn from his investigation, such is not a reasonable basis for discharging employees, particularly absent any discussion with them about the matter.

I conclude that, absent the union activity, the apparent timecard "violation" discovered in the way Carmel testified he did would not have caused management to discharge employees. At best he would have talked to O'Donnell and/or the employees.

The Respondent also contends that these employees spent a lot of time "goofing off" and "loafing." Such was admitted by them but they further stated that the reason was they had no work.

To this the Respondent apparently agrees. In fact, the Respondent went to some effort to demonstrate that May and June are traditionally slow months for the shipment of athletic shoes and that indeed work was substantially down in May and June 1980. Using April as a base of 100 percent, the volume of athletic shoes shipped out of the Elm Street warehouse in May was 47.1 percent and in June 49.9 percent. The volume did pick up subsequently.

In his notice of termination Carmel stated that low productivity was one of the factors involved in the layoff; however, he testified that what he had reference to was seeing the employees loafing. He did not testify to any other production factor nor did the Respondent bring forth any documentary evidence which would tend to establish that the Elm Street employees were not productive if in fact they had the work to do. On this record, if the employees sometimes were not working in May and June, a fact amply demonstrated, such was not their fault. This was a seasonal slowdown. In the normal course of events such might cause a layoff, though there had been none in the past. The lack of work, however, would not normally be imputed to employees with the conclusion that they were "goofing off."

I conclude that the reasons advanced by the Respondent were a pretext to disguise its true motive in discharging a group of union sympathizers during an organizational campaign. I conclude that the Respondent was in fact motivated by the union activity and that, by terminating these employees on June 12 and 13, Respondent violated Section 8(a)(3) of the Act.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above, occurring in connection with the Employer's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having concluded that the Respondent engaged in certain unfair labor practices, I shall order that it cease and desist therefrom, and take certain affirmative action including offering full and immediate reinstatement to Mary Ann Slothour, Belinda Geiman, Phyllis Shue, and Morgan Dietz to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, and make them whole for any losses of wages and other benefits they may have suffered as the result of the discrimination against them, with interest in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Brooks Shoe Manufacturing Company, Inc., Hanover, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of their interest in or activity on behalf of United Food & Commercial Workers Union Local 1436, chartered by United Food & Commercial Workers International Union, AFL-CIO, or any other labor organization.

(b) Threatening employees with discharge, plant closure, or otherwise, because of their interest in or activity on behalf of the Union.

(c) Interrogating employees concerning their interest in or activity on behalf of the Union.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[8]

2. Take the following affirmative action:

(a) Offer full and immediate reinstatement to Mary Ann Slothour, Belinda Geiman, Phyllis Shue, and Morgan Dietz to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment and make them whole for any losses they may have suffered as a result of the discrimination against them in accordance with the formula set forth above.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Hanover, Pennsylvmnia, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] While there is no particular evidence of a proclivity on behalf of the Respondent to engage in unfair labor practices, the discharge of an entire crew of employees is, I think, sufficiently egregious in the circumstances here to justify a broad remedial order. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Isla Verde Hotel Corporation d/b/a Hotel Holiday Inn de Isla Verde *and* Asociacion de Empleados del Casino del Holiday Inn de Isla Verde. Cases 24-CA-4269 and 24-CA-4381

December 4, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On June 15, 1981, Administrative Law Judge George F. McInerny issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

Amended Conclusions of Law

Substitute the following for the Administrative Law Judge's Conclusion of Law 5:

"5. By discharging and refusing to reinstate unfair labor practice strikers, Respondent has violated Section 8(a)(1) and (3) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Isla Verde Hotel Corporation d/b/a Hotel Holiday Inn de Isla Verde, Carolina, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(g):

"(g) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Upon request, bargain with Asociacion de Empleados del Casino del Holiday Inn de Isla Verde as the representative of employees in the following unit admitted to be appropriate:

> All croupier employees of Respondent employed at its hotel, exclusive of all other employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions,

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Members Fanning and Jenkins agree with the Administrative Law Judge's finding that the strike which occurred herein was in response to serious and aggravated unfair labor practices, but, for the reasons separately stated by them in *The Dow Chemical Company*, 244 NLRB 1060, 1061, fn. 8 (1979), they would find the strike to be protected activity regardless of the seriousness of Respondent's unlawful conduct.

We find it unnecessary to adopt the Administrative Law Judge's speculation that Respondent regarded Felix Ramos as more competent and versatile than other employees.

We note that, contrary to the Administrative Law Judge's statement that the record does not indicate that the union officers told Assistant Manager Jose Alvarez what they were planning to do, Alvarez testified they had told him their plans in the event they did not receive the bonus that night. We also note that the Administrative Law Judge inadvertently stated that Ruben Ramos testified he had seen Rafael Castillo on the night of September 12, 1980, talking with David Maza, when Ruben Ramos actually testified that Hector Rivera told him he (Rivera) had seen Castillo talking with Maza. These errors, to which Respondent excepted and which we correct accordingly, do not affect the Administrative Law Judge's conclusions or our adoption thereof.

[2] In the absence of exceptions thereto, we adopt *pro forma* the Administrative Law Judge's dismissal of the allegation that Respondent violated Sec. 8(a)(1) of the Act by offering a striking employee benefits if he returned to work. We also note that no exceptions have been filed regarding the Administrative Law Judge's conclusion that a no-strike clause may be implied from the parties' collective-bargaining agreement.

[3] We believe that a broad remedial order is warranted in this case, under the standard of *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), inasmuch as Respondent has engaged in numerous serious violations of Sec. 8(a)(1), (3), (4), and (5) of the Act and has thereby demonstrated a general disregard for employees' fundamental statutory rights. Accordingly, we shall modify the Administrative Law Judge's recommended Order by inserting the broad "in any other manner" cease-and-desist language. We shall also correct a typographical error in the Administrative Law Judge's recommended Order, par. 2(a) of which inadvertently refers to "officer clerical employees" rather than "office clerical employees."

We shall conform the Administrative Law Judge's Conclusion of Law 5 with his findings by inserting "discharging and" between "By" and "refusing."

We note that the Administrative Law Judge inadvertently omitted pars. 1(e) and 2(a) of his recommended Order from his notice. We shall modify the notice to conform with the Administrative Law Judge's recommended Order, as modified herein.

In agreeing with the Administrative Law Judge's make-whole remedy with respect to the discharged unfair labor practice strikers, we note that the remedy shall be computed according to the principles enunciated in *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979).

Member Jenkins notes that he would award interest on any backpay due based on the formula set forth in his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

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the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT unilaterally discontinue our Christmas bonus and WE WILL NOT refuse to bargain about that bonus.

WE WILL NOT threaten or discharge unfair labor practice strikers who are on strike because of our unfair labor practices.

WE WILL NOT deny unpaid leave, issue written reprimands to, change shifts or days off, or deny the right to swap shifts of our employees because they engaged in union or protected activities, or filed charges or gave testimony under the National Labor Relations Act.

WE WILL NOT discharge or refuse to reinstate our employees or revoke condonations of their acts because they engaged in union or concerted activities, or filed charges or gave testimony under the National Labor Relations Act.

WE WILL NOT require our employees to sign waivers of statutory rights in order to obtain reinstatement.

WE WILL NOT in any other manner interfere with, coerce, or restrain our employees in the exercise of the rights guaranteed under the National Labor Relations Act.

WE WILL offer to Jose Crespo, Humberto Sanchez, Arnaldo Delgado, Geraldo Rodriguez, and Felix Ramos immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges and WE WILL make them, together with all employees who engaged in a strike on and after December 20, 1979, caused by our unfair labor practices, whole for any losses they may have suffered as a result of our unlawful discrimination, plus interest.

WE WILL remove from the files of Felix Ramos all records of disciplinary actions taken on January 26, July 2, and September 12 and 15, 1980.

WE WILL, upon request, bargain with the Asociacion de Empleados del Casino del Holiday Inn de Isla Verde as the representative of employees in the following appropriate unit:

> All croupier employees employed at our hotel, exclusive of all other employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act.

ISLA VERDE HOTEL CORPORATION
D/B/A HOTEL HOLIDAY INN DE ISLA
VERDE

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge: This matter began with the filing of a charge in Case 24–CA–4269 on January 28, 1980, by Asociacion de Empleados del Casino del Holiday Inn de Isla Verde, herein referred to as the Union or the Charging Party.[1] The charge alleged that Isla Verde Hotel Corporation, d/b/a Hotel Holiday Inn de Isla Verde,[2] herein referred to as Respondent,[3] the hotel, or the casino, had refused to pay a Christmas bonus, had refused to bargain with the Union, and had discharged 16 employees, all alleged to be unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.*, herein referred to as the Act. The charge was amended on February 1, 1980, and on March 20, 1980, the Regional Director for Region 24 of the National Labor Relations Board issued a complaint alleging violations of Section 8(a)(1), (3), and (5) of the Act. Respondent duly filed an answer, denying the commission of any unfair labor practices.

Pursuant to notice accompanying the complaint, the matter came on to hearing before me in Hato Rey, Puerto Rico, on June 16, 1980. The hearing continued on June 17, 18, and 19, at which time counsel for Respondent, Ramos-Acosta, became ill, and, by agreement of all parties, the matter was continued to August 4, 1980. The hearing proceeded on August 5, 6, and concluded on August 7, 1980, again in Hato Rey, Puerto Rico.

Thereafter, on September 2, 1980, I received notice from the official reporter in this matter that certain tapes containing a portion of the testimony received at this hearing on August 4 had been stolen from the reporter and had not been recovered.

Before any action could be taken on this development, on September 2, the Union filed an additional charge in Case 24–CA–4381 against Respondent alleging further violations of the Act, some of which allegedly arose as a result of the appearance of a witness at this hearing. The charge in Case 24–CA–4381 was amended on September 16, 1980, and, on October 6, the said Regional Director issued a complaint in Case 24-CA-4381, alleging that Respondent had violated Section 8(a)(1), (3), and (4) of the Act. Respondent filed an answer to this complaint again denying the commission of any unfair labor practices.

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[1] The Charging Party herein was represented by Attorneys Leonardo Llequis and Jorge Farinacci. Attorney Farinacci appeared as counsel for the Charging Party on November 12, 1980. However, Attorney Llequis originally appeared as counsel for the Charging Party and there is no record of his withdrawal as counsel.

[2] The name of the Employer was changed at the hearing. This is the correct name.

[3] Respondent herein was represented by Attorneys Francisco J. Ramos-Acosta and Rafael Buscaglia. Attorney Buscaglia appeared only as the signatory to the post-hearing brief filed on behalf of Respondent and as signatory on behalf of Respondent to a post-hearing motion. Attorney Ramos-Acosta originally appeared as counsel for Respondent and there is no withdrawal of his appearance in the record.

On October 14, 1980, counsel for the General Counsel in Case 24-CA-4269 filed a motion with me to reopen the record in Case 24-CA-4269 to reconstruct the missing testimony, and to consolidate that case with Case 24-CA-4381. This was agreed to by counsel for Respondent, and on October 20, 1980, I ordered that the record in Case 24-CA-4269 be reopened to receive the testimony which was lost, that Case 24-CA-4269 be consolidated with Case 24-CA-4381, and that the consolidated cases be heard beginning on November 10, 1980. The hearing proceeded in Hato Rey and Isla Verde, Puerto Rico, on November 10, 11, and 12, 1980.

Throughout this extended hearing, all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. Following the close of the hearing, briefs were filed by the General Counsel and Respondent. These have been carefully considered.[4]

Based upon the entire record in this case, including my observation of the witnesses, and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Isla Verde Hotel Corporation is a corporation organized under and existing by virtue of the laws of the Commonwealth of Puerto Rico. At all times it has done business as Hotel Holiday Inn de Isla Verde, and maintains its principal office and place of business in the city of Carolina, Puerto Rico, where it is engaged in the operation of a hotel and gambling casino. During the year prior to the issuance of the complaints herein, which period is representative of its annual operations, Respondent derived gross revenues of over $500,000. In that same period Respondent purchased and caused to be transported and delivered to its Carolina, Puerto Rico, location foodstuffs, beverages, and other goods and materials valued in excess of $50,000 directly from points located outside of the Commonwealth of Puerto Rico. The complaints allege, the answers admit, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaints allege, the answers admit, and I find that Asociacion de Empleados del Casino del Holiday Inn de Isla Verde is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background to the Strike*

This case concerns only the relationships between Respondent and those persons employed as croupiers in the casino operated as a part of the Holiday Inn at Isla Verde. There is no dispute that the appropriate bargaining unit is, as described in the complaints herein: All croupier employees of Respondent, employed at its hotel, exclusive of all other employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act. Croupiers are the employees who actually run the three games offered by the casino: dice, roulette, and blackjack. The casino itself is modest in size compared to those in Atlantic City or Las Vegas, containing 3 roulette tables, 2 dice tables, 10 blackjack tables, and an unspecified number of slot machines.

Croupiers must, of course, be able to handle at least one of these games, and the more skilled and experienced can run two, or all three games. While the exact ratio of supervisors to rank-and-file employees is not defined in the record, it is evident that the ratio is very high, at slow times as high as one supervisor for each croupier. In addition to supervision by Respondent, the games are also closely watched by the Government of Puerto Rico. At all times there is at least one inspector from the Commonwealth Department of Tourism present in the casino.

Early in 1977 the croupiers organized themselves into an association, which is the Union in this case. Respondent voluntarily recognized the Union as the representative of the croupiers and the parties negotiated a collective-bargaining agreement.

This agreement between Respondent and the Union was executed originally on May 14, 1977, then supplemented by agreements dated November 8, 1978, and March 10, 1979. The documents appear unsophisticated, but upon analysis it is clear that the substantive content covers the basic areas of wages, hours of work, and other conditions of employment.[5] There is a grievance procedure culminating in final and binding arbitration, conditioned, however, on the agreement of both parties to the arbitration portion of the procedure. The contract lacks a no-strike clause, although in general terms the Union agreed to be bound by all management rules, and employees were bound by the terms of the November 8, 1978, and the March 10, 1979, supplements "not, under any circumstances, abandon the table" and "not abandon work or the table of his own volition, without having been relieved or without being authorized by an official." (November 8, 1978 supplement, rules 9 and 16.) Respondent under the March 10, 1979, supplement was empowered to suspend or discharge any employee for "Abandonment, without just cause, of the table where work is being performed or without prior permission from the immediate superintendent"[6] or for "refusal to work at the assigned table or work shift." (March 10, 1979, supplement, rules 2(G) and (I).)

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[4] On December 22, 1980, all parties filed a motion to include in the record a stipulation of fact entered into on August 4, 1980. The motion is allowed.

[5] There was some question about parts of the agreement setting out a seniority list, and dealing with internal union matters, but even those parts were accepted by management. It was apparent that the parties considered that this group of documents was the collective-bargaining agreement between them, and I so find.

[6] Identified in this supplement as Luis Santiago Frilla.

In the November 1978 supplement, the parties agreed that "starting in April 1979 a work schedule with off duty rotating days every three months will be prepared." The purpose of this was an attempt to assure that weekend time off for employees in the casino's 7-day operation would be equally shared, by rotating days off every 3 months. This sounds like a relatively simple procedure, but in practice it did not work out that way. One of the union officers during this period, Jose Crespo Nieves,[7] testified that the Union tried on three separate occasions during 1979, in April, August, and November, to work out schedules to implement this provision, but all three proposed schedules were unacceptable to the casino management.

After the second attempt to work out a mutually acceptable schedule the Union filed a request with the Commonwealth Department of Labor for the appointment of an arbitrator to enforce the contractual requirement for rotating days.[8]

Sometime in November, the testimony is not clear when, Crespo, who was then the president of the Union, together with Arnaldo Delgado Rodriguez, the general shop steward, met with the casino manager, Bienvenido Tosado Feliciano, to discuss proposed schedules worked out by the Union. According to Crespo, the only witness who testified about this meeting, Tosado rejected the schedule, became excited, and said he would not accept the schedule even if it were ordered by a court or the department of labor. At another point Crespo quoted Tosado as saying that he was not going to make the days rotational and that he was not going to do anything which was not for the benefit of the casino.

On December 4 Crespo, as president of the Union, filed a charge against Respondent with the Puerto Rico Labor Relations Board alleging a violation of the collective-bargaining agreement since April because of the Employer's failure to implement the rotating days schedule.

During December, the Union and management had other discussions over concerns of the employees with regard to uniforms,[9] the annual Christmas party, and a Christmas bonus.[10] With respect to the last issue, the evidence shows that there is a law in the Commonwealth which requires the payment of a Christmas bonus to employees of employers who have enjoyed a profitable year. There is some evidence that Respondent did not make a profit in 1979, but that is really not at issue here. Bonuses were paid to employees in 1977 and 1978. The discussions on these issues were apparently productive and in a letter dated December 6 management announced that uniforms would be supplied, a Christmas party would be held, and steps were being taken to pay a Christmas bonus to all those entitled to receive a bonus.

Respondent did proceed with plans to pay the Christmas bonus. Tosado testified that it was his intention to pay the bonus at the Christmas party which was held at another hotel on December 18. However, Tosado was informed by the hotel's general manager, David Maza San Miguel, that there was no money available on that date. Tosado informed several employees at the Christmas party that the bonus would be paid on December 20 or 21.[11] Other evidence shows that management intended to give the bonus at 8:30 p.m., the time when the shifts changed in the casino, on December 21. Carlos J. Luna, the hotel's personnel director, testified that Maza wanted to meet with the employees concurrently with the giving of the bonus to explain to them the hotel's economic problems.[12]

However, on December 20, Respondent received notice from the Commonwealth Labor Relations Board of the charge which had been filed on December 4.

This was the state of things on the afternoon of December 20.

B. *The Strike*

Luna came into the casino between 1:30 and 2 p.m. on December 20 and spoke to Miguel Barbosa Figueroa, the Union's steward on the day shift. Luna and Barbosa gave sharply different versions of this conversation. According to Barbosa, Luna had with him a copy of the charge from the Commonwealth Labor Relations Board. He showed Barbosa the document and asked if it had been filed by the Union. Barbosa replied that it had, and that the Union was going to take it "all the way." Luna then said that Maza was angry and that he was not going to give the employees the Christmas bonus.

Luna agreed with Barbosa on the time and place of the conversation, but testified that he had two documents with him, the charge and the request for arbitration, referred to above, which had been filed on November 9 with another agency of the Commonwealth. Luna said that he told Barbosa the bonus would be distributed on the next night at the shift change. Luna then said he showed Barbosa the two cases, the arbitration request and the charge, and asked whether Barbosa knew of this duplication. Barbosa replied that he would speak to the Union's directors about the matters.

In view of what happened immediately after this conversation Luna's version of the event is totally improbable and unbelievable. Barbosa's version is wholly in accord with his subsequent actions. Further, based on my observation of his demeanor, I found Barbosa to be a completely credible witness. Luna, here and in his testimony on other aspects of these consolidated cases, appeared to me to be guarded and less than candid. Thus I credit Barbosa's version of this conversation.

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[7] Following the local custom I shall give the full name of each witness, if the full name is given, and when it first appears. Afterwards I shall refer to the witnesses by their patronyms.

[8] This was not filed until November 9, just before the third attempt to work out a schedule. The matter did proceed to arbitration but since I did not consider the arbitrator's decision material to the issues here I rejected the decision when offered as an exhibit.

[9] Croupiers were required to wear evening clothes while on duty.

[10] The bonus would have amounted to about $200 for a person who had worked for the whole year, and proportionally less for those who had worked less than a full year.

[11] I found Tosado to be a credible witness. He was no longer employed by the casino when he testified, and he had severed his other business relations with Maza.

[12] I had some problems with Luna's credibility, as noted *infra*, but I do not find this recital of Respondent's intentions to be inconsistent with other facts in the record.

As soon as Luna left the casino Barbosa called Delgado, the general shop steward and a night-shift employee, at his home.[13] Delgado in his turn, contacted Crespo and Union Vice President Humberto Sanchez. These three drove immediately from their homes to the casino. On arriving there, they asked Assistant Manager Jose Alvarez if Barbosa could be relieved from duty to consult on the matter. Alvarez agreed and the four union officials went to the hotel's main office in order to talk to Maza. On hearing of their request, Maza came to the door of his office and told them he had no time to talk to them, and that they should talk to the casino manager. They returned to the casino and again spoke to Alvarez, since the manager, Tosado, was not there. Alvarez tried to contact Tosado but could not, then told the employees to wait for Tosado to come in.

Around 2:30 or 3 p.m. Delgado testified that he, Crespo, and Sanchez had a conversation in the parking lot of the hotel.[14] They decided that, if management did not give the bonus and refused to speak about it, they could stage a "hands down" stoppage.[15]

Crespo, Sanchez, and Delgado then waited for Tosado at the casino until about 6 o'clock, then went home to eat and change their clothes before reporting back to work at 8:30. There is no indication in the record that the union officers told Alvarez what they were planning to do, but Delgado did admit that they told other employees, and it is clear from Alvarez' own testimony that he was aware that strike action was a real possibility. In fact Alvarez located Tosado some time before 8 o'clock and told him of the situation. Tosado told Alvarez to hold the day-shift supervisors beyond the end of their shift in order to cover the gambling tables in case of an emergency.

Tosado finally arrived at the casino about 10 that night. He spoke to Alvarez and Santiago, the assistant manager in general charge of personnel matters. According to Tosado he learned from Alvarez and Santiago that the situation was unchanged.

At that point Tosado left the casino and went to see Maza. Tosado and Maza discussed the fact that the bonus had been promised, and also their impression that if they gave the bonus that night, under pressure, they would be establishing an undesirable precedent. They agreed that in those circumstances they would no longer have control of the casino. Thus Tosado and Maza decided that they would not give the bonus that night, but if the employees did not strike they would give the bonus the next day.

With this decided, Tosado returned to the casino around 10:30 p.m. and told Santiago to inform the Union that they were not going to give the bonus that night.[16] Tosado did tell Santiago that, if the employees did not strike, they would receive the bonus on the next day. However, he instructed him not to tell this to the employees.

Santiago then called Sanchez and Crespo into the casino office and informed them that there was no Christmas bonus and that Tosado had nothing to discuss with them.

At this point Sanchez and Crespo left the office and proceeded into the casino. On the way Sanchez encountered Tosado and asked whether he was going to pay the bonus or not. Tosado replied that he was not, emphasizing the point with an all-purpose, apparently untranslatable, Spanish epithet. Sanchez and Crespo then proceeded from table to table in the casino, instructing the employees that the "casino is stopped," but not to abandon the tables.[17] The union leaders were, obviously, trying to implement a sit-down strike in the casino. These aims were thwarted by management, as Tosado gave orders that supervisors move in on the tables, relieve the employees, and order them to leave the casino. This order to leave was also conveyed to employees who were off duty in the croupiers' restroom.[18] There were no problems and no incidents. The croupiers all left the casino and went outside the hotel, where they established a picket line. Although Respondent maintained in later communications to the strikers, and in its answer to the complaint in Case 24–CA–4269, that the employees had abandoned the tables, leaving chips and money unguarded, there is no evidence in this record that any employee left his table unguarded, or that anyone left his table except by the order of a supervisor. Rafael Rossi Soto, a witness for Respondent, testified that Sanchez had told him to leave the casino. Then he asked Tosado what he should do.[19] Tosado replied that he should do what the shop steward had instructed, that he alone could do nothing. It would, indeed, be inconsistent with the Union's plan to stage a sit-down strike to abandon the tables, and any departures by employees from their tables was the result of management's prompt response to the work stoppage. Thus I cannot find that any employee willfully abandoned his table, and, further, I find that the attempt to stage a sit-down strike, whatever the intention of the

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[13] I have relied on the undenied and mutually corroborative testimony of Delgado, Sanchez, and Crespo for my findings on the events of the afternoon and early evening of December 20.

[14] It is not clear whether this was before or after they met with Alvarez.

[15] At the hearing the translation was, as stated, "hands down." However, Delgado's affidavit, in evidence, translates the words *paro de brazos caidos* as a "sit-down strike." The latter translation of these words is corroborated by Simon and Schuster's International Dictionary, English/Spanish, Spanish/English, Simon and Schuster, New York, 1973, and Appleton's New Cuyas, Prentice-Hall, Inc., Englewood Cliffs, New Jersey, 1972. Accordingly I find that the agreement was to hold a sit-down strike at the casino, to force management to grant the bonus.

[16] Tosado explained that he used Santiago as an intermediary because the latter was named in the contract as the management representative responsible for dealing with the Union.

[17] The only dissent to this evidence was the testimony of Rafael Rossi Soto, who could have been mistaken about what Sanchez said to him. Carlos Emmanueli, a government inspector on duty that night, testified that there were not many people in the casino that night, even though it was at the beginning of the tourist season. Emmanueli stated that there were three out of nine blackjack tables open, one out of three roulette tables, and one out of two dice tables.

[18] The evidence shows that the croupiers work, roughly, a schedule of one hour at the tables and one-half hour off. Thus approximately one third of the employees on a given shift would be off duty at all times during their shift. There are some variations to this which are not material here.

[19] Rossi was a new employee who had not yet joined the Union and felt no loyalty toward it.

Union, was forestalled, and that such a strike did not, in fact, occur.[20]

In subjecting these facts to analysis, it is first necessary to determine whether the employees who went out on strike on the night of December 20 were engaged in protected concerted activity or whether their action was unprotected, subjecting them to disciplinary action by Respondent.

Initially there is no question that the discussions about the rotating days off constituted protected activity in pursuance of the employees' concerted aims as expressed in the November 1978 amendments to the collective-bargaining agreement. There is no indication in the record that, at least up to November 1979, the failure to reach agreement on this matter was due to any factor other than the difficulty of implementing the mechanics of the schedule. That this difficulty produced feelings of frustration in the Union is evident from the request for arbitration filed on November 9 by the then president, Ruben Ramos Perez. These frustrations may also have led to the resignation of Ramos in November and his replacement by Crespo.

Such a change in leadership, particularly if the change is impelled or motivated by dissatisfaction with the policies of the prior officers and impatience with the results achieved by those officers, is almost inevitably accompanied by a higher lever of militancy and a more aggressive approach to the problems at hand. Thus in late November Crespo testified about expressions of anger and impatience by Tosado in the course of their discussions on uniforms, the Christmas party, and the Christmas bonus, as well as further discussions on the rotating days off issue.[21] In this last situation Crespo fared no better than his predecessor, Ramos, in reaching a solution. Crespo then tried a new tactic in filing a charge with the Puerto Rico Labor Relations Board on December 4.[22] While the substance of this charge may have overlapped, or even duplicated the matter included in the November arbitration request, there can be no question that this was also protected concerted activity.

There is no direct evidence in the record on when the Respondent was notified of the charge. There is no indication on the charge itself, nor on the interview notice from the Puerto Rico Labor Relations Board, that copies of those documents were sent to the Employer. It is logical to assume, and I find, that notice was given to Respondent, and from the testimony of Luna I infer and find that whatever form that notice took was received by Respondent on December 20.

I have already found that Respondent's reaction to this charge, as dictated by Maza and relayed by Luna to Barbosa, was to unilaterally determine that the Christmas bonus would not be paid. I find that this action constituted a violation of Section 8(a)(1) and (5) of the Act.

The next event in the chain was the meeting in the parking lot between Crespo, Delgado, and Sanchez where it was decided that the Union would strike if the bonus were not paid that night, and if management refused to discuss the matter of the bonus. The substance of this decision, at least that part dealing with the possibility of a strike, was conveyed to Alvarez, who in turn alerted Tosado.

The evidence shows that Respondent was aware of the nature of the problem, the seriousness of the situation, and the potential disruption of the business of the casino at the beginning of the tourist season. The record is nearly barren of evidence tending to show any actions by Respondent's agents in the period from mid-afternoon until 10 o'clock that night, or Respondent's motivations in that time period. It is not unusual for the casino manager to arrive at the casino as late as 10 p.m. The casino operates from 1 p.m. to 4 a.m. Later testimony from one of Tosado's successors would indicate that the manager is present off and on during the early hours of operation, but he apparently arrives late and remains until closing time. Thus I can raise no inference from the fact that Alvarez could not reach Tosado until 7 or 8 p.m., and that the latter did not actually arrive at the casino until after 10.

It may well be that Respondent had no clear or definite plan of action during this period. There is no explanation of Tosado's whereabouts or activity. There is no evidence that anyone had talked to Luna, whose announcement to Barbosa early in the afternoon had precipitated the whole thing. Luna testified that he was in his office until 5 p.m. when he left for the day. I did not find Luna to be a credible witness but he was the personnel manager for the hotel, and there is no indication that Alvarez, Tosado, or anyone else contacted him either before or after he left work for the day.

By 10 p.m., then, the stage was set for a confrontation between the Union and Respondent. At that time Tosado came into the casino, verified the status of the situation by conferring with Alvarez and Santiago, and left to consult with Maza. Tosado and Maza were apparently under the impression that the Union would strike if the bonus were not given that night. Accordingly they decided to test the Union by precipitating the threatened confrontation. They determined that they would not pay over the bonus that night, but, if the strike did not occur, they would pay it the next day.[23]

Tosado then determined that he would notify the Union of the first part of this decision, that the bonus would not be paid, but not the fact that it would be paid on the next day if there were no strike. In this decision I find that Tosado not only intended to test the Union's will and strength, but also, by determining not to discuss the matter with the Union's representatives in the terms decided on by Maza and himself, flung down a gauntlet to the Union, and dared them to test their resolve against his.

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[20] Accordingly, cases such as *Fansteel Metallurgical Corp.* v. *N.L.R.B.*, 306 U.S. 240 (1939), cited by Respondent in its brief, are inapplicable to this case.

[21] Crespo's testimony on this is so sketchy and conclusionary that I cannot make a finding that Tosado showed animus or hostility toward the Union or its officers. His comments could reflect only the normal give and take of labor relations generally.

[22] There is testimony that under Puerto Rican law violations of the terms of a collective-bargaining agreement are violations of that law.

[23] There is no explanation of why Maza would have instructed Luna to tell the Union that the bonus would not be paid at all because of the filing of the charge with the Puerto Rico Labor Relations Board, then changed his mind and agreed with Tosado that the bonus would be paid on December 21 if there were no strike. Maza did not testify, and did not deny that he gave the orders or made the statements attributed to him by others.

As a final indication of Tosado's provocative and contemptuous attitude toward the Union and its officials, I note that even after the message that there would be no bonus was delivered by Santiago, Sanchez tried once more to ask Tosado about the bonus, only to be peremptorily and crudely rebuffed.

In these circumstances, I find that Tosado's actions constitute not only refusal to bargain over Respondent's unilateral refusal to pay the bonus, but also total willful rejection of the collective-bargaining process. I find his refusal to bargain to be a violation of Section 8(a)(1) and (5) of the Act.

As has been noted, the collective-bargaining agreement between Respondent and the Union does not contain a no-strike clause. It does contain an arbitration provision which is operative on the agreement of both parties to submit an issue to arbitration. The evidence in this case shows two instances where the parties have proceeded to arbitration, and no instance where the Union has requested, and Respondent has refused, to arbitrate. Accordingly the arbitration clause in the contract may be taken to be the *quid pro quo* for an agreement by the Union not to strike.[24] A no-strike clause may also be inferred from the agreements by individuals not to abandon their work or work stations contained in the contract. There is no question in my mind that a refusal to give the bonus in this case would have been an arbitrable matter.[25] Arbitration of a dispute over the bonus would have accorded with Federal policy as enunciated by Congress[26] and affirmed by the courts[27] favoring arbitration of labor disputes. These authorities and this policy would tend to the conclusion that a strike occurring in these circumstances, while in protest against unfair labor practices, would not constitute protected activity by the employees where the grievance and arbitration route could have been followed.

This, however, presents a different picture than that considered by the Board in accordance with the principles outlined above, *The Dow Chemical Company*, 212 NLRB 333 (1974), cited by Respondent in its brief. Here the unilateral change imposed by Respondent was effectuated in retaliation for the employees' exercise of their right to file a charge with the Puerto Rico Labor Relations Board.[28] In addition, the decision in *Dow Chemical* shows that there was considerable discussion between the union there and the employer between the announcement by the employer of the unilateral change in hours and the implementation of that change. Here Respondent through the casino manager, Tosado, absolutely refused to discuss the matter with the Union, in violation of the grievance procedures of the contract,[29] and the national labor policy.[30]

It is my view that the strike which occurred in Respondent's casino was in response to unfair labor practices so serious as to be "destructive of the foundation on which collective bargaining must rest."[31] Respondent's announcement that the bonus would not be granted because the Union had filed a charge can only have demonstrated to employees the futility of their exercise of legal rights under the law of the Commonwealth, and the absolute refusal of Tosado to discuss the matter, as he was required under the contract, vouchsafed to the employees the attitude of Respondent toward the contract and its obligations thereunder. Respondent is ill cast, now, in the role of the champion of those very contractual principles it so cavalierly disregarded on the night of December 20, 1979.[32]

Accordingly, I find that the strike which occurred on December 20 was in protest against serious and aggravated unfair labor practices by Respondent. Indeed, in my view nothing shatters the foundation on which collective bargaining is based so thoroughly and completely as an utter refusal to engage in collective bargaining. I find that the strike was protected and that the actions of the employees in striking were protected concerted activity.

C. *The Effects of the Strike*

As noted previously, on leaving the casino the striking employees established a picket line in front of the hotel. On the next day, December 21, the day-shift employees joined the strike beginning at 1 p.m.

Also on December 21 the casino management composed two form letters. The first was directed, individually, to the employees who had walked out on the previous evening and stated that the addressee had "abandoned" his work leaving large amounts of valuables on the gambling table. As a result each of these employees was discharged. The second letter went, again individually, to the day-shift employees who had joined the strike on December 21. The addressees were "required to immediately report" to their regular work schedule. Failure to report would allow management to "take all those measures that are deemed appropriate."

The strike continued, and on December 26 management directed another form letter to the day-shift employees informing them that they had not reported to work as directed on December 21 and had offered no excuse or justification for such failure to report. The employees were directed to report to work at 12:30 p.m. on December 28 on penalty of suspension, since such failure to report would, in management's view, constitute abandonment of their employment.

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[24] *Textile Workers Union of America, AFL-CIO* v. *Lincoln Mills of Alabama*, 353 U.S. 488 (1957).

[25] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[26] See the preamble of the Act.

[27] See, e.g., *Gateway Coal Co.* v. *United Mine Workers of America, et al.*, 414 U.S. 368 (1974).

[28] Respondent understandably may have been annoyed by the prospect of being forced to litigate the same factual matter in two different *fora*, but this does not give it license to react in the manner chosen.

[29] See original contract of May 14, 1977 (English translation, p. 1), and March 10, 1979 supplement (English translation, p. 1 of supplement).

[30] National Labor Relations Act, as amended, Sec. 8(d).

[31] *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270 (1956); *Arlan's Department Store of Michagan Inc.*, 133 NLRB 802 (1961).

[32] See *The Dow Chemical Co.*, 244 NLRB 1060 (1979).

With one exception, none of the employees returned to work until the Union abandoned the strike on January 5. This employee, Rafael Rossi, stated that he called Tosado on December 22. Tosado arranged to have Rossi picked up and driven in to the hotel. Rossi lived in the hotel with free room and board, and continued to work there while the strike lasted. He testified that Tosado promised to raise his salary after the strike was over, but this happened after he had returned to work and cannot be considered an inducement to return.[33]

There was another meeting at the casino on December 22 attended by Tosado, Santiago, Alvarez, and Felix Ramos Hernandez, an employee who worked on the day shift and also served as alternate shop steward for the Union. Ramos testified that Santiago called him on December 22, asked him to come back to work, and began to talk about reinstating some employees. Ramos would not talk about these matters, but agreed to come to the casino. The meeting among Ramos, Tosado, Alvarez, and Santiago took place at 10:30 p.m. According to Ramos, Tosado told him that if he came back to work he would have profit sharing and hotel protection while working. If Ramos came back he could stay in the hotel and everything would be all right. Ramos replied that it would be "immoral" to do that and, apparently, the meeting ended.

There was no further testimony or evidence on this meeting. Neither Tosado nor Alvarez was asked about it, and Santiago did not testify. The General Counsel amended the complaint at the opening of the hearing, alleging, among other things, that Respondent had violated Section 8(a)(1) of the Act by offering "a profit sharing plan and other benefits and improvement in . . . working conditions and terms of employment." It seems to me that Ramos' description of the meeting of December 22 falls short of proving the violation alleged. Even if I were to credit Ramos in this instance, and I do have some questions about his credibility, as will be discussed later, I do not believe that such a vague and general statement about profit sharing can furnish me with a basis for a finding that Respondent violated the Act in this regard.

The letters of December 21 to the night-shift employees, and December 26 to the day shift are another matter. Since I have found that the strike was in protest against substantial unfair labor practices by Respondent, and that the strike was protected concerted activity, the conduct of Respondent in discharging the night-shift employees as of December 21 and the day-shift employees as of December 26 constituted further violations of Section 8(a)(1) and (3) of the Act.[34]

Additional post-strike developments show that after the strike was called off on January 5 there were negotiations between the Union and management leading to the return of the day-shift employees to work in mid-January.[35] Further negotiations resulted in the return of the night-shift employees except for Crespo, Sanchez, and Delgado.

As a condition of their return, however, the night-shift employees, according to the credible testimony of Julio Bonet Harris, were required to sign a letter accepting the hotel's offer to return, and also containing a "voluntary" waiver of "any claim that . . . [the Union] . . . or any other person may be making on my behalf, both with the Agencies of the Commonwealth of Puerto Rico as well as the Federal Government." Bonet's testimony is corroborated by a letter identical to his letter to management executed by Edwin Feliciano Lopez.[36] Accordingly I find that Respondent required that employees waive their rights before this Agency, the National Labor Relations Board, as well as agencies of the Commonwealth, as a condition to their return to work. I find this to be a further violation of Section 8(a)(1) of the Act.

D. *Incidents Involving Felix Ramos*

1. The January 26, 1980, incident

Up to now this Decision has been concerned with the incidents leading up to the strike, the strike itself, and its aftermath. Henceforth I shall be concerned with a series of incidents concerning a single individual, Felix Ramos. The first of these incidents occurred on January 26, 1980, and was included in the original complaint in Case 24-CA-4269. The others took place in June, July, and September 1980 and constitute the substantive allegations in Case 24-CA-4381.

In his extensive testimony, given in this proceeding, Ramos revealed himself to be a person of intelligence and personal charm. He must also possess a high degree of competence as a croupier, as will be seen by the fact that Maza granted him a unique and special schedule, premium days off, and an unpaid leave of absence. Ramos did, however, have a tendency to tone down and to minimize the vehemence of his words and actions in his two serious confrontations with management. Thus Ramos' testimony while generally credible, will be evaluated against the testimony of others where conflicts exist, in the light of these observations.

Ramos first appeared in this case when he was called by Santiago on December 22 and later that night went to the casino to talk with Santiago and Tosado.[37] There is no evidence in the record concerning whether Ramos participated in the negotiations leading up to the return to work of the day shift, but he was appointed as alternative union steward by Crespo after the strike ended on

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[33] There is no allegation in the complaint concerning this incident and, in any event, it was not fully developed or litigated. Therefore I make no finding whether it constitutes a violation of law.

[34] See, e.g., *Pacemaker Yacht Co., a Division of Mission Marine, Inc.*, 253 NLRB 828 (1980).

[35] With the exception of Geraldo Rodriguez Rivera, who was held responsible by management, together with Crespo, Sanchez, and Delgado, of having instigated the strike. These four were never offered reinstatement.

[36] See G. C. Exhs. 11A and 17A. Lopez, however, testified that his "fellow employees" told him that this type of letter would allow him to return to work. This does not explain the fact that the letters are identical and leads to my conclusion that in fact management prescribed the form the letters were to take.

[37] This would indicate not only that Ramos was a valued employee, but that he was considered by management as influential with his fellow employees.

January 6, and he did return to work with the day shift about that time.

On January 26, at 3 or 3:30 in the afternoon, Ramos noticed that a supervisor was working at one of the roulette tables.[38] Ramos was not on duty at the time but pursuant to his perception of his obligation as alternate steward he approached the assistant manager of the casino, Pedro Padin, and asked if he could talk to him about a problem at the roulette table. Padin replied that he had no time to talk to Ramos, adding that he had to wait for additional management personnel to arrive before he would have time to speak to Ramos. The latter persisted, saying that the problem existed then, and not later in the evening. Padin then ordered Ramos to go to the croupiers' restroom.[39] Ramos obeyed the order and went to the restroom[40] where he discussed the matter with Alberto Guzman Rivera, the treasurer of the Union. Guzman advised Ramos to speak to the gambling inspector about it. Ramos left the restroom and told the inspector, Carlos Troche, about the supervisor working the roulette table. Troche then went to Padin and told him that the employment of supervisors to work the gambling tables was contrary to the regulations of the Tourism Department. Troche showed Padin the regulation and Padin said he would discontinue the practice.

The incident did not end there. Later in the afternoon Padin and Troche went to the restroom where Ramos and Guzman were taking their break.[41] Padin asked Ramos why he had complained to the inspector. Ramos answered that Padin had no time to talk to him about the incident and he talked to Troche as part of his duties as shop steward. Padin then said that he did have time to speak to the government inspector but he did not have time to speak to Ramos until 8 p.m. Padin's voice was raised at this time and he was pointing his finger at Ramos.

At 8 o'clock that evening Ramos had finished work and was talking to another employee, Ruben Ramos. Ruben Ramos was working a blackjack table but there were no players at the time.[42] Padin came up to them and told Felix Ramos that he had time for him now and for them to go to the office. Felix Ramos replied that he had nothing to discuss because the matter had been remedied. He added that he was going to wait for Tosado. In the meantime he was going to watch out for the interests of the employees in his role as shop steward. Padin then banged his fist on the blackjack table and told Felix Ramos that he had to go to the croupier's restroom. Felix Ramos replied that he was not going to leave the casino because he was carrying out his functions as shop steward.[43] He then walked toward an empty table at the back of the casino. Padin followed him and said that Ramos had two alternatives, he could go to the restroom, or he could resign. Ramos said he was not going to resign, whereupon Padin suspended him on the spot.

The suspension was originally supposed to be for 7 days, but on the next day Ramos was told by Guzman that the suspension was converted to a discharge. On January 28 Padin addressed a memorandum entitled "Justified Discharge" and explaining that Ramos was discharged for "insubordination and lack of respect" toward Padin. However, the incident outlined in the memorandum, which is identical to the incident as described by Padin in his testimony, bears little relation to the several incidents described in the credible testimony of Felix Ramos, Troche, Guzman, and Ruben Ramos. Even so, the incident as described by Padin and set out in the January 28 memorandum shows that the discharge was based at least in part on Ramos' insistence on performing his function as a union steward. Further, contrary to the statement in the January 28 memorandum that a discussion of grievances concerning the casino in the gambling area violated the grievance procedure of the collective-bargaining agreement, I find that the agreement contains no such provision. It would appear, rather, that Ramos was entirely correct in approaching Padin, as he did, to discuss the grievance. Ramos' action in pursuing the matter with the inspector also appears to be proper, particularly since the inspector immediately went to Padin and told him to stop the unauthorized use of a supervisor. Since I do not credit Padin's testimony that Ramos was rude and disrespectful, I find that the January 28 memorandum shows that Ramos was discharged for invoking the grievance procedure, and for complaining about casino operations to the inspector from the Department of Tourism.

Accordingly, based on the credible evidence on this incident I find that Ramos complained about a violation of the parties' practice and the regulations of the Tourism Department. Padin's conduct when he came into the croupiers' restroom shows his resentment not at Ramos' conduct in seeking to discuss the irregularity at the roulette table, but at Ramos' action in complaining to the gambling inspector. Ramos' discharge thus was a violation of Section 8(a)(1) and (3) of the Act. See *Interboro*

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[38] There is nothing in the contract about a supervisor working at a table, but there was no question raised by Respondent that the practice was not contrary to the parties' understanding.

[39] Apparently the casino rules require off-duty croupiers to take their break in the restroom.

[40] There is a wide variance in the version of this conversation between the testimony of Ramos and Padin. In the latter's testimony, he described Ramos as screaming at him in the middle of a crowded casino at the height of the tourist season. However, Padin's testimony was confused, mixing up this incident in the afternoon with one which happened later in the evening. My own observations of Ramos, and the testimony on an incident in September 1980 indicate to me that he may have been more forceful in pressing his grievance than he was willing to admit, but his testimony is substantially corroborated by that of the Commonwealth's gambling inspector, Carlos Troche Santiago, who was present. Respondent brought forth only Padin, whose testimony I find to be unreliable. Therefore I credit the broad outlines of Ramos' testimony and these findings are based on that testimony.

[41] The testimony of Ramos on this part of the day's events was corroborated by Guzman and undenied by Padin. I accept Ramos' version as credible and logical.

[42] I have made these findings on the mutually corroborative stories of Ruben and Felix Ramos. Padin, as I have noted, confused this incident with the earlier exchange in the casino. I do not credit his testimony in this matter.

[43] In an affidavit which was given in the course of the investigation of this case and which was received in evidence Felix Ramos stated that there were no other union officers in the casino at that time. However, in his testimony at the hearing he said that Barbosa and another steward named Roman were there that evening. This discrepancy may be explained if these other stewards were in the restroom at that precise time. This is a logical inference which I find acceptable.

Contractors, Inc., 157 NLRB 1295 (1966); *Varied Enterprises, Inc. d/b/a Private Carrier Personnel*, 240 NLRB 126 (1979).

2. Incidents in June and July 1980

After his discharge, in March or April,[44] Ramos was called by Attorney Leonardo Llequis. Llequis informed Ramos that the Union and Respondent had reached an agreement on the reinstatement of the night-shift employees who had struck on December 20,[45] as well as Ramos' situation. Ramos was told to go to the hotel and talk to General Manager Maza. At this meeting Maza told Ramos that the "punishment" had been unjust and that he knew that Ramos was a capable and cooperative employee. Maza further stated that Ramos could have his choice of shifts and days off and that he could take a leave of absence whenever he wanted if he returned to work.

At this time Ramos had another job, as a designer with the American Fire Sprinkler Corporation in San Juan. His hours were flexible, and required that he work from 6 or 7 a.m. until early in the afternoon. Thus on his return to work at the casino, he chose the hours from 4 o'clock in the afternoon until midnight, with Saturdays and Sundays as his days off. These unusual considerations lead me to conclude, as I have above, that Ramos was a versatile and highly regarded employee.[46]

On June 18, 1980, Ramos testified in this proceeding. Shortly after that he requested from Pedro Padin a leave of absence to run from July 5 through November 3.[47] Padin told him to put the request in writing, which he did under date of June 26, 1980. On receiving the request Padin left the casino to consult with Maza, then returned, and said that the leave was not approved because of "problems with other leaves." Padin then added that if Ramos had not testified (at this hearing) he would have "enjoyed the favor" of management, but that he had gravely injured Respondent by his testimony. Padin gave the leave request back to Ramos marked "Not approved."

Although Padin did not deny this conversation he did testify that the reason Ramos was not granted the leave was that Ramos had been given many privileges, more than other employees. Luna testified on this matter, but said that the reason the leave was not granted was because Ramos had been granted a leave of absence on aother occasion and that in June they "were not in a position to give him another."

Padin's remarks to Ramos that the reason he was not being granted the leave were clearly discriminatory. Thus I find that Respondent's action in denying Ramos leave without pay in June 1980 is a further violation of Section 8(a)(1), (3), and (4) of the Act.

On the same night, after Ramos had his conversation with Padin about the leave, he left the hotel about 11. As Ramos related the story, a woman who was a guest at the hotel stopped him in the lobby and asked him some questions about the games. He answered her and they both walked toward the exit. Ramos held the door for the guest, but did not remain with her after they were outside the hotel. He went to his car which was in the hotel parking lot.

This incident was observed by one of the hotel's security force and a report that Ramos had left the hotel in the company of a woman guest was handwritten by the security office and forwarded to Carlos Luna. There is no written rule in evidence in this case which prohibits casino employees from leaving the hotel with guests. There are rules requiring croupiers to exercise the utmost discretion concerning guests and their business. Thus I credit Luna's testimony that there was an unwritten rule against employees' leaving the hotel in the company of guests. However, Luna also testified that his customary procedure in matters of this sort[48] was to check out the report, then to hear the employee's side of the story before issuing a warning or other disciplinary measure. In this case Luna admitted that he did not check the report from the security office, did not make any independent investigation, and did not ask Ramos for an explanation. He summoned Ramos to his office, confronted him with the security office report and told him he had violated the rules "in a crass form."

This interview was followed on July 2 by a memorandum from Luna to Ramos entitled "Last chance" in which Luna described the incident with the guest[49] and noting that this violated the rules "in a flagrant manner." The memorandum went on to state that this was Ramos' last chance, and that he would be discharged for any further violations of the rules.

In this case I credit Ramos' version of the incident, but I can understand how the fact that Ramos opened the door of the hotel for the guest, then followed her out the door, could be misinterpreted by a security guard. Thus I can find nothing out of the ordinary in the fact that the security office reported the incident to Luna. I have already found that the rule alleged to have been violated here, while not contained in the rules of conduct for croupiers, was consistent with the tenor and spirit of those rules. Luna offered no explanation in this case as to why he departed from his usual practice in disciplinary cases of checking the report, investigating the incident, and listening to the explanation of the accused employee. By his own testimony, he summoned Ramos to his office, showed him the report from the security office, and issued the warning.

In view of the absence of any reason for this variance from custom, and in consideration of the timing of the warning less than 2 weeks after Ramos had first testified in this case, and particularly in the light of Padin's remarks to Ramos about betrayal of Respondent through that testimony, I find that the variance from Luna's usual practice, and the severity of the warning[50] flowed from Respondent's resentment at Ramos for his prior testimony in this case. Therefore I find that this warning is an additional violation of Section 8(a)(1), (3), and (4) of the Act.

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[44] Ramos was uncertain about this date. At one point he said it was in March, at another time he recalled the date as April 27. Since I have found that the striking night-shift employees returned to work in March, I find that the events related here also occurred in March.

[45] With the exception of the four union officers mentioned above.

[46] See also the letter from Carlos Luna containing a laudatory recommendation of Ramos and dated February 7, 1980.

[47] I rely for the findings of the leave request on the credible testimony of Felix Ramos. Padin did not testify on this issue.

[48] Luna testified that he had taken disciplinary action against other employees for the same infraction, but never against a croupier.

[49] The English translation of the memorandum described the incident as having occurred on June 23. However the Spanish version states that it occurred on June 26. The report of the security office likewise places the date on June 26.

3. Ramos' shift change and second discharge

At the resumption of this hearing on August 4, 1980, the General Counsel amended the complaint in Case 24–CA–4269 to allege the violations of the Act which have been discussed in the section of this Decision just concluded. Felix Ramos testified concerning these allegations at the resumed hearing. Ramos testified that he took some vacation time in August and returned to work on September 1.

In the meantime, on August 26, Ramos was elected acting president of the Union.[51] On September 4 or 5 Ramos, accompanied by Attorney Jorge Farinacci, approached the acting manager of the casino, Hector Rivera Rivera,[52] and explained to him that they had a letter addressed to Maza notifying him of Ramos' election as acting president of the Union. They had been unable to locate Maza so they gave the letter to Rivera. According to Ramos, Rivera read the letter and then put it in his pocket. Farinacci testified that Rivera took the letter[53] and put it into a drawer in his desk. Rivera denied that the meeting took place, and stated that he did not know of Ramos' election until September 19 or 20.[54]

Whatever happened to the letter of September 5, I credit the testimony of Farinacci that he told Ramos-Acosta and Luna on September 3 that Ramos was the acting president, and I credit the testimony of Farinacci and Ramos that they told Rivera on the night of September 5 that same thing. For reasons given below I do not credit Rivera on significant issues in this case.

The significance of all this is the fact that as the result of an agreement between Tosado and the Union's first president, Ruben Ramos, the president was entitled to work days and to have Saturdays and Sundays off. This practice was described credibly by Ruben Ramos, Jose Crespo,[55] and Felix Ramos.

Felix Ramos, moreover, had always worked days since he started at the casino in January 1977.[56] As of April 1980, after his first discharge he had Maza's promise that he could choose his own schedule and his days off. Thereafter Ramos worked for a few months on a 4 p.m. to midnight schedule with Saturdays and Sundays off. In July he requested that he change to the 12:30 to 8 schedule and retained the same days off. He returned from his vacation on September 1 to the same schedule.

Hector Rivera had been the casino's assistant manager for some 6 or 7 months before Padin's departure in August and his own elevation to the position of acting manager. As assistant manager, Rivera had charge of scheduling, casino operations, and personnel matters. He testified that in that capacity he instituted a number of schedule changes designed to assure a fair distribution of weekend days off for all employees. He also stated that he changed a number of shifts.

Respondent entered a chart into evidence to support Rivera's testimony on schedule changes. The chart shows all schedule changes including shifts and days off for the period from April 11, 1980, to November 1, 1980. I have examined this chart for the period from April 11 through September 12, 1980, which seemed to me to be the dates relevant to the issues in this case, and I find that the data contained therein do not support Rivera's testimony either that he attempted to equalize the weekend days off or that he systematically changed employees' shifts.

With respect to days off, the chart shows that as of April 4 there were four employees who had Saturdays and Sundays off. On April 11 three of those employees had their days off changed. There were only seven employees whose days off were changed to Saturdays and Sundays, and in all but two of those cases, the changes to Saturdays and Sundays were only for periods of 1 to 2 weeks. Ruben Ramos had those days off from September 5 through September 12, when his days off were changed again to Sunday and Monday. Edwin Feliciano was changed to weekend days off on May 23, then returned to Sunday and Monday on June 6. Miguel Medina enjoyed weekend days off from July 4 to 18 when he was assigned Thursday and Friday as days off. Raymond Flores had Saturdays and Sundays off from July 18 to August 1. Luis Serra was one of the three employees whose days were changed from Saturday and Sunday on April 11. His days were changed back to Saturday and Sunday on July 23 and he remained on that schedule through September 12. Miguel Barbosa was moved to a Saturday and Sunday schedule on August 22 where he remained through September 12.

These figures make it clear that there was no effort to equalize weekend days off among the croupiers. Even if one discounts four employees listed as terminated as of April 11 there were 26 employees who never had weekends off during this April-September period. Rivera's statement that it was his "main idea for all of the employees to be able to enjoy the week-ends" is demonstrably inaccurate.

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[50] Luna testified that he had checked with the security office about previous violations of rules, and the July 2 memorandum vaguely alluded to prior offenses, but I do not credit Luna and I find that prior violations of the rules by Ramos have not been established.

[51] There are intimations in the record that this change in leadership was not without some internal conflict in the Union and that Crespo was contesting the change. These internal disputes are not really relevant here since Ramos had at least *de facto* title to the office he claimed. I presume that this change in leadership was the reason for the replacement of Attorney Llequis by Attorney Farinacci.

[52] Padin had left the casino in August. Rivera was appointed acting manager at the end of August, and was named manager in September 1980. Farinacci described this incident as happening on September 5, Ramos said it was on the 4th. Other testimony indicates that Farinacci was in the casino on the 5th, so that date is more probably correct, but the discrepancy is minimal.

[53] Along with a copy addressed to Padin as casino manager. Farinacci also said that he notified Luna and Attorney Ramos-Acosta of the change and Ramos' election at a meeting on September 3. According to Farinacci, Ramos-Acosta told him to send a letter informing Respondent of this change.

[54] At another point in his testimony Rivera said that Ramos gave him a letter on September 14 informing him of Ramos' election.

[55] Crespo preferred to work nights, but on his accession to the presidency in November 1979 his days off were changed to Saturday and Sunday.

[56] Of the 24 names on the Union's seniority list as of November 8, 1978, Felix Ramos was number five.

The chart shows that Rivera's further statement that he wanted to allow employees to enjoy "the most advantageous shift, which is the day shift" is similarly in error. Excluding Felix Ramos and the four employees terminated as of April 11, on April 4 there were 15 employees on the day shift, and 17 on nights. Of all these only two, Hector Lopez and Rafael Rossi, were moved from nights to days. Lopez was changed from the night shift to the day shift on April 18, but on May 9 was moved back to the night shift. Rossi was changed from nights to days on August 29. Three employees (excluding Felix Ramos) were moved from days to nights. Ariel Cortes was changed on September 5, but on September 19 he was promoted to supervisory rank. Miguel Barbosa was transferred from days to nights on April 18 but changed back to days on August 22. Fernando Paulino was transferred to a mixed day-night shift from the day shift on April 11, then to the night shift on April 18. Raymond Flores presents a unique situation. He transferred from days to nights to mixed day-night shifts a total of 7 times from April 6 to August 1. In contrast to Flores' situation, seven employees showed no changes either in their days off or their shifts during this period, and 17 additional employees kept the same shifts although their days off changed in this period.

All of this shows clearly that there was no attempt made during the time Rivera was setting the schedules for the casino employees to equalize the disadvantages of night-shift work, or to spread more equitably the advantage of weekends off.

Rivera testified that the schedule for employees was worked out by him and posted on Wednesdays for the following week or 2 weeks. In September, Rivera stated, he noticed that Felix Ramos "had been enjoying Saturdays and Sundays off with a comfortable day shift" so he determined "to place another person in order for them to enjoy that shift" and to place Felix Ramos on the night shift.

Rivera testified that he posted this schedule for Ramos on Wednesday, September 3, but Ramos stated that on Friday, September 5, Rivera came up to him at a blackjack table and told him that he was to report to the night shift on the next night, Saturday. Ramos remonstrated with Rivera, pointing out that he had already made other arrangements for the weekend; that his other job, which was known to management, made it impossible for him to work the night shift; and that both his position as acting union president and his April agreement with Maza would accord him the privilege of choosing his shift and days off. To all of this Rivera responded that there was nothing personal in it, but he, Rivera, had been "notified" about it and that Ramos had to come to work the next night.

The appearance in the English language record of this word, "notified," points up one of the real problems in extracting the meaning, particularly the nuances or shadings, in words which a witness has uttered in his native Spanish, indeed in an idiomatic Spanish, in response to a question which is phrased in English, then translated into Spanish. Thus I am unaware of whatever shades of meaning may reside in the Spanish word which was translated by the interpreter in this case as "notified." The word "notify" is defined in Webster's New Collegiate Dictionary, 1973 ed., G. & C. Merriam Company, Springfield, Massachusetts as "1. obs: to point out; 2. to give a notice or report the occurrence of . . .; 3. to give formal notice to . . ." In my view, the third meaning is what Rivera meant when he told Ramos that he was "notified" that Ramos' shift and days off were to be changed. From this I can infer and I find that Rivera was notified by someone or ones higher in the hierarchy of management than he. Since at this time Rivera was at least the acting casino manager the only person higher than he in Respondent's management structure were Luna and Maza. Since I have already found that Rivera was not truthful when he asserted that he changed schedules and days off to share the benefits of weekends off and day shifts, I do not credit his statement that he alone decided to change Ramos' shift and days off so that another employee could enjoy those advantages.[57] Luna did not testify on this issue and Maza, of course, did not testify at all.

There is, then, no credible reason in this record as to why Luna or Maza "notified" Rivera to change Ramos' schedule. But I have already noted, and credited testimony that Padin had expressed to Ramos the hostility felt toward him by management on account of his treachery in testifying at this hearing in June. If management felt that way in June, it is unlikely that this hostility would have abated when Ramos again testified in support of the further allegations against Respondent at the August portion of the hearings. Moreover, Respondent was aware of the practice, agreed upon between Ruben Ramos and Tosado, of permitting the union president to pick his shifts and days off. Respondent was aware of the arrangement Maza had made with Ramos in April, and the latter's second job, and Respondent was aware, having been notified by Farinacci on September 3, of Ramos' election as acting president of the Union. In the absence of any legitimate business reason, or of any credible justification for this action, I infer and find that Ramos was reassigned on September 5 to retaliate against his further testimony at this hearing in August and his elevation to the acting presidency of the Union. This conduct constitutes a further violation of Section 8(a)(1), (3), and (4) of the Act.

While Ramos and Rivera were discussing the reassignment on the night of September 5, they were joined by Attorney Farinacci. They then agreed that Ramos would not be required to work on Saturday, September 6, but would begin his new schedule on the night shift, with Tuesdays and Wednesdays off, on Sunday, September 7.

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[57] Respondent's schedule chart shows that no one was moved from nights to days in the week of September 5 or 12, or in several weeks following. Ruben Ramos who was already on the day shift had his days off changed in the week of September 5 from Tuesday and Wednesday to Saturday and Sunday, but that only lasted for 1 week, as he was changed to Sunday and Monday in the week of September 12.

It was the practice at the casino that one employee could swap shifts with another provided that the substitute was qualified and that prior approval of management was obtained. On September 5 Ramos informed Rivera that it was impossible for him to work the late shift because of his other part-time job, but that he would change shifts with another employee, Eugenio Rosario Rexach. Rosario was equally as skilled as Ramos and Rivera accepted the swap for the 5 days beginning on September 11.

On Sunday, September 7, Ramos called another employee, Anibal Colon Hernandez, and asked him to substitute for that 1 night. Colon agreed and Ramos called Supervisor Abelardo Garcia and informed him of the substitution.[58] Colon worked that night and Ramos himself worked the night shift on Monday, September 8. Tuesday and Wednesday, September 9 and 10, were Ramos' days off under his new schedule.

On September 11, Ramos was working the day shift under his agreement with Rosario which had been approved by Rivera. About 2:30 in the afternoon Rivera told Ramos that the change that Ramos and Rosario had worked out could no longer continue because "they no longer wanted it." Who "they" were was not explained in the record, but I infer and find that, as with the change of shift, the orders to discontinue the arrangement between Ramos and Rosario came from above, either Maza or Luna.

In his testimony, Rivera asserted that he had authorized the swap between Rosario and Ramos, but only for 2 days, not for a week. Rivera did not deny the conversation with Ramos outlined in the previous paragraph, and I note that Thursday, September 11, was only the first day of the swap. Thus Rivera contradicted his own testimony, a further indication of his unreliability as a credible witness. Rosario was also informed of this decision and he worked his regular day shift on September 12.

While this incident was not alleged in the complaint as a separate and distinct violation, the matter has been fully litigated in this proceeding and Respondent is not prejudiced by a separate finding on this matter. Accordingly, I find that the decision to cancel the swap between Rosario and Ramos was made by Maza or Luna, and that the reason that decision was made was the same as the reason for the original change in shift and days off for Ramos, in retaliation for his testimony in this proceeding, and his election as acting president of the Union. I find this abrogation of the arrangement between Rosario and Ramos to be a separate and additional violation of Section 8(a)(1), (3), and (4) of the Act.

On September 12, at noon,[59] Attorney Farinacci filed the charge in Case 24–CA–4381 with the Regional Office of the Board on behalf of Felix Ramos. Later that afternoon Farinacci and Ramos attended an arbitration hearing at the Commonwealth Department of Labor involving the prior discharge of an employee named Pastrana. Representing the casino at this hearing were Carlos Luna and Attorney Francisco Ramos-Acosta.

There is some conflict in the testimony of Farinacci and Ramos on the one hand, and Luna and Ramos-Acosta on the other, over what was said and done concerning the charge which had been filed earlier in the day. I do not find it necessary to resolve the questions of credibility growing out of this conflict because it is undisputed that Farinacci gave a copy of the charge to Ramos-Acosta. The latter informed Luna of the contents of the charge either by telling him orally, or by giving him a copy. Thus Respondent was aware of the matter on that afternoon.

That evening Ramos reported to the night shift at the casino. His timecard which was received in evidence shows that he punched in at 8:27 p.m.

Because of the practice in the casino of relieving croupiers as described above in connection with the incident between Padin and Ramos, it was the the custom for supervisors to schedule some employees for a break at the beginning of their shift. This was done on a rotating basis so that on alternative days or nights a croupier would either begin work at the beginning of the shift, or would begin one-half hour or so after that time. On September 11 Ramos had been scheduled to begin work at the beginning of his shift. Of course it had been Rosario and not Ramos who actually worked the night shift on September 11. The supervisor in charge on September 12, Rafael Castillo Rodriguez, was aware of that, and he scheduled Ramos to begin work at the start of the night shift at 8:30 p.m. on September 12. Ramos, however, acting on his understanding of the existing practice, did not immediately report to work, but was present in the casino a short time after 8:30.[60]

Between 8:30 and 8:35, according to Juan Rivera, Castillo and Ramos had a conversation close to the table where Rivera was eating. Rivera was not busy at the time. In fact he had nothing to do, and was able to give his full attention to the conversation. Castillo began by instructing Ramos to go to work because his shift had already started. Ramos answered that he did not have to begin because he had done so the previous night. Castillo then said that Ramos had not worked the previous night and to get to work.

Ramos then began to argue with Castillo, asking if there were something personal that Castillo had against him. Castillo continued to order Ramos to begin work.

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[58] Garcia denied that he had been notified of the substitution, but raised no objection at the time. Resolution of this credibility issue is not necessary to the resolution of the issues herein.

[59] According to the date stamp imprinted by the Board's Regional Office.

[60] Ramos himself testified that he had reported to work and had a conversation with Castillo at 8:25 p.m. This is contradicted by the timecard showing that Ramos had clocked in at 8:27 and must have encountered Castillo some minutes later. Ramos' entire testimony on this incident with Castillo is defensive, contradictory, and marked by self-justification which is not warranted by the facts. While I find that Ramos' description of events later that evening is credible, I do not credit his version of the conversation with Castillo shortly after 8:30. I also had trouble with Castillo's credibility, so I have relied for the facts on this incident on the credible testimony of Juan Rivera Melendez, a cashier who works part time at the casino and is not a member of the bargaining unit here.

Ramos then began walking toward the roulette table where he was assigned, continuing to argue. He then said that if there were something personal against him the two of them could take care of it in the parking lot at 4 o'clock (when the shift ended).[61] Ramos continued, saying that he was not Ta Ta[62] and if it were something personal they could settle it themselves. Juan Rivera then cautioned Castillo not to continue the argument. Ramos went to work and the incident was over.

After this, according to Castillo, he went to the casino office and wrote a report on the incident. In fact Castillo wrote two reports. In what was identified as the first report, Castillo recited the fact that Ramos had invited him to fight at 4 a.m., and described this as a violation of the agreement and stated that Ramos was forthwith discharged.[63] He was instructed to report to Luna's office at 1 p.m. on Monday, September 15, for final processing.

Then Castillo wrote another letter allegedly correcting errors which appeared in the first. The second letter shows three substantive changes from the first. The words "attended the undersigned" in the first paragraph of the first letter were changed to "offended the undersigned" in the second. There is no question that this change makes the paragraph more accurate, and reflects what actually happened. However the other changes are more difficult to explain. Indeed Castillo furnished no credible explanation as to why, in the second letter, he eliminated the reference to Ramos' position as acting shop steward in the salutation, and the reference to Ramos as the "group representative" in the last paragraph. Despite extensive cross-examination, Castillo's explanation is so confused and contradictory as to be totally unconvincing.[64] Hector Rivera, the casino manager, likewise was thoroughly confused on his role in passing on these letters. Castillo said, for example, that he showed both letters to Rivera. Rivera stated that he saw only one, then identified that as the first letter. For these reasons I discredit the testimony of both Castillo and Rivera on this issue. I really can make no findings on this subject, but the logic and the inherent probabilities of the situation would indicate to me that Castillo prepared the first letter and showed it to Rivera when the latter arrived at the casino about 11:30 p.m. Rivera noted the references to Ramos as acting steward, and, knowing that Ramos was no longer acting steward, but acting president, decided to delete those references and so instructed Castillo. I cannot speculate as to the reason Rivera did not ask Castillo to include Ramos' current title.

After Hector Rivera arrived at the casino, Juan Rivera testified that Ramos approached Castillo and attempted to excuse himself, saying that he had lost his head. Hector Rivera then came up and suggested that they go to his office to discuss the matter.

In the office, according to Hector Rivera and Castillo, they went over the incident, Ramos again apologized, and Castillo told him that the "report" had already been prepared but that he would consult with Rivera and let Ramos know their decision later. Ramos testified that Castillo had misunderstood the reference to 4 a.m. and that what Ramos meant was that they had to settle personal matters after working time. Rivera then said that if they reached an agreement it was all right with him. Rivera then left and Castillo and Ramos reached an agreement that Castillo would ask Rivera to "revoke" the report. In this instance, I credit Ramos over Castillo and Rivera, and I find that the incident in the casino was forgiven by Castillo with Rivera's approval.

The night was not yet ended, however. Around 3:30 Rivera came up to Ramos and handed him the dismissal letter.[65] Rivera then told Ramos that he was not going to drop the charges because Castillo had spoken of the incident to Maza and Maza had told Castillo to go ahead with the discharge. This testimony by Felix Ramos was corroborated by Ruben Ramos who testified that he spoke with Rivera on the day after Felix Ramos was discharged, and that Rivera told Ruben Ramos that Maza had found out about the incident and "wanted to go on with the case." Ruben Ramos added that he had seen Castillo talking with Maza in the lobby of the hotel on the night of Felix Ramos' discharge.

Crediting this testimony by Felix and Ruben Ramos, I find that the confrontation in the casino had been adjusted and forgiven by Respondent through the actions of Castillo and Rivera at the 11:30 p.m. meeting in the casino office. This constituted a clear and unequivocal condonation of whatever misconduct Ramos may have committed. *N.L.R.B.* v. *Marshall Car Wheel and Foundry Co. of Marshall, Texas, Inc.*, 218 F.2d 409 (5th Cir. 1955); *Retail Wholesale and Department Store Union, AFL-CIO* [*Coca Cola Bottling Works, Inc.*] v. *N.L.R.B.*, 466 F.2d 380 (D.C. Cir. 1972).

After the fact of this condonation and forgiveness, Maza found out about the incident. I have already noted Maza's hostility toward Ramos as expressed in the earlier incident between Ramos and Padin. I have further found evidence of a continuation of this hostile attitude in the change of shifts and the denial to Ramos of the privilege of swapping shifts with other employees. Maza did not testify, nor did any other witness ascribe to him any reason or motive for this action. In view of this the only logical inference I can draw is that Maza ordered the discharge of Ramos, using the incident with Castillo as a pretext, because he had testified in previous phases of this hearing contrary to the interests of Respondent, and, on that very day, had filed a new charge with the Board complaining of further misconduct by Respondent. *Shattuck-Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1967). I thus find that by revoking the agreement condoning the incident in the casino, and ordering the discharge of Felix Ramos on the night of September 12, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

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[61] Juan Rivera understood this remark to be an invitation to fight.

[62] Ta Ta is the nickname of an employee named Eduardo Rivera. Ramos explained that Eduardo Rivera had been humiliated in an incident with Castillo in front of a number of people, but chose not to file a grievance or complaint about it. Ramos apparently wanted Castillo to understand that he would not supinely accept that type of manifestation of Castillo's authority. Juan Rivera testified that Ramos was excited, and was talking in a loud voice with his arms extended and waving his hands.

[63] The phrase used several times in this proceeding is translated as "suspended from employment and salary permanently." I think that the plain meaning of this is that the employee is discharged.

[64] The two letters were typed by a croupier named Rosalie Rodriguez, but she did not testify in this proceeding.

[65] The second of the two letters discussed above.

After handing Ramos the discharge letter in the casino at 3:30 a.m. Rivera then said that Ramos could "defend" himself at the meeting with Luna at 1 on Monday, September 15. However, Rivera stated that he never bothered to inform Luna about the situation. I find this rather hard to believe, but even harder to believe was Luna's testimony that when Castillo and Ramos came to his office Monday afternoon he knew nothing about the matter. Since this meeting is really only a postscript to the main events in this case, I need make no findings concerning it, other than to note my disbelief of the testimony of Rivera that he never notified Luna of the meeting's purpose, and Luna's denial of any knowledge of the incident in the casino on September 12. This reinforces my lack of confidence in the credibility of either Luna or Rivera.

IV. THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the strike which began on December 20, 1979, was an unfair labor practice strike I shall recommend that Respondent offer Jose Crespo, Humberto Sanchez, Arnaldo Delgado, and Geraldo Rodriguez immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and make these employees, together with all other employees who went on strike on December 20 and 21, 1979, against Respondent's unfair labor practices, whole for any loss of earnings they suffered by reason of Respondent's unfair labor practices and the discrimination against them by payment to them of sums of money equal to that which they normally would have earned, absent the unfair labor practices and discrimination against them, including the 1979 Christmas bonus, less net earnings during such period, with interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[66]

I shall further recommend that Respondent offer Felix Ramos immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equal job, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings suffered by him by reason of the discrimination against him in January and in September 1980 computed in the same manner as outlined in the preceding paragraph.

I shall further recommend that Respondent bargain on request with the Union, and that all references to certain disciplinary action be removed from the files maintained by Respondent concerning Felix Ramos.

CONCLUSIONS OF LAW

1. Isla Verde Hotel Corporation d/b/a Hotel Holiday Inn de Isla Verde is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Asociacion de Empleados del Casino del Holiday Inn de Isla Verde is a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally discontinuing its Christmas bonus in December 1979, Respondent has violated Section 8(a)(1) and (5) of the Act.

4. By refusing to bargain about the discontinuance of the Christmas bonus Respondent has violated Section 8(a)(1) and (5) of the Act.

5. By refusing to reinstate unfair labor practice strikers, Respondent has violated Section 8(a)(1) and (3) of the Act.

6. By sending letters threatening them with reprisals for engaging in protected concerted activity, Respondent has violated Section 8(a)(1) and (3) of the Act.

7. By requiring employees to waive statutory rights in order to obtain reinstatement, Respondent has violated Section 8(a)(1) of the Act.

8. By discharging its employee, Felix Ramos, on January 26, 1980, Respondent has violated Section 8(a)(1) and (3) of the Act.

9. By denying an unpaid leave to its employee, Felix Ramos, in June 1980, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

10. By issuing a written warning to its employee, Felix Ramos, in July 1980, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

11. By changing the shift and days off of its employee, Felix Ramos, in September 1980, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

12. By denying to its employee, Felix Ramos, the right to swap shifts with other employees, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

13. By revoking an agreement to condone the conduct of its employee, Felix Ramos, on September 12, 1980, and thereby causing his discharge, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[67]

The Respondent, Isla Verde Hotel Corporation d/b/a Hotel Holiday Inn de Isla Verde, Isla Verde, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain on request with the Union.

(b) Unilaterally discontinuing its Christmas bonus.

(c) Refusing to grant benefits or discontinuing existing benefits to employees because they engaged in union activities, or in concerted activities for their mutual aid or protection, or because they filed charges with or gave testimony to the Board under the Act.

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[66] See, generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962).

[67] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Issuing threats of discipline and warning notices to employees because they engaged in union activities, or in concerted activities for their mutual aid or protection, or because they filed charges with or gave testimony to the Board under the Act.

(e) Requiring employees to sign waivers of statutory rights in order to obtain reinstatement.

(f) Discharging or refusing to reinstate or revoking agreements to condone activities of its employees for engaging in union activities, or in concerted activities for their mutual aid or protection or because they filed charges with or gave testimony to the Board under the Act.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the representative of employees in the following unit admitted to be appropriate:

> All croupier employees of Respondent employed at its hotel, exclusive of all other employees, officer clerical employees, guards and all supervisors as defined in Section 2(11) of the Act.

(b) Offer to Jose Crespo, Humberto Sanchez, Arnaldo Delgado, Geraldo Rodriguez, and Felix Ramos immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and make them, together with all other employees who engaged in an unfair labor practice strike on and after December 20, 1979, for any losses of earnings suffered by them in the manner set forth in section IV of this Decision, entitled "The Remedy."

(c) Remove from the files maintained by Respondent and concerning Felix Ramos all reference to disciplinary actions taken against him on January 26, July 2, and September 12, and September 15, 1980.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Isla Verde, Carolina, Puerto Rico, in the English and Spanish languages, copies of the attached notice marked "Appendix."[68] Copies of said notice, on forms provided by the Regional Director for Region 24, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[68] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Progressive Supermarkets, Inc. *and* **Retail Store Employees Union Local 1262, United Food and Commercial Workers International Union, AFL-CIO and CLC.** Cases 22-CA-9686 and 22-RC-8060

December 4, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 13, 1980, Administrative Law Judge Joel P. Biblowitz issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Respondent filed exceptions and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge, as modified below,[3] and to adopt his recommended Order, as so modified.[4]

1. The General Counsel excepts to the Administrative Law Judge's failure to find that the Respondent unlawfully postponed the regularly scheduled January wage increase. The record clearly demonstrates, and the Administrative Law Judge found, that the Respondent postponed the scheduled January increase because of the pendency of the Union's petition. The Board and courts have long held that the withholding of pay raises from employees who are awaiting the holding of a Board election violates the Act if the employees otherwise would have been granted the pay raises in the normal course of the employer's business.[5] Unlike the situation in *Uarco Inc.*,[6] the Respondent here did not tell employees that the sole reason for its action was to avoid the appearance that it sought to influence the election. More important, it placed the onus for the postponement on the Union.[7] We therefore find that the Respondent violated Section 8(a)(1) and (3) of the Act.

We also disagree with the Administrative Law Judge's conclusion that the Respondent's repeated references to the possibility of strikes and the fact that economic strikers can be permanently replaced were protected by Section 8(c) of the Act. Rather, we view those references, when read in the context of certain other of the Respondent's campaign statements, to constitute implied threats violative of Section 8(a)(1).

A major theme of the Respondent's campaign literature and speeches was that unionization did not guarantee automatic increases in wages and benefits, or, specifically, that its office employees would receive the wages and benefits enjoyed by its unionized store employees. Thus, the Respondent repeatedly emphasized that the law did not require it to agree to any union demand, only that it bargain in good faith, that the only weapon a union had to force agreement was a strike, and that economic strikers could be permanently replaced. In conjunction with these points, Controller Cimini stated that the Respondent would do whatever it had to do to keep the Union out, that the Respondent "certainly would not agree" to pay the store rates, and that, if the Union demanded those rates, there would be a long strike. Vice President Gold stated that the Respondent knew how to protect its interests and, in both his speeches, stated that there was "no way in the world" that the Respondent would pay the store rates.

In concluding that the Respondent's strike statements were protected by Section 8(c), the Administrative Law Judge noted that the Respondent never stated that it would not bargain or never reach an agreement. To the contrary, he noted that the Respondent stated that it was required to bargain in good faith, that it spoke only of the possibility of a strike, and that it never foreclosed the

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[1] The General Counsel's "Motion to Strike Respondent's Exceptions and Portions of Its Memorandum in Support Thereof" is hereby denied.

[2] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Further, there is nothing in the record to indicate that the Administrative Law Judge was biased or prejudiced against the Respondent or that the Respondent was accorded less than a full and fair hearing.

[3] In agreement with the General Counsel, we find that Vice President Gold's statements to employee Evers, following the termination of employee Medaska, are sufficient to establish the Respondent's knowledge of Medaska's union sympathies. In addition, we find it unnecessary to pass on whether the Respondent's campaign literature contained an unlawful solicitation of grievances since such would not affect the scope of the remedy. Finally, we shall leave to the compliance stage of this proceeding the determination of whether Medaska would have remained in the Respondent's employ beyond January 28, 1980.

[4] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on any backpay due Medaska based on the formula set forth therein.

Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), for finding Medaska's discharge unlawful. As the Administrative Law Judge found, the asserted lawful reasons for her discharge were "incredible," so that no lawful reason exists and only the unlawful one remains. *Wright Line* is concerned only with deciding between a genuine lawful and a genuine unlawful reason for a discharge, and it is misleading and inaccurate to apply it where only the unlawful reason is genuine.

[5] See *Florida Steel Corporation*, 220 NLRB 1201 (1975), affd. 538 F.2d 324 (4th Cir. 1976), and cases cited therein.

[6] 169 NLRB 1135 (1968).

[7] See, generally, *Centre Engineering, Inc.*, 253 NLRB 421 (1980).

259 NLRB No. 74

possibility of reaching an agreement. He further noted that the statements regarding the replacement of economic strikers were a correct description of the law. However, the Administrative Law Judge apparently failed to consider the Respondent's statements as they related to the Respondent's descriptions of the Union's response to unionization by its own clerical employees.

In a letter to employees dated December 28, 1979, the Respondent referred to a 1970 strike by the Union's office employees and made the following statements:

> You must think that Local 1262 would have some understanding for the needs and wants of its own office employees . . . . What Local 1262 did was to bargain the Office Employees Union into the ground, get the employees out on strike, and then permanently replaced all the strikers. The strike lasted for two months, and only one striker ever got her job back . . . .
>
> What makes you think that things will be any different here? This union has a track record of not treating office employees fairly. Moreover, we know how to negotiate hard, just like the union does. And we know about rights regarding the replacement of economic strikers.

In the speech given January 4, 1980, Vice President Gold reiterated that the Union had permanently replaced its own striking clerical employees and added:

> So you can ask the union what it means to be permanently replaced, because Local 1262 really knows how to do it. And I can assure you that this company knows how to do it as well.

Finally, Gold, in his last speech to employees, stated that the Union "broke" its own employees' union and, as to the Respondent's opposition to paying its employees increased wages and benefits, added that it was in "pretty much the same position that Local 1262 was back in 1970."

The above statements demonstrate that the Respondent's strike references went beyond the mere expression of "views, argument or opinion" protected by Section 8(c). Rather, the Respondent told its employees that the Union had previously bargained its own employees "to the ground," forced them on strike, and permanently replaced them. It described its opposition to its employees' demands as similar to the Union's and assured employees that, like the Union, it knew how to bargain "hard" and replace strikers. Moreover, Controller Cimini told employees that the Respondent would do whatever it had to do to keep the Union out. In this context, the Respondent's statements were not limited to the "ifs" and "possibilities" of strikes and collective bargaining but contained a not so subtle threat that, upon unionization, it too would force a strike, directly resulting in the permanent replacement of strikers and the loss of jobs.[8] Accordingly, those statements violate Section 8(a)(1).

2. The Respondent's threats to force a strike and permanently replace strikers add to the necessity for the bargaining order recommended by the Administrative Law Judge. Through its campaign statements and unfair labor practices, the Respondent made clear its opposition to its employees' unionization and, significantly, the dire consequences which would result. Thus, the Respondent threatened more onerous working conditions and told employees that, because of the union campaign, wages and benefits would be frozen. It also threatened that unionization would result in a loss of current benefits which would then have to be negotiated back.

More important, the Respondent's threat to discharge employee Plant, its threat that unionization would result in a strike and the replacement of employees, and its unlawful discharge of employee Medaska underscored its resolve to do, as Controller Cimini threatened, "whatever it had to do" to keep the Union out. As the Administrative Law Judge noted, no employer conduct is more serious than the discharge of an employee because of union affiliation, and such misconduct is particularly effective where, as here, the employer explicitly reveals to employees its unlawful motivation. Nor was the Respondent's unlawful activity limited to threats and reprisals. For, on at least two occasions, the Respondent impliedly promised to remedy employee grievances, thereby giving addded and unlawful emphasis to its contentions that the employees did not need a union to obtain the best that it could offer.

The Respondent's unfair labor practices were serious and accomplished their intended result—the dissipation of the Union's preelection majority. By its unfair labor practices, the Respondent vividly demonstrated to employees the perils of unionization and the rewards of its rejection and, with the employees so conditioned, the possibility of a fair re-run election is, at best, slight.

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[8] See *St. Francis Hospital*, 249 NLRB 180 (1980); *Components Inc.*, 197 NLRB 163 (1972). See also *Georgetown Dress Corp.*, 201 NLRB 102 (1973).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Progressive Supermarkets, Inc., Parsippany, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Add the following as paragraphs 1(i) and 1(j), relettering subsequent paragraphs accordingly:

"(i) Threatening that unionization would result in a strike, the permanent replacement of strikers, and the loss of jobs.

"(j) Withholding wage increases because of its employees' union activity."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

> WE WILL NOT threaten our employees with the loss of benefits should they choose to be represented by Retail Store Employees Union Local 1262, United Food and Commercial Workers International Union, Local 1262, AFL-CIO and CLC, or any other labor organization.
>
> WE WILL NOT threaten to discontinue our employees' dental benefit plan should they choose to be represented by Local 1262 or any other labor organization.
>
> WE WILL NOT threaten to freeze the wages or other benefits of our employees due to their activities on behalf of Local 1262 or any other labor organization.
>
> WE WILL NOT threaten to install a timeclock for our employees should they choose to be represented by Local 1262 or any other labor organization.
>
> WE WILL NOT interrogate our employees regarding their activities, and the activities of other employees, on behalf of Local 1262 or any other labor organization.

WE WILL NOT promise to correct the grievances of our employees in order to induce them to refrain from supporting Local 1262 or any other labor organization.

WE WILL NOT threaten our employees with discharge should they choose to be represented by Local 1262 or any other labor organization.

WE WILL NOT threaten that unionization will result in a strike, the permanent replacement of strikers, and the loss of jobs.

WE WILL NOT withhold wage increases because of our employees' union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

WE WILL offer Diane Medaska immediate and full reinstatement to her former position or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges, and make her whole, with interest, for any loss of earnings she may have suffered because of our discriminatory conduct against her.

WE WILL recognize and, upon request, bargain with Local 1262 as the exclusive representative of our employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All full time and regular part time office clerical employees employed at our Parsippany office, but excluding confidential employees, professional employees, guards, all other employees and all supervisors as defined in the Act.

PROGRESSIVE SUPERMARKETS, INC.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was heard before me in Newark, New Jersey, on June 23, 24, 25, July 1 and 2, 1980. The complaint was issued on February 22, 1980, based upon a charge and amended charge filed respectively on January 7 and January 17, 1980, by Retail Store Employees Union Local 1262, United Food and Commercial Workers International Union, AFL-CIO and CLC, herein called the Union. Basically, the complaint alleges that Progressive Supermarkets, Inc., herein called Respondent, violated Section 8(a)(1), (3), and (5) of the Act by the following actions: (1) threatening its employees with loss of benefits and more onerous working conditions, (2) threatening its employees with discharge if they selected the Union as their collective-bargaining representative, (3) informing its employees of the futility of selecting the Union as their collective-bargaining representative and impliedly promising its employees an improvement in their wages and benefits if they rejected or refrained from supporting the Union, (4) soliciting employee complaints and grievances to encourage the employees to refrain from supporting the Union, (5) discharging Diane Medaska due to her activities on behalf of the Union, (6) withholding an annual wage increase and then granting the annual wage increase in an amount greater than in previous years, due to its employees' activities on behalf of the Union, (7) providing its employees with a lounge and implementing split lunch breaks to discourage its employees from engaging in further activities on behalf of the Union, and (8) refusing to bargain with the Union which had been selected by a majority of Respondent's employees as their collective-bargaining representative in an appropriate unit.

On February 22, 1980, the Regional Director for Region 22 issued a Report on Objections and Order Consolidating Cases in Case 22-RC-8060 in which he found that the issues raised by the objections were coextensive with those set forth in the complaint in Case 22-CA-9686 and he therefore consolidated said objections with the unfair labor practice matter, for decision by me. The objections are as follows:

1. The employer, by its officers and agents, did solicit grievances from employees and sought methods to correct them in an effort to discourage employees' support of the petitioning union.

2. The employer, through its officers and agents, spoke to employees individually on the day before and the day of the election. During "those one on one" meetings, the employer intimidated, threatened, and coerced employees in an effort to discourage them from supporting the petitioning union.

3. The employer in remarks made at meetings of employees, threatened employees with a loss of their fringe benefits and dire consequences in the event that the Union succeeded in the election.

4. The employer, on January 4, 1980, did discharge Diana Medaska because of her support for the petitioning union and in an effort to discourage others from voting for Local 1262. By these and other acts, the Employer destroyed the laboratory conditions required by the Board in the conduct of a fair election.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation with its principal office located at 1279 Route 46, Parsippany, New Jersey, is engaged in the operation of retail supermarkets within the State of New Jersey. Annually, Respondent's gross revenues exceed $500,000 and, for the same period, it purchased goods and supplies valued in excess of $5,000 which were transported to its place of business in interstate commerce directly from points outside the State of New Jersey and purchased goods valued in excess of $50,000 from suppliers located within the State of New Jersey, who, in turn, had received said goods directly from points outside the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

Respondent admits, and I find, that the appropriate unit herein is all full-time and regular part-time office clerical employees employed at Respondent's Parsippany office, but excluding confidential employees, professional employees, guards, all other employees and all supervisors as defined in the Act.

IV. THE EMPLOYEES INVOLVED

The unit involved in this proceeding is Respondent's office employees at its office in Parsippany, New Jersey. On November 16, 1979,[1] the date the Union simultaneously made its request for recognition and filed its petition with the Board, the following 12 office employees were employed by Respondent: Judy Edwards, Dorothy Evers, Christine Kelly, Diane Medaska, Linda Packard, Kathleen Piper, Katalin Plant, Nancy Rinaldo, Mary Salink, Rose Marie Scalfani, Bablir Jo Sedicavage, and Anne Shally. Between November 16 and November 30, Nancy Gerard was hired by Respondent as an office clerical employee. On December 7, when the parties entered into a consent election agreement, they listed these employees on a *Norris Thermador* list. Lee Cimini, Respondent's controller (and an admitted supervisor), together with Deborah Huck and Diane Branca, supervise the work of these employees. To a lesser degree, Edward Gold, Respondent's vice president, and to an even lesser degree, William Margolis, Respondent's president, spend some time in the office supervising the work of these employees.

V. THE UNION'S AUTHORIZATION CARDS AND MAJORITY STATUS

The Union obtained a total of 11 authorization cards from these employees. Under the portion of the card the employee fills in, and above the place for signature, the following legend appears: "hereby authorize United Food & Commercial Workers International Union, AFL-CIO, CLC, or its chartered local union to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law."

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[1] Unless otherwise stated, dates in November and December are in 1979, and dates in January, February, or thereafter are in 1980.

On or about November 12, Louis Marcucci, organizing director for the Union, received a telephone call from Evers who informed him that Respondent's office employees were interested in being represented by a union and would he meet with them. They arranged to meet at a nearby motel after work on November 14. The employees who were present at this meeting were Evers, Edwards, Plant, Medaska, Packard, Piper, and Branca.[2] They spoke with Marcucci who handed out authorization cards to them all and each of them signed a card and returned it at that time to Marcucci.

Although acknowledging the existence of these signed cards and others to be discussed *infra*, Respondent attacks the validity of these cards on the ground that they were signed as "election only" cards. Marcucci testified that he informed the employees that the Union "wanted the cards so that we could prove to the company that we did represent a majority of the employees. We had intentions of demanding recognition." He also testified that he informed the employees that the first purpose of the card was to use them to seek recognition from Respondent and following a rejection of recognition the Union would use the cards to petition the Labor Board for an election. Evers testified that Marcucci informed them that the purpose of the card was to authorize the Union to represent them and explained the election procedures before the Board. On cross-examination, Medaska, who testified that she had read the authorization card, testified that Marcucci said that after the cards were signed a petition would be filed and a secret-ballot election would be held. In answer to a question from me, she testified that she was informed that the signing of the cards "showed that the majority of us in the office did want the union to represent us, and that this would bring about an election, and a final decision." On redirect, in answer to the question: "Did he indicate to you under what circumstances an election might be held?" She answered: "If the Company would not agree to just the cards." Plant testified as follows: "Mr. Marcucci explained to us that through the signing of the cards we would be authorizing the union to represent us, and using those cards they would have to go and make a demand for recognition. But if that didn't work, then we would have to go on to an election." Piper testified as follows: "He said that this would authorize the union to go into the office to find out—to let them know that the girls wanted a union. This would authorize him to send someone in to petition the company to get the union in, and if it got to the point where they would not accept the petition or the request, or whatever it's called, that it would go into an election so many days after this particular presentation." Packard testified that Marcucci told them that by signing the cards the employees would give the Union the authority to represent them in trying to get a union into the office, that if a majority of the employees signed the cards he would request that Cimini recognize the Union, but in all likelihood Cimini would not agree to that, and they would then go to an election. Edwards testified that Marcucci said that signing the cards showed that the employees wanted the Union to represent them:

> A. When he gave the cards to us he said that we needed a majority of the girls to sign the cards if we wanted the union to represent us, that if we got a majority it could go into an election.
>
> Q. That if you got a majority it could go into an election; is that correct?
>
> A. Yes, if the company didn't want it, if they were going to fight it, that if they didn't accept the union after the cards were shown to them, that it could go possibly into an election.

Before the conclusion of the meeting the employees requested some additional cards from Marcucci to give to some of the employees who did not attend the meeting; Evers and Medaska took cards with them. On the next day, during working hours in the office, Evers gave authorization cards to Rinaldo and Sedicavage; they read the cards and returned them to Evers, who returned the cards to Marcucci at a luncheon meeting the Union held that day with the employees. Both Sedicavage and Rinaldo were present at the meeting and Marcucci showed them their signed authorization cards and asked them if they had signed them and they said they had.

On the same day, also during working hours in the office, Medaska handed authorization cards to Kelly and Salink; she explained to them that the purpose of the cards was to get the Union to represent them and they would probably have to go to an election if the Company would not accept the cards. She also told them to read the cards and return them to her. Kelly and Salink took the cards into the back room of the office and returned them signed to Medaska later in the day. Medaska then gave these cards to Evers who returned them to Marcucci about 5 p.m. that same day. That evening, Marcucci called Kelly and Salink at home, told them that he had received their signed authorization cards, and asked them if they had signed the cards and they said that they had.

Gerard began her employ with Respondent on November 19. Medaska gave her an authorization card during a break and told her it was for the purpose of having the Union represent them. Gerard read the card, signed it, and returned it to Medaska who then gave it to Evers. At a meeting the Union held with the employees on November 21, Evers gave the card to Marcucci; Gerard was present at this meeting and Marcucci showed her the card and asked her whether she had signed it and she said that she had.

In *Cumberland Shoe Corporation*, 144 NLRB 1268 (1963), the Board stated that unambiguous cards or "single purpose cards" which state that the purpose of the card is to authorize the union to represent them for collective bargaining, and do not state that the purpose is to seek an election, will be counted unless it is proven that the employee was told that the card was to be used solely for the purpose of obtaining an election. This approach was approved by the Supreme Court for "single purpose cards" in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 606 (1969) whence it stated that "employees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature."

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[2] Upon noticing that Branca set forth "accounts payable supervisor" as her position on the authorization card she signed, Marcucci had her speak to the Union's attorney and when he was satisfied that she was a supervisor within the meaning of the Act, he informed her not to come to the meetings between the Union and the employees and not to take an active part in the Union's organizational activities at Respondent. Branca did not solicit any union cards from employees.

The authorization cards herein refer only to union representation and are therefore "single purpose cards." Although the testimony of the card signers and solicitors was not as exact as a purist in labor law would desire, it is clear that the employees were told that the purpose of the card was to designate the Union to represent them and that there would be an election only if Respondent refused to voluntarily recognize the Union on the basis of these cards. The cards were therefore a valid designation of the Union as their collective-bargaining representative.

On the basis of these cards the Union was designated as the collective- bargaining representative of 10 out of the 12 employees in the unit as of November 16; on November 21, when Gerard signed her card, the Union had 11 designations out of 13 unit employees. Therefore, during this period, the Union was clearly designated as the collective-bargaining representative of a majority of the employees in appropriate unit—Respondent's office employees.

VI. THE REQUEST FOR RECOGNITION

On November 16, Michael Parente, the Union's business agent, went to Respondent's office. He met Cimini, informed him that the Union represented a majority of the employees and wanted to be recognized as their bargaining agent. He also handed Cimini a letter from the Union to Respondent, entitled "Demand For Recognition" dated that day, stating:

> Dear Sir:
>
> This is to advise you that a majority of your employees in an appropriate unit of clerical employees located at Progressive Supermarkets, 1279 Route 46, Parsippany, New Jersey, have designated Retail Store Employees Union, Local 1262 as their exclusive representative for the purpose of collective bargaining. The bargaining unit consists of all regular full-time and part-time employees except supervisors and confidentials, as defined in the National Labor Relations Act of 1947, as amended. We accordingly demand recognition in behalf of such employees.
>
> We offer to prove our majority status by submitting signed authorization cards to be checked against your payroll by a mutually selected impartial person. It is the desire of this union to institute negotiations with you immediately to work out an agreement on a contract which will set forth wages, hours and other terms and conditions of employment. No other person or organization now represents a majority of these employees and you are hereby cautioned against entering into any contract or negotiating with any person or organization presuming to act as agent for, or in behalf of, any such employees.

Cimini told Parente that he did not have the authority to recognize the Union, that Gold would have to do that, but that Gold was not in the office. Cimini requested to see the authorization cards, but Parente declined the request. Parente left without making an appointment to see Gold.

At the same time, Marcucci was waiting at the Board's office in Newark, petition in hand. Based upon arrangements previously made, Parente called the Union's office and left a message at the switchboard that the Union's demand for recognition had been denied. Marcucci then called the Union's office, was informed of Parente's message and filed a petition with the Board covering the instant unit. On the same day, the Union sent a telegram to Respondent, to the attention of Cimini, demanding recognition in the unit involved herein. The telegram states that the Union was prepared to demonstrate its majority status and that a petition had been filed that day. The telegram also requests an immediate response from Respondent. There was no response to the telegram until the parties entered into the consent election agreement on December 7.[3]

I find that the Union's actions on November 16 constitute a valid request for recognition. Although Cimini was, in all probability, not the proper person from whom to demand recognition, he was, admittedly, an agent of Respondent and Parente left with him the Union's demand for recognition. Even if that were not a sufficient request (and I find that it was) the Union's telegram to Respondent certainly was sufficient.

VII. THE CAMPAIGN

Between December 7 and January, Respondent sent four letters to its employees; in addition, Cimini made one speech and Gold made two speeches to Respondent's employees, in addition to speaking to a number of employees individually. As the General Counsel alleges that the speeches and meetings with the employees, combined with the contents of the letters, constitute the unfair labor practices and objectionable conduct herein (together with the termination of Medaska) it is necessary to set forth the letters *verbatim*. The letters are dated December 13, December 21, December 28, and January 7, were all prepared by Respondent's counsel and retyped on Respondent's stationery, were signed by Cimini, and end with a "Yes" and a "No" box, with an X in the "NO" box.

A. *The Letters*

To Our Employees:

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[3] At the election conducted on January 10, there were five votes for the Union and six votes against. One ballot (that of Medaska) was challenged, but was not determinative.

As you know, on Thursday, January 10, 1980, the National Labor Relations Board will hold a secret ballot election among the Company's office employees. The purpose of this election is to determine whether or not you want to be represented by Retail Clerks Local 1262.

In a very real sense, you will be deciding whether you want to turn over your most important affairs to union officials about whom you know very little and who represent primarily store employees. I feel sure you want to make this vital decision based on the *facts* and not campaign talk or worthless promises. The Company is sincerely convinced that a union would *not* be in your best interests, and during the next few weeks we intend to submit to you facts clearly showing the soundness of this position.

The following answers to questions often asked by employees have been prepared to provide accurate information on which you can make a sound decision as to whether or not you want a union to act and speak for you. We want to be sure that you are not misled by any false claims or empty promises from union representatives. It is only right and fair that you should know the truth on the whole matter before you make up your mind.

1. Q. Will I lose my job in the event the union is rejected and I may have signed a union authorization card or was active in behalf of the union?

A. Positively not! The Company will not penalize, punish or discriminate against employees because they signed union cards. No matter how unwise we think it is that you may have signed a card, no employee will suffer at the hands of the Company because of his union activity. And if anyone has told you anything contrary to this—whether he be a union organizer or a fellow employee working for the union—*he has told you something that is absolutely untrue.*

2. Q. If I vote against the union, will I lose my job in the event the union wins the election?

A. Definitely not. Neither the law nor the Company will permit or tolerate discrimination among employees.

3. Q. Will those who vote for the union get special advantages if the union should win the election?

A. No. In the first place the election is held in secret and how an individual votes is unknown by the Company or the union. Secondly, following the election employees will be treated alike. The Company will not permit any discrimination whatever. Under no circumstances will union members get any special advantage over non-members.

4. Q. Do I have to vote for the union if I have signed a union authorization card or paid money to the union for dues or initial fees?

A. Certainly not. It doesn't make any difference whether you have signed a union card or attended union meetings. The election will be your opportunity to vote in freedom and by secret ballot. No matter what commitment you may have made, verbally or in writing, to any union representative or to any fellow employee, no matter what you may have done or said in advance of the election, *you are entirely free to vote as you please.*

5. Q. Can the union guarantee me an increase in wages or any other benefit?

A. No. Only the Company can give you more money. It is the Company that furnishes your job and your paycheck—not a union. A union will never furnish you a day's work or a cent of pay.

6. Q. If the union wins the election, will the law compel the Company to reach an agreement with the union?

A. Absolutely not! The Company does not have to agree to a single thing the union proposes so long as we bargain in good faith. The law itself provides that bargaining in good faith does not require the Company to agree to any union demands or to make any concessions to the union. Thus, we do not have to sign any contract which we don't believe to be in the Company's best interest. There is no law that forces us to agree with the views and demands of the union.

7. Q. If the union wins the election, will we automatically get the things the union has been promising, such as the retail clerks store contract?

A. No. Even if the union wins an NLRB election, nothing happens automatically. The union could ask for anything, but as long as we bargain in good faith, the Company does not have to give in to any demand which we believe would not be good business practice or might be harmful to the Company or its employees. Thus, there is no way for the union to guarantee promises that they may have made. Ask yourself if you can guarantee to spend someone else's money.

8. Q. If the union wins the election, will we be called out on strike?

A. The only way that the union can try to force the Company to agree to what the union has been promising is to call you out on strike. Promises are cheap, but it is something else for the union to fulfill those promises. There is only one sure way to avoid the possibility of strikes and that is not to have a union.

9. Q. If the union calls us out on strike, will we get paid while the strike is going on?

A. No! If you strike, you lose your pay. The Company is not required to pay you while you are on strike. Under New Jersey law, strikers are not entitled to unemployment compensation. Moreover, your Company-paid insurance benefits might also be stopped in the event you do go out on strike. The union might give you a handout, or pay you some limited benefits, but you also ought to know you can't even get unemployment benefits while you are striking. A good question to ask yourself here is who will pay your bills if you are walking in a picket line.

10. Q. If the union calls a strike and I go out on strike, can I lose my job?

A. Yes! Under the law, if the union calls a strike to try to force the Company to agree to the union's economic demands, the Company is free to permanently replace the strikers. This means that if you are permanently replaced in such a strike, the law does not force the Company to rehire you immediately after the strike is over. You might end up on a preferential hiring list, having to wait weeks or months for a vacancy to occur.

11. Q. Will I lose my right to discuss on my own behalf with Company officials about my wages, hours and working conditions if the union is voted in?

A. Yes. If the union were to win the election, all the employees, even those who vote against the union, will absolutely lose their right to discuss these subjects individually with management. None of them will be able any longer to come to me or their supervisors and discuss privately their own personal cases regarding wages, hours and working conditions.

12. Q. If the union wins, who will be the union shop stewards and committeemen who will handle the affairs of everybody else?

A. Look around you and see who is active in pushing this union. In all probability, there is your answer.

They will be running things for you. They will be the ones working with the union negotiators and officers in bargaining with the Company over your pay, your working hours, and your employment benefits. They will be the ones handling your grievances.

Ask yourself this question: Are they people whom you consider to be capable of handling your problems and into these hands you are now ready to trust your affairs for the future?

13. Q. Does it cost money to belong to a union?

A. Yes! It could cost quite a bit, about $150.00 a year. Unions collect monthly dues, and besides that, there could be other charges such as initiation fees and assessments. Unions can also fine members who violate union rules. A union must have income to keep going and to pay its officers and organizers, and its biggest source of income is dues. This explains its interest in YOU—not as an individual but as a dues payer!

14. Q. What if we vote for the union just to try it out; can't we get rid of it if we don't like it?

A. Getting rid of a union once it is in, would be a hard job. Once a union gets in, it normally remains your bargaining agent until a new election is held. In order to get an election, 30% of the employees would have to sign a petition or some other document. Voting a union in is easy. But when you find you made a mistake, it's a pretty hard job to get out of it. You're best off not getting into it in the first place.

15. Q. Why is the Company opposed to a union?

A. The Company feels that a union will only cause dissension among our employees and bitterness between those who are for or against the union. It feels that a union will try to generate trouble between the management and its employees in order to justify its own existence.

We feel that we are able to work out our problems with our employees on a personal basis, without the interference of outsiders. The Company does not feel that its employees have to pay their good money to a union to get the best the company can give to its employees. And we think that we have done pretty well by our employees, both in salary rates and in fringe benefits.It is my sincere hope that these facts will be helpful to you in making the important decision you will have an opportunity to make on January 10. I would recommend that you think seriously about them and if further questions occur to you, please feel free to ask me about them.

To Our Employees:

By now, you have had an opportunity to reflect on this union election that's going to be held here on January 10, 1980.

We have tried to explain to you that even if the union were to win the election, you would not automatically get any increases in your salary or benefits. All a union wins, even if it wins an election, is the right to sit down and negotiate with the Company about wages and benefits.

But negotiation does not necessarily mean agreement. The law provides quite clearly that the obligation to bargain does not require the Company to agree to any union proposal. The enclosed leaflet, which is excerpted from an official National Labor Relations Board publication, explains what this bargaining obligation means. What it does not mean is that either party must agree to anything it feels is not in its best interests.

What happens if the Company and the union negotiate but can't reach agreement? The only weapon the union would have would be to pull you out on strike. Remember, strikers don't get paid and they are not eligible, under New Jersey law, for unemployment compensation. Moreover, the Company would not have to pay insurance premiums for employees who are out on strike.

Finally, employees who strike for more money or higher benefits are called "economic strikers" and are subject to being permanently replaced by other employees. Remember, just because the union calls a strike, it doesn't mean that everybody has to go out on strike and it doesn't mean that the Company has to stop its operations. So if an employee goes out on strike and gets permanently replaced, when the strike ends she does not get her job back right away but has to wait until a vacancy occurs. That could take weeks or even months. The first paragraph of the enclosed leaflet gives you the official word from the Labor Board on that subject.

You don't need a union to get the very best this Company has to offer. Vote for yourselves on January 10; vote NO.

To Our Employees:

I hope that none of you are being fooled into believing that getting a union in here is a guarantee of anything at all, except perhaps lots of trouble for all of us.

There's something that you all ought to know about; and it deals with how this union treats its own office employees. Some years ago, back in 1970, the Union's office employees organized, went to a Labor Board election and won. The Union was forced to sit down and bargain with the Office Employees Union that represented its own office employees.

You might think that Local 1262 would have some understanding for the needs and wants of its own office employees. You might think that—but you'd be dead wrong. What Local 1262 did was to bargain the Office Employees Union into the ground, get the employees out on strike, and then permanently replaced all the strikers. The strike lasted for two months, and only one striker ever got her job back. That's how this union handled negotiations with the union of its own office employees.

What makes you think that things will be any different here? This union has a track record of not treating office employees fairly. Moreover, we know how to negotiate hard, just like the union does. And we know about rights regarding the replacement of economic strikers.

Ask the union how it treats its own office employees. Ask the union if it's paying its own employees the same wages that the store employees get. It doesn't. The Union's own office employees earn about the same as you do, and they don't get cost-of-living increases. There is no set time for increases, while you get reviewed twice a year.

Your salary and benefit package is every bit as good as what the Union pays, and probably a lot better. You don't need a union to get the best this Company has to offer.

Vote for yourselves on January 10. Vote NO.

To Our Employees:

The Labor Board election will be held on Thursday, January 10, 1980 in the vacant office across the hall. The polls will be open from 3:00 p.m. to 3:30 p.m. and you may vote at anytime during that 30 minute period.

All of the office personnel, except for the two supervisors, are eligible to vote. This election will be decided by a majority of those who actually vote. If you don't vote, your future could be decided by someone else.

Here are a few things you should keep in mind before you vote:

1. Voting Procedure. The ballot you will receive will have two spaces, the one on the left marked "Yes" and the one on the right marked "NO." If you do not want the union, you should put an "X" in the "NO" space. Do not sign your ballot; if you do, your vote will not count.

2. Secrecy of the ballot. The election will be conducted by an agent of the U.S. Government, who will insure that the election is conducted by secret ballot. No one will ever know how you vote.

3. Freedom of choice. This is your election and your choice to make. You owe it to yourself and your family to vote strictly on the basis of FACTS, and not on the basis of some vague union promises. You are free to vote as you wish regardless of what you may have said and done in the past. Even if you signed a union card, you are 100% free to vote NO in the election. If anyone has told you that you are committed to vote for the union, he is telling you a lie. You are free to vote as your conscience dictates.

4. Union promises. Don't be misled by empty union promises. The union cannot guarantee you a single thing. Even if the union were to win the election, the Company's only obligation would be to bargain with the union. But as we have pointed out to you, the law does not require the Company to agree to any union demands or to make any concessions to the union. Nor can the union guarantee you job security. All a union can bring you is job insecurity in the form of a strike.

5. The cost of a union. The only thing that a union victory will guarantee is that you will have to pay union dues of $150.00 or more a year. Having a union would also subject you to union discipline, and the union could fine you for "conduct unbecoming a union member," for crossing a picket line, or for some other silly charge.

6. What does joining a union mean? The U.S. Supreme Court put it this way: Joining a union "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." What this means is that you would lose your individual rights, and in return some stranger would do your talking—and your thinking for you.

Be sure to vote. Some of you have said that you want no part of the union and that you don't want to vote. That's wrong. If you don't want the union but don't vote, you're really helping the union get in here. You've got to cast your ballot while the polls are open. Otherwise, you'll be letting someone else decide your future.

Before you vote, remember all the benefits you now enjoy, benefits that not only exceed what other office employees in this area get but are also as good as, if not better than, what the store employees get. These benefits include 11 paid holidays a year; an excellent paid vacation schedule; 12 days of sick leave per year; an excellent medical/hospitalization/major medical policy; funeral leave; a pension plan; competitive salaries with regular reviews and regular increases; a comfortable place to work; and steady work with no layoffs.

You didn't need a union to get these benefits, and you don't need a union to keep them and to improve upon them.

I hope that you'll give a lot of thought to this important election, and that you'll vote NO on January 10.

B. The Speeches

All the speeches were made to all the employees present on that particular day. The first speech was made by Cimini on December 20 in the office. The prepared speech that Cimini had in his hand on this occasion, is as follows:

> I'm sure all of you know what this meeting is all about. For reasons that I'm only now becoming aware of, a number of you have gone to the union and have asked for union representation. As you know, there's going to be an election here on Thursday, January 10, 1980, at which all of the people in the office, with the exception of two supervisors, will be able to vote by secret ballot about whether or not you want a union to be your exclusive bargaining representative.
>
> The Company's position in all of this is pretty clear, and I want to make sure that all of you understand it. We do not think that you need a union to get the very best that this Company has to offer, and we hope that you will vote No in the election on January 10.
>
> We think that a union would be a mistake, both for the Company and for you. Between now and January 10, we intend to explain our position to you and we hope that you will agree with us, or that at least a majority of you will agree with us, that you don't need a union here.
>
> You may be asking yourselves why the Company is opposed to a union here in the office when it has the very same union representing its employees in its store in Northern New Jersey. Well, the reason is pretty simple. We know what having a union means. It means a lot of problems, both for the employees and for the Company. We're stuck with it in the stores, and there's nothing we can really do about it so we have learned to live with it. But the stores are remote from the office. Mr. Gold and I aren't out there on a regular basis, and we don't know the people and we can't handle their problems directly. But the office is another situation entirely. Mr. Gold and I are here all the time. There's a small number of people involved, a total of about 15. We see each other everyday, and if any of you have any problems, you are free to bring them to us right away, directly without interference by anyone else. You don't need a union to do your talking for you as far as your relationship with us is concerned. That makes it a bit different from the situation in the stores. In the stores, there are a number of levels of management between Mr. Gold and the employees. That doesn't hold true here in the office.
>
> What I am saying is, if you have any problems you can bring them directly to us, without having to pay a union $10 or $12 a month in dues to do your talking for you. Unions tend to be devisive, and they cause problems simply to justify their existence. We don't need that kind of aggravation here in the office, not you and not me. I had always liked to think that we could resolve our problems together. I really don't know what makes you think that you need an outside party to do that for you now.
>
> There is, however, one thing that I have heard that distresses me because it demonstrates that the union is trying to sell you a bill of goods. I understand that the union has been telling you that if it wins an election here, the employees in the office will get the store rates of pay. Frankly, I don't blame employees for wanting to make more money. That's the American way. But I hope that none of you will be fooled into believing that if the union gets in here, you will automatically get what the food employees are getting in the stores.
>
> First of all, there is nothing automatic about anything even if the union wins an election. If the union were to win the election, all it would win would be the right to sit down and negotiate with us about your wages and working conditions. That's all we would have to do. We would have to bargain with the union in good faith. The union would be free to make certain demands, and we would be free to make demands of our own. And if we could not reach agreement, all the union could do would be to call you out on strike in an effort to try to force us to agree to its demands. I'll be talking more about these bargaining obligations and the business of strikes at another meeting.
>
> The most important thing I would like to get across to you right now is that there is a major distinction between the work done by the food employees in the stores and the work done by nonfood employees in the stores and by you people here in the office. The food employees work long hours, standing on their feet, dealing face to face with customers, handling cash, and generally performing work that is harder physically than the work that you do here in the office. I don't think that there's any reason in the world why you should expect to be paid more than, or even as much as, the food employees in the stores. Your work is a great deal easier from a physical standpoint. You sit in a nice office, you perform work at

> your own pace, you take breaks on a regular basis and whenever you want to, you work Monday through Friday only, and day shift hours only, and you generally have an easier time of it. Now, if any of you are really interested in doing store work, I'll be glad to do my best to get you a job in one of the stores. But you can't expect to get paid the very same thing in an office that the food employees get in the stores.
>
> The union recognizes this. The union contracts that we have covering our store here in Northern New Jersey, our contract with Retail Clerks Local 1262, has separate rates for full time food employees and for full time non-food employees. These non-food employees earn considerably less than the food employees, and they earn considerably less than you do. For example, as of April 8, 1979 and continuing until there is a raise of 20 cents an hour on April 6, 1980, a non-food employee after six months will be earning $3.35 an hour, going up to a high of $4.10 an hour after two years of employment. That rate is significantly lower than the rates of pay you now enjoy. So don't kid yourselves into believing that the union is going to press for a food rate for office people, or that if they do press for it, that we will ever agree to it. That's just not the way it works.
>
> The union itself recognizes this. The Retail Clerks Union, including Local 1262, have a contract with Two Guys, and it provides for wage rates that are just a little bit less than you people are now earning. Those are non-food rates, and the union realizes that rates of that nature are lower than the food rates in the supermarkets.
>
> I hope that none of you will be fooled into believing that if you vote the union in here, you will automatically get the food store food rates. That's just not in the cards. The union might be promising it to you, and if it is it's not telling you the truth. I can tell you here and now, however, that even if the union were to try to get that for you, we certainly would not agree to it. Then, the only weapon the union would have to try to force us to give in would be to call you out on strike. I know that none of you like that idea, and I know that I certainly don't either. But that's what it would take, a long strike, if the union were to make the demand for food employee rates in this office.
>
> You don't need that kind of trouble, and neither does the Company. We have a pretty good organization here, and we do pretty well by you. Your fringe benefits are every bit as good as the fringes in the stores, and your salaries are every bit as good as the salaries for other office employees in this area. We compete pretty well in that regard, and we shall continue to do so.
>
> Well, I've talked on a bit longer than I had intended to, now, if any of you have any questions, I'll be glad to answer them for you.

Cimini first testified that "I basically read it. I read the whole thing." He then testified," I would say ninety nine percent of the speech I read." After looking over the speech, he testified that he said everything that was in the speech and said nothing that was not in the speech. Later, in answer to a question from me as to whether he said anything that was not in the prepared speech, he testified: "Maybe one or two words as I took my eyes off the paper, that might have been changed." Cimini also testified that he never said that Respondent would take whatever steps it had to in order to keep the Union out.

Evers testified that Cimini said that the Union was trying to get into the office, and that the employees had great benefits and good salaries and that Respondent was going to do everything it could to keep the Union out. Plant testified that Cimini did not read from the speech, but referred to it several times and elaborated on what it said. She also testified that Cimini said that the employees were all aware that the Union had made a demand for recognition, but that he could not understand why the employees needed a union to get the best that Respondent would have to offer. He then discussed the benefits they were receiving and how good they were and concluded by saying that Respondent would do anything it could to keep the Union out. Gerard testified that Cimini referred to the speech that he had in his hand and said that there was going to be a secret-ballot election coming up and that he did not think the employees needed a union to get the best that Respondent had to offer and he could not understand why the employees wanted a union and that the employees should have come to speak to him about it. Cimini then discussed the fact that Respondent's store employees are represented by unions, including the Union, but since he and Gold were always available to the office employees they did not need a union to do their talking for them. He went on to say that if the Union won the election all it would win was the right to sit down and negotiate and the company would be required to bargain in good faith and if the parties could not reach an agreement all the Union could do would be to call a strike. He also said that Respondent would do whatever they had to do to keep the union out. He then informed the employees of the difference between the kind of work performed by Respondent's store employees and its office employees and that the office employees could not expect the same rate of work as that received by its store employees. He informed the employees that their fringe benefits were as good as those received by Respondent's store employees and that their salaries were as good as that of other offices employees in the area.

Packard testified that Cimini told the employees that they had good benefits and that he did not think they needed a union; if the Union did come in, everything would be negotiable. She testified that Cimini never said that Respondent would do anything it had to keep the Union out. Edwards testified that Cimini was holding papers in his hand reading from them; he informed them of the upcoming election and that Respondent did not think that they needed a union to get the best that Respondent had to offer; that the Union would be a mistake for the employees and Respondent. He said that the Union has represented its store employees, but he and Gold are not in the stores, but in the office and able to deal directly with the office employees and that they did not need a union to do their talking for them. He said that they did not need to pay dues when you can discuss any problems directly with Respondent. He then said that even if the Union won the election, the office employees would not get the store rates of pay, that all the Union would win would be the right to negotiate with Respondent. He informed them that their fringe benefits were as good as that of the store employees. Edwards testified on direct examination that Cimini said that Respondent would do anything to keep the Union out. During a point-by-point questioning on cross-examination about Cimini's speech, she did not again refer to this statement.

Gold made his first speech on January 4. He testified that on this occasion, and for his second speech on January 9, he had with him the speech that was prepared for him by Respondent's counsel. Gold testified in the following manner of the use he made of the prepared text in both of these speeches:

> Q. How did you use them?
>
> A. I read them to a great degree. I used some of my own words, but I followed the content meaning of the speeches completely.
>
> Q. Did you vary the content of the speeches at all?
>
> A. Perhaps in one instance when I mentioned that there could be a time clock.
>
> Q. All right, but except for time clocks you followed the speeches, is that correct?
>
> A. That is right.

In answer to questions from the General Counsel, Gold testified as follows:

> Q. And while you followed the text fairly closely, you also deviated from the speech somewhat, did you not?
>
> A. Not to any great extent.
>
> Q. But you did say things that were not in these speeches themself?
>
> A. A word here and a word there.
>
> Q. Are you saying that you read right from the text?
>
> A. No.
>
> Q. How did you give the speech then? In what fashion? If you didn't read from the text?
>
> A. I just used my own language.

Gold testified that preceding these speeches he had learned that the Union had promised the employees that their wages would be increased to the level of Respondent's store employees and that whatever benefits they had could only increase in negotiations. The prepared text that Gold had in his hand for his first speech on January 4 is as follows:

> It's only a week now until the Labor election on January 10. I'm sure that many of you are getting tired of hearing from the Company, and I'm sure you are hearing from the Union as well, about how you should vote in this election. Well, that's the way things go in the political arena, and a Labor Board election is no less political than an election for presidents, for congressmen, or for mayor.
>
> In fact, a Labor Board election is probably a bit more important to each of you than is a political election, because the Labor Board election will have a very direct, immediate and real impact upon your working lives. What I mean is, if the Union gets in here, your working lives are going to be very radically affected. And when I talk about being "radically affected," I don't mean affected for the good, but for the bad. I really believe that if you vote a union in here, you'll be hurting the Company but, most importantly, you'll be hurting yourselves.
>
> Why do I say this? As I have said before, we get along with Local 1262 in our store, and I don't thing (sic) it is a bad union for the store employees. But I think it would (sic) an unmitigated disaster for you here in the office.
>
> After all, what is it that you really hope to gain by getting a union in here? It would be one thing if you were badly treated on a personal basis here at the office. I could understand it if I or anyone else in the management of this Company treated you with disrespect, fired people without reason, or generally did bad things to you. But that's not the case. We do our level best to treat you fairly and with the respect and dignity to which you are entitled. You don't need a union to get that. and I don't think that any of you should have any claim that we have not treated you fairly and with respect. If any of you think differently, I would really like to hear about it.
>
> It would be another thing if your fringe benefits were bad. But that's not the case. Your fringe benefit package is an outstanding one, every bit is good as to what the employees have in the store and certainly better than what the union itself provides to its office employees. You've got 11 holidays a year, 8 of them fixed holidays and 3 personal days. You've got an outstanding vacation schedule, with one-week vacation after six months, two weeks after one year, and three weeks after five years. In fact, your vacation schedule is more favorable than what the employees in the store have. You've got funeral leave, whenever anyone is unfortunate enough to need it. You've got twelve days a year of sick leave, more than they have in the stores. You've got medical, hospitalization and major medical insurance, including dental and optical insurance. The Company pays for that for each of you. You've got an outstanding pension plan, and you've got life insurance, paid for by the Company. That fringe benefit package is every bit as good as you would hope to get, and is a lot better than what the union itself has for its own employees in this office. I'll talk a little bit more about that later.
>
> As far as your wages are concerned, your salary rates are in line with what other people pay for office personnel in this area, and perhaps a little

> better. Employees start here at $140 a week, and get a $10 a week increase after 90 days. Thereafter, all of you are reviewed twice a year, and increases are given as deserved. I don't think anyone can honestly say that she is being unfairly treated or underpaid for the work she is doing. If anyone thinks that, I would certainly like to hear it.
>
> Now here is what it (sic) my understanding that the union is offering. The union appears to be promising—or at least some of you think that the union is promising—that if the union wins the election you will automatically get the store rate of pay. Let me disabuse you of that right now. There is no way in the world that we are going to pay a store rate for office work. In fact, under the union contract for the stores, there is a non-food rate, which is a lot less than what you are now earning. As I told you before, there's no way that we are going to pay a store rate for office personnel. The union doesn't do that for its office employees, and we certainly won't either.
>
> Now let's suppose the union were to get in here and we would have to negotiate with it. Remember now, all the union wins if it wins an election is the right to sit down and negotiate with the Company about your wages and working conditions. In that letter I sent to you, I enclosed a copy of this leaflet [at this point, hold up a copy of the "Get the Real Facts" leaflet]. This leaflet is excerpted from this pamphlet [at this point, hold up a copy of the "Guide to Law and Procedure" pamphlet]. This pamphlet is an official publication of the National Labor Relations Board, and it explains what collective bargaining means. It means that while the parties have to confer in good faith, the bargaining obligation "does not, however, compel either party to agree to a proposal by the other, nor does it require either party to make a concession to the other."
>
> This means that if we have to negotiate with the union, we would do so but we would be under no obligation to agree to anything that we felt was not in your best interests or in the Company's best interests. I can assure you that we know how to protect our interests. The union can make all sorts of demands, and we would be entirely free to reject them. Incidently, we would be entirely free to make demands of our own, to trade off for certain other things the union would want by getting the union to concede away certain of the things that you now have. For example, if the union wanted a union-shop clause, which would mean that everyone would have to join the union and pay dues in order to keep her job here, we might be willing to give that in return, for example, for a reduction of your sick leave. Those kinds of trade-offs are common in collective bargaining, as I'm sure that most of you know.
>
> Well, let's suppose we had to negotiate with the union and we could not reach an agreement. What would happen then? Well, the only weapon the union would have would be to call you up on strike. I know that none of you like to hear that, but you might as well hear it now, and from me, because I'm sure that the union isn't talking about strikes with you. The only economic weapon a union has, to try to force an employer to give in to the union's demands, is to call the employees out on strike. Remember, strikers don't get paid, and they are not eligible for unemployment compensation benefits. Moreover, the Company is under no obligation to pay insurance premiums for strikers, so if employees go off on strike they might find that they might have to pay their own medical insurance premiums in order to maintain their coverage.
>
> But there is a more important problem with economic strikers. An economic striker is an employee who goes out on strike for higher wages and more benefits. The Company is free to replace economic strikers permanently, and to continue to operate its business during the strike. That's what this leaflet and this pamphlet say. If employees go out on strike and they are permanently replaced, they don't get their jobs back when the strike ends, but they have to wait until a vacancy occurs.
>
> This is no idle statement. Ask Retail Clerks Local 1262 about economic strikers, because that union knows first-hand how to replace strikers. Back in 1970, the Office Workers Union won an election among the employees of Local 1262's office. The union was certified and negotiated with Local 1262 but couldn't reach an agreement. So the Office Workers Union called a strike against Local 1262. That strike lasted for two months, from August to October, 1970. By the time the strike had ended, the union had replaced every one of the strikers. Out of the goodness of its heart, the union took back only one of the employees that went on strike; all of the others lost their jobs.
>
> So you can ask the union what it means to be permanently replaced, because Local 1262 really knows how to do it. And I can assure you that this company knows how to do it as well.
>
> I really don't like to have to say such things to you, but I think it is important that you understand what it is you might be getting yourself into if you vote this union in on January 10. All it would mean would be trouble, for the Company and for you.
>
> As I have said before, you don't need a union here to get the very best this Company has to offer. We have always been able to deal with each other, without outside interference, in the past and I am sure that we can continue to do so in the future. Now, if you have any questions, I would be glad to anwer them for you.

Evers testified that Gold did not read from the speech he was holding; once in a while he referred to it, but he spoke mostly without reading from the speech. She testified that Gold began by telling the employees that their salaries were comparable to those of other office employees in the area; that they weren't as good as the store employees received, but they didn't do the same kind of work as store employees. She also testified that Gold said that some of the employees were going around the office discussing the Union and the employees knew who they were. She testified that Gold said that if the Union won the election he would have to negotiate with the Union and everything would be negotiable; you do not start from where you are now. All the employees' benefits would be frozen and the employees would have nothing and would have to start at ground zero and renegotiate everything; for example, that if they had $5,000 worth of dental bills[4] they better pay for it themselves because everything would be frozen and they would not be able to use their benefits.[5] According to Evers' testimony, Gold then told the employees that Respondent's policy of granting wage increases in January would be frozen until everything was cleared up with the Union. Evers also testified that Gold said that if the employees went on strike, Respondent might not rehire them; that the Union had a strike of its employees and very few of them were rehired by the Union; he said that none of the other offices were unionized and that he was not going to be number one; that he can be very hard and he would do everything he could and would use every means to keep out the Union.

Piper testified that Gold seemed to be using the speech he was holding "as a guideline." She testified that he spoke about the upcoming election and that although the Union represents some of Respondent's store employees, he did not think it would be a good idea for them to represent the office employees; he also told them that if the Union won the election Respondent would be obligated to negotiate with the Union; that the Union would be free to make demands and Respondent would also be free to make demands and that he would be tough; everything would have to be negotiated from ground zero. She further testified that he said that if the Union and Respondent could not reach an agreement there was a possibility that the Union would call a strike and that Respondent could hire employees to replace the strikers, and if that occurred, the strikers might not get their jobs back immediately, but might have to wait until a vacancy occurred; he then mentioned the strike by the Union's employees and said that the Union knows how to replace strikers.

Gerard testified that Gold began by speaking about the election and said that the Union represented some of Respondent's store employees and that it was a pretty good union in the stores, but he did not think it was good for the office employees. He spoke about their wages and other benefits and compared them to wages and benefits paid to Respondent's store employees. He said that the Union appeared to be promising that if it won the election the employees would automatically receive the stores rate of pay[6] but there was no way that Respondent would do that. Gerard also testified that Gold said if the Union won the election, Respondent would have to negotiate with the Union and everything was negotiable; the employees would not start from one step better, "they would start from ground zero, scratch, and that everything would have to be renegotiated; he also said that anyone who had incurred bills using their dental plan, would have to pay these bills on their own because these benefits would be frozen." According to Gerard's testimony, Gold then informed the employees that if the parties could not reach an agreement there was a possibility that the Union would call a strike and, if this occurred, Respondent could hire permanent replacements and, at the conclusion of the strike the striking employees would have to wait for a vacancy before being reemployed by Respondent. Gerard testified that Gold concluded by saying that the employees do not need a union in order to get the best that Respondent could offer.

Rinaldo[7] testified that Gold began by telling the employees that they had good benefits, compared them with the benefits received by Respondent's store employees, and compared the work of the store employees with that of the office employees. She testified further that he said that if the Union won the election everything would be negotiable; according to her testimony, Gold never used the term "ground zero" nor did he ever say that dental benefits or any benefits would be frozen; he discussed dental benefits, but only along with the other benefits Respondent provided its office employees. Rinaldo then testified about Gold's mention of a time clock in his speech: "There was a comparison being made about the store personnel, the different types of work that they did, the dealing with the public, the punching of the time clock . . ." "There was not one there—we don't have to punch a clock now, but with the union coming in, there could be one installed" and "one could possibly be installed."

Packard testified that Gold spoke about the benefits Respondent gave to its office employees (although she did not remember any specific discussion of dental benefits) and said that if the Union won the election all the employees' benefits would be negotiable. According to Packard's testimony, Gold never used the term "ground zero" nor did he say that the employees would lose any benefits if the Union won the election.

Shally testified that Gold discussed the benefits the employees were then receiving and that if the Union won the election, all the benefits would be negotiable. According to Shally's testimony, Gold never said that if the Union won the election the benefits would be frozen or that, if he had to negotiate, everything would start at ground zero, nor did he say that if the Union won the election the employees might lose benefits. Other than that, Shally remembered very little of either of Gold's speeches.

Cimini, who was present at Gold's speeches, testified that Gold told the employees of the benefits Respondent gave them and said that if the Union won the election everything would be negotiable; "that they weren't automatically started from what we already had"; Gold never said that benefits would be frozen and never used the term "ground zero"; in addition, according to Cimini's testimony, Gold never said anything about dental benefits being frozen, or that dental benefits would be adversely affected by the Union winning the election, only that they would negotiable.

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[4] There was much testimony to the effect that Rinaldo had a lot of dental work about that time, that Respondent's benefit plan covered a large part of the expense, and that the other employees were aware of this.

[5] The employees' existing benefits with Respondent covered dental bills.

[6] Gerard testified that the Union never told her that.

[7] Rinaldo testified that the Union had informed the employees that in negotiations benefits would start from where they were and go up from there; that they were not going to lose anything.

Edwards testified that Gold had the speech in his hand and, at times, appeared to be reading from the speech, and at other times spoke without looking at it. Edwards testified that Gold began by stating that the Union represented some of Respondent's store employees, but he did not think the office employees needed a union; he then informed the employees of Respondent's fringe benefits for the office employees and said that they were good benefits and that their wages were in line with other office employees in the area. Edwards testified that Gold then said that he understood that the Union was promising that if it won the election, the employees would automatically get the rates received by Respondent's store employees, but that was not so; the office employees would not receive the same wages as the store employees because of the job differences. Edwards also testified that Gold stated that if the Union won the election he would have to negotiate with the Union over the benefits; he said that the employees should not expect the package plan they then had because bargaining would start from ground zero; he said that wasn't it nice that Respondent pays part of a $5,000 dental bill, "we don't guarantee anything that we have now, that he could be very hard and tough on the employees," and "don't expect what we have now"; Gold also said that all benefits would be negotiable. Edwards testified that Gold then said that if no agreement was reached the employees could go out on strike, but there was no guarantee that they would all get their jobs back. He also said, according to Edwards' testimony, that Respondent didn't want to be the first one to have a union in their office and that they would go to any measures to keep it out; he also told the employees that although they were due for a raise, their wages would be frozen until after the election. He concluded the speech by saying that the employees did not need a union to get the best Respondent had to offer.

Medaska, who did not attend Gold's January 9 meeting because she was terminated by Respondent later in the day on January 4, does not remember the term "ground zero" being used by Gold in his January 4 speech.

Gold testified that at this speech he discussed the employees' benefits, including dental benefits, but without any specific emphasis, but he never told the employees that they had better get their dental work done at that time because they would have to pay for it themselves if the Union won the election, nor did he ever threaten to freeze the employees benefits if the Union won the election. He testified that he informed the employees that all benefits were negotiable; he never said that benefits would be frozen or lost, and never used the phrase "ground zero." As regards the timeclocks, he testified that he informed the employees "that it was possible that if the Union won, the same as we had time clocks in the stores, it could be possible that there would be time clocks in the office." He testified that he never told the employees that wages would be frozen if the Union won the election.

The prepared text that Gold had in his hand for his second speech which took place in the empty office across the hall from Respondent's office on January 9 is as follows:

> This is the last opportunity we're going to have to get together as a group before this Labor Board election tomorrow. I would like to discuss the mechanics of the election with you, and then get into some of the issues.
>
> First of all, the election will be conducted here at the office, in the vacant office across the hall, between 3:00 and 3:30 in the afternoon. It will be conducted by an official of the National Labor Relations Board, out of the Labor Board's Newark, New Jersey regional office. The Labor Board official will conduct this election by secret ballot, which means that no one will ever know how you voted.
>
> The election is going to be decided by a majority of those who actually show up at the polls and vote. There are no proxy ballots, and there are no absentee ballots. Therefore, if you want your voice to be heard, you have to show up in person at the polls and vote between 3:00 and 3:30 p.m. on Thursday, January 10. If you don't, your entire future might well be decided by someone else.
>
> When you go in to vote, there will be two employees present, one serving as an observer for the Company and one serving as an observer for the Union. The purpose of these observers is simply to identify the voters. There will also be a person from the Labor Board. All you have to do is give your name to the observers, who will check your name off the list. Then, the Labor Board person will give you a ballot, which you will take into the voting booth and mark. Make an "X" in one of the boxes; do not sign your ballot or make any identifying marks on it. Then fold the ballot, come out of the voting booth, put the ballot in the ballot box and leave. That's all you have to do. The ballots will be counted just after 3:30, and we should all know the results at that time.
>
> Now, let's talk a little bit about what this election is all about. It seems that Progressive Supermarkets is in the vanguard of the Union's organizational efforts among office employees. What is happening is that Local 1262 has decided that it wants to expand its membership to include, not just employees in the stores, but also office employees. What it has done is to send out letters to its stewards in the stores, asking the stewards to help "talk up" the Union among the office employees of the companies that they work for. I have here a copy of just such a letter [At this point, hold up a copy of the Union's "Stewards Newsletter"]. Enclosed with this letter was this leaflet [At this point, hold up a copy of the leaflet], which is what the Union has been distributing to office employees. I don't know whether any

of you have gotten one of these leaflets, but if you haven't, this is what it looks like.

It's really sort of funny, and somewhat hypocritical, for Local 1262 to be telling office workers like yourselves that it has the "strength, unity and bargaining experience" to enable it to succeed as the bargaining agent for office workers where others have failed. Why have others failed? Well, the Office and Professional Employees union failed in New Jersey among office workers because Local 1262 broke that union. You don't have to believe me; I have copies of a 1970 newspaper article all about the strike that occurred at Local 1262's headquarters. Here are copies of that article [At this point, distribute copies of the Star-Ledger article]. This article tells how the strike began in August, 1970, but it doesn't tell how the strike ended. The strike ended in October, 1970 with the office workers union giving up and offering to have the employees abandon the strike and return to work. However, Local 1262, which knows how to do things like this, had permanently replaced all the strikers. As a result, not all of the strikers got their jobs back; most of them were permanently replaced and had to wait a long time to get back to work.

What was the strike over? Well, the article says the office workers wanted more money and the Union wasn't about to give it to them, because Local 1262 felt that it was paying its employees a fair wage. The last couple of paragraphs of the article sum it up pretty well [At this point, read the last two paragraphs of the Star-Ledger article].

Now, we're in pretty much the same position that Local 1262 was in back in 1970. We think that we are treating our office employees just as fairly and just as well as we possibly can. Your fringe benefits are every bit as good as what the store employees have, and in some instances your fringes are even better. As far as your salaries are concerned, those salary rates are competitive with what other employers pay office employees in this area. I'm not going to kid any of you into saying that your salary rates are as good as the salaries for 40 hours for store employees. But your rates are a lot better than the union rates for non-food employees in the stores, and your pension is a lot better than the non-food pension that Local 1262 has for its non-food and store employees.

What I am saying to you is that Local 1262 itself recognizes that there is a distinction between food employees and non-food employees in the stores, and we agree. That distinction is equally true between store employees and office employees. Working in an office is a lot more pleasant than working in a store. In a store, employees stand on their feet, have to load and unload merchandise, have to stand at cash registers, have to work nights and weekends, and generally have a far less pleasant job life than you here in the office. That distinction in job requirements reflects itself in the rate of pay. Office employees generally earn less than blue collar store employees. I'm not looking down my nose at those store employees, by any stretch of the imagination. And if any of you are really interested in doing store work, I would certainly do my very best to accommodate any of you who would like to go out into a store. I'm sure, however, that there aren't many of you who would like to do that.

It's just a bit unfair for you to expect that you are going to get all the benefits of the store employees when you have none of the burdens of those employees.

If the union is telling you that it will get you store pay in the office, it is really misrepresenting the facts. There's no way in the world that we can afford to pay store rates in the office, and there is no way in the world that we would pay store rates in the office.

As it has been explained to you before, if the union were to get in here, all we would have to do is to sit down and negotiate in good faith with the union. We would be under no obligation to agree to any union demand; all we would have to do would be to negotiate in good faith. If we could not reach agreement—if we refused to make any concessions—like Local 1262 did in 1970, the same thing that happened there could happen here. The union would be free to call you out on strike, and we would be free to permanently replace any employee who went out on strike. Ask the union how that is done; they really know.

I don't want to spend a lot of time reviewing your fringe benefits, except to say that your fringe benefits are every bit as good as the benefits the store emoloyees get, and in some cases they are even better. For example, you start getting two weeks vacation after one year of service, while in the stores employees have to work two years before they get two weeks of vacation pay. In the stores employees get ten days of sick leave; you get 12 days. Your medical insurance program, which includes dental and optical insurance, is better than the plan that the union has. And your pension plan is every bit as good as the store employees pension plan.

I'd like to talk about that pension plan for just a minute. Local 1262 has two pension plans, one for food employees and one for non-food employees. The food employees pension plan provides $14.00 to $16.00 a month of pension for each year of credited service. The non-food employees pension plan provides $5.50 a month of pension for each year of credited service. That's one third as much as the food employees get. Remember, as far as the union is concerned, you are non-food employees. It could be that if the union were to get in here, and it tried to get a non-food contract for you, you might lose some of the benefits you now enjoy. I don't know that that would happen, but I can tell you that it's a real possibility.

You don't need a union here to get the very best this Company has to offer. You don't have to pay $12.00 or $14.00 a month in union dues in order to

> work here or in order to keep your jobs here. You don't have to pay dues to a union in order to get the very best this Company has to offer.
>
> I hope that none of you will be fooled into making yourselves parties to the union's grandiose schemes to increase its membership. We have always treated you fairly, and we hope to be able to deal directly with you in the future and to continue to solve our problems together, without the intervention of outside parties that could bring strikes and unpleasantness here.
>
> Now, if any of you have any questions, I'll be glad to answer them for you.
>
> There's one other thing I want to mention before we end this meeting. Last week, we replaced two of the employees here. We replaced Mary Salink because we needed someone full-time for her job, and we hired someone. We also replaced Diane Medaska, who had resigned in December and had given us notice that she would be leaving the end of January. We had been looking for a replacement for Diane and we found one who could start this past Monday. So we called Diane in last Friday and told her that we were accepting her resignation as of that day. But because she had given us plenty of notice; we paid her through the end of the month. In other words, we gave her 3 weeks paid vacation. So Diane certainly wasn't hurt by what did.
>
> It's true that she told us last Friday that she was thinking of staying beyond the end of the month, but unfortunately she didn't tell us that until after we had hired a replacement for her, and there simply wasn't anything we could do now.
>
> I should tell you that the union is trying to make an issue out of this. It has gone to the Labor Board and has filed an unfair labor practice charge alleging that we replaced Mary and Diane because of their union activities. That's an outright lie, and the union knows it. But they're trying to use this as a campaign tactic. We don't plan to let them get away with it, and I hope that none of you will be fooled by this union trick.
>
> Well, that's about all I have to say. I hope that you'll vote NO tomorrow and keep this a good place to work. Now, if any of you have a question, I'll be glad to answer it for you.

Evers testified that Gold told the employees that the salaries they received were fair and comparable for office work in the area and that even though it was less than Respondent paid its store employees, the work they perform was different; he also informed them of the strike by the Union's employees. Evers also testified that Gold said that if the Union won the election "we'd have to renegotiate everything. That we'd have to start from ground zero and renegotiate all our benefits . . . That he was the one who paid us our salaries and gave us our benefits and we would have to renegotiate everything." According to Ever's testimony, Gold also said "that we may have a time clock if we got the union in."

Plant testified that Gold had some papers with him, and he referred to these papers and read a few lines from them and elaborated on what he read; he told the employees of the strike by the Union's employees; that at the conclusion of the strike only a few of the striking employees were rehired and he passed out copies of newspaper articles about the strike. He then said that the election would be by secret ballot and to consider Respondent and vote no. He also told the employees that they were receiving good salaries and benefits which were comparable in the area. Plant further testified that Gold said that all a union wins in an election is the right to sit down and negotiate with a company; that you do not necessarily start from where benefits are, but that the Union would have to start from scratch, from ground zero to negotiate for the benefits the employees then had, that all the benefits were negotiable. Gold then mentioned dental benefits and "he said that if we were having work done on our teeth, we would have to pay for it ourselves, because that benefit would be frozen until the Union renegotiated for it." He also stated that if the employees went on strike they could be replaced. Plant also testified that Gold said that members of the Union that worked in the store had a timeclock which the office employees did not have, and if the Union won the election that could be put into effect.

Piper testified that Gold said basically the same thing that he said in his first speech; he began this speech by discussing the mechanics of the election and that it would be a secret-ballot election; that at one time the Union's employees went on strike and some of them had been permanently replaced. He then spoke about their benefits, that Respondent's contract with the Union differentiated between food and non-food employees, that there was a distinction between the work that store employees perform as compared to non-store employees and Respondent could not afford to pay its office employees the same as it paid its store employees. According to Piper's testimony, Gold also spoke about Respondent's obligation to bargain in good faith with the Union if it won the election, the permanent replacement of strikers, the Union's dues that the employees would have to pay, that Respondent had always treated them fairly and they did not need a union to bring strikes and unpleasantness to the office. Piper also testified that Gold informed the employees "that the stores have a time clock, and if we wanted to punch in, and punch out, then they could install a time clock if that's what it came down to," although he did not connect the installation of the timeclock with the Union winning the election.[8] Gold ended his speech by saying that Respondent had let Medaska go because she had given notice of her resignation, that they had obtained somebody to replace her and they had paid her through the time she had given notice for, and they felt they had treated her fairly.

Gerard testified that Gold referred to, but did not read directly from the notes he had with him. He began by explaining the secret-ballot procedure for the Board election the next day. He then spoke about the Union and the strike in 1970 that Respondent's employees engaged in and that most of those striking employees did not get their jobs back immediately after the strike. He said that the employees salaries were comparable to that of other office employees in the area and their fringe benefits were as good, or better, than those of the store employees; he told the employees of the differences between food and nonfood work and wages, and that the Union, in its contract, recognized the difference. Gerard also testified that Gold said that if the Union won the election Respondent would have to sit down and negotiate in good faith with the Union, but that any benefits they had would be frozen. "They would start from ground zero to be renegotiated for. And if, for example, we had any dental benefits, they—the amount incurred would have to be paid for on our own, as they would be frozen . . . that benefits would start from ground zero . . . if the union got in." Gold also said that the wages would be frozen until the matter was settled. As regards the use of a timeclock, Gerard testified as follows regarding Gold's speech: ". . . was going over the fact that the people in the stores do have to punch and that we did not have to and that it could be arranged, and that we shouldn't vote for the union because—so that the office would remain on friendly and personal manner. He felt that the Union coming in would change . . . I recall him saying that we did not have a time clock now, but that could be arranged—that we could have one should the union prevail."

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[8] On direct examination, however, Piper testified that Gold said, "there was no time clock now, but there was the possibility that if the Union came in there would be one installed." In answer to a question from me, she testified that Gold said that as the stores had a timeclock, there was a possibility that they could have one installed.

> Q. Isn't it true that when he talked about a time clock, he talked about it coming in, or that it could come in, in connection with negotiations with the Union.
>
> A. No.
>
> Q. He did not. It was totally apart from negotiations with the Union.
>
> A. Yes.
>
> Q. But if the Union won the election.
>
> A. Yes.

In answer to a question from me as to what Gold said regarding the circumstances under which a timeclock would be installed, she testified:

> A. Well we, right then, did not have to punch a time clock. And that we should consider the people that work in the stores do, and he said that that could be arranged for us.
>
> JUDGE BIBLOWITZ: Did he say under what circumstances?
>
> A. No. He just said that that could be arranged.

Gerard also testified that Gold said that they were the first office employees the Union was attempting to represent and he did not want to be first, and that they did not need a union and the payment of union dues to get the best Respondent had to offer. He ended by saying that they had replaced Medaska because she had resigned and they needed someone to replace her, that they had paid her through the end of January so she was not hurt by their actions.

Rinaldo, Packard, and Shaily, on direct examination in answers to questions from counsel for Respondent, and in cross-examination, referred to this speech and the earlier speech together. Therefore, for a discussion of their testimony see *supra*, re the January 4 speech.

Edwards testified that Gold began the meeting by discussing the mechanics of the Board election to be conducted the following day. He told the employees of their excellent fringe benefits and the difference between store and nonstore employees and, regardless of what the Union was telling them, they should not expect the same rate of pay as the store employees receive because the office employees do not have to deal with the public. She testified that Gold said that if the Union won the election, Respondent would have to sit down with the Union and try to come to an agreement, and if they could not reach an agreement, the employees could strike, but there was no guarantee that their jobs would be available when they came back because they could be permanently replaced. Gold then spoke about the fringe benefits the office employees were receiving and he said that if the Union won[9] the election "that they could be frozen; that we'd have to start from ground zero as far as negotiations go." He also said, "at this point you're not punching in the time clock but you could be in the future." She also testified that Gold said that he knew that the employees were due for raises, but that they would be frozen until after the election. Gold ended the speech by saying that all the employees knew that Medaska was getting married and he felt that Respondent gave her a fair shake by asking her to leave at that time and that her replacement would be in on Monday.

For the discussion of what Gold testified he said, and did not say, in this speech, see the discussion, *supra*, re the January 4 speech.

Credibility Determination

In determining what was said by Cimini and Gold in these three speeches, it has been necessary to carefully scrutinize the testimony of all the witnesses to, and participants in, these speeches. After doing so, I have determined that the most credible witnesses in this regard were Piper and Gerard; their testimony was the most direct, they were the least evasive on cross-examination and had the least amount of contradictory testimony. I would therefore find that in his speech, Cimini did say, *inter alia*, that Respondent would do whatever it had to do in order to keep the Union out.

As regards Gold's first speech, I would find that he said, *inter alia*, that if the Union won the election, he would have to negotiate with the Union; everything was negotiable and that he would be tough; that in negotiations the employees would start from ground zero and everything would have to be renegotiated. There was a possibility that the Union would call a strike and Respondent could hire strike replacements and, if that occurred, the strikers might not get their jobs back immediately, but might have to wait until a vacancy occurred. I would also find that Gold said that anyone who had incurred bills using their dental plan would have to pay these bills on their own because these benefits would be frozen.

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[9] Edwards testified that Gold, in both speeches, used the expression "ground zero," but did not use the expression "start from scratch."

As regards Gold's second speech, I would find that Gold said, *inter alia*, that if the Union won the election, Respondent would have to negotiate in good faith with the the Union, but that any benefits they had would be frozen, that they would start from ground zero to be renegotiated for; that if the employees incurred any expenses for dental benefits they also would be frozen and would have to pay for it themselves. I would also find that Gold said, *inter alia*, that the employees' wages would be frozen until the matter was settled, that the employees in the stores punch a timeclock and there was a possibility that if the Union won the election they could have one installed, and that he also spoke about possible strike replacements as he had in his earlier speech.

VIII. INDIVIDUAL MEETINGS WITH EMPLOYEES

Gold conducted a number of individual meetings with employees; with Evers on January 4, and with a number of other employees on January 9 and 10.

Evers testified that after Gold's first speech he asked her to have a cup of coffee with him in the back room. The two of them went into the room and Gold said, "Tell me now, what's going on? What's happened? Why did you go to the union?" Evers told Gold that she did not start it, that it was a group effort of the employees who were dissatisfied with their working conditions. Gold asked why they did not go to Cimini, and Evers said that the employees will not go to Cimini because they had tried in the past and gotten nowhere. Gold asked her what the problem was, and she said that they were not concerned with their benefits, but they were dissatisfied with their salaries, the demands that they work overtime, and the days they had to stay in the office during their lunch hour to answer the telephone. Gold mentioned that Evers had worked for Respondent for a long time and asked: "Why can't you help me with the girls?" (Although he did not explain what he meant.) Gold then said that it did not seem like a big problem to him, to go to the Union, that they could easily be taken care of and "maybe we can have a meeting once a month and discuss the problems of the office."

Plant testified that about a half hour after Gold's second speech Cimini asked her to see Gold in the new office across the hall, which she did. At this meeting, attended only by her and Gold, he told her how good Respondent's benefits were and that she should consider Respondent when she voted the following day; that she should not be fooled into believing that if the Union won the election they would start from where they were and go one step better; they would have to start from scratch, ground zero and renegotiate each one of the benefits they had. Gold then asked her why she thought the Union had gotten involved in Respondent's office and Plant answered that the employees were unhappy because the increased amount of work had required the employees to work overtime. Plant testified that on the following day, prior to the election, Cimini again asked her to see Gold in the office across the hall. Again, the two were alone and Gold said that the reason he called her back was that he had forgotten to mention the day before that nobody should worry about losing their jobs because of the union matter. Plant then asked Gold to explain what he meant by her benefits being frozen, which, she said, meant to her that she was losing them. Gold's answer was that yes, she could say that she would be losing them; they would have to renegotiate for those benefits—some you may get back and some you may not.

Following Gold's first speech, Piper was called into a private meeting with Gold. Piper testified that Gold asked her if she had thought about what was taking place and if she had made up her mind, she answered that she had been thinking about it, but not anything definite. Gold then asked her if she would be afraid to discuss any problems she had with Cimini and she said that she would not. The following day, prior to the election, Piper was again called into a private meeting with Gold in the new office space across the hall. Gold asked her if she made up her mind as to how she was going to vote; he told her that he did not want her to tell him, he just wanted to know if she had decided. Piper told Gold that she had not decided; that she would weigh both sides and do what was right for herself. She also told Gold that she and a lot of the other girls were afraid of losing their jobs whether or not the Union came in, and Gold told her that everyone's job was secure, that they had nothing to worry about. Gold then said that after the election there might be some unpleasantness in the office because one party would be unhappy that it lost the election, but that would pass. Gold also told Piper that the election would be close, but he felt Respondent would win.

Shortly after Gold's second speech, Cimini asked Gerard to go into a private meeting with Gold in the new office across the hall. He spoke about the employees' benefits and asked if she had been harassed or pushed into making a decision about the Union and she said she had not. Gold then informed her that their benefits would start from ground zero and would have to be negotiated for; he also informed her that if the Union lost the election he would try to hold meetings once a month to go over the problems the employees were having and see if he could work something out. The next morning Gerard was again called into a private meeting with Gold in the new office across the hall. He reminded her that she was still employed on a trial period and he hoped that she would still be there when the trial period was over; he discussed the employees' benefits, said that the employees did not need the Union, and that he hoped that she would consider Respondent when she voted, so that the office would remain in a friendly and personal manner.

Gold testified that after his second speech he met individually with most of the employees; he told them that he thought Respondent had been treating them fairly and he hoped they would give Respondent consideration in the matter. He testified that he never asked the employees what their problems were, nor did he ask any employee how she was going to vote in the election.

As regards the above conversations, where there are conflicts I would credit the employees' testimony over that of Gold. As will be discussed further, *infra*, I do not find Gold to be a credible witness. His testimony is contradictary, in places, and he was extremely evasive during examination by the General Counsel. The employees, on the other hand, generally, testified in a direct and straightforward manner on both direct and on cross-examination. Although I may not have fully credited their testimony in other situations, *supra*, I would credit their testimony herein over Gold's denials.

IX. SPLIT LUNCHES AND NEW LOUNGE

Until January, Respondent had a system by which all employees, except one, would have their lunch hour from 12 to 1 p.m.; the employee who did not get her lunch hour would spend that hour answering all telephone calls to Respondent's office. The employees alternated on this "telephone day" so that each employee performed this task about once every 2 weeks, and they were not paid for this time spent in the office; not surprisingly, the employees were not happy with this procedure. In early 1979, an employee named Cindy Pisani asked Cimini if he could institute a split lunch program so that half the employees would take their lunch between 12 and 1 p.m. and the other half between 1 and 2 p.m., thereby obviating the necessity of having one employee remaining, on her own time, to answer the phone. Cimini informed her that he had previously tried split lunches, but that it did not work out well because some of the employees ate lunch at their desks and spoke among themselves and the noise made it difficult for the other employees to work at their desk at the same time.

Shortly thereafter, Cimini discussed with the landlord of Respondent's office location the possibility of Respondent obtaining additional space in the building, but nothing was available at the time. About September 1979, a room across the hall from Respondent's office became available and Respondent entered into an oral agreement with the landlord to rent this office.[10] Cimini testified that, about that time, he made an announcement to all the office employees that Respondent had obtained this new office space and that either it would be used as a lounge for the employees, or desks and machinery would be put in the new office space and an employee lounge would be set up in the original office. The employees had their Christmas party in this new office (albeit without any new furniture) and the election was conducted in this new office.

In late January, after the election, the employees' lounge was set up with the coffee machine from the old machine-break room, couches, table, and chairs (together with some office machines in the rear of the room separated by a divider) in the new office space across the hall, and the employees began using it at that time; at the same time, Respondent instituted the split lunch program, thereby obviating the need for the unpopular telephone day. The General Counsel, although conceding that the acquisition of the new office space preceded the advent of the attempted organization of Respondent's employees by the Union, alleges that Respondent did not definitely determine that this space was to be used as a lounge for the employees until after the Union's appearance, and was therefore a granting of a benefit to the employees to induce them to withdraw their support from the Union. It is therefore necessary to examine the testimony of the employees as to what they were told regarding the lounge.

Evers testified that Cimini informed her about Respondent's acquisition of this office space prior to the petition having been filed in this matter, but that he had not decided what would be done with the space—an employee lounge was mentioned to her as one of the possible uses of the space about a month prior to the election. Branca testified that although she knew that Respondent had acquired this space prior to the advent of the Union at Respondent's office, it was not until after the election that Respondent decided to use this space as a lounge for its employees. In December, however, Cimini told her that there would be a lounge for the employees and that it would be taken care of when the auditors left Respondent's premises at the end of January. Plant testified that she first learned that Respondent had acquired the new office space in early fall of 1979, but that the alternative that Cimini listed for the use of this space was to make it into a file room, installing the computer there, or transferring accounts payable or payroll to the new room; Plant does not recall Cimini saying anything about a lounge being there until January.

Piper testified that she was informed of Respondent's acquisition of the space prior to November, but cannot recall any discussions by Gold or Cimini regarding the uses of this room. Rinaldo testified at some length on this subject, but her testimony came down to this:

> Q. Prior to November 16, had Mr. Cimini said there would be a lounge somewhere with tables and chairs?
>
> A. Yes.
>
> Q. And he wasn't sure whether it was going to be across the hall or in the old room or where?
>
> A. Right.

Packard testified that about September 1979 she was informed that Respondent had acquired the additional office space and that either an employee lounge would be set up there or the machine-break room would be altered, expanded, and converted to a lounge for the employees. Shally testified that about a week prior to November 14 Cimini informed her that as soon as the auditors (who were there at the time) left Respondent's premises Respondent would fix up the new office as a lounge for the employees.

As stated above, the parties stipulated that Respondent acquired the additional office space prior to the Union's attempt to organize Respondent's employees. On the basis of the above testimony, I would find that also prior to the Union's appearance Respondent informed its employees that it would set up a lounge for them (without specifying what furniture would be in the lounge) either in the newly acquired space or in the old machine-break room, which would be expanded for the purpose.

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[10] The parties stipulated that this space was acquired by Respondent long before the Union's appearance in November.

X. THE WAGE INCREASES

The record establishes that Respondent has generally granted wage increases to its employees in January. The election herein was conducted on January 10. In February, Respondent announced and granted to all its employees a $20-a-week wage increase retroactive to January 14. The General Counsel alleges two violations in this regard: one for withholding its annual increase from January to February, and the other[11] for granting an increase in an amount significantly greater than those granted in the past, all, allegedly, to discourage support of the Union.

Respondent prepared a summary of the wage increases which were granted to its employees since 1975 (G.C. Exh. 11). Of the 11 employees listed as being employed in 1975, 1, who began her employment in April received a $5 increase in that year, 4 received $10 increases, 1 received a $15 increase, and 5 received $20 wage increases. In 1976, three employees received $10 increases, four received $15 increases, two received $20 increases, and two received $25 increases. All of the above wage increases were granted to the employees either in January or 3 months after they began their employment with Respondent. In 1977, the following wage increases were granted, together with the month in which they were granted: $15 and $20 in April and December; $10 in June; $5 and $20 in May and December; $25 in July; $15 in April; $10 and $5 in April and July; $10 and $20 in April and July; and $10 and $5 in April and July. The wage increases in 1978 were: $20 in July; $20 in January; $20 in July; $15 and $10 in January and July; $15 and $10 in January and September; $10, $10, and $10 in January, April, and July; in January and July; $10 in January; and $20 in January. In 1979, the wage increases were generally granted in January and July; Shally received $15 and $20; Evers, $10 and $15; Rosemary Scalfani, $15 and $20; Rinaldo, $10 and $15; Plant, $10 and $20; Packard, $15 and $20; Piper, $10 and $25; and Medaska, $10 and $15 (Piper's and Medaska's increases were granted in March and July, presumably because they commenced their employment with Respondent in November and December 1978, respectively). Edwards, who began her employ in May 1979, received $15, presumably 3 months later.

Respondent's position is that the wage increases were not granted in January because that was when the election was conducted and their attorney informed them not to grant wage increases at that time because it might be considered as a bribe to the employees. By February, however, some of the employees had become "edgy" about the absence of the wage increase.[12] At this time, the Regional Office of the Labor Board was investigating the Union's unfair labor practice charge and objections in this matter. According to counsel for Respondent (and stipulated to by the General Counsel), he met with the Regional Office representative on two occasions regarding the investigation of this charge and the objections—the first time at the end of January, when Cimini was questioned, and again on February 8 when both Cimini and Gold were questioned. As stated by counsel for Respondent: ". . . it became readily apparent to me that this matter was going to go to a hearing, because there were serious credibility issues. I also know, which is common knowledge, of the backlog with the Administrative Law Judges, and its going to take a few months to get a hearing."

On the basis of that, counsel for Respondent instructed Respondent to grant the increases and make them retroactive to January, and on February 18 he wrote to counsel for the Union, informing him of the increases and the reason, as stated above.

Respondent explains that the increase was retroactive to January because that is when the employees would have received the increase, if not for this pending matter, and that everybody was given the same increase because Respondent did not have an opportunity to review the employees' performance and grant a corresponding merit increase, as they had done in the past.

XI. THE MEDASKA TERMINATION

Medaska began her employ with Respondent in November 1978; she was admittedly a good employee. About the beginning of December, Medaska informed Cimini that she would be leaving Respondent's employ at the end of January when she was to get married and move to Florida. About mid-December, Medaska told a number of the employees, including Supervisor Branca, that there was a possibility that she would not be getting married and would be remaining at her job, but that she was not sure and would not know for sure until she returned from vacation, at which time she would inform Branca one way or the other.[13] While Medaska was on her vacation, Cimini informed Branca that he was looking for someone to replace Medaska and Branca told him that before she left for her vacation Medaska was unsure of what she would do and there was a possibility that she would be coming back. (Cimini admits that Branca told him this and testified that he told Branca to inform Medaska to speak to him because he was looking for her replacement.) Cimini said that as far as he was concerned Medaska had told him that she was not coming back, and he had to plan for the future and look for another employee.

Medaska returned from her vacation on Wednesday, January 2. Although Medaska had made up her mind to remain in Respondent's employ, she was nervous about informing Cimini of her decision and did not attempt to speak to him until late in the afternoon of Friday, January 4, although Branca told her that she had told Cimini that she was unsure about leaving and encouraged Medaska to speak to Cimini. At that time, Medaska informed Cimini of her decision to stay and Cimini told her that it was too late because he had already located another employee who was capable of performing the work and did not want to let the opportunity pass. Cimini then took out of his desk a prepared check for Medaska's salary through January 28 (she had earlier that day received her regular paycheck for the week). Medaska said that she could not believe that he was going to let her leave since she wished to continue working, and that it was quite a coincidence that he was letting her go 1 week before the election. Cimini said that it had nothing to do with it, Medaska told him that Branca had informed him that she would not be leaving, and Cimini said that he knew nothing about it and would continue with his previous plans.

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[11] Pursuant to an amendment of the complaint at the hearing.

[12] In fact, Evers testified that in her discussion with Gold on January 4, she informed him that she was disturbed that she had not gotten a raise.

[13] Medaska testified that before she left for her vacation during the Christmas to New Year's week she definitely decided that she would remain in Respondent's employ and informed Branca of this decision. Branca testified, however, that Medaska did not inform her that her marriage plans were off and that she would definitely remain in Respondent's employ until after she returned from her vacation. Although not crucial to the issue, I would credit Branca in this regard, as her memory appears superior to that of Medaska.

Before leaving the office, Medaska met Respondent's president, Margolis, who asked if she were alright, she said that she was, and he asked if he could do anything for her. Medaska answered no, since the new employee had already been hired. Margolis then said that she should understand the position of Respondent, that they were set up; Medaska asked him what he meant and he said that the employees do not understand how much Respondent pays for their benefits. Medaska then informed Margolis that the employees were not upset about the benefits, but about their wages and Cimini.

Medaska left this meeting and began clearing out her desk; Evers noticed that she was crying, asked her what was wrong and Medaska said that Respondent had paid her off until the end of the month and it was her last day. As Evers was leaving the office, she met Gold and asked to speak to him. They went to Gold's office and were joined by Cimini and Margolis. Evers' uncontradicted testimony is that she asked why they let Medaska go when she wanted to stay and Cimini knew it. Gold said that she had told them that she would leave at the end of the month and he paid her for that period; he asked what she would do and Evers said she would have kept her. Gold said that he had already hired somebody else. Evers answered, "but isn't it sensible to keep her? She was a good employee, she was a very likeable girl, we liked her very much and it will cost money to hire somebody else and train them." Gold then said, "Well, I have to do everything I can to save my company" and Evers said, "What you're saying then, is that you are doing it for the vote" and Gold said, "do you blame me?" Evers then said, "Well, you do what you have to do." They then began discussing the benefits Respondent was giving its employees and the meeting ended.

Respondent's position regarding the termination of Medaska on January 4 is as follows: when she gave Cimini the notice in early December that she would be leaving Respondent's employ at the end of January they began to look for a replacement for her. Because it was the holiday season they could not locate a replacement. Sometime during the week after Christmas (when Branca informed Cimini that Medaska was "up in the air" about leaving) Gold contacted Joe Greenblatt, a man he knew, who was the controller of Consolidated Supermarkets, herein called Consolidated, and asked him if he could recommend any employee whom Gold could hire to replace Medaska. Greenblatt told him that he had employee Karen Gordon who performed the same type of work as Medaska. Cimini went to Consolidated's office, interviewed Gordon, and hired her to begin on January 7. Gordon remained in Respondent's employ for about 2-1/2 weeks, left without any explanation to Respondent, and returned to her former position at Consolidated. While employed at Respondent, Gordon was paid $175 a week.

Consolidated's payroll records establish that just prior to Gordon's brief employment at Progressive she was paid $5 an hour by Consolidated. Gordon testified, and Consolidated's payroll records further establish that, during her brief employment at Respondent, in the evenings she voluntarily returned to Consolidated's office to perform some of her regular work there; for the week ending January 12 she worked 5 hours at regular time and 17.25 hours of overtime at Consolidated; for the weeks ending January 19 and January 26 these figures were, respectively, 5 and 18.75, and 19 and 15.50.

Gordon testified that just prior to the events in question she had been employed by Consolidated for 2-1/2 years. Shortly before she was interviewed by Cimini, Greenblatt called her into his office and told her that Progressive was short-handed and needed someone in the office and would she help out until they found someone else. Greenblatt told her what work she would be performing at Respondent, but she was not sure whether he informed her of the wages she would be receiving or any other benefits. When asked on direct examination if she were given any choice about going to Respondent, Gordon answered: "I was asked to go. I don't question what my boss asks me to do. If he asks me to go, I go."

> Q. Did you apply for a job at Progressive?
>
> A. No.
>
> Q. Did you interview for the job in anyway, like you would for any other job you might apply?
>
> A. No.
>
> Q. What did Mr. Cimini say to you?
>
> A. He asked if I was qualified, if I knew the work.
>
> Q. And what did you tell him?
>
> A. Yes.

Gordon later testified that she did not believe Cimini asked her anything else during this interview, nor did anybody ask her if she would be available for employment at Respondent at the end of January, rather than the beginning of January; Cimini admits this.

After approximately 2-1/2 weeks' employment at Respondent, Gordon called in sick at Respondent because it was too long a trip from her home; she lived approximately 5 minutes' distance from Consolidated, and approximately 45 minutes from Respondent, and Cimini was aware of this. She then called Greenblatt and told him that she could not travel anymore. Greenblatt told her that he would find out about it and called her back and told Gordon that she could continue her work at Consolidated.[14]

On cross-examination, Cimini testified as follows regarding Gordon's sick leave absence from Respondent:

> Q. . . . did you attempt to reach Karen Gordon to find out what the problem was?
>
> A. No, I did not.
>
> Q. You had her home phone number, didn't you?
>
> A. Right.
>
> Q. But you made no effort to contact her? She just didn't come to work for a few days. She called in sick one day, and yet you made—you just assumed that she didn't want to work there anymore, correct?
>
> A. Correct.

Cimini testified that during the period in which Gordon was employed by Respondent he continued to look for a replacement for Medaska. He also testified that he hired a new employee to replace Medaska and Gordon "right after Karen left." He also testified that the reason he did not rehire Medaska after Gordon left (or keep her in Respondent's employ on January 4) was because she was always changing her marriage plans and she therefore was not dependable enough, although he admitted that Medaska's notice of leaving in December was the only notice she had ever given Respondent.

Probably the most interesting question in regard to Medaska's termination is why, on January 4, when Cimini was informed by Medaska that she changed her plans and wished to remain in Respondent's employ, it did not cancel Gordon's employment or, at least cancel it until January 28, her original notice date, especially since they paid Medaska up until January 28. Cimini and Gold's answers were simply that they had a "commitment" to Gordon. Cimini, on cross-examination, was asked:

> Q. You're telling me, then, that you thought that because you had told Karen Gordon to start working the following Monday, that there was no way that you could change that. That was irreversible?
>
> A. No, it wasn't irreversible.

The corollary question is why, since Respondent paid both Medaska and Gordon for the last 3 weeks in January, it did not at least keep Medaska in its employ for that period. Respondent's answer to this was the lack of space at Respondent's premises; although the office was very busy at the time, there was no room for an additional employee. When it was pointed out to Gold that Respondent, at that time, had the new additional space across the hall, he testified that it was not proper for the purpose since new telephone lines would be needed if an employee were placed there.

I do not credit Gold and Cimini's version of Medaska's termination. I found Gold, and to a lesser degree Cimini, not to be credible witnesses. Gold's testimony was often contradictary, his answers to the General Counsel's questions were often evasive and hostile, and, generally, his testimony, and that of Cimini regarding Medaska's termination, was implausible; for example, why was Respondent in such a hurry to obtain a replacement for Medaska at the end of December after Branca had informed Cimini that Medaska was "up in the air" about leaving? Even if Medaska did leave, it would not be for another month, presumably when it would be easier to locate a replacement, being after the Christmas season; in addition, Medaska's replacement, Gordon, who had been employed by an acquaintance of Gold's, never applied for the job, but "was asked to go" to Respondent by her employer, Consolidated, had only a *pro forma* interview by Cimini, earned less at Respondent than she had been earning at Consolidated, continued to do substantial work in the evenings at Consolidated during the brief period of her employment at Respondent, had to travel 45 minutes to her employ at Respondent rather than the 5-minute commute to Consolidated (which Cimini was aware of), and was never asked if she would be available to begin working for Respondent at the end of January. Also especially revealing is the fact that after Gordon called in sick during the third week of her employ at Respondent, and never returned there without any explanation to Respondent, Cimini never attempted to contact her to find out if she would be returning, together with the fact that even during the brief period of Gordon's employ at Respondent Cimini continued to look for a permanent replacement for Medaska. Additionally, as Respondent's office was very busy at the time of Medaska's termination, it is difficult to understand why, even if it had a "commitment" to Gordon, Respondent could not place Medaska in the new office across the hall, with or without a telephone. (If Respondent was able to arrange an employee lounge shortly thereafter, it could certainly have arranged to have a telephone installed there a few weeks earlier for Medaska or Gordon). Also puzzling is why Respondent never contacted Medaska to return when Gordon left its employ after only 2-1/2 weeks. Finally, sealing this matter was Gold's answer to Evers—"do you blame me?"—when she asked him if he was terminating Medaska for her vote 6 days later? All of these factors lead to the inescapable conclusion that Respondent precipitously terminated Medaska to prevent her from voting in the upcoming election.[15]

XII. ANALYSIS

I have found that Gold, in his two speeches to the employees on January 4 and January 9, said *inter alia*, that if the Union won the election he would have to negotiate with the Union and that he would be tough; everything was negotiable and that in the negotiations employees would start from ground zero and everything would have to be renegotiated; any benefits they had would be frozen and that their wages would be frozen until the matter was settled. I would also credit Plant's testimony regarding her private meeting with Gold on January 10 where he informed her of what he meant by saying that the employees' benefits would be frozen, which, to her, meant that she was losing them; that yes, she could say that she would be losing them; that they would have to renegotiate for those benefits—some they may get back and some they may not.

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[14] One week after returning to Consolidated's employ, Gordon received a 7-1/2-percent wage increase.

[15] I make this finding being aware that there was no definite proof that Respondent was aware that Medaska was one of the prounion employees.

There have been numerous cases recently on the legality of statements such as Gold's "ground zero" statements herein. The question is whether, under Section 8(c) of the Act, they are lawful statements explaining to the employees the mechanics of bargaining or are unlawful threats of withdrawal of benefits should the employees choose the Union as their collective-bargaining representative. In *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977), the Board stated:

> "Bargaining from scratch"[16] is a dangerous phrase which carries within it the seed of a threat the employer will become punitively intransigent in the event the union wins the election. The Board has held that such "hard bargaining" statements may or may not be coercive, depending on the context in which they are uttered. Thus, where a bargaining-from-scratch statement can reasonably be read in context as a threat by the employer to unilaterally discontinue existing benefits prior to negotiations, or to adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees for choosing collective representation, the Board will find a violation. Where, on the other hand, the clearly articulated thrust of the bargaining-from-scratch statement is that the mere designation of a union will not automatically secure increases in wages and benefits, and that all such items are subject to bargaining, no violation will be found. A close question sometimes exists whether bargaining-from-scratch statements constitute a threat of economic reprisal or instead constitute an attempt to portray the possible pitfalls for employees of the collective-bargaining process. The presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks.

In *Plastronics, Inc.*, 233 NLRB 155 (1979), the Board stated that statements which indicate that collective bargaining "begins from scratch" or "starts at zero:"

> . . . are objectionable when, in context, they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore. On the other hand, such statements are not objectionable when additional communication to the employees dispels any implication that wages and/or benefits will be reduced during the course of bargaining and establishes that any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining.

Gold's statements to the employees herein regarding negotiations went beyond the permissible limits. Prior to these speeches Cimini, in his speech, informed the employees that Respondent would do whatever it had to do in order to keep the Union out. In addition to Gold's statements regarding negotiations starting from "ground zero" he informed the employees that if he had to negotiate with the Union, the employees' benefits would be frozen, and that their dental benefits would be frozen and they would have to pay for any dental expenses on their own. He also informed the employees that their wages would be frozen until the matter was settled. This, together with his above-mentioned statement to Plant and Respondent's numerous comments to the employees in its letters and speeches about strikes and strike replacements[17] and the other 8(a)(1) and (3) violations discussed and found, *infra*, convince me that Gold's references to negotiations beginning from "ground zero" were more than simply an explanation of the processes of collective bargaining; rather they were threats to take action detrimental to the employees should they choose to be represented by the Union, and thereby violated Section 8(a)(1) of the Act.[18] I would likewise find that Gold's statements regarding the employees' wages and benefits being frozen were unlawful threats within the meaning of Section 8(a)(1).

Additionally, I find that Gold's statements in his speeches that anyone who incurred bills using Respondent's dental plan would have to pay these bills on their own because these benefits would be frozen, and that there was a possibility that if the Union won the election a timeclock could be installed both violate Section 8(a)(1) of the Act. Both statements were made in the context that all benefits would have to be renegotiated, would be frozen, and would start at ground zero, if the Union won the election and Respondent had to negotiate with the Union. As stated in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969):

> If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. . . . [As] stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *NLRB* v. *River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967).

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[16] I consider "bargaining from scratch" and "start from ground zero" to be synonymous.

[17] I have found, *infra*, that Respondent's numerous references to strikes and strike replacements in its letters and speeches do not, in themselves constitute a violation of Sec. 8(a)(1) of the Act.

[18] *South Hills Health System*, 240 NLRB 69 (1979); *Buckeye Tempo Gamble-Skogmo, Inc.*, 240 NLRB 723 (1979); *TRW-United Greenfield Division*, 245 NLRB 1135 (1979).

That is the situation herein; it was the threat to take action solely on its own initiative should the employees choose the Union as their collective-bargaining representative in the upcoming election. It was not a prediction ". . . carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . ." *Gissel, supra*. Both statements therefore violate Section 8(a)(1) of the Act.

Although I have found, *supra*, that Gold's references to negotiations starting from "ground zero" violate Section 8(a)(1) of the Act, I would find that Respondent's statements about strikes and strike replacements in its letters and speeches do not violate Section 8(a)(1) of the Act. All Respondent's letters, except the last, and both of Gold's speeches clearly refer to Respondent's right to hire permanent replacements for employees who engage in a strike. But this is not a situation where Respondent informed its employees that it would not bargain with the Union or would never sign a contract with the Union. Gold informed the employees that if the Union won the election he would have to negotiate in good faith with the Union. Although he did say he would be tough, he said that he would negotiate.[19] Additionally, he never foreclosed the possibility of reaching an agreement with the Union; he referred to the *possibility* of the Union calling a strike.[20] Further, Respondent's reference to the fact that economic strikers can be permanently replaced is a correct description of the law. Although the speeches and letters repeated this message on numerous occasions during the preelection period, I would find that these statements are lawful under Section 8(c) of the Act and therefore do not violate Section 8(a)(1) of the Act.

As regards Gold's individual meetings with the employees, I would find his questioning of Evers—"tell me now, what's going on? What's happened? Why did you go to the Union?"—to be interrogation in violation of Section 8(a)(1) of the Act. There could have been no lawful purpose to the inquiry with the election only 6 days away, Evers was given no assurances against reprisals, there was, as is true with all interrogation of this sort, a lack of anonymity, and Respondent engaged in numerous other unfair labor practices during this period.[21]

I would also find that Gold by his statement to Evers on January 4, "maybe we can have a meeting once a month and discuss the problems of the office" impliedly promised to correct grievances in the future if the Union were defeated in the upcoming election, in violation of Section 8(a)(1) of the Act.

In *Uarco, Incorporated*, 216 NLRB 1 (1974), the Board stated:

> the solicitation of grievances at preelection meetings carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries. Thus, the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary. However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

In *Uarco, supra*, the Board found no violation because the employer rebutted the inference by repeatedly informing the employees that it could make no promises regarding the grievances raised.[22] Additionally, the Board found the record devoid of any showing of union animus or concurrent unfair labor practices on the part of the employer.

In *Merle Lindsey Chevrolet, Inc.*, 231 NLRB 478 (1977), the employer, a few days after the Union began its organization drive, informed his employees that he "wanted to find out what kind of problems they were having" and that he "would talk to them concerning such problems." The Board, quoting the above-mentioned language from *Uarco, supra*, found a violation of Section 8(a)(1), stating: "In the instant case, there is no evidence that Respondent made any statement or took any action to establish that it was not promising to remedy grievances and we therefore find that Respondent did not meet its burden of rebutting the inference."

In the situation herein, Gold asked Evers what the problems were, and after she informed him of them he said that it did not seem like a big problem and that they could easily be taken care of; he then suggested the monthly meetings to discuss the office problems (without making any "no promises" statement.) This was clearly an implied promise to correct the employees' grievances in the future in exchange for the defeat of the Union, a violation of Section 8(a)(1) of the Act.

As regards Gold's individual meetings with Plant, I would find that his statements to her regarding benefits starting from ground zero and being renegotiated if the Union won the election, together with his statement that she would be losing some benefits—some she may get back and some she may not—violate Section 8(a)(1) of the Act for the reasons stated, *supra*. During the individual meeting with Plant on January 9, Gold also asked her why she thought the Union had gotten involved in Respondent's office. Although this interrogation did not directly question Plant's union sympathies, I would find that it violated Section 8(a)(1) of the Act as the question served no valid purpose with the election only 1 day away and took place in the context of other unlawful statements made by Gold to Plant.[23]

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[19] *The Tappan Company*, 228 NLRB 1389 (1977).

[20] *Richard Tischler, et al. d/b/a Devon Gables Nursing Home*, 237 NLRB 775 (1978).

[21] *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967); *Solboro Knitting Mills, Inc.*, 227 NLRB 738 (1977), enfd. as modified 572 F.2d 936 (2d Cir. 1978); *Bourne Co.* v. *N.L.R.B.*, 332 F.2d 47 (2d Cir. 1964).

[22] See also *Tiffin Division of Hayes-Albion Corporation*, 237 NLRB 20 (1978), where the Board found no violation in the employer's soliciting grievances and questions at meetings with employees, since the employer took a no "promises" position at these meetings.

I find that Gold's statements to Piper came within the protection of Section 8(c) of the Act.

Gold's statement to Gerard on January 9 regarding benefits starting from ground zero is a violation of Section 8(a)(1) for the reasons stated, *supra*. In addition, his statement to Gerard that if the Union lost the election he would try to hold meetings once a month to go over the problems the employees were having and see if he could work something out is an implied promise to correct the employees' grievances in the future if the Union lost the election, in violation of Section 8(a)(1) of the Act, *Uarco, supra*. On the next morning (the day of the election) Gerard was again called in to speak to Gold and he reminded her that she was still employed in her trial period and he hoped that she would still be there when the trial period was over. It requires no case citation to find (as I do) that an employer violates Section 8(a)(1) of the Act when he makes such a statement which could have no other purpose than to serve as a threat to the employee.

I find that the General Counsel has not sustained his burden of establishing that Respondent instituted the split lunch program and established the lounge for the employees in the new office in answer to the Union's organizational drive. Although I did not credit Cimini's testimony regarding Medaska's termination, I would credit his testimony regarding the split lunch program and the new lounge; his testimony on these matters was clear and concise, believable, and generally supported by the testimony of other witnesses. It appeared to me that, on this subject, Cimini, knowing that he was testifying truthfully, was open and direct in his testimony.

It is reasonable to assume that a change in Respondent's "telephone day" system required a separate lounge where the other employees could have their lunch without disturbing the employees who were answering the telephones. The evidence herein establishes that prior to September Respondent had no such place available to it, although Respondent had been receiving numerous complaints from its employees regarding "telephone day." The parties stipulated that Respondent acquired new office space across the hall from its existing office long before the Union's appearance in November. The testimony also establishes that prior to the Union's appearance in November Cimini informed the employees that Respondent had acquired this space and that Respondent would establish a lounge for the employees either in the new office space or that desks and machinery would be placed in the new office space and an expanded lounge would be established in the existing office space. As Respondent had therefore decided to create a lounge for its employees prior to the appearance of the Union, I find it unnecessary to make a determination as to when Respondent made its final decision as to which location the lounge would be at; either way the employees would have a new expanded lounge (and correspondingly a split lunch system) and this was decided prior to the Union's appearance in November. I would therefore dismiss this 8(a)(1) allegation.

I would likewise dismiss the allegation that Respondent violated Section 8(a)(1) of the Act by withholding its annual wage increases from January to February and the allegation that it violated Section 8(a)(1) of the Act by granting a wage increase in Feburary that was significantly greater than those granted in the past. As regards the first allegation, Respondent was clearly in a bind; the records establish that Respondent generally granted wage increases to its employees, at least, in January of each year. Presumably because of the election conducted on January 10, Respondent delayed granting its usual wage increase to the employees at that time. In fact, Respondent may well have placed itself in a precarious legal situation if it had granted the increase in the first 10 days of January (why could not it wait until after the election?) or if it had granted the increase during the last 20 days of January (why could not it wait until the Regional Office issued a determination on the Union's objections to the election?) I would therefore find that Respondent's action in withholding the regular wage increase for a 1-month period did not violate Section 8(a)(1) of the Act.[24]

Whether the amount of the increase given to the employees in February, retroactive to January, violates the Act is a more difficult issue. All employees were granted a $20-a-week wage increase. The record establishes that the January 1979 weekly wage increases granted to the employees ranged from $10 to $15, and that the weekly wage increases granted by Respondent to its employees in July 1979 varied from $15 to $25. In addition, in 1978, four employees received $20 increases in their weekly wages at one point in the year. This establishes that in the past Respondent had occasionally granted $20 wage increases to its employees; however, Respondent never adequately explained why it granted *all* employees $20 weekly wage increases where it previously had granted varying merit increases to its employees. Cimini's testimony that ". . . we didn't have a chance for the reviews" does not ring true; if anything, Respondent had an additional month in which to evaluate the work of its employees in order to determine the amount of increase to grant each of them. However, as the amount of the increase granted in February 1980 was not greatly in excess of the increases granted in 1979, with the increasing rate of inflation during this period, and the arithmetic fact that a higher rate of salary requires a larger actual increase to maintain the same percentage rate of increase, I find that the General Counsel has not met his burden herein; and I will therefore dismiss this 8(a)(1) allegation.

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, (1980), the Board set forth the rule it will henceforth apply in dual motive or pretextual cases such as the instant matter: "First, we shall require that the

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[23] *Baker Manufacturing Co., Inc.*, 218 NLRB 1295 (1975).

[24] In making this determination, I am cognizant of the fact that Gold, in his second speech, stated that the employees' wages would be frozen until the matter was settled and that I have found that statement, in the context in which it was made, violated Sec. 8(a)(1) of the Act.

General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."

The General Counsel has made such a *prima facie* showing herein. Respondent's explanation for Medaska's termination (as discussed, *supra*) is so incredible as to lead to the inescapable conclusion that she was terminated to prevent her from voting in the upcoming Board election. Although there was no clear evidence of Respondent's knowledge of Medaska's union activities or preference, I believe this knowledge can be imputed to Respondent under the small-plant doctrine.[25] This doctrine is applicable here in that, during the period in question, there were only 12 or 13 employees in the unit working within an enclosed office area. In addition, Cimini had a view of this area from his office. There was also testimony that after the Union began organizing these employees Medaska spent a lot of time during her breaks speaking with Evers, the employee known by Respondent to be the leading adherent on behalf of the Union.

That being established, the remaining question is whether Respondent has satisfied its burden to demonstrate that it would have terminated Medaska on January 4 even if not for the election taking place 6 days later. On the basis of all the evidence herein, the answer is clearly that it has not. As stated above, there was no valid business reason (as compared to an antiunion reason) for terminating Medaska on January 4. The evidence leaves no doubt that, if it were not for the election, Medaska would not have been terminated at all, or at least not until January 28; Medaska was a good employee, Respondent's office was busy during this period, and Respondent was not able to locate a permanent replacement for her until the end of January, long after she informed Cimini, on January 4, that her wedding plans had been terminated and that she wished to remain in Respondent's employ. I therefore conclude that Respondent terminated the employment of Medaska in violation of Section 8(a)(1) and (3) of the Act.

XIII. THE EFFECT OF SUCH CONDUCT ON THE ELECTION

The objections include certain of the allegations contained in the complaint herein. The finding that Respondent promised Evers and Gerard to correct the employees' grievances in the future, in violation of Section 8(a)(1) of the Act, sustains Objection 1. The finding that Respondent interrogated Evers in violation of Section 8(a)(1) of the Act, threatened and interrogated Plant in violation of Section 8(a)(1) of the Act, and threatened Gerard in violation of Section 8(a)(1) of the Act sustains Objection 2. The finding that Respondent, by Gold's speeches of January 4 and January 9, threatened employees with the loss of benefits in violation of Section 8(a)(1) of the Act sustains Objection 3, and the finding that Respondent's termination of Medaska on January 4 violated Section 8(a)(1) and (3) of the Act sustains Objection 4. In view of the bargaining order found applicable herein, *infra*, it is recommended that that election conducted on January 10, 1980, in Case 22-RC-8060 be set aside and that the representation proceeding be dismissed.

XIV. THE REFUSAL TO BARGAIN

The Supreme Court, in *N.L.R.B.* v. *Gissel Packing Co., Inc., supra*, set forth the situations where bargaining orders would be appropriate relief: the first were those situations where an employer had committed "outrageous and pervasive" unfair labor practices which eliminate the possibility of holding a fair election; the second were the "less extraordinary cases marked by less pervasive practices" where there is a showing at one point that the Union had authorization cards from a majority of the unit employees, and the Board concludes that the extensiveness of the unfair labor practices "have the tendency to undermine majority strength and impede the election processes."

As of November 15, the Union represented a majority of the employees in the unit herein; therefore, the only remaining question is whether the extensiveness of the unfair labor practices committed by Respondent warrant the imposition of a bargaining order under the tests established by *Gissel, supra*. The events herein took place among a unit consisting of 12 to 13 employees working together in 1 office. The unfair labor practices found, which immediately affected all the employees, were the threats made by Gold in his speeches that negotiations would start at ground zero and that their benefits would be frozen if the Union won the election and he had to negotiate with the Union, that their wages would be frozen until the matter was settled, that any employee who incurred dental bills would have to pay for them on their own because these benefits would be frozen, and that there was a possibility that if the Union won the election a timeclock could be installed. These threats rate high on the "*Gissel* scale of seriousness" because they were to all of the employees. The Board also considers 8(a)(3) terminations as serious in determining whether a bargaining order is warranted. As the Board stated in *Armcor Industries, Inc.*, 227 NLRB 1543 (1977):

> The Board is well aware that no employer conduct is more serious or has consequences more crippling to the free exercise of Section 7 rights than the discharge of an employee because of the employee's union affiliation. Indeed, both the Board and the courts have frequently pointed out that such conduct "goes to the very heart of the Act." . . . The effect of such a discharge is particularly pronounced when, as is true of the instant case, one of the victims is well known as the instigator of the Union's drive. In such circumstances, only the most remarkably obtuse employee would fail to perceive and to heed the employer's message that any employee who advocates the Union is embarking on a perilous venture.

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[25] *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959).

Although Medaska did not initiate the drive to have the Union represent Respondent's employees, she solicited authorization cards from three employees. When she was terminated by Respondent 6 days before the election, the message was clear to all the employees that supporting the Union can be dangerous.

I have also found 8(a)(1) violations by Gold directed at three employees individually: interrogation of Evers and Plant, the promise of the future corrections of grievances to Evers and Gerard, and threats to Gerard and Plant.

Considering the small size of the unit involved herein, the number and seriousness of the violations referred to, *supra*, and that they were committed not by a low level supervisor, but by Gold, Respondent's vice president, I find that a bargaining order is warranted herein under the "less extraordinary" test of *Gissel, supra,*[26] and that the duty to bargain commenced on November 16, 1979, the date the Union requested recognition after it had attained majority status the previous day.

XV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in sections VII through XI, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Threatening its employees with the loss of benefits should they choose to be represented by the Union as their collective-bargaining representative.

(b) Threatening to discontinue the employees dental benefits should they choose to be represented by the Union as their collective-bargaining representative.

(c) Threatening to freeze the employees' wages and other benefits due to their activities on behalf of the Union.

(d) Threatening to install a timeclock if the employees chose to be represented by the Union as their collective-bargaining representative.

(e) Interrogating its employees regarding their activities, and the activities of other employees, on behalf of the Union.

(f) Promising to correct the grievances of the employees in order to induce them to withdraw their support from the Union.

(g) Threatening employees with discharge in order to induce them to withdraw their support from the Union.

4. Respondent violated Section 8(a)(1) and (3) of the Act by terminating the employment of Diane Medaska because she engaged in activities on behalf of the Union.

5. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act: All full-time and regular part-time office clerical employees employed at Respondent's Parsippany office, but excluding confidential employees, professional employees, guards, all other employees and all supervisors as defined in the Act.

6. Since November 15, 1979, and at all times material thereafter, the Union herein represented a majority of the employees in the above-described appropriate unit, and has been the exclusive representative of all said employees for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. By refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the above-described unit since on or about November 16, 1979, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent's unlawful conduct interfered with the representation election conducted on January 10, 1980.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully terminated Diane Medaska, I shall recommend that Respondent be ordered to offer her immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and to make her whole for any loss of earnings suffered as a result of the discrimination by payment of a sum equal to that which she would have earned, absent the discrimination, with backpay and interest computed in accordance with *F. W. Woolworth Company,*[27] and *Florida Steel Corporation.*[28]

For the reasons set forth above, I shall recommend that Respondent be ordered to recognize and, upon request, to bargain collectively with the Union as the exclusive bargaining representative of the employees in the above- described unit. As a bargaining order has been found appropriate, it would be consistent that the election in Case 22–RC–8060 be set aside and that the petition in that matter be dismissed.[29]

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[26] *American National Stores, Inc.*, 195 NLRB 127 (1972); *Armcor Industries Inc., supra.*

[27] 90 NLRB 289 (1950).

[28] 231 NLRB 651 (1977). See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[29] Although I have found that the unfair labor practices committed herein warrant the imposition of a bargaining order, I would find that they were not so egregious or widespread as to warrant a broad order. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[30]

The Respondent, Progressive Supermarkets, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with the loss of benefits should they choose to be represented by the Union as their collective-bargaining representative.

(b) Threatening to discontinue its dental benefit plan if its employees choose to be represented by the Union as their collective-bargaining representative.

(c) Threatening to freeze the employees' wages and other benefits because of their activities on behalf of the Union.

(d) Threatening to install a timeclock if the employees selected the Union as their collective-bargaining representative.

(e) Interrogating its employees regarding their activities, and the activities of other employees, on behalf of the Union.

(f) Promising to correct the grievances of its employees to induce them to withdraw their support from the Union.

(g) Threatening its employees with discharge should they choose to be represented by the Union.

(h) Discharging or otherwise discriminating against employees because of their union activities or sympathies.

(i) Refusing to recognize, and, upon request, bargain with the Union as the exclusive bargaining representative of its employees in the following unit:

> All full-time and regular part-time office clerical employees employed at Respondent's Parsippany office, but excluding confidential employees, professional employees, guards, all other employees and all supervisors as defined in the Act.

(j) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Diane Medaska full and immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay suffered as a result of the discrimination against her in the manner set forth above in the section entitled "The Remedy."

(b) Recognize and, upon request, bargain with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit set forth above with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement.

(c) Post at its Parsippany, New Jersey, location, copies of the attached notice marked "Appendix."[31] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint herein be dismissed insofar as it alleges violations of the Act not specifically found herein.

IT IS FURTHER ORDERED that the election in Case 22-RC-8060 be set aside and that the petition in that matter be dismissed.

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[30] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[31] In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Ventura County District Council of Carpenters *and* **Commercial Industrial Constructors, Inc.** Cases 31-CB-3572 and 31-CC-1264

December 7, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 17, 1980, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to modify his remedy,[1] and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Ventura County District Council of Carpenters, Ventura, California, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Restraining and coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act by charging, trying, fining, or otherwise disciplining Ron Purseley, Mel Ellison, Steve Gerhardt, Mike O'Connor, Mark Valencia, Ray E. Thomas, John Schembri, Roger Haynes, Richard Crawford, and Tim Becker, or any of its members, in order to induce or encourage them to withhold their services from a neutral employer, with an object of forcing or requiring the neutral employer to cease doing business with a primary employer."

DECISION

STATEMENT OF THE CASE

ROGER B. HOLMES, Administrative Law Judge: The unfair labor practice charges in Cases 31-CB-3572 and 31-CC-1264 were both filed on January 18, 1980, by Commercial Industrial Constructors, Inc., which is referred to herein as the Employer or the Charging Party. (See G.C. Exhs. 1(a) and (c).)

The Regional Director for Region 31 of the National Labor Relations Board, herein called the Board, who was acting on behalf of the General Counsel of the Board, issued on February 22, 1980, an order consolidating cases and consolidated complaint and notice of hearing against Ventura County District Council of Carpenters, herein called the Respondent or the Union. (See G.C. Exh. 1(e).)

The General Counsel's consolidated complaint, which was amended at the outset of the hearing, alleges that the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, herein called the Act. The Respondent filed an answer to the General Counsel's consolidated complaint, and the Respondent denied that it had committed the alleged unfair labor practices. (See G.C. Exh. 1(g).) In response to the additional allegations which were made by the General Counsel at the beginning of the hearing, the attorney for the Respondent entered the Respondent's denial of those allegations on the record. (See G.C. Exh. 2, which sets forth the additional allegations.)

The hearing was held before me on July 1, 1980, in Ventura, California. The time for filing post-hearing briefs was extended to September 5, 1980. Both counsel for the General Counsel and the attorneys for the Respondent prepared and filed briefs which have been considered.

FINDINGS OF FACT

I. THE EMPLOYER

At all times material herein, the Employer has been a California corporation with an office and place of business located in Ventura, California, where the Employer has been engaged in the building and construction industry as a framing subcontractor.

In the course and conduct of its business operations, the Employer annually purchases and receives goods or services valued in excess of $50,000 from sellers or suppliers located within the State of California, which sellers or suppliers receive such goods in substantially the same form directly from outside the State of California.

In view of the foregoing admitted or stipulated facts, I find that the Employer has been at all times material herein an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNION

It was admitted in the pleadings that the Respondent has been at all times material herein a labor organization

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[1] Interest is to be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[2] We have modified the Administrative Law Judge's recommended Order to conform with his findings.

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within the meaning of Section 2(5) of the Act. In view of the foregoing, and the entire record in this case, I find that fact to be so.

III. THE WITNESSES

In alphabetical order by their last names, the following four persons appeared as witnesses at the hearing in this proceeding:

Doug Chickering has been the secretary-treasurer of the Employer for the past 3-1/2 years. He also works as a field superintendent for the Employer.

Douglas Dole is a business representative of the Respondent.

Samuel Heil has been the executive secretary of the Respondent for approximately 7 years.

John Schembri worked for the Employer as a journeyman carpenter from mid-November 1979 until mid-January 1980.

IV. CREDIBILITY RESOLUTIONS

The findings of fact made herein are based upon portions of the credible testimony of each one of the witnesses named above in section 3. There are a few minor differences in some parts of the testimony, but there are no differences which are of consequence or significance in resolving the issues raised in this proceeding.

Additionally, certain findings of fact are based upon documentary evidence which was introduced by the parties at the hearing.

V. FACTS NOT DISPUTED IN THE PLEADINGS

Certain allegations in the General Counsel's consolidated complaint were not disputed in the pleadings. Accordingly, those facts are found to be true. (See Sec. 102.20 of the Board's Rules and Regulations, Series 8, as amended.)

The findings of fact set forth below are numbered to correspond with the numbers given to those paragraphs in General Counsel's Exhibit 1(e):

> 2. (c) At all times material herein, Buena Vista Properties, Inc. (herein called Buena Vista), with an office and principal place of business located in Ventura, California, has been engaged as a general contractor in the building and construction industry.
>
> (d) At all times material herein, Buena Vista has been engaged in the construction of an office building in Ventura, California (herein called the jobsite).
>
> (e) At all times material herein, Buena Vista subcontracted the framing work at the jobsite to the Employer.
>
> (f) At all times material herein, Buena Vista subcontracted the finishing carpentry work at the jobsite to Cal-Built Construction (herein called Cal-Built).
>
> (g) At all times material herein, Cal-Built has been a general partnership with an office and place of business located in Ventura, California, where it is engaged as a finishing carpentry subcontractor in the building and construction industry.
>
> * * * * *
>
> 6. (a) At all times material herein, the Respondent has had a labor dispute with Cal-Built.
>
> (b) At no time material herein has the Respondent had a labor dispute with any person herein other than Cal-Built.
>
> 7. Commencing on or about December 13, 1979, and continuing to the latter part of December 1979, the exact date presently unknown, Respondent picketed the jobsite with placards containing the following legend: "Cal-Built Construction not in Compliance With Area Standards—Ventura DC of Carpenters."

VI. THE UNFAIR LABOR PRACTICES

A. *The Jobsite Involved in This Proceeding*

As indicated above in section V, an office building was being constructed at the jobsite involved in this proceeding. The building was three stories in height, and was surrounded on three sides by a parking lot.

The jobsite was located just north of the Ventura freeway. It was located on Alessandro Street approximately one-quarter mile west of Seaward Avenue. The project was on the north side of Alessandro Street which is a dead end street. Except for some clumps of dirt, the construction site was on flat ground.

There were two driveways from Alessandro Street to the parking lot surrounding the office building. One such driveway was on the west side of the building, and the other was on the east side of the building.

There was a sign at the driveway to the west of the building, which for convenience herein will be referred to as the west gate. The sign posted at the west gate indicated that the gate was reserved for the employees and the suppliers of Cal-Built and Royal Electric. As indicated in section V herein, Cal-Built had the subcontract to perform the finishing carpentry work at the jobsite. As further indicated in section V herein, the Respondent has had at all times material herein a labor dispute with Cal-Built. Royal Electric was described at the hearing as being a nonunion contractor on the project.

Another sign was posted at the driveway to the east of the building, which for convenience herein will be referred to as the east gate. The sign at the east gate indicated that the gate was reserved for all of the employees and suppliers other than the employees and suppliers of Cal-Built and Royal Electric.

Located between the west gate and the east gate were two construction shacks on the project. The general superintendent of the project occupied one of the construction shacks, and the Employer occupied the other construction shack. The shacks were described as being within 20 feet of each other.

Doug Chickering served as the field superintendent for the Employer on the jobsite, as well as on other projects for the Employer. Thus, Chickering was not at that one project on a full-time basis, but he had a full-time foreman who did work on that one jobsite. His name was Gary Fishback. Fishback had the authority to hire, to fire, and to assign work to employees. The Employer had a varying number of journeymen carpenters and apprentice carpenters at the jobsite between the middle of September 1979 and March 1980, during which time the Employer performed framing work at the jobsite. Chickering estimated that the number of the Employer's employees varied from 2 employees a day to 45 employees a day, with an average of approximately 25 employees a day.

Identified as employees of the employer who worked at the jobsite during the month of December 1979 were Ron Pursley, Mel Ellison, Steve Gerhardt, Mike O'Connor, Mark Valencia, Ray E. Thomas, John Schembri, Roger Haynes, Richard Crawford, and Tim Becker.

Schembri testified that he worked at the jobsite from mid-November 1979 until mid-January 1980. He worked as a journeyman carpenter performing framing work. Schembri was a member of the Respondent.

Although Chickering was a field superintendent, he also was a member of the Respondent in December 1979.

B. *The Picketing and Other Occurrences at the Jobsite*

Picketing by the Respondent was first observed at the jobsite at 8 a.m. on December 13, 1979. The Respondent's pickets were at the west gate of the project. The wording on the picket signs has been described in section V above. There were no pickets at the east gate of the project.

In addition to the pickets at the west gate, the Respondent also had pickets at the corner of Alessandro Street and Seaward Avenue, but those pickets were not on the jobsite location.

Chickering said that he drove his truck to the project, and that he parked his truck on Alessandro Street between the west gate and the east gate. He then walked onto the project. On occasion Chickering walked through the east gate, and sometimes he walked onto the project in the area adjacent to the construction shacks. Sometimes he left the project by walking out near the construction shacks. Chickering never went through the west gate.

Schembri also parked his vehicle on Alessandro Street, and he walked onto the project in the area adjacent to the construction shacks. He also left the project by walking out in the same area.

Dole observed persons walk onto the jobsite at the construction shacks located between the two gates. He also saw some persons park their vehicles at the curb, and he saw some persons drive their vehicles over the curb and onto the project on a couple of occasions. Dole did not observe anyone using the east gate.

On December 13, 1979, a steward's report was taken by the Respondent on the project. Schembri stated that he wrote his own name on the steward's report on that occasion. Chickering asked the Respondent's executive secretary, Heil, on that same date on the jobsite "why he was harassing my troops on that job—my employees." Heil responded that he was simply checking union cards, whereupon Chickering volunteered showing his union card to Heil.

C. *The Sign Posted at the Christmas Party and the Sign Posted at the Respondent's Office*

One of the local unions affiliated with the Respondent held its annual Christmas party on either December 17 or 21, 1979, at the fairgrounds.

As Schembri entered the area where the Christmas party was being held, he noticed that there was a sign posted where persons came in to show their union cards. The sign was about 2 feet by 3 feet in size.

According to Schembri, the sign stated, "Members of CICI have crossed the union-sanctioned picket line at the . . . jobsite." Thereafter listed on the sign were the names of the 12 persons involved in this proceeding.

On January 14, 1980, Schembri observed a similar sign posted at the Respondent's office. However, he said the sign at the Respondent's office was not as large as the one which had been posted at the Christmas party.

D. *The Filing of the Intraunion Charges on January 4, 1980*

Business Representative Dole filed on January 4, 1980, intraunion charges against certain members of the Respondent. Copies of those charges were introduced into evidence as General Counsel's Exhibits 4(a) through (l). The charges were filed against Ron Pursley, Mel Ellison, Steve Gerhardt, Mike O'Connor, Mark Valencia, Ray E. Thomas, John Schembri, Roger Haynes, Richard Crawford, Gary Fishback, Tim Becker, and Doug Chickering.

The intraunion charges allege a violation of the provisions of section 55,A, paragraph 10, of the constitution and laws of the United Brotherhood of Carpenters and Joiners of America. Specifically, the charges allege, "This member was working behind a duly authorized picket line of the United Brotherhood." The offense is alleged in the charge to have occurred on December 13, 1979, at the jobsite.

Copies of the intraunion charges were sent by mail to the individuals named in the charges. Accompanying the charges was a letter dated January 4, 1980, from Executive Secretary Heil to the member involved. The letter advised the member of the time, date, and place for his appearance before the Respondent's executive board to answer the charges brought against the member. (See G.C. Exhs. 5(a) through (l).)

The Respondent's procedure in such situations was also to include a copy of certain sections of the constitution and laws of the United Brotherhood of Carpenters and Joiners of America in order to advise the member of his rights. Those sections reproduced for the member were: Section 55, "Offenses and Penalties"; section 56, "Charges and Trials"; and Section 57, "Appeals and Grievances." (See G.C. Exh. 6.)

The Respondent's executive board did meet as scheduled, and the executive board referred the charges to the Respondent's trial committee.

E. *The Conversation on January 14, 1980, Among Heil, Chickering, and Schembri*

About 1 or 1:30 p.m. on January 14, 1980, there was a conversation in Heil's office among Heil, Chickering, and

Schembri. Schembri had a good recollection of what was said by those persons on that occasion. He testified:

> All right. Doug asked Mr. Heil if he knew about the charges that were brought against us, and he said he did. Doug wanted to know if there was any way that we could settle it or have the charges dropped.
>
> And Mr. Heil told us that he hadn't brought the charges, that Doug Dole had and that we should be speaking to him.
>
> We asked him if we could see Mr. Dole, and he told us that he was out sick that day.
>
> Mr. Heil also stated that there was a member of the Sierra Group on the job site December 13th, and that somebody had called them to be there at that time. And we didn't respond to this because we didn't know who had called him.
>
> I asked Mr. Heil if he was familiar with the two signs that had been posted, and he said he was. And I asked him if he didn't think it was harassing and discriminatory to put those signs up before we were even given a chance to defend ourselves, and he said he did not.
>
> Doug Chickering also told Mr. Heil that if there was no way that we could settle the charges, that he would bring counter charges with the NLRB. And Mr. Heil responded by saying that he wished we would, because he wanted a test case. And people were asking him how members of CICI could work behind a picket line without getting in trouble.
>
> Doug also mentioned that it would cost the union money if they had to go through this legal battle. And Mr. Heil said well, it was our money anyway, meaning the money of the members of the union. That is about all I can recall from that day.

F. *The Conversation on January 17, 1980, Between Dole and Chickering*

There was a very brief conversation on January 17, 1980, between Dole and Chickering. The conversation took place at the jobsite.

Chickering asked Dole if Dole could drop the charges. Dole responded that he would not drop the charges.

G. *The Proceedings Regarding the Intraunion Charges*

Introduced into evidence as General Counsel's Exhibits 7(a) through (l) were copies of the Respondent's "Official Notification to Appear Before Trial Committee." The documents were dated February 22, 1980, and they directed the persons previously named above to appear before the Respondent's Trial Committee on March 4, 1980. Copies of the trial committee's reports were introduced into evidence as General Counsel's Exhibits 8(a) through (l). The reports for Pursley, Valencia, and Thomas were dated April 1, 1980. (See G.C. Exhs. 8(a), (e), and (f).) The other reports were dated March 4, 1980. All of the persons previously named were found guilty of the charges which had been filed by Dole.

The following persons received a fine of $100 with $50 suspended and were placed on 1 year's probation: Pursley, Ellison, O'Connor, Valencia, Thomas, Schembri, Haynes, Crawford, Fishback, and Chickering. (See G.C. Exhs. 8(a)–(b), (d)–(j), and (l).)

Gerhardt was given a $50 fine with $50 suspended and placed on 1 year's probation. (See G.C. Exh. 8(c).)

Becker was given a $50 fine with $25 suspended and placed on 1 year's probation. (See G.C. Exh. 8(k).)

General Counsel's Exhibits 9(a) through 9(l) are copies of the Respondent's "Official Notification of the Action of Ventura County District Council of Carpenters."

Only 1 of the 12 members of the Respondent appealed the foregoing action. That person was Roger Haynes. His appeal had not been decided by the time of the hearing in this case.

H. *Conclusions*

In analyzing the evidence presented herein, it is especially helpful to study the Board's decision in *Orange County District Council of Carpenters; and Carpenters Local 2361 (J. A. Stewart Construction Co.)*, 242 NLRB 585 (1979).

The Board found that the respondents in that case had violated Section 8(b)(1)(A) of the Act by imposing internal union discipline, including fines, upon certain employees in order to induce or encourage them to withhold their services from a neutral employer with an object of forcing or requiring the neutral employer to cease doing business with a primary employer.

In the *J. A. Stewart* case, as in the present case, the respondents therein had a labor dispute with one of the several employers who were engaged in the construction of a building. There was picketing of the common situs jobsite, and two reserved gates were established. Three carpenters worked for neutral employers on that jobsite, and they observed the reserved gate system for neutral employees. Nevertheless, a business representative brought internal union charges against the three carpenters for "working behind a duly authorized picket line." *J. A. Stewart, supra* at 586. Thereafter, as a result of the charges, two of the employees were assessed fines, and the other one was cited to appear before the council to select a trial committee.

The Board distinguished the Court's opinion in *N.L.R.B.* v. *Allis- Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), and the Board specifically relied on the Court's holding in *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423 (1969), where the Court stated at 430: "§8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."

The Board held in *J. A. Stewart, supra* at 587:

> We have no trouble in finding that such discipline not only frustrates the policy reflected in the secondary boycott provisions of the Act, which forbids labor organizations from enmeshing neutral employers in primary labor disputes, but, as alleged, would also require a finding of unlawful secondary boycott activity. We are guided to this conclusion by Board precedent.

In *Belleville, supra,* as pointed out by the General Counsel, the Board found that a union violated Section 8(b)(1)(A), as well as Section 8(b)(4)(i)(B), by fining and threatening with internal union discipline members who worked for a neutral employer during a labor dispute involving another employer at a construction site. The Board assumed, without deciding, that the picket line aimed at the primary employer by another union was lawful and concluded:[7]

> While it is true that a union may lawfully impose internal union discipline on an employee for refraining from certain kinds of activity from which he has a Section 7 right to refrain (for example, making a delivery across a primary picket line or working during a primary economic strike against his own employer), a union may not lawfully impose such discipline on a member for working for a secondary employer at a common situs where an employer other than his own is being subjected to a primary (or, *a fortiori*, a secondary) picket line.

The rationale supporting this result is that such discipline induces or encourages employees of a neutral employer to refuse to perform services, within the meaning of Section 8(b)(4)(i)(B), a natural and apparent object of which is to cause the neutral employer to cease doing business with the primary employer.[8]

The case referred to by the Board in the text of the above quotation is *Local Union No. 153, International Brotherhood of Electrical Workers, AFL-CIO (Belleville Electric & Heating, Inc.)*, 221 NLRB 345 (1975). In that case, the Board found violations of Section 8(b)(1)(A) and Section 8(b)(4)(i) and (ii)(B) where the respondent therein threatened its members with internal union discipline and other reprisals if they worked for a neutral employer, and fined and expelled a member because he worked for a neutral employer, with an object of forcing or requiring certain neutral employers to cease doing business with a primary employer.

In addition to the foregoing cases, I have also looked for guidance to the Board's decision in *Glaziers and Glassworkers Local Union No. 1621, affiliated with International Brotherhood of Painters and Allied Trades (Alameda Glass and Mirror Co., Inc.)*, 242 NLRB 1011 (1979). In that case, the Board followed the rationale and holding in *J. A. Stewart, supra*. The Board concluded on "nearly an identical factual situation" as in *J. A. Stewart* (242 NLRB at 1012–13):

> We conclude, therefore, on the authority of our holding in *Stewart,* that Respondent unlawfully fined Ginestra and Bentley for working for a neutral employer at a common situs, thereby inducing or encouraging employees of a neutral employer to refuse to perform services, with the natural and apparent object of causing the neutral employer to cease doing business with a primary employer.[6]

I conclude that the rationale and the holdings in the Board precedents cited above are applicable to the present case. Here the Respondent's picketing of the common situs jobsite was directed at Cal-Built with whom the Respondent had a labor dispute. The Employer in this case was a neutral employer. The 12 persons involved in this case worked for the neutral employer. Of those 12, 10 were employees, and 2, Chickering and Fishback, were supervisors.

The west gate was the gate reserved for the employees and the suppliers of Cal-Built and another non-union employer, Royal Electric. There is no evidence that the 12 persons involved in this case used the west gate in entering or leaving the jobsite.

There is evidence that they had entered and left the jobsite near the Employer's construction shack, rather than through the east gate. Nevertheless, that area near the construction shack was not a part of the west gate, where the picketing was being conducted and which was reserved for the primary employer's employees and suppliers. Because the 12 persons involved herein did not use the west gate in entering or leaving the premises, I conclude that their failure to use the east gate is not such a crucial or determinative fact which would negate the applicability of the Board precedents cited above.

Accordingly, for the reasons stated by the Board in its decisions referred to above, I conclude that the Respondent in this case has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and Section 8(b)(4)(i) and (ii)(B) of the Act as alleged in the General Counsel's consolidated complaint.

In the Respondent's brief at pages 9 and 10, it is urged that:

> II. THE BOARD SHOULD HAVE REQUIRED
> THE EMPLOYEES IN THIS CASE TO
> EXHAUST INTERNAL UNION REMEDIES.
>
> Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act provides that a union member may be required to exhaust internal union hearing procedures not exceeding four months before instituting proceedings before a court or administrative agency. In this case, had the Board stayed its hand and required the members to exhaust their remedies within the Union, the protected character of the fines imposed to ensure respect for the Union's picket line at the entrance reserved for the struck employer would have been obvious and the

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[7] 221 NLRB at 353.

[8] *Pace, supra,* 222 NLRB at 618; see *Local 252, Sheet Metal Workers' International Association, AFL-CIO (S. L. Miller, Inc.)*, 166 NLRB 262 (1967), enfd. 429 F.2d 1244 (9th Cir. 1970).

[6] It makes no difference that the union discipline was imposed upon Ginestra and Bentley after they had completed work on the project. As we said in *Stewart*, quoting from an earlier case, "The 'cease doing business' element of Sec. 8(b)(4)(B) embraces prospective as well as existing business relationships, and does not require that the company-party to the primary dispute even be known at the time of the union conduct in question."

> expensive and long complaint and hearing process of the Board would have been obviated. This is not a case in which members have been punished for filing charges with the Board, nor in which internal union procedures are inadequate, nor in which public policy rather than the internal affairs of the Union are involved. It is instead a case in which a union has sought to protect the effectiveness of a strike and picketing by using available internal measures to require its own members to observe the reserved gate system. Where no unlawful secondary object was pursued, the Board should have respected those internal union measures.

With regard to a person's "unimpeded access to the Board," the Supreme Court stated in *N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO. et al.* [*United States Lines Company*], 391 U.S. 418 at 424 (1968):

> A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy. The Board cannot initiate its own proceedings; implementation of the Act is dependent "upon the initiative of individual persons." *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235, 238. The policy of keeping people "completely free from coercion," *ibid.*, against making complaints to the Board is therefore important in the functioning of the Act as an organic whole.

Congress has not incorporated the language found in Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act into the National Labor Relations Act. After considering the foregoing, I conclude that the failure of 11 persons involved in this proceeding to exhaust their internal union remedies does not preclude the processing of the General Counsel's consolidated complaint nor the finding of unfair labor practices under the provisions of the National Labor Relations Act.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Cal-Built Construction and Buena Vista Properties, Inc., are persons and employers engaged in a business affecting commerce within the meaning of Section 8(b)(4) and Section 2(6) and (7) of the Act.

3. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act by restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act by charging, trying, fining, or otherwise disciplining Ron Pursley, Mel Ellison, Steve Gerhardt, Mike O'Connor, Mark Valencia, Ray E. Thomas, John Schembri, Roger Haynes, Richard Crawford, and Tim Becker in order to induce or encourage them to withhold their services from a neutral employer, with an object of forcing or requiring the neutral employer to cease doing business with a primary employer.

5. The Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act by charging, trying, fining, or otherwise disciplining Ron Pursley, Mel Ellison, Steve Gerhardt, Mike O'Connor, Mark Valencia, Ray E. Thomas, John Schembri, Roger Haynes, Richard Crawford, Tim Becker, Gary Fishback, and Doug Chickering in order to induce or encourage them to withhold their services from a neutral employer or other person engaged in commerce, or in an industry affecting commerce, with an object of forcing or requiring such neutral employer or other person to cease doing business with a primary employer.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Since I have found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in those unfair labor practices.

I shall also recommend to the Board that the Respondent take certain affirmative action in order to effectuate the policies of the Act. Such affirmative action will include rescinding the disciplinary action taken against the 12 persons involved in this proceeding, expunging from the Respondent's records all references to the intraunion charges a and refunding the amount of the fines paid by the individuals involved. In addition, appropriate interest is to be paid by the Respondent to the individuals on the amounts to the refund. Such interest is to be computed in accordance with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). See also the Board's decision in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

In accordance with the Board's decision in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), I shall recommend to the Board a narrowly drafted cease-and-desist order rather than a broadly drafted one.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[1]

The Respondent, Ventura County District Council of Carpenters, Ventura, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Charging, trying, fining, or otherwise disciplining Ron Pursley, Mel Ellison, Steve Gerhardt, Mike O'Connor, Mark Valencia, Rav E. Thomas, John Schembri,

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[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Roger Haynes, Richard Crawford, and Tim Becker, or any of its members, in order to induce or encourage them to withhold their services from a neutral employer, with an object of forcing or requiring the neutral employer to cease doing business with a primary employer.

(b) Charging, trying, fining, or otherwise disciplining Ron Pursley, Mel Ellison, Steve Gerhardt, Mike O'Connor, Mark Valencia, Ray E. Thomas, John Schembri, Roger Haynes, Richard Crawford, Tim Becker, Gary Fishback, and Doug Chickering, or any of its members, in order to induce or encourage them to withhold their services from a neutral employer or other person engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring such neutral employer or other person to cease doing business with a primary employer.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary in order to effectuate the policies of the Act:

(a) Rescind disciplinary action taken against the 12 persons named above and expunge from its records any reference to that discipline.

(b) Refund to each one of the 12 persons named above any money held on account of the fines assessed against them in connection with the aforesaid disciplinary action, with interest, as set forth in the section of this decision entitled "The Remedy."

(c) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director for Region 31 sufficient copies of the attached notice marked "Appendix" for posting by Commercial Industrial Constructors, Inc., if that employer is willing to do so, in conspicuous places, including all places where the employer customarily posts notices to its employees.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT restrain and coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended, by charging, trying, fining, or otherwise disciplining Ron Pursley, Mel Ellison, Steve Gerhardt, Mike O'Connor, Mark Valencia, Ray E. Thomas, John Schembri, Roger Haynes, Richard Crawford, and Tim Becker, or any of our members, in order to induce or encourage them to withhold their services from a neutral employer, with an object of forcing or requiring the neutral employer to cease doing business with a primary employer.

WE WILL NOT charge, try, fine, or otherwise discipline Ron Pursley, Mel Ellison, Steve Gethardt, Mike O'Connor, Mark Valencia, Ray E. Thomas, John Schembri, Roger Haynes, Richard Crawford, Tim Becker, Gary Fishback, and Doug Chickering, or any of our members, in order to induce or encourage them to withhold their services from a neutral employer or other person engaged in commerce, or in an industry affecting commerce, with an object of forcing or requiring such neutral employer or other person to cease doing business with a primary employer.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind the disciplinary action taken by us against the 12 persons named above, and WE WILL expunge from our records any reference to that discipline.

WE WILL refund to the 12 persons named above any money held on account of the fines assessed against them in connection with the aforesaid disciplinary action, and WE WILL pay them appropriate interest on such money.

VENTURA COUNTY DISTRICT COUNCIL OF
CARPENTERS

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[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Harbor Construction Company, Inc.; Peninsula Metal Structures, Inc.; Pac West, Inc., et al.; Bruce Beard, individually; Bruce Beard d/b/a Peninsula Metal Structures; Bruce Beard d/b/a Pac West; Bruce Beard d/b/a Harbor Construction Company, Inc., et al. ***and*** **Seattle District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO; Darrell Dewayne Bash; Lonnie Bash.** Cases 19–CA–12824, 19–CA–13483, 19–CA–12904, and 19–CA–12905

December 7, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On July 1, 1981, counsel for the General Counsel filed in the instant cases a Motion for Summary Judgment and To Transfer Cases to the Board alleging that Harbor Construction Company, Inc.; Peninsula Metal Structures, Inc.; Pac West, Inc., *et al.*; Bruce Beard, individually; Bruce Beard d/b/a Peninsula Metal Structures; Bruce Beard d/b/a Pac West; Bruce Beard d/b/a Harbor Construction Company, Inc., *et al.*, hereinafter called Respondent, constitute a single employer, and that, as such, it had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. A copy of the motion was sent by certified mail to each entity named as Respondent. On July 9, 1981, the Board issued an order transferring the proceeeding to the Board and a Notice To Show Cause, granting Respondent until July 23, 1981, to respond to the motion. On July 29, 1981, 6 days past the filing deadline, Bruce Beard, individually, and Pac West, Inc., hereinafter called Beard and Pac West, respectively, filed a motion requesting that the Board deny the General Counsel's motion, and permit Beard and Pac West to file an answer to the complaint, or permit them to file a response to the Notice To Show Cause.

The proceeding was originated by a charge in Case 19–CA–12824 filed on October 1, 1980,[1] by Seattle District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, hereinafter called the Union, against Peninsula Metal Structures, hereinafter called Peninsula, alleging that Peninsula had violated Section 8(a)(5) and (1) of the Act by repudiating the parties' collective-bargaining agreement. A copy of the charge was sent by certified mail to Peninsula at its business address, 131 Second Avenue South, Edmonds, Washington. On November 12, the Union amended the charge to include Harbor Construction Company, hereinafter called Harbor, as a Respondent. The amended charge was sent by certified mail to Harbor at the same Second Avenue address listed for Peninsula.

On October 27, Darrell Dewayne Bash filed a charge in Case 19–CA–12904 alleging that Peninsula had violated Section 8(a)(3) and (1) of the Act by discharging him because he cooperated with the Union and by refusing to pay him the wages required by the collective-bargaining agreement Peninsula had with the Union. He amended the charge on November 12 to include Harbor as a Respondent. Both the original and amended charges were sent by certified mail to Peninsula and Harbor at their Second Avenue address.

On October 27, Lonnie Bash filed a charge in Case 19–CA–12905 alleging that Peninsula had violated Section 8(a)(3) and (1) of the Act by laying him off because he "joined with" the Union and by refusing to pay him in accordance with the parties' collective-bargaining agreement. He amended the charge on November 10 to include Harbor as a Respondent. Peninsula and Harbor were sent copies of the original and amended charges by certified mail at their Second Avenue address.

On November 13, the Regional Director for Region 19 ordered the consolidation of these three cases and issued a consolidated complaint and notice of hearing. The consolidated complaint alleges, *inter alia*, that Peninsula and Harbor are a single integrated enterprise and/or are *alter egos*, and that Peninsula and Harbor had violated Section 8(a)(1), (3), and (5) of the Act in the manner set forth in the charges. The consolidated complaint was served by certified mail on Peninsula and Harbor.

On January 20, 1981, the attorney asigned to the cases by the Region wrote the following letter:

> Bruce Beard, President
> Harbor Construction Company
> Peninsula Metal Structures
> 131 Second Avenue South
> Edmonds, Washington 98120
>
> RE: Harbor Construction Company
> Peninsula Metal Structures
> 19–CA–12824, 19–CA–12904,
> 19–CA–12905
>
> Dear Mr. Beard:
>
> My records indicate that you have not filed an answer to the complaint issued in the above cases on November 13, 1980. The Rules and Regulations of the National Labor Relations

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[1] All dates herein are in 1980 unless otherwise indicated.

259 NLRB No. 76

Board requires that answers to complaints be filed within 10 days of their issuance.

Please be advised that an answer to the consolidated complaint must be filed within this office within 10 days of the date of this letter, or this office will be forced to seek a summary judgment against your companies.

If I can be of assistance in this matter, please do not hesitate to contact me.

Sincerely yours,
Cora M. Vaughn
Attorney

On April 15, 1981, the same attorney wrote this second letter:

Bruce Beard, President
Harbor Construction Company Peninsula Metal Structure[sic]
131 Second Ave. So.
Edmonds, WA 98020

RE: Harbor Construction Co./
Peninsula Metal Structures
Case Nos. 19-CA-12824, 19-CA-12904, 19-CA-12905

Dear Mr. Beard:

As you were advised telephonically on April 15, 1981, unless an Answer to the Complaint issued in the above referenced cases are [sic] received in this office by Friday, April 17, this office will move for a Summary Judgment in those cases.

My records indicate that you are not represented by Counsel in these cases. If you retain Counsel, please advise me accordingly.

As I previously advised you, it would be mutually beneficial if these cases were settled outside of trial. Thus, in the event you now wish to discuss settlement possibilities, or require my assistance, please contact me at 442-5693.

Sincerely yours,
Cora Vaughn
Attorney

On April 22, 1981, the Union filed a charge in Case 19-CA-13483 naming Harbor, Peninsula, "Pac West, Inc., et al.; Bruce Beard, Individually; Bruce Beard d/b/a Harbor Construction Company, Bruce Beard d/b/a Peninsula Metal Structures, Bruce Beard d/b/a Pack [sic] West, Inc., et al." as Respondent. The charge alleges that Respondent had violated Section 8(a)(5) and (1) of the Act by repudiating the collective-bargaining agreement in a number of specified ways. The charge also alleges that the "Employer is currently operating under the name Pac West, Inc.," and that "Pac West is a joint employer or alter-ego of Harbor Construction Company and Peninsula Metal Structures." The charge further alleges that "[a]ll of the above companies are either owned or managed by Bruce Beard." A copy of this charge was sent by certified mail to the Second Avenue address listed for Respondent on the charge.

On June 4, 1981, the Regional Director for Region 19 issued a second order consolidating cases and consolidated complaint and notice of hearing. The second consolidated complaint alleges that "Respondents Peninsula, Pac West, Harbor, Bruce Beard and any other companies that have been or may be formed by Respondent Bruce Beard to disguise the continuation of Harbor are, and have been at all times material herein, *alter egos* and a single employer within the meaning of the Act." The second consolidated complaint also alleges that "Respondents Harbor, Peninsula and Pac West have common ownership, common supervision, interchangeability of employees and equipment and centralized control of labor relations policies." The violations alleged in this second consolidated complaint are identical to those alleged in the first consolidated complaint. Return receipts for service of the second consolidated complaint show that service was made in the names of Peninsula and Harbor at the Second Avenue address listed on the charge.

On July 1, 1981, counsel for the General Counsel filed a Motion for Summary Judgment and To Transfer Cases to the Board. The motion restates the history of the proceedings, summarizes the alleged violations, and further alleges that, since January 5, 1981, counsel for the General Counsel sought to communicate personally by telephone and letter with Respondent's president, Bruce Beard, regarding the need for prompt compliance with the requirement for filing an answer. The motion also alleges that Respondent had neither filed an answer nor requested an extension of time to file an answer. A "Certification of Nonfiling of Answer," made by the Acting Regional Director for Region 19, certified that Respondent had neither filed an answer nor requested an extension of time. The certificate of service attached to the motion shows individual service by certified mail on Peninsula, Harbor, Pac West, and Beard.

On July 9, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause, granting Respondent until July 23, 1981, to answer the motion. Harbor and Peninsula failed to respond, while on July 29, 1981, Beard and Pac West filed their motion seeking leave to file an answer to the complaint, or to respond to the Notice To Show Cause, and requesting that the Board deny the General Counsel's motion.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

Beard and Pac West argue that their motion should be granted because their admitted failure to meet the deadlines for filing was excused by "confusion, lack of proper notice to them, and excusable neglect on their part and the part of their employees and agents in not recognizing that the nature of the case had changed with the addition of more parties." The motion also asserts that Beard never did business as Peninsula or Harbor, that Pac West is not a successor corporation to Harbor or an *alter ego* of Harbor or Peninsula, and that Beard and Pac West had a "valid and true defense." The motion also contends that neither Pac West, Inc., nor Bruce Beard, individually, were ever mailed a copy of the charge in Case 19-CA-13483 or of the second order consolidating the cases.

The return receipt and the letter mailed with the charge in Case 19-CA-13483 indicate that Beard and Pac West were not individually served with copies of the charge. Rather, it appears that one copy of the charge, which named Pac West and Beard, was mailed jointly to all those named as Respondent at the Second Avenue address. Similarly, the affidavit of service attached to the second order consolidating the cases names Peninsula and Harbor as receiving copies at the Second Avenue address, but does not list Beard or Pac West as individually receiving copies. Concerning the failure to respond to the second consolidated complaint, neither Beard nor Pac West claims that they had no notice of the charge and the complaint in Case 19-CA-13483. In fact, their motion, which requests that they be excused from their failure to respond to the second consolidated complaint by the June 18, 1981, deadline because of "excusable neglect on their part and the part of their employees and agents in not recognizing that the nature of the case had changed with the addition of more parties," essentially admits having received the documents here in issue. As to their failure to respond to the Notice To Show Cause by the July 23, 1981, deadline, Beard and Pac West offer no excuse whatsoever.

We note that copies of the charge and complaint in Case 19-CA-13483 were sent to Respondent's business address, 131 Second Avenue South.[2] Section 11(4) of the Act provides that "[c]omplaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served." There is no contention that Beard and Pac West did not share the Second Avenue business address, and, in fact, the affidavit of service attached to the General Counsel's Motion for Summary Judgment, which Beard and Pac West admit having received, shows service to Beard and Pac West at that address.

Accordingly, it appears that Beard and Pac West had actual notice and were served in accordance with the statutory requirements. Because they failed to respond in a timely manner to the complaint or to the Notice To Show Cause, or to demonstrate good cause for failing to do so, we hereby deny their motion. Furthermore, no good cause having been shown for Harbor's and Peninsula's failure to file an answer, the allegations of the complaint are deemed admitted and true, and we grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Harbor and Peninsula are Washington corporations with an office and place of business in Edmonds, Washington, where they are engaged in the business of general construction. During the past 12 months, a representative period, Harbor and Peninsula had gross sales of goods and services valued in excess of $50,000, and purchased and caused to be transferred and delivered to their facilities within the State of Washington goods and materials valued in excess of $50,000 directly from sources outside that State or from suppliers within that State which in turn obtained such goods and materials directly from sources outside that State.

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[2] The General Counsel's Motion for Summary Judgment, which Beard and Pac West do not deny having received, asserts that this Second Avenue address is Respondent's business address. Nowhere in Respondent's motion does it challenge this assertion.

Pac West is a Nevada corporation with an office and place of business in Edmonds, Washington, where it is engaged in the business of general construction. During the past 12 months, a representative period, Pac West had gross sales of goods and services valued in excess of $500,000, and purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of $50,000 directly from sources outside that State or from suppliers within that State which in turn obtained such goods and materials directly from sources outside that State.

Harbor, Peninsula, and Pac West have common ownership, common supervision, interchangeability of employees and equipment, and centralized control of labor relations policies.

Peninsula and Pac West were established by Beard as a subordinate instrument to and a disguised continuation of Harbor.

Peninsula, Pac West, Harbor, Bruce Beard, and any other companies that have been or may be formed by Beard to disguise the continuation of Harbor are *alter egos* and a single employer within the meaning of the Act, and have been at all times material herein.

We find, on the basis of the foregoing, that Harbor, Peninsula, Pac West, and Bruce Beard, are, and have been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Seattle District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Unit*

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by Respondent as journeymen or apprentice carpenters in the construction industry.

The Union has been the collective-bargaining representative of the employees in said unit since October 1972, and it continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Refusal To Bargain*

Respondent has entered into successive collective-bargaining agreements with the Union since October 1972. The most recent collective-bargaining agreement is effective by its terms for the period June 1, 1977, to May 31, 1981. Since on or about June 5, 1980, Respondent has refused to apply the terms and conditions of the collective-bargaining agreement to, or to recognize the Union as the exclusive bargaining representative of, its employees working as journeymen or apprentice carpenters in the construction industry.

Accordingly, we find that, by the conduct described above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

C. *The Threat and the Discriminatory Discharges*

In or about the month of June 1980, Respondent told employees that they could retain their jobs only if they agreed to work for below union scale wages.

Accordingly, we find that, by the conduct described above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

In or about the month of June 1980, Respondent laid off or discharged employees Darrell Dewayne Bash and Lonnie Bash, and has failed and refuse to recall or reinstate them to their same or to substantially equivalent positions, because they joined or assisted the Union or otherwise engaged in union activities.

Accordingly, we find that, by the conduct described above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several

States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5), (3), and (1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

We will, *inter alia*, order Respondent to give effect to the terms and provisions of the collective-bargaining agreement retroactively to June 5, 1980. We will also order Respondent to make whole its employees for any losses they may have suffered as a result of Respondent's refusal to abide by that agreement, plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[3]

We will also order that Respondent make whole Darrell Dewayne Bash and Lonnie Bash for any losses they may have suffered because of Respondent's unlawful conduct in discharging or laying them off by paying them a sum equal to what each would have earned, less any net interim earnings, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth above.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Respondent Harbor Construction, Inc.; Peninsula Metal Structures, Inc.; Pac West, Inc., *et al.*; Bruce Beard, individually; Bruce Beard d/b/a Peninsula Metal Structures; Bruce Beard d/b/a Pac West; Bruce Beard d/b/a Harbor Construction Company, Inc., *et al.*, is an employer engaged in commerce with the meaning of Section 2(6) and (7) of the Act.

2. Seattle District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about October 1972, and at all times material herein, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees, pursuant to Section 9(a) of the Act, in the following appropriate unit:

> All employees employed by Respondent as journeymen or apprentice carpenters in the construction industry.

4. In or about the month of June 1980, Respondent, at its construction site, violated Section 8(a)(1) of the Act by threatening its employees that they could retain their jobs only if they worked for below union scale wages.

5. At all times material herein, Respondent has refused to recognize the Union as the exclusive bargaining representative of its employees working as journeymen or apprentice carpenters, and has refused to apply the terms and conditions of the collective-bargaining agreement to its employees working as journeymen or apprentice carpenters, in violation of Section 8(a)(5) and (1) of the Act.

6. In or about the month of June 1980, Respondent, at its construction site, discharged or laid off Darrell Dewayne Bash and Lonnie Bash, and has failed and refused to recall or otherwise reinstate them to their same or substantially equivalent positions, because these employees joined or assisted the Union or otherwise engaged in union activities, in violation of Section 8(a)(3) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Harbor Construction Company, Inc.; Peninsula Metal Structures, Inc.; Pac West, Inc., *et al.*; Bruce Beard, individually; Bruce Beard d/b/a Peninsula Metal Structures; Bruce Beard d/b/a Pac West; Bruce Beard d/b/a Harbor Construction Company, Inc., *et al.*, Edmonds, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and to bargain collectively regarding wages, hours, and other terms and conditions of employment with Seattle District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All employees employed by Respondent as journeymen or apprentice carpenters in the construction industry.

(b) Refusing to apply the terms and conditions of the collective-bargaining agreement with the Union effective from June 1, 1977, to May 31, 1981.

(c) Threatening its employees that they could retain their jobs only if they agreed to work for below union scale wages.

(d) Discharging or laying off its employees, and failing and refusing to reinstate them to their same or substantially equivalent positions, because they have joined or assisted the Union or otherwise engaged in union activities.

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[3] Member Jenkins would award interest on sums due under the Order herein based on the formula set forth in his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit described in paragraph 1(a) above regarding wages, hours, and other terms, and conditions of employment.

(b) Give effect to the terms and provisions of the collective-bargaining agreement retroactively to June 5, 1980.

(c) Make whole its employees for their loss of wages and other benefits which are provided for in the collective-bargaining agreement as provided in the section of this Decision entitled "The Remedy."

(d) Offer Darrell Dewayne Bash and Lonnie Bash immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make employees Darrell Dewayne Bash and Lonnie Bash whole for any loss of earnings due to the discrimination practiced against them in the manner set forth in the section of this Decision entitled "The Remedy."

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Edmonds, Washington, facility copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Act gives all employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

We will not refuse to recognize or to bargain collectively regarding wages, hours, and other terms and conditions of employment with Seattle District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, as the exclusive bargaining representative of our employees in the following appropriate unit:

All employees employed by us as journeymen or apprentice carpenters in the construction industry.

We will not refuse to apply the terms and conditions of the collective-bargaining agreement with the Union effective from June 1, 1977, to May 31, 1981.

We will not threaten our employees that they could retain their jobs only if they agreed to work for below union scale wages.

We will not discharge or lay off our employees, and fail and refuse to reinstate them to their same or substantially equivalent positions, because they have joined or assisted the Union or otherwise engaged in union activities.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

We will, upon request, bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit described above regarding wages, hours, and other terms and conditions of employment.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL give effect to the terms and provisions of the collective-bargaining agreement retroactively to June 5, 1980.

WE WILL make whole our employees for their loss of wages and other benefits which are provided for in the collective-bargaining agreement, plus interest.

WE WILL offer Darrell Dewayne Bash and Lonnie Bash immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees Darrell Dewayne Bash and Lonnie Bash whole for any loss of earnings due to the discrimination practiced against them, plus interest.

HARBOR CONSTRUCTION COMPANY INC.; PENINSULA METAL STRUCTURES, INC.; PAC WEST, INC., ET AL.; BRUCE BEARD, INDIVIDUALLY; BRUCE BEARD D/B/A PENINSULA METAL STRUCTURES; BRUCE BEARD D/B/A PAC WEST; BRUCE BEARD D/B/A HARBOR CONSTRUCTION COMPANY, INC., ET AL.

Model A and Model T Motor Car Reproduction Corporation *and* United Steelworkers of America, AFL-CIO-CLC *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Cases 7-CA-17064, 7-CA-17412 (2), 7-CA-17450, 7-CA-17774, 7-CA-17561 (1), 7-CA-17561 (2), 7-CA-17643, and 7-CA-18030

December 7, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 13, 1981, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, both the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(1) of the Act by interrogating employees with respect to their union activities and sympathies, by threatening employees with reprisals and soliciting grievances from employees in order to influence their union affection, and by promulgating and continuing in effect an invalid no-solicitation rule.[2] We also agree with the Administrative Law Judge's finding that Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees Jeffrey Smith and Richard Burton,[3] and by discharging employees Michael Smead,[4] James Hunt, and Roy Rine because of their union activities,[5] and that Re-

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[1] Both the General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge found that Respondent's maintenance of a no-solicitation rule violated Sec. 8(a)(1) of the Act because it prohibited solicitation of union support by employees during the entire workday. Specifically, rule 16 in Respondent's personnel manual read as follows:

> Employees will be subject to disciplinary action for any of the following offenses . . . . Vending, soliciting, or collecting contributions for any purpose, unless authorized by Management.

Respondent excepts to the Administrative Law Judge's finding. Respondent does not claim that the above rule was valid, but contends that the rule was rescinded on February 14, 1980, and a valid no-solicitation rule was promulgated on that date. The new rule, rule 17, reads:

> The following will constitute violations of company rules . . . . Distributing written or printed literature during working time.

We agree with the Administrative Law Judge. We note that union organizing campaigns at the Company had existed for several months prior to Respondent's rescission of Rule 16, and we may reasonably infer that, during this time period, Respondent's maintenance of an invalid rule inhibited the union activities of its employees. We further note that, at the time Respondent promulgated rule 17, it never explicitly repudiated rule 16, and there is no evidence that employees were aware that the rule had been changed. Respondent's belated and unannounced rescission of its invalid no-solicitation rule does not absolve its violation of the Act. See, e.g., *Automated Products, Inc.*, 242 NLRB 424 (1979).

Moreover, under our recent decision in *T.R.W. Bearings Division, a Division of T.R.W. Inc.*, 257 NLRB No. 47 (1981), rule 17 would also be invalid. The phrase "working time" no longer confers presumptive validity upon a no-solicitation rule. For a no-solicitation rule to be acceptable, it must clearly indicate to employees that they may engage in protected activity during periods of the workday when they "are properly not engaged in performing their work tasks." *T.R.W. Bearing Division, a Division of T.R.W., Inc., supra*, sl. op., p. 6. Rule 17 does not conform to this requirement. However, the General Counsel has not alleged that Rule 17 was invalid and the validity of this rule was not litigated at the hearing. Therefore, we shall not find herein that Respondent, by promulgating rule 17, committed an independent violation of Sec. 8(a)(1) of the Act.

[3] The Administrative Law Judge correctly found that Respondent violated Sec. 8(a)(3) of the Act by suspending employees Smith and Burton because of their union activities. He also found that, when Respondent's personnel director, Mark Nicolai, informed Smith and Burton of their suspensions, he told them that they were not to enter company premises during the length of their suspensions and, if they needed to contact anyone in the Company, they had to clear it through him. Nicolai also told Burton that "if [he] was to ever hand out any more printed literature that [he] would be terminated." The Administrative Law Judge found that "[s]ince the suspensions were invalid the above-noted restrictions placed by Respondent upon Smith and Burton interfered with their Section 7 rights and were in violation of Section 8(a)(1) of the Act." The General Counsel agrees that these restrictions were invalid, but excepts to the Administrative Law Judge's reasoning as to why they were invalid. The General Counsel contends that they were invalid because they improperly interfered with the employees' union activities, not merely because they derived from the illegal suspensions. We agree with the General Counsel.

Respondent did not demonstrate that it routinely limited access to company property to suspended employees. Nor did it demonstrate that these restrictions were in any way related to the maintenance of company production or discipline. These restrictions were directed solely to union activists and were aimed at hindering their ability to pursue union activities. For these reasons, the restrictions violated Sec. 8(a)(1) of the Act.

[4] We agree with the Administrative Law Judge that Respondent discharged employee Michael Smead because of his union activities, in violation of Sec. 8(a)(3) of the Act. However, we do not agree that the determination of whether Smead is fit for reemployment with Respondent should be left to the compliance stage of these proceedings. The record evidence convinces us that we should order reinstatement herein.

Smead was discharged during the morning of November 2, along with six other employees, for wearing a union button. He returned later in the day and directed obscene language toward two of Respondent's managers and verbally threatened them with physical harm. Smead's abusive behavior was provoked by his discriminatory discharge. While we do not condone his conduct, we do not believe that it warrants his forfeiting the opportunity for reinstatement. See *Hagerty Catering Company*, 236 NLRB 1553, 1557 (1978). *Key City Mechanical Contractors, Inc.*, 227 NLRB 1884, 1888-89 (1977).

Member Jenkins would compute interest on backpay due in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[5] Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), in finding the discharges herein violative of the Act. That decision applies only to cases in which it is necessary to identify the cause of a discharge where both a genuine lawful

Continued

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spondent did not violate the Act by discharging employee Joseph Hadley.[6]

However, we disagree with the Administrative Law Judge in two respects. We find certain statements made by Respondent's foreman, William Wagner, to employee Charles Pelfrey to constitute threats of reprisal for union activity in violation of Section 8(a)(1) of the Act. We also find that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee David Hall because of his union activities.

In late March 1980, Pelfrey, an outspoken UAW adherent, was working overtime in the presence of Wagner. As set forth by the Administrative Law Judge, Pelfrey testified with respect to their conversation as follows:

> Well, I asked Mr. Wagner if there was any truth to the Company moving to Indiana because there had been rumors going around that the Company was going to move. Frequently rumors travel through the Company, and he told me that he wasn't sure whether or not the Company was going to move, but if it was, that he had planned on moving with the Company. I asked him if the employees would have the opportunity to move with the Company or whether they would just be left behind, and if the Company would hire all new employees, and he told me that the Company would probably give the employees a chance to relocate except for the union organizers. He said that the Company would not be taking them with them, because if they moved, that is what they would be trying to get away from in the first place.

The Administrative Law Judge found that Wagner's statements were "highly speculative and lacked positiveness" and therefore did not violate the Act. The General Counsel excepts to this finding and contends that these remarks consituted a veiled threat that Respondent would close its plant and relocate in order to avoid unionization. We agree with the General Counsel.

Although Wagner did not positively declare that Respondent would relocate, his statement strongly suggests that Respondent was at least contemplating moving. Moreover, by stating that if it did relocate, Respondent would not hire the union organizers because "that is what they would be trying to get away from," Wagner indicated that Respondent planned to retaliate for the employees' union activity. It is clear that this statement, made during the course of Respondent's extensive unfair labor practices, would tend to discourage union activities among the employees. In fact, Pelfrey repeated Wagner's statement to at least five other employees. Accordingly, we find that, through Foreman Wagner, Respondent threatened its employees with reprisals for their union activities, thus coercing them in the exercise of their Section 7 rights, and violating Section 8(a)(1) of the Act.[7]

David Hall was originally hired by Respondent on June 28, 1979, and was discharged for poor attendance on September 18 of that year. In early January 1980,[8] he was reemployed by the Company.[9]

On February 22, Hall attended a luncheon provided by Respondent for its employees. Hall wore a button and a cap indicating that he was a member of the United States Steelworkers of America and he sat at a table with several employees who were similarly decorated. An individual who introduced himself as Jim Lauren of Respondent's sales department walked over to Hall's table and asked him his views concerning unionization at the plant. Hall replied that he desired union representation, because the employees needed a "middle man" between themselves and Respondent.[10]

In fact, Lauren was not a member of Respondent's sales department but was the vice president of West Coast Industrial Relations, a management consulting firm. According to Respondent's personnel director, Mark Nicolai, Lauren came to the plant on February 22 "to ascertain whether or not his firm would be of any service to us in initiating and conducting a union avoidance campaign." Lauren spent the day investigating the likelihood of

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reason and a genuine unlawful reason exist. In each of the discharges found violative in this case, Respondent's asserted reason has been determined to be a pretext, leaving only the genuine unlawful reason as the actual cause for the discharge. To attempt to apply *Wright Line* in such situations is futile, confusing, and misleading.

[6] In excepting to the Administrative Law Judge's conclusion that Respondent's discharge of Hadley did not violate the Act, the General Counsel attributes considerable significance to events which occurred on April 16, one day before Hadley was informed of his discharge. On that day, Hadley leafleted at Respondent's plant and was observed by several supervisors. We note, however, that Hadley was discharged by Nicolai on April 11 as part of an overall reduction in Respondent's work force necessitated by slow sales. Hadley had been laid off for lack of work since April 3, and thus was not informed of his discharge until he returned to work on April 17. However, his termination slip is clearly dated April 11, and the General Counsel provides us with no direct evidence that this date is not authentic. Accordingly, Respondent's knowledge of Hadley's activities on April 16 is not relevant to our determination of whether his discharge violated Sec. 8(a)(3) of the Act.

[7] See *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980).

[8] All dates are in 1980 unless otherwise indicated.

[9] Hall applied to Vonda Shay, the wife of Respondent's president, and she decided to rehire him.

[10] This account of the incident is, of necessity, based entirely on Hall's testimony, as Lauren failed to respond to a subpena ordering him to appear at the hearing.

unionization at the plant and conferring with Nicolai and other management personnel.[11]

On February 29, Nicolai discharged Hall. He informed him that his reemployment violated a company policy prohibiting rehire of former employees who had previously been discharged for cause. At the hearing, Nicolai testified that this policy was instituted when he became personnel director on January 21, 1980.[12] He stated that he had not known that Hall had been discharged for cause until February 22, when Harry Shay informed him of this fact and Shay suggested that Hall be fired.

The Administrative Law Judge found that the General Counsel did not demonstrate that Lauren's conversation with Hall was communicated to any representative of Respondent. On this basis, he found that the General Counsel failed to establish a *prima facie* case sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to discharge Hall. He further found that Respondent would have discharged Hall in the absence of protected conduct, on the basis of Respondent's policy prohibiting rehire of employees discharged for cause.[13] We find, to the contrary, that there is adequate evidence on the record to demonstrate that Respondent was aware of Hall's union activity, that this activity was a motivating factor in his discharge, and that Respondent would not have discharged Hall in the absence of this activity.

Although, as indicated by the Administrative Law Judge, there is no direct evidence that Respondent had knowledge of Hall's support for the Steelworkers, on the basis of the record evidence we may easily infer that Respondent was aware of Hall's union activity. Hall wore Steelworkers insignia for several weeks prior to his discharge. It is unlikely that Shay, who told Nicolai that he saw Hall on February 22, would have failed to notice his union button and cap. Moreover, it is inconceivable that Lauren did not relate his conversation with Hall to Nicolai, Shay, or other managerial employees of Respondent with whom he met later that day. Lauren's visit to the plant was subsidized by Respondent so that he would personally determine the extent of unionization among the employees. We cannot believe that he would have kept the results of his surreptitious investigation to himself. This conclusion is further reinforced by the fact that Hall was discharged within 1 week of his conversation with Lauren, and by the clearly pretextual nature of Respondent's asserted reasons for discharging him.

Respondent's alleged policy of not hiring employees who had been previously discharged was never reduced to writing. Moreover, the alleged policy was not even in existence when Hall was rehired. Additionally, although Nicolai claims that he refused to *hire* several applicants who had previously been discharged, Respondent does not claim that the Company ever *fired* any other employee who was rehired in violation of this policy. In fact, Nicolai admitted that he never looked through the personnel files to determine whether there were any other such employees. For these reasons, we find that Respondent failed to demonstrate that it discharged Hall pursuant to a consistent, uniformly applied policy. Rather, Respondent invented this policy as a convenient pretext after the decision was made to discharge Hall because of his union activities.[14] Accordingly, we find that Hall's discharge violated Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Model A and Model T Motor Car Reproduction Corporation, Battle Creek, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Discouraging activities on behalf of United Steelworkers of America, AFL-CIO-CLC, or International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), or any other labor organization, by discharging, suspending, or otherwise discriminating against employees in any manner with respect to their hire or tenure of employment, or any term or condition of employment."

2. Substitute the following for paragraph 2(a):

"(a) Offer Michael Smead, Roy Rine, David Hall, and James Hunt immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired to replace them, and make them whole for any loss of pay or other benefits suffered by Respondent's unlawful discharge of them, in accordance with the recommendations set forth in the section of the Administrative Law Judge's Decision entitled 'The Remedy.'"

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[11] Respondent compensated Lauren for his work on February 22, and reimbursed him for expenses incurred. However, Respondent did not further retain his firm.

[12] The policy was thus instituted subsequent to Hall's reemployment.

[13] His analysis was based on the test that we set forth in *Wright Line, a Division of Wright Line, Inc., supra.*

[14] In light of our disposition of this issue, we find it unnecessary to rule on the General Counsel's contention that Lauren was acting as an agent of Respondent and that his knowledge should therefore be imputed to Respondent.

3. Insert the following as paragraph 2(c) and reletter subsequent paragraphs accordingly:

"(c) Expunge from its files any reference to the disciplinary suspensions of Smith and Burton and to the discharges of Smead, Rine, Hall, and Hunt, and notify them in writing that this has been done and that evidence of those unlawful disciplinary actions will not be used as a basis for future discipline against them."

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discourage activities on behalf of United Steelworkers of America, AFL-CIO-CLC, or International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), or any other labor organization, by discharging, suspending, or otherwise discriminating against employees with respect to their hire or tenure of employment, or any term or condition of employment.

WE WILL NOT unlawfully interrogate employees with respect to their union activities or sympathies.

WE WILL NOT unlawfully solicit grievances in order to influence our employees' union affection.

WE WILL NOT continue in effect an invalid no-solicitation rule.

WE WILL NOT unlawfully threaten reprisals because of our employees' union sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Michael Smead, Roy Rine, David Hall, and James Hunt immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, discharging if necessary any employees hired to replace them, and WE WILL make them whole, with interest, for any loss of pay they may have suffered because we unlawfully discharged them.

WE WILL make whole Jeffrey Smith and Richard Burton, with interest, for any lost pay they may have suffered by reasons of their suspensions from February 18 to February 21, 1980.

WE WILL expunge from our files any references to the disciplinary suspensions of Smith and Burton, and to the discharges of Smead, Rine, Hall, and Hunt, and WE WILL notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

MODEL A AND MODEL T MOTOR
CAR REPRODUCTION CORPORATION

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge: The charge in Case 7-CA-17064, filed by United Steelworkers of America, AFL-CIO-CLC, herein referred to as the Steelworkers, on November 13, 1979, was served by registered mail on Model A and Model T Motor Car Reproduction Corporation, Respondent herein, on November 15, 1979. A complaint and notice of hearing was issued on December 28, 1979. The charges in Cases 7-CA-17412(2) and 7-CA-17450 filed by the Steelworkers on February 15, 1980, and February 27, 1980, respectively, were served on Respondent by registered mail on or about February 20 and 29, 1980. The charges in Cases 7-CA-17561(1) and 7-CA-17561(2), filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), herein referred to as the Autoworkers, on March 24, 1980, were served on Respondent by registered mail on or about March 27, 1980. An order consolidating cases and amended complaint and notice of hearing was issued April 30, 1980. The charge in Case 7-CA-17643, filed by the Autoworkers on April 11, 1980, was served on Respondent by registered mail on or about April 14, 1980. A complaint and notice of hearing in Case 7-CA-17643, and an order consolidating cases, were issued May 27, 1980. The charge in Case 7-CA-17774, filed by the Steelworkers on May 14, 1980, was served on Respondent on or about May 16, 1980. A complaint and notice of hearing in Case 7-CA-17774 and an order consolidating cases was issued on June 30, 1980. The charge in Case 7-CA-18030, filed by the Autoworkers on July 21, 1980, was served by certified mail on Respondent on or about July 24, 1980. A complaint and notice of hearing in Case 7-CA-18030 and an order consolidating cases were issued on August 7, 1980. Complaints in the consolidated cases allege that Respondent had violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein referred to as the Act.

Respondent filed timely answers denying that it had engaged in or was engaging in the unfair labor practices alleged.

The consolidated cases came on for hearing in Marshall, Michigan, on September 9, 10, and 11, 1980, and Battle Creek, Michigan, on November 18, 19, and 20, 1980. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan.

At all times material herein, Respondent has maintained its principal office and place of business at 200 Elm Street, in the city of Battle Creek, and State of Michigan, herein called the Elm Street plant. Respondent maintains an additional facility at 4950 W. Dickman Road, in the city of Battle Creek, and State of Michigan, herein called the Dickman Road plant. Respondent is, and has been at all times material herein, engaged in the manufacture, sale, and distribution of reproductions of antique automobiles and related products. The Elm Street and Dickman Road plants located at Battle Creek, Michigan, are the only facilities involved in this proceeding.

Since about July 1979, at which time Respondent commenced its operations, Respondent, in the course and conduct of its business operations, manufactured, sold, and distributed, at its Elm Street and Dickman Road plants, products valued in excess of $500,000, of which products valued in excess of $50,000 were shipped from said plants directly to points located outside the State of Michigan.

Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

United Steelworkers of America, AFL-CIO-CLC, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), are now and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The 8(a)(1) Violations and the Discharge of Union Button Wearers*

In October 1979, Jeffrey Smith, an employee of Model A and Model T Motor Car Reproduction Corporation, contacted United Steelworkers of America and arranged for a meeting between a Steelworkers representative and employees of Respondent. In addition to Smith, employees Richard Burton, Randy Chilton, Steve Cica, Ivan Head, Walter Kilborn, and David Woods attended the first meeting held at the Ironworkers Hall in Battle Creek, Michigan, between the Union and the employees on October 19, 1979. Cards were distributed at this meeting and a few were signed. A time was set for a second meeting to be held on October 30, 1979.

Prior to the second Steelworkers meeting, on the morning of October 28, 1979, Danny Sanders, a supervisor at Respondent's Elm Street plant, distributed copies of a letter received by Respondent from the American Federation of Grain Millers. This letter, dated October 19, 1979, addressed to Harry Shay, president of Respondent, listed Smith, Chilton, Burton, Head, Kilborn, and Cica as among the employees constituting the organizing committee.[1]

At lunchtime on the same day, October 28, Danny Sanders addressed a group of workers, among whom were some of the employees mentioned in the Grain Millers' letter. Sanders said that "he wanted to know [the employees'] reasons for wanting a union," because "they wanted to know upstairs." In addition, "[he] told [employees] what the Company was planning to do for [them]"; the Company was "going to start a bonus program and vacations." He said that his uncle, Harry Shay (president of Respondent), was not a greedy man but felt that because Model A was a startup company a union was not needed at that time and that a "union would not give . . . job security." Sanders indicated that the employees would be better off without the Union and that the Company would give the employees more.

On October 30, 1979, employees Smith, Denise Warfield, Chilton, Burton, Head, Kilborn, Cica, Woods, Peter Dixon, and a woman named Mary Lou attended the second Steelworkers meeting. Jim Golden, the union representative, distributed buttons which read "Volunteer Organizer, United Steelworkers of America." Employees Burton, Cica, Chilton, Smith, Woods, Bill Wilson, and Michael Smead wore the Steelworkers buttons in the plant on October 31 and November 1 and 2, 1979.

On November 2, 1979, Smith, Burton, Chilton, Cica, Woods, Wilson, and Smead were discharged for insisting on wearing the union buttons while at work. Sanders told Wilson that he "couldn't wear [his union button] on company time." Sanders also ordered Smith to take his button off. Joe Shay, vice president of Respondent, told Smith on November 2 that he was "terminated" for wearing the button. Skip Turner, supervisor at Respondent's Elm Street plant, tapped Cica's button and said that "this is going to get you in trouble and anybody else wearing one will get in trouble also." Sanders told Cica that he "would have to take off the badge or leave." Joe Shay told Chilton and Woods that they "couldn't wear . . . union buttons on company time . . . and to take that button off or punch out." After Burton had punched out, he phoned Shay to ascertain if he were actually fired. Shay responded, "Yes, Richard . . . you are fired for wearing a badge. This is harassment to other workers."

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[1] Although organizing on behalf of the Grain Millers continued, Cica, Burton, Smith, Woods, Chilton, and Wilson organized actively only on behalf of the Steelworkers after the Steelworkers meeting October 30, 1979. The Grain Millers is not a party to this case.

Thereafter Smith, Burton, Wilson, Woods, Cica, and Chilton, all discharged for wearing union buttons, were told by Maurice Halstead, a Steelworkers representative, to report back to work on November 8 or 9. All of the aforementioned returned to work as instructed and attempted to punch in at their regular starting time, 7 a.m. All were wearing buttons and some wore Steelworkers pocket holders. When they attempted to punch in, Skip Turner, a supervisor, told them not to punch in but rather to go upstairs to the cafeteria and wait. He also said "that the union did not hold up their agreement" and demanded that Chilton, Smith, and Burton take their buttons off. "[H]e said you are just asking for trouble again," and "do you want to go out the door again." Subsequently, all went up to the cafeteria but refused to remove their buttons as demanded by Turner. Smith, Burton, Chilton, and Cica waited in the cafeteria and were told by Turner that they "couldn't start work today that the union didn't hold up to their agreement." Turner did not explain the nature of this agreement and the above employees and Wilson and Woods (who did not wait in the cafeteria) were told to leave or to take off their buttons. All left. Approximately 7 weeks later, those employees received letters from the Company telling them that they could return to work immediately and to report to their normal stations. All the employees returned to work immediately upon receipt of the letter in December 1979.

"Unless special circumstances are present which justify the maintenance of production and discipline, an employer may not require an employee to remove union insignia while on the job in a plant. Such a restriction collides with the employees' rights guaranteed by Section 7 of the Act." *The Loray Corporation*, 184 NLRB 557, 577 (1970). Respondent offered no valid evidence which would sustain its right to restrict the wearing of union badges in its plants. Hence, by Respondent's threat to discharge employees for wearing union insignia and by its discharges of employees wearing union insignia, Respondent violated Section 8(a)(1) and (3) of the Act.[2] See also *Pay'n Save Corp.* v. *N.L.R.B.*, 641 F.2d 697 (9th Cir. 1981).

George Dunlap, an employee at the Elm Street plant and a volunteer organizer for the Steelworkers through April 1980, testified without contradiction that Skip Turner asked him on three occasions during the period October through January whether he was going to attend a union meeting. These inquiries usually occurred on Tuesday in the evening of which union meetings were held. Although it is not apparent whether Dunlap had begun wearing his button at this time, it is apparent that he had been attending Steelworkers meetings since October and that other employees had begun wearing their buttons.

The General Counsel claims that the interrogations by Sanders and Turner detailed above were in violation of Section 8(a)(1) of the Act. "Any interrogation by the employer relating to union matters presents an ever present danger of coercing employees in violation of their [Section] 7 rights." *Texas Industries, Inc., et al.* v. *N.L.R.B.*, 336 F.2d 128, 133 (5th Cir. 1964). Such interrogation has the "natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B.* v. *West Coast Casket Company, Inc.*, 205 F.2d 904 (9th Cir. 1953). In the instant case Respondent has shown no legitimate purpose in seeking the information requested nor did it assure the employees involved that they would be free from reprisals. Indeed, in the case of Sanders, the interrogations were accompanied with promises of benefits (a bonus program and vacations and that Respondent would give more without a union) and a threat that the Union would give no job security. The interrogations of employees by Sanders and Turner were in violation of Section 8(a)(1) of the Act.

In respect to Sanders, the General Counsel additionally claims Sanders unlawfully solicited grievances citing *Federal Yeast Corporation*, 226 NLRB 1046, 1054 (1976). In support of the claim, Sanders' testimony reveals that he "asked them what their problems were . . . we knew we had problems, that we were a start up company and that [he] wanted to try to remedy as many as [he] could." Sanders added that he "didn't think the Union would be able to solve these problems." The General Counsel's point is well taken. The General Counsel concedes that the complaint contains no allegation regarding the solicitation of grievances; nevertheless, relying on *Crown Zellerbach Corporation*, 225 NLRB 911, 912 (1976), the General Counsel seeks an 8(a)(1) finding "inasmuch as the evidence supports such a finding, the matter is inextricably tied to a conversation that was specifically alleged, and the issue of the conversation was fully litigated." Since the General Counsel's assertion is supported by the record and the authority cited, an 8(a)(1) finding is hereby entered.

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[2] On November 20, 1980, Respondent, Steelworkers, Autoworkers, and the General Counsel entered into a settlement stipulation constituting a partial agreement of the outstanding complaint allegations, which was approved by the Administrative Law Judge and by the Board on February 5, 1981. Provided for in the settlement stipulation was the reinstatement of Richard Burton, Jr., Randy Chilton, Steven Cica, Jeffrey Smith, David Woods, and Wilson, discharged on November 2, 1979, for protected concerted activity in violation of Sec. 8(a)(3) and (1) of the Act and reinstated in late December 1979. Also included in the settlement was an amount due David Latta for Respondent's alleged refusal to grant a pay raise in violation of Sec. 8(a)(3) and (1) of the Act. A part of the stipulation further provided that the "General Counsel may present evidence in respect to the issues settled herein and said evidence may be considered by the Administrative Law Judge to the extent that it bears upon the unsettled issues in the aforementioned case."

The General Counsel further maintains that the following provision of the Employer's personnel manual constituted an unlawful no-solicitation rule:

> Employees will be subject to disciplinary action for any of the following offenses: . . . 16. Vending, soliciting, or collecting contributions for any purpose, unless authorized by Management.

The General Counsel argues that the rule is "impermissibly invasive for failing to distinguish between working and non-working time." The General Counsel relies on *Lyman Steel Company*, 249 NLRB 296, 303 (1980). Since the above rule on its face prohibits solicitation during working hours by employees on their own time or in work areas on their own time, which they may do absent unusual circumstances not here shown without permission of management, the rule is in violation of Section 8(a)(1) of the Act. *T.B.C. Graphics, Inc.*, 214 NLRB 1003, 1004 (1974). Accordingly, Respondent, by maintaining in effect the invalid no-solicitation rule, was in violation of Section 8(a)(1) of the Act.

B. *Distribution of Union Leaflets by Smith and Burton*

Jeffrey Smith distributed leaflets on behalf of the union organizing campaign once a week after he was reinstated in December 1979. On February 14, 1980, at 6:30 a.m. he and Richard Burton passed out leaflets inside the employee entrance. They stood three steps inside the entrance, adjacent to the loading dock area and as close to the wall as physically possible. At this time there was no work activity in the loading dock area for it was common practice for such activity not to begin until 8 a.m. In fact, the door to the loading dock was padlocked and the woman who kept the keys did not begin work until 8 a.m. Thus it was impossible to unlock the door until 1 hour after the 7 a.m. shift began. During preshift hours the area was used solely as an employee entrance. It was in fact the only entrance to the plant to be used by employees.

Employees Iris Swartz and Mildred Jackson entered the plant on February 14, 1980, through the employee entrance where Smith and Burton stood and distributed leaflets. Here, an incident occurred which they reported to Nicolai and which is described below in the statements submitted to Nicolai by Swartz and Jackson. Swartz' statement is as follows:

> Walked into building this morning and they were handing out pamphlets. She first said she didn't want one but finally took one. She was [sic] didn't know what they were. She turned around and tore it up and said she was not interested and proceeded to the time clock. The person then said "Why don't you take this to your Harry Shay" and used language she didn't catch. She then said "I'll do just that" and tried to take another pamphlet and he looked at her and used "F ASS." This upset her very much. She felt as if she was abused and intimidated.
>
> She clocked in and broke down in tears and went upstairs and by then was pretty upset. She went to Skip Turner's office and no one was there and tried one of the others and then Bob Shirk came along and asked her what was the matter. She asked if Mr. Harry Shay was in and Mr. Shirk said come on and sit down and she told him what happened.
>
> Iris identified the one of the persons as Jeff Smith.

Jackson's statement is as follows:

> She came in the building and they were standing at the door and she said she didn't want any and that they were not supposed to be standing at the door handing out papers. She went over to talk with the guard. They said take this up to your GD Harry Shay. She was pretty sure it was Jeff Smith. She then walked over to the guard. She turned around and Iris was crying.
>
> Mildred does not know what Union it is.
>
> Mildred was not around Iris when they were talking to her.

After these statements were composed, Nicolai called Smith and Burton to his office on February 15, 1980, and read to them the following rule, published in Respondent's personnel policy manual, distributed February 13, 1980:

> The following will constitute violations of Company rules:
>
> * * * * *
>
> 16. Threatening, intimidating, coercing, or interfering with fellow employees

Nicolai also read the following:

> PLANT SOLICITATIONS
>
> Our Company is interested in fund raising drives and requests for contributions within our community. However, in order to maintain efficiency and prevent littering we must have certain rules.
>
> Employees *are not allowed to engage in any oral solicitation during working time in any work areas. Employees are not allowed to distribute any printed material in work areas during either working or non working time.*
>
> *Persons who are not employees are not to be allowed on the Company premises at any time to engage in either oral solicitation or the distribution of printed material.*[3] [Emphasis supplied.]

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[3] Prior to February 13, 1980, the personnel policy manual of October 26, 1979, contained the following which governed the same areas of concern:

Continued

Nicolai asked Burton and Smith if they were "aware of the no-solicitation rule" and asked Smith if he "was aware of Rule 16" and if they understood its meaning. Both Smith and Burton answered affirmatively but "they stated it was not a work area." Smith also denied that he had "threatened, intimidated, or coerced a fellow employee." Nicolai then "executed a correction notice for Burton to the extent that he [Burton] received a written warning and was suspended for three days for violation of company policy in the distribution of printed material in a work area during working or nonworking time," and "prepared a similar one for Mr. Smith with the exception that he also received a warning and said warning also included and said for violating company rule 16, threatening, intimidating or coercing a fellow employee." Both Smith and Burton were suspended for 3 days commencing on February 18, 1980, and ending February 21, 1980. Smith refused to sign his warning slip acknowledging his receipt of a copy. Burton signed his slip and both were informed by Nicolai, that, as suspended employees they were not to enter "company premises during the length of their suspension," and that if they had "need to contact anyone in the company or any fellow employee, that they [were] to call [Nicolai] personally" so that he could "review the request and either grant it or relay a message." They were also told "not to pass out pamphlets anywhere on the premises again." Nicolai said to Burton, "if [he] was to even hand out any more printed literature that [he] would be terminated."[4] Smith and Burton returned to work on February 21, 1980, after their suspension. Respondent's no-distribution rule set out above apparently did not bar employees from distributing union leaflets in nonwork areas. Since the credible proof does not establish that the area in which Burton and Smith distributed union leaflets was a working area or that their distribution of union leaflets interfered with production or discipline or that there was any business justification for banning distribution of union leaflets in the area, the restriction which was placed upon Burton and Smith interfered with employees' Section 7 rights and was in violation of Section 8(a)(1) of the Act. Thus it follows that their suspensions for distributing union pamphlets were in violation of Section 8(a)(3) of the Act. See *The Times Publishing Company*, 231 NLRB 207 (1977); *Fluid Packaging Company, Inc.*, 247 NLRB 1469 (1980); and *J. P. Stevens & Co.*, 244 NLRB 407, ALJD, sec. III,B,1,a.

Since the suspensions were invalid the above-noted restrictions placed by Respondent upon Smith and Burton interfered with their Section 7 rights and were in violation of Section 8(a)(1) of the Act.

During February 1980, Harry Shay, president of Respondent, gave two luncheon meetings at the Elm Street plant which employees were free to attend and at which lunches were provided and paid for by Respondent. The first meeting was held on February 5 and "[t]he whole plant" or "at least 150" employees attended. Harry Shay gave a speech to the employees where he said, *inter alia*:[5]

> I'm Harry Shay and I'm President of this Company. . . . you have that Suggestion Box here that your [sic] free and we hope you will drop any comments you have at any time and to show you that we use that box, we type up every suggestion that goes into it and put our answers to it and we post it.
>
> * * * * *
>
> . . . [T]here's been a lot of organizing activity from various Unions. . . . [U]sually when a company is approached with Unions, there is a grievance there is something wrong somewhere and we can't find out, I can't, what is wrong if the people really want a union here. Now, some of the comments I've heard that it have been said that among union organizers we know are totally wrong, which I'll point those out in a minute, and if anybody is being persuaded to join a union because of those things then they are absolutely being misled. Now, if there is any other reason or grievances you people have, then that is what we have the Suggestion Box for. Because at this point in time, we've said this over and over, this is a new Company, it is a start-up Company, these things are distractions.
>
> . . . [*W*]*e were also told that the unions here understand that a start-up company needs time to get started* and there's no efforts to distract the union right in the midst of organizing a company, that was told to us in writing. *An absolute lie. It is pretty damn obvious around here that it is going on. So now what that does it disrupts the operation we've got* and the effort were making just to get the Company going. The result of that is in order to organize apparently, they come up either because the organizers themselves don't know that's going on in the Company or their [sic] being misled since they are outsiders,

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15. Threatening, intimidating, coercing or interfering with fellow employees.[First violation to result in written warning; second, week layoff; and third, discharge.] In addition to Smith, Burton, and Nicolai, Carl Searer, the plant manager, and Jim Krider, the general manager, were present. Both Smith and Burton had received the manual on February 13, 1980.

16. Vending, soliciting, or collecting contributions for any purpose, unless authorized by management. [First violation to result in written warning; second, day layoff; and third, discharge.]

17. Distributing written or printed matter of any description during working time.[First violation to result in written warning; second, day layoff; and third, discharge.]

[4] Testimony of Smith and Burton is credited here as Nicolai does not deny that he verbally instituted a broad no-solicitation, no-distribution rule. In fact on direct examination, Nicolai stated, "I do not allow anyone to distribute anything in the Company. If I find out that it is going on, I order it stopped to the extent that it is going on, I order it stopped to the extent that I will not even allow people to distribute the sale of Girl Scout cookies, Little League tickets, anything of that nature. There is no solicitation that goes on—there is none that has been authorized without my knowledge. If there is anything that does go on that I do discover, I stop it."

[5] This speech was taped by Mark Nicolai, corporate personnel director, and transcribed under his direction. It is credited as an accurate transcription. The General Counsel listened to the tapes provided by Respondent's counsel and agreed that the transcription could be submitted as an accurate reflection of Harry Shay's speech on February 5, 1980. In addition, the content of testimony concerning Shay's speech by three employees present at the meeting, Jeffrey Smith, Richard Burton, and Charles Pelfrey, virtually is identical to the content of the transcription.

> maybe they don't know what's going on. So your [sic] being misled by people within the Company, who themselves don't know whats going on. But, for example, *I've seen a union thing out in writing saying we are now established for two years, we've had our start-up time and are ready to organize. Totally wrong.* [*Emphasis supplied.*]
>
> *Two years ago, this Company was nothing but a thought in my head* I hadn't even registered the Company, I hadn't even incorporated it yet. Nothing but a thought. *You don't organize my thoughts.* [Emphasis supplied.]
>
> * * * * *
>
> Now we say we have incentives and some misunderstanding has come up here is that when we say we're working on something and we're looking to do something, some incentive program, bonuses and things like that . . . . So we are looking at various plans, one is a share project that is used by Coachman, we've talked to other companies that have these incentive programs, which one makes the people the happiest. . . . We hope we are going to have that plan worked out in two to four weeks. . . . Now, it was said that we made some promises in the past by some managers that are not here and we are not aware of them, so if anybody feels that's a hardship on them, some promises made, we would like you to just write it up and drop it in the Suggestion Box. I presume these are individual promises that we are talking about. We would like to know what they are and we will look into it. The only way I know how to bring those up is to drop your comment in there and we'll see what was promised.
>
> We mentioned previously they were trying to work toward a four day work week. We are still trying to work for it but that will be some weeks ahead. . . . So, the kind of news we get from all this disruption when we say talking about a union and at time when we are trying to organize our own company is disruptive, is the word we got from Ford yesterday. . . . Their [sic] telling us they've heard possible disruption company become uneasy. . . . These are the kind of problems that come up when you say this is not the time to be organizing a union. . . . We must convince Ford there is no disruption so these are the problems that we say don't belong to a new company. And that's why we say we need a little peace here and we were told we would have peace here in order to keep on our goal, which is producing cars, getting our creditability, showing our creditors we do what we say, paying the bills we are supposed to be paying and that sort of thing.
>
> . . . Unions don't guarantee more money or more benefits. They negotiate. Now, right now if anybody around here has anything to us we are always open to this listen to it, suggestion box. Most half of you know who the top is, if you want to get personal about it. Now what's happen the union, your dues would then hire a negotiator to speak for you and he would come in to meet and say what you want. You wouldn't say it he would say it. Typically we would engage in a negotiator, more of the company's money to go to that man to sit down with the union representative and two paid people, neither one having anything to do with the company, other than their [sic] paid to talk which then starts the negotiation. So I don't see, at this point in time, where you expect to find much from that and that's again why I say this is not the time to be organizing a union.
>
> . . . We have benefits here I understand that major medical insurance and things like that, that some 50 year old companies in this city do not give their employees yet. So we want to point that out. There is no union that requires deals. We look at everybody and we do the best we can do. . . .
>
> . . . *We are not compelling anyone to stay we are just saying that you came into this Company, knowing what we are trying to do and let us do it. If you wanted to come in for an interview and say that when I get in here I'm going to reorganize your Company for you, you could have said it then and we would have said out the door. We didn't hire you to tell us how to reorganize this Company. So we would like you to bear that in mind. Nobody is a prisoner. They don't like working here they can leave.* [Emphasis supplied.]
>
> . . . I recall that one day on Burnham Street, when we were over there, a person said he hadn't ate that day and didn't have a job and didn't have nothing to eat and wanted a job. We didn't need him there, we didn't need him for two months, but we hired him any way and then we brought him back here and he's one of them organizing the union now. It's too bad we didn't have a union then because he probably wouldn't have been hired but this is the kind of thing that we happen, we lean over, we try to consider everybody as individuals and they got a problem, what can we do to help. Then if their [sic] going to forget us as an individuals and start acting as a group, we have no choice than to turn around and act as a group. So I think that covers what I was trying to and hope that the next lunch we have will be one with some better news. Maybe the bonuses will be made or something like that. And, if you do have any questions, we can't answer them all here unless someone had a real vital question, we ask you to throw them in the box and we'll try to answer them for you, every one of them.

In his brief the General Counsel cites sections of the speech emphasized above and asserts that such passages state, "in essence, that Respondent would not knowingly have hired union organizers" and that "Shay's repeated encouragement in the speech of employees use of the 'suggestion box' also illegally solicits grievances in violation of Section 8(a)(1) of the Act." In consideration of Shay's antiunion stance and in the context used, Shay's remarks clearly contained threats of reprisal[6] and the illegal solicitation of grievances in violation of Section 8(a)(1) of the Act.

The General Counsel further claims that Respondent committed an unfair labor practice by Danny Sanders' remark to employee William Wilson that if he "didn't like the way it was, that [he] could hit the door." Sanders' remark followed Wilson's observations: "I mentioned the fact that if Model A and Model T would put something down in writing in front of the lawyer, that there would be no need for a union, if they would stand behind what they say." Wilson was wearing a union button at the time.

In the case of *Rolligon Corporation*, 254 NLRB 22 (1981), the Board has said:

> We have found that an employer's remarks which imply that a union activist is unhappy on the job and therefore should seek work elsewhere violate Section 8(a)(1) of the Act. In the instant case, Respondent told an assembled group of employees that employees who are unhappy and would rather work in a union shop would do Respondent a great service by finding a job elsewhere. We find that such a statement is coercive and threatening and violates Section 8(a)(1) of the Act because it conveys the clear message that support for the Union and continued employment by Respondent are incompatible.

Thus the remarks of Sanders directed to employee Wilson constituted a violation of Section 8(a)(1).[7]

C. *The Discharge of Michael Smead*

Smead, an employee of the Elm Street plant, punched out during the day on November 2, 1979, for the same reason that employees previously mentioned herein punched out. He had been asked to punch out as a button wearer. Unlike the other button wearers, Smead returned to the plant about "a quarter of four after the shift had ended." Joe Shay and Danny Sanders were locking the plant when Smead returned. "Mr. Smead appeared to be intoxicated" as evidenced by "the heavy smell of liquor on his breath, slurred speech, his obnoxious attitude." He demanded his payroll check from Joe Shay and when Shay explained that it was impossible to issue his check immediately, Smead said, "[I]f I ever see you at a bar or out on the street, I will get you." Danny Sanders intervened and told Smead "that he had better leave the building right now." Smead "cursed and turned and started to walk toward the exit." He opened the employees' door, "stopped approximately two steps away from the door out into the parking lot and said if you [Sanders and Shay] came out here now, I'll whip your ass out here." Shay then closed the door and he and Sanders continued locking up the plant.

Smead's discharge notice read: "Reportedly left work station and disrupted work by others. Also, threatened safety and well being of a member of the management team." The latter phrase evolved after the incident described above. Smead was not reinstated with the other button wearers or included in the stipulation above mentioned.

Since the incident of alleged drunkenness occurred after Smead was unlawfully discharged for wearing a union button, Respondent's representation that the discharge was also for the above incident will be viewed as Respondent's claim that it may decline to employ Smead because his subsequent conduct rendered him unfit for future employment. A resolution of this matter is best left to the compliance stage of these proceedings. Smead's discharge being in violation of Section 8(a)(3), reinstatement for Smead will be recommended.

D. *The Discharge of Ray Rine*[8]

On or about February 5, 1980, President Harry Shay, in his address to Respondent's employees, alluded to Roy Rine in these words: "I recall that one day on Burnham Street, when we were over there, a person said he hadn't ate that day and didn't have a job and didn't have anything to eat and wanted a job. We didn't need him there, we didn't need him for two months, but we hired him any way and then we brought him back here and he's one of them organizing the union now. It's too bad we didn't have a union then because he probably wouldn't have been hired."[9]

One week later on February 11, 1980, Rine was fired for "too many absenteem [sic]." As noted by President Shay, Rine was a volunteer union organizer.

Rine had been employed since August 8, 1979, at the Wixom facility and had been transferred with other employees to the Fort Custer plant in the latter part of September. In January, Rine began wearing a UAW button and pocket saver in the assembly department where he worked.[10] He also distributed union literature and cards for a 2-week period at the timeclock or in the parking lot. Dennis Konecny, plant manager, Dan Weymouth, foreman, and Danny Sanders, supervisor, observed Rine engaged in this activity on several occasions when they came into the vicinity of the timeclock to use the food vending machine.

Sometime after organizing on behalf of the UAW had begun, Rine and his foreman, Dan Weymouth, had a discussion in which Weymouth told Rine that he was being removed as team leader and replaced with an employee with less seniority because Dennis Konecny, plant manager, had seen him standing around not doing his job. Rine complained about the way the Company handled seniority: "[T]he company doesn't want a union in here . . . this the way you treat your workers. What do you expect . . . ." Weymouth responded, "We don't have to worry about that because Harry Shay will relocate this plant before he'll allow a union to come in."[11] On another occasion Rine complained to Weymouth about how "they would paint right on the line where everybody had to work . . . they built a paint booth and they would still bring the paint sprayer over to the line. The painter had a mask to wear and the other workers didn't. They had a dust particle mask, but that isn't any good for keeping the fumes out. It just picks up dust in the air." After Rine objected to these conditions to Dan Weymouth, he was assigned to paint on the line for 1 or 2 weeks. He had never been assigned to paint on the line prior to voicing his objection.

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[6] Shay's statement that he would not have knowingly hired union partisans is linked logically to employees' reasonable fear that they would be discharged if they engaged in union activities.

[7] While not urged as an unfair labor practice, Shay in his February 5, 1980, speech used similar language: "They don't like working here they can leave." (Resp. Exh. 10.)

[8] The teachings of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), has been followed in connection with the consideration of all discharges.

[9] Charles Pelfrey, an employee of Respondent at the time of the hearing, attended this luncheon meeting and was called on behalf of the General Counsel. He testified that he and other employees were able to determine clearly from this paragraph in Harry Shay's speech that Roy Rine, an alleged discriminatee, was the employee being referred to by Shay. The witness' testimony is credited.

[10] In the assembly department other employees also had begun wearing some kind of UAW insignia. Roy Rine, Jerry Nichols, Jim Hunt, Tom (last name unknown), Joe Hadley, and Dave Latta. All were on the UAW organizing committee. (Rine, Hunt, Hadley, and Latta are alleged discriminatees.)

Approximately 2 weeks before Rine was discharged, on February 1, 1980, Dennis Konecny initiated a conversation with Rine in which Rine was told that he was going to be transferred to Fisher's line because it was apparent that he and Weymouth did not "get along very well." Konecny assured Rine that he "would still be drawing leader's pay and so forth." At this time Konecny told Rine "that [he] thought very highly of him but . . . was most concerned about this attitude and his absentee record[12] because [Rine] was in a group leader slot and . . . wasn't showing a good example to the new employees that were being hired at the time."

Rine reported to Kermit Fisher's line on Monday, February 4, and was absent Thursday, February 7, and Friday, February 8. Rine's girlfriend, Bonnie Lind, called in for Rine on February 7 and 8 as outlined in the personnel policy manual in effect at the time of Rine's discharge. Rine had fallen on the ice and suffered a disabling back injury.

On Monday, February 11, Dennis Konecny "instructed Mr. Kermit Fisher who was [Rine's] immediate foreman that if Mr. Roy Rine could not supply . . . a doctor's excuse for Thursday and Friday, that [Rine] was to be terminated for excessive absenteeism."[13] "[Rine] reported to work on Monday and worked all day. At the end of the shift . . . Mr. Fisher asked [Rine] if [he] had a doctor's slip for the two previous days [February 7 and 8] that [he] had missed and [he] told him no, and [Fisher] said well, I'm going to have to let you go."

Respondent hired Rine when he was hard pressed for a job and Rine apparently performed well on the job in return. He was a team leader in the assembly department at least by December 1979 and was thought highly of by Konecny. In fact, he was thought so highly of that Respondent chose to ignore his absence record until it was evident that he was a union partisan.[14] He had 8 of the 11 absences before he began organizing on behalf of the UAW on January 22, 1980, and no action was taken by Respondent. After January 22 and after Respondent became aware of Rine's prounion stance through its employees Weymouth, Konecny, and Sanders, Rine was put under the supervision of an employee with less seniority, and was assigned to less responsible work on the line by Weymouth, his foreman, who also told him that Harry Shay would relocate the plant before a union was permitted by Respondent. On February 5, Harry Shay, in his luncheon speech, referred to Rine as a disloyal employee because of his union organizing activities. On February 11 he was asked to produce a doctor's slip which he had no reason to assume would be required.

The credited evidence indicates that Rine was actually discharged because he failed to furnish a doctor's statement although the assigned reason for his discharge was "too many absenteem [sic]." Thus it would appear that the reason for his discharge was shifted in that it would be difficult to convince a reasonable person that Respondent actually would have discharged Rine for failing to furnish a doctor's statement without giving him an opportunity to produce one. The precipitous nature of his discharge coupled with Respondent's union animus and inclination to commit unfair labor practices to discourage union activities belies a legitimate motive. Thus it seems clear that "too many absenteem [sic]" was seized upon to shroud the real reason and the true motive of Respondent. Moreover, the credited evidence does not reveal that either Rine in the past or other employees had been subjected to the same arbitrary demand as was Rine.[15]

Rine's alleged absenteeism as a reason for discharge was an afterthought utilized to shore up a weak and untenable reason for discharge, one which had discrimination written all over it. Thus, it is found that Rine's discharge was pretextual and for the purpose of discouraging union activity. Rine's discharge accommodated Shay's expressed antipathy against Rine pronounced in his speech of February 5, 1980.

In *The Radio Officers' Union of the Commercial Telegraphers Union, AFL [A. H. Bull Steamship Company]* v.

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[11] This record is unclear as to when this conversation actually occurred. Both Rine and Weymouth testified it was in January and Rine testified it was after he began organizing for the UAW. Weymouth also testified, however, that during the conversation Danny Sanders intervened and Sanders and Rine cursed at one another. A correction slip was written up and offered at the hearing, but is dated December 13, 1979. There is no testimony offered in an attempt to reconcile this discrepancy so the testimony that it occurred in January after organizing began is credited.

[12] Rine had 11 absence and lateness reports between October 26, 1979, and February 11, 1980. Nicolai, personnel director, testified that 7 out of the 11 were unexcused and that only those marked were excused. None of the 11, however, are marked excused. It is therefore impossible from the record to determine whether the absences, in fact, are unexcused.

[13] Rine's testimony is credited. Fisher did not testify and was not employed by Respondent at the time of the hearing.

[14] Resp. Exh. R-6 is a summary of plant employees terminated for absenteeism and tardiness between August 1979 and April 5, 1980. Twelve employees with fewer absences than Rine were terminated. This chart illustrates clearly Respondent's lack of consistent treatment of employees who have been absent or tardy, e.g., one employee was terminated without a verbal or written warning and without suspension with only two tardies and one absence while a second employee was terminated only after being given a written warning and 1-day suspension with seven tardies, two "left earlies," and nine absences.

[15] A Respondent rule read, "Five absenteecisms or tardiness within a three month period, that are not supported by request for leave of absence, or *signed medical statement*, will be grounds for discharge." (Emphasis supplied.) The credible record does not reveal that the medical statement requirement had ever been enforced or that any employee had been discharged for its violation.

N.L.R.B., 347 U.S. 17, 45 (1954), the Supreme Court opined, "[A]n employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage or discourage is sufficiently established."

The natural consequences of Respondent's discharge of Rine, a union partisan, following on the heels of Shay's remarks at the February 5 luncheon, was to discourage membership in a labor organization. Any other conclusion would be at odds with the realities of the industrial world and in opposition to sound reason. Thus it must be deemed that Respondent intended such result, that Respondent's conduct was "'inherently destructive' of important employee rights," and that an unfair labor practice may be found "even if the employer introduces evidence that the conduct was motivated by business considerations." See *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Had Respondent not intended the consequences of its act, i.e., discouragement of union activity, Rine obviously would not have been discharged. Rine was the victim of Shay's antiunion stance, for no reasonable employer, except for an ulterior purpose, would have fired a man because he was unable to meet an impossible condition set by his employer, in this case a demand for a doctor's report which Rine was not given a fair opportunity to obtain before he was discharged.[16]

E. *The Discharge of James Hunt*

The UAW had its first organizing meeting for employees of Respondent on January 22, 1980. Employees James Hunt, Joe Hadley, and Roy Rine, alleged discriminatees, became part of the UAW organizing effort at this meeting.

James Hunt signed a card and a "UAW organizing committee form" and received a packet of authorization cards to distribute at the Fort Custer plant. Before work on January 23, Hunt discussed the Union with other employees, distributed authorization cards, and received signed cards in return. All of his activity was observed by Plant Manager Dennis Konecny and Foreman Danny Weymouth. At this time Konecny warned Hunt that "any organizing for any union" was to be "done on . . . personal time and not on company time." Weymouth also asked "what his [Hunt's] reasons were for wanting a union." Nevertheless, Hunt continued to distribute cards every day for a week after the first day of distribution on January 23 and to wear his UAW button openly on his shirt pocket every day until his discharge on March 17, 1980.

Transferred in the last part of January or the first part of February to work outside, Hunt "was in charge of moving the vehicles from inside the plant to the outside . . . of taking care of the shipping, handling of the trucks coming in to pick up the vehicles for shipment." On March 4, while Hunt and his partner, Bob Hancock, were working outside, a cleanup was begun in the plant,[17] which generated much refuse.[18]

Hunt removed two heater fans and Bob Hancock removed miscellaneous scrap from the dumpsters which they put in a cardboard box and placed in a Dodge van used on company premises "in the work procedures outside." Later in the day when Hunt went to remove the fans from the van, the driver of the van Franklin Rood, asked him "if [he] had any permission or if [he] had ever had any permission to remove what he was removing . . . referring to the two heater fans." Hunt responded that he and Bob had gotten the material out of the dumpster and that they "had permission to remove things that had been in the dumpster." Rood then watched Hunt put the fans into his automobile and return to work. On his way to his automobile, Hunt passed the security guard and waved.

Rood reported the incident to Nicolai and the following statement was prepared for Rood:

> On Tuesday, March 4, 1980, I was driving the company van, when Jim Hunt came over to the van and told me that he had asked and received permission to take two heater motors that had come from the trash. I sat in the van while he took the two motors and walked out to his car, put them in his car and came back. I thought nothing further of the things. The next morning Bob Hancock came and asked me what had happened to the two heater motors and I told him that [Jim] took them, telling me that he had permission to do so.

Nicolai called Hunt into his office on March 17, 1980. Hunt had been absent from March 4 to 17 because of illness. Nicolai showed Hunt the statement[19] allegedly given by Franklin Rood, the employee who witnessed the removal, and read him rule 33 on theft.[20] When asked if he were familiar with the rule, Hunt replied that he was, but that he did not consider this theft since he had gotten blanket permission from Connie, the previous plant supervisor, to take scrap from the dumpsters. He offered to return the fans to the Company, but Nicolai did not respond and asked him to leave the room. When he returned, Nicolai told him he was discharged.

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[16] Even if Fisher, Rine's foreman, were justified in requesting a doctor's slip from Rine, he was not justified in demanding and expecting its immediate production. Fisher's demand for immediate production of a doctor's slip created a no-win situation with which Rine was expected to comply. Even if Rine had had a good-faith desire to comply with Fisher's demand, it was impossible for him to do so without being permitted time between the demand for the doctor's slip and its expected production.

[17] James Hunt was wearing his UAW button on March 4. His partner, Bob Hancock, was not wearing a union button and there is no evidence indicating he was a union partisan.

[18] In general, refuse from the plant either found its way as scrap into the dumpsters which were ultimately carried away by trash pickup trucks and returned empty to Respondent; or, as in the case of vendor parts such as the heater motors, it was "sent back to the vendor for new parts." Vendor parts were not normally put into the trash system.

[19] The statement was admitted for the purposes of proving that it was the document Nicolai showed to Hunt and the document upon which Nicolai relied in discharging Hunt. It was not admitted to prove the truth of the matters asserted therein, as Rood did not testify and, therefore, did not verify the signature as his own and the statement as true.

[20] Rule 33 reads as follows:

> 33. Theft of any Company, Government or Employee Property
>
> Violation of any work rule will result in disciplinary action, which will range from verbal reprimand to discharge depending on the seriousness of the violation and whether it is a first violation or a recurrence. A combination of work rule violations will be dealt with according to the circumstances of each case.

The reason for Hunt's discharge was described as "Theft of company property to heater motors, 3/4/80 Co. Rule 33."

Apparently, Respondent had not written or published anything for employees specifically concerning the removal of scrap from the dumpsters.[21] Rather it was communicated orally through the employees' immediate foremen. Dennis Konecny, plant manager at the Fort Custer plant, received a memorandum from Jim Krider, general manager, directing the foremen upon requests from employees to remove scrap for personal use, to orally inform them, "that they did not have the authority and that neither did [Konecny] and the only way [to] get authority was through Jim Krider." This directive was to be shared only upon an employee's request to remove scrap and was never publicized generally in the plant.

Understandably, it is difficult to discern what specific policy was to be followed by employees to gain valid permission to remove scrap: Whether written permission from Krider was necessary; whether oral permission from Konecny was sufficient; or whether permission could be obtained at all from anyone. It is reasonable, therefore, to infer from Respondent's varying policies that employees must have been confused as to what process was to be followed to gain permission and whose permission was valid. It is, therefore, a rational inference that Hunt had a good-faith belief that he did not need to seek permission every time he wished to remove scrap and that his belief was reasonable under the circumstances.

It is clear that the General Counsel has met his burden of establishing a *prima facie* case by producing sufficient evidence to support the inference that protected conduct was a "motivating factor" in Respondent's decision to discharge Hunt in conformity with the teachings of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). These factors are controlling in this respect: (1) Hunt was an aggressive union partisan, (2) Respondent harbored union animus of sufficient intensity as to cause it to commit unfair labor practices, (3) there was no proof that other employees had been discharged for removing scrap from dumpsters although such removal had been apparently commonplace, (4) the rules in respect to employee removal of dumpster scrap were not well defined, (5) no evidence was offered that Hunt was an unsatisfactory employee, (6) the heater fans were of such insignificant value that when Hunt offered to return them his offer was not accepted, and (7) whereas Hunt was discharged for theft, an intentional crime, the credited evidence indicates that he harbored no intent to steal, openly took the fans without stealth, and honestly believed that he was permitted to take the fans, all of which must have been apparent to Nicolai when he discharged Hunt.

To meet its burden Respondent asserts that "the Respondent had a rule that was generally known to the employees." If such assertion refers to a rule governing the removal of scrap from the dumpsters, the credited evidence does not support this assertion. Respondent further maintains that "Respondent constantly enforced the theft rules in the situations in which it was aware of the theft." However, the examples offered by Respondent were for theft of tools or materials, items of value to Respondent used in production by Respondent. Hunt's discharge was the only one for removing scrap from the dumpster. Hunt was discharged as a thief, which he was not. He was deprived of any benefit of the doubt although the penalty for his alleged offense could have been in a range from a verbal reprimand to a discharge. Moreover, Hunt's offense was innocuous since the scrap fans were of such slight value that Respondent did not want them returned. Hunt's offense as it may have affected Respondent's business operation was minimal. Accordingly, it appears that Respondent has not carried its burden and it is found that the motivation for Hunt's discharge was to discourage union activity. By Hunt's discharge, Respondent violated Section 8(a)(3) of the Act. The credible evidence reveals no legitimate business justification for Hunt's discharge nor has Respondent demonstrated by credible evidence that Hunt, a satisfactory employee, would have been discharged even in the absence of his protected conduct. Indeed, no action was taken against Hancock although he likewise removed items from the dumpster on the same day Hunt retrieved the heater fans.

F. *Discharge of David Hall*

David Hall was hired by Respondent on June 26, 1979, at the Burnham Street plant, and after 3 months transferred to the Elm Street plant. He was discharged from the Elm Street plant on September 18, 1979, for his poor attendance record. On January 11, 1980, David Hall returned to Respondent and talked with Vonda Shay, the president's wife, about whether the Company would rehire him. He was rehired and reported to work on January 14, 1980. Subsequently, he was discharged on February 29, 1980, because of a company policy not to rehire employees who had been discharged for cause.

Mark Nicolai, Respondent's personnel director, was hired on January 21, 1980, 7 days after Hall had been rehired by Mrs. Shay with the approval of the previous personnel director. When Nicolai became personnel director, he instituted a policy of not rehiring persons who had been discharged for cause, but because he was hired after Hall was rehired did not know who David Hall was, nor did he know of David Hall's employment history. Consequently, when Nicolai was asked by Harry Shay, Respondent's president, what David Hall was doing in the plant, he was unable to respond without asking who David Hall was. Shay explained that Hall had been discharged for cause and had "created quite a scene and it was a rather violent discharge" and, therefore, Hall should not have been rehired. Nicolai was unable to find a second application in Hall's file, so he called Hall into his office and asked Hall if a second application had been filled out. His reason for calling Hall into the office was in actuality to determine how he got rehired. Unable to determine how Hall got rehired, Nicolai prepared Hall's last check, and, under Harry Shay's instruction, discharged Hall on February 29, 1980.

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[21] A written memorandum allowing removal of scrap from dumpsters with a supervisor's approval was posted on the plant bulletin board prior to March 17, but there is no credible evidence that it was posted before March 4, the day Hunt allegedly removed the heater fans for his personal use without permission from Respondent.

The General Counsel alleges that Hall was discharged for union activity protected by Section 7 of the Act. This allegation is based on a conversation that supposedly took place between Hall and Jim Lauren, a representative with West Coast Industrial Relations, during an employee luncheon at the Elm Street plant on February 22, 1980. During this luncheon Lauren allegedly questioned Hall about whether the employees needed a union and Hall answered affirmatively.

Counsel for the General Counsel failed to adduce any evidence that Hall's response to Lauren's query was communicated to any representative of Respondent. Hall wore a union insignia.

The General Counsel has failed to establish a *prima facie* case sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to discharge Hall after he was rehired. Furthermore, Respondent has adduced sufficient evidence to support an inference that Respondent would have discharged Hall in the absence of protected conduct on the basis of Respondent's policy not to rehire employees discharged for cause. The 8(a)(3) allegation in connection with Hall's discharge is dismissed.

G. *The Discharge of Joe Hadley*

Joe Hadley was hired by Respondent on August 31, 1979, and was terminated April 11, 1980, after a slowdown in production necessary to produce higher quality cars was instituted.[22] This slowdown resulted in the termination of 28 employees who had the worst absentee and productivity records in the weeks ending April 11, 18, and 25. Hadley was one of three terminated on April 11 and the other 25 followed in the next 2 weeks. The three terminated on April 11 were discharged by Nicolai, the personnel director. His decision to terminate Hadley was based on Hadley's excessive absenteeism. The remaining 25 were terminated by a management group.

The General Counsel has shown that Hadley was a union partisan. Hadley distributed union authorization cards and literature and wore a UAW button daily. He was known to supervisors at the air cargo facility as a union activist.

However, it appears that Respondent has successfully demonstrated that it would have taken the same action against Hadley in the absence of his engaging in union activities. Hadley and many other employees were on layoff when Respondent found it necessary to terminate 28 employees. Although a good worker when present, Hadley was frequently absent or late. He was terminated for his absenteeism only when Respondent decided to terminate 28 people even though Respondent knew of Hadley's union activities as early as the first or second week of February. Given these circumstances, Respondent's actions do not "suggest a predetermined plan to discover a reason to discharge" Hadley "and thus rid the facility of a union activist."[23]

Accordingly, for the reasons noted above, it is found Respondent's discharge of Joe Hadley did not violate Section 8(a)(3) of the Act.

H. *Letter to Kathy Lauderdale*

Kathy Lauderdale started June 25, 1979, at Respondent's Burnham Street facility where she remained until August. In August she moved to the Fort Custer plant, and in September transferred to the Elm Street plant in personnel. She began working as the secretary to the director of personnel, Mark Nicolai, at the end of January 1980 after serving as the secretary to the previous director of personnel from the time of her transfer to the Elm Street plant.

She was employed until April 8, 1980, as Nicolai's secretary and she left voluntarily. After she left Respondent's employ, she testified for the Department of Labor, CETA program, and spoke about "safety conditions at the plant at the time of Tom Mell's death, rehiring of individuals, about Dave Hall." She also spoke to Pete Cassidy from the Steelworkers about "[t]he conditions of how Dave Hall got rehired. The conditions of [her] termination and why it involved David Hall." She also discussed the above issues with Linda Rabin of the National Labor Relations Board and gave testimony on the seven men who were discharged on November 2, 1979, for wearing union buttons and on Rine, Hadley, Hunt, and Hall, all employees discharged by Respondent.

On May 8, 1980, Respondent, through counsel Jonathan Miller, sent a letter (G.C. Exh. 16) to Katherine Lauderdale suggesting legal action if she were to continue her testimony before "various organizations and/or governmental entities." In this letter Respondent states that "[a] person should always furnish such information which dictated by her conscience [sic]," but that "[i]f the Company is damaged by any furnishing of any information which is incorrect, or about which a person has so little knowledge as to make the matter misleading then the Company will pursue their legal remedy." The General Counsel claims that the May 8, 1980, letter constituted a violation of Section 8(a)(1) of the Act.

As asserted by Respondent "there is no violation of the law either on the basis of the content of the letter nor as to Kathy Lauderdale inasmuch as she was not an employee at the time of the receipt of the letter." Moreover, the General Counsel has cited no authority for his claim that the fact that "Lauderdale was not an employee of Respondent at either the time of the testimony or the time she received the letter is immaterial." That part of the complaint referring to the May 8, 1980, letter is dismissed.

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[22] Hadley worked for Respondent from August 31 to December 28, 1979, when he voluntarily quit. He was rehired January 17, 1980, laid off for lack of work on March 3, to March 13, 1980, and again from April 3 until April 17, 1980. He was finally terminated the last time he was on layoff.

[23] *Wright Line, supra.*

I. *Foreman Wagner's Alleged Threat of Closure and Relocation*

The General Counsel plants his claim that Foreman William Wagner's remarks were in violation of Section 8(a)(1) of the Act on the following incident described by employee Charles Pelfrey in the record as follows:

> Well, I asked Mr. Wagner if there was any truth to the Company moving to Indiana because there had been rumors going around that the Company was going to move. Frequently rumors travel through the Company, and he told me that he wasn't sure whether or not the Company was going to move, but if it was, that he had planned on moving with the Company. I asked him if the employees would have the opportunity to move with the Company or whether they would just be left behind, and if the Company would hire all new employees, and he told me that the Company would probably give the employees a chance to relocate except for the union organizers. He said that the Company would not be taking them with them, because if they moved, that is what they would be trying to get away from in the first place.

Since Wagner's remarks were highly speculative and lacked positiveness, it is not found that they, as claimed by the General Counsel, constituted threat of closure and relocation.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By unlawfully discharging Michael Smead on November 2, 1980, Roy Rine on February 11, 1980, and James Hunt on March 17, 1980, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By unlawfully suspending Jeffrey Smith and Richard Burton for 3 days commencing February 18, 1980, and ending February 21, 1980, for lawfully distributing union literature at Respondent's plant on February 14, 1980, Respondent has violated Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It also having been found that Respondent unlawfully discharged Michael Smead on November 2, 1980, Roy Rine on February 11, 1980, and James Hunt on March 17, 1980, respectively, and has since failed and refused to reinstate them, in violation of Section 8(a)(3) of the Act, it is recommended that Respondent remedy such unlawful conduct. In accordance with Board policy, it is recommended that Respondent offer the foregoing employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing if necessary any employees hired on or since the dates of their discharges to fill any of said positions, and make them whole for any loss of earnings that they may have suffered by reason of Respondent's acts herein detailed, by payment to them of a sum of money equal to the amount they would have earned from the date of their unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[24]

It is further recommended that Jeffrey Smith and Richard Burton be reimbursed for any lost pay by reason of their aforesaid unlawful suspensions, with interest, in accordance with the Board's usual policy and that their suspensions be expunged from their personnel records.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[25]

The Respondent, Model A and Model T Motor Car Reproduction Corporation, Battle Creek, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging union or concerted activities of its employees or their membership in United Steelworkers of America, AFL-CIO-CLC, or International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), or any other labor organization by unlawfully discriminatorily discharging its employees or discriminating in any other manner with respect to their hire or tenure of employment or any term or condition of employment in violation of Section 8(a)(3) and (1) of the Act.

(b) Unlawfully interrogating employees in respect to their union activities or sympathies.

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[24] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[25] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Unlawfully soliciting grievances from employees in order to influence their union affection.

(d) Continuing in effect an invalid no-solicitation rule.

(e) Unlawfully threatening reprisals because of employees' union sympathies.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Michael Smead, Roy Rine, and James Hunt immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired to replace them, and make them whole for any loss of pay that they may have suffered by reason of Respondent's unlawful discharge of them in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Make whole Jeffrey Smith and Richard Burton, with interest, for any lost pay they may have suffered by reason of their unlawful suspensions from February 18 to 21, 1980.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its facilities at Battle Creek, Michigan, copies of the attached notice marked "Appendix."[26] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act other than those found in this Decision.

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[26] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Wayne Construction, Inc. *and* **Edward Lewis Charland. Case 19-CA-12610**

December 7, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 17, 1981, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Wayne Construction, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III,B, par. 2 of his Decision, the Administrative Law Judge found that Respondent's failure to call its co-owner, Arntzen, to corroborate the testimony of Jeffords concerning a promise of a job to Charland, purportedly made by Arntzen, supported a fair inference that, had Arntzen been called as a witness, his testimony concerning that matter would not have supported that of Jeffords. However, we find that, since there is no basis for inferring that Arntzen was not equally available to be called as a witness by both Respondent and the General Counsel, no adverse inference can be drawn against Respondent with respect to its failure to call him to corroborate Jeffords' testimony. *Plumbers and Steamfitters Local No. 40, United Association of Journeymen and Apprentices of Plumbers and Pipefitting Industry of the United States and Canada, AFL-CIO (Mechanical Contractor Associations of Washington)*, 242 NLRB 1157, 1160, fn. 10 (1979). This finding, however, does not affect our decision to affirm the Administrative Law Judge's discrediting of Jeffords' testimony, as the other factors cited by the Administrative Law Judge, including Jeffords' demeanor and the contradiction of his testimony by neutral witnesses, are sufficient grounds to support his credibility resolutions.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

259 NLRB No. 82

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT interrogate our employees regarding the union sympathies and activities of their coworkers.

WE WILL NOT threaten to close down our construction projects before allowing our employees to become unionized.

WE WILL NOT discharge or otherwise discriminate against our employees because they attempted to become unionized.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights as set forth above, which are guaranteed by Section 7 of the National Labor Relations Act.

WE WILL make whole Edward Lewis Charland for any loss of pay he may have suffered as a result of our unlawful termination of him on June 24, 1980, with interest on the amount owing.

WAYNE CONSTRUCTION, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Juneau, Alaska, on May 5, 1981. On September 4, 1980,[1] the Acting Regional Director for Region 19 of the National Labor Relations Board issued an order consolidating cases, consolidated complaint and notice of hearing, based on unfair labor practice charges, the one in Case 19-CA-12610 having been filed on July 18,[2] alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*, herein called the Act. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record and the briefs filed on behalf of the parties and upon my observation of the demeanor of the witnesses, I make the following:

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[1] Unless otherwise stated, all dates occurred in 1980.

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Wayne Construction, Inc., herein called Respondent, has been a State of Washington corporation, with an office and place of business in Seattle, Washington, engaged in the business of construction contracting in the States of Alaska and Washington. During the 12-month period prior to issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, derived gross revenue in excess of $500,000 and, during that same period, sold and shipped goods or provided services valued in excess of $50,000 from its facilities within the State of Washington directly to customers outside of that State and, also, to customers within the State of Washington who were themselves engaged in interstate commerce by other than indirect means. Therefore, I find, as admitted by Respondent, that at all times material herein it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

At all times material herein, Teamsters Local 959, State of Alaska, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; International Union of Operating Engineers, Local 302, AFL-CIO; and Laborers' International Union of North America, Local 942, AFL-CIO, have each been labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The facts giving rise to the complaint in this matter occurred on Metlakatla Island, herein called the Island, which is owned and controlled by native Alaskans. In order for a non-native to reside or work there, a permit must be obtained from the 12-person council, which establishes policy for the Island. From early summer 1979 until late October 1980, Respondent was working on the Island, constructing a breakwater. To do this, Respondent employed truckdrivers who hauled rock to the water from a quarry located 5 or 6 miles away from the breakwater location. Edward Lewis Charland was one of those truckdrivers whom Respondent employed. He worked from March 3 until June 24, when the General Counsel alleges that he had been terminated unlawfully and, conversely, when Respondent contends that he had quit by walking off the job. The only other dispute in this case centers on whether Donald R. Jeffords, the superintendent for the project,[3] had made certain statements on June 24 that constituted an unlawful interrogation and a threat to shut down the jobsite.

In late April or early May, oiler Jeff Staples had been given authorization cards. While he did not distribute them, Staples testified that after he had obtained them Jeffords had said, "[W]ell, I see your friend from the Union was here," and had warned, "[W]ell, if I hear anybody talking union around here, they're fired."[4] In mid-June, Charland obtained the cards from Staples and began distributing them himself.

On June 24, Charland reported for work at 7 a.m. and began hauling rock from the quarry to the site where the breakwater was being constructed. At approximately 9 a.m., as he drove by Respondent's office, Jeffords flagged him down. After parking the truck, Charland entered the office. Only he and Jeffords were present during this conversation. Charland testified that Jeffords began cursing at him and accusing him of being sneaky and of "going behind [Jeffords'] back with these cards." According to Charland, Jeffords had said that the council's registrar, Rosabel Nelson, was going to pull Charland's permit because he had received too many tickets, adding that going behind his back had been the wrong thing to do and that he would close down the job before going union. Then, testified Charland, Jeffords had said that Charland was "through for good, we've got ways of taking care of things like this."

Jeffords agreed that this conversation had occurred and that, during it, the subject of the organizing campaign had been discussed. However, he denied that this had been his purpose for summoning Charland to the office that day. Rather, he testified that he had done so to discuss certain problems involving Charland's "work habits, his driving habits, and some living conditions that we previously discussed."[5] According to Jeffords, imme-

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[2] Three other cases, Cases 19-CA-12678, 12679, and 12701, also were originally consolidated in this matter. At the hearing, I granted the General Counsel's motion to sever those three cases, dismiss the complaints, and remand the charges to the Regional Director for final disposition.

[3] It is admitted that at all times material herein Jeffords had been a supervisor within the meaning of Sec. 2(11) of the Act and an agent of Respondent.

[4] Jeffords admitted having discussed the matter of organizing Respondent's employees with Staples, testifying he had said that the proper way to do this would be to get all the employees together and to discuss it as a group, rather than cause rumors by doing so on an individual basis. However, he did not deny having threatened that employees who talked about unions would be fired. Counsel for the General Counsel represented that the purpose for introducing this evidence was solely "to show the union animus by respondent [sic], just for background only," and disavowed any intention or desire to seek a remedial order based on Jeffords' comments during this conversation.

[5] Jeffords testified that, during the time that Charland had been driving Respondent's blue Peterbilt truck, Charland had been "responsible for breaking a drive line, a transmission, a rear-end, and some U-joints, either directly or indirectly." Jeffords also testified that he "had had some complaints through the chief of police pertaining to rock being scattered on the road" and that lead truckdriver Blaine Gormley had reported that Charland had been "powering into the corner" by the council chambers, thereby causing his truck to tip sufficiently to scatter some of the rock being transported. Finally, testified Jeffords, there had been an earlier occasion when, as a result of some bad checks that the mayor had reported

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diately upon entering the office Charland had said "I know immediately what you're going to do . . . you're jumping me over this union thing." Jeffords testified that he had denied that this had been his purpose for summoning Charland to his office, but had said that since Charland wanted to discuss it, "[L]let's get that out of the way first before we go any further." Then, testified Jeffords, he had told Charland essentially the same thing as he assertedly had told Staples earlier: that all of the employees should be involved in the decision concerning unionization and that the proper method for arriving at a decision regarding the matter was to convene a meeting of all employees to consider it, instead of creating problems by approaching only certain selected employees during working hours.

Jeffords testified that following these remarks he had attempted to discuss other subjects with Charland. Thus, according to Jeffords, he had said that there were rumors that Charland's work permit was going to be revoked, that the continuing damage to the Peterbilt truck would have to cease, that Charland would have to stop scattering rocks, and that Charland had made a misrepresentation about having been promised a job by Donald Arntzen, Jeffords' immediate superior, when he had applied for employment to Jeffords.[6] However, testified Jeffords, Charland had kept interrupting, returning to the subject of the organizing campaign and accusing Jeffords of "trying to railroad him." Jeffords testified that ultimately he had told Charland that "if he didn't get down there and square it away they was [sic] going to pull his permit," and that Charland had "just busted out the door and that's the last I saw of him."

Staples testified that before he had arrived for work on June 24, at his normal starting time of 11:30 a.m., he had been told by Charland and another truckdriver that Charland was no longer working for Respondent. He further testified that when he arrived for work that day he had been summoned to the office where Jeffords had said, "First of all, I want to tell you Ed wasn't fired because of the union, the town had pulled his work permit because of too many speeding tickets." According to Staples, Jeffords then asked who was involved in the unionizing campaign, but, notwithstanding Jeffords' efforts to persuade him to do so, Staples had declined to identify them.

Jeffords agreed that this conversation had taken place. He testified that he had said that he had been hearing rumors that he had fired Charland but that "I didn't fire Ed Charland for union activities. And I didn't even tell him he was fired, I told him to go down to the city and square his permit away. And I want you to understand, Jeff, that your job is not in jeopardy, nobody's job is in jeopardy here because of union activities."[7]

Finally, Acting Police Chief Doug Askren testified, without contradiction by Jeffords, that in June he had been told by Jeffords that "due to [Charland's] driving record and his involvement in driving habit complaints that he had, that he was letting him go on that pretense. Then the statement was made to me that he was also involved in some union activity."

B. *Analysis*

The threshold question here is whether, as the General Counsel contends, Charland had been discharged or whether, as Respondent contends, he had quit. As set forth above, Charland testified that, during the June 24 conversation, he had been told by Jeffords that he was "through for good . . . ." Such words, if spoken, "would logically lead a prudent person to believe his tenure had been terminated . . . ." *Fred I. Putnam* v. *Harry C. Lower*, 236 F.2d 561, 566 (9th Cir. 1956); accord: *N.L.R.B.* v. *Trumbull Asphalt Company of Delaware*, 327 F.2d 841, 843 (8th Cir. 1964), and cases cited therein.

While Jeffords claimed, as also set forth above, that Charland simply had walked out of the office on June 24 and had never returned, thereby effectively having quit employment with Respondent, a number of factors warrant the conclusion that Jeffords should not be credited. When he testified, Jeffords did not appear to be doing so in a candid fashion. He did not deny having told Askren that Respondent was "letting [Charland] go," which is, of course, an admission of the very fact that he had denied when he testified in this proceeding. In another area, Jeffords claimed that he had discussed the matter of pulling Charland's work permit with both the chief of police and with Mayor Stanley R. Patterson. Each of them, however, denied categorically ever having told Jeffords that Charland's work permit was going to be revoked. Jeffords claimed that on Monday, June 23, while outside the mayor's office, Chief of Police Askren had complained about Charland scattering rocks on the road. Askren denied having discussed Charland with Jeffords after a mid-May meeting between Askren and all of Respondent's drivers. In another area, while Jeffords claimed that Arntzen, Jeffords' superior, had reported a misrepresentation by Charland, regarding a promise of a job to Charland purportedly made by Arntzen, Arntzen was never called to confirm either that he had made such a report to Jeffords or that he had not made such a promise to Charland. Nor did Respondent claim that Arntzen was unavailable to it as a witness. Accordingly, it is a fair inference that had Arntzen been called as a witness, his testimony concerning these matters would not have supported that of Jeffords. *Colorflo Decorator Products, Inc.*, 228 NLRB 408, 410 (1977), enfd. by memorandum opinion 582 F.2d 1289 (9th Cir. 1978); *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn. 1 (1977). Jeffords' complaints regarding Charland's

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that Charland had written to pay his rent, Jeffords had agreed to permit Charland to move his motor home to Respondent's camp facilities, but when Jeffords had heard that the motor home had no bathroom, he had decided to notify Charland that he had changed his mind.

[6] Jeffords claimed that he had learned that Arntzen had made no such promise a few days prior to the June 24 confrontation. However, Jeffords conceded that "when I originally called him in there I wasn't even thinking of [that] misrepresentation, I was thinking basically of the rock on the road and the housing situation."

[7] Jeffords also testified that he had told Staples, with regard to Charland's departure, "I want to squelch any rumors that started right now."

purported abuse of the Peterbilt truck were not corroborated. Indeed, they were refuted, for the most part by Staples who had been one of the two individuals responsible for maintaining and repairing Respondent's vehicles. If, as Jeffords claimed, he had been concerned with "squelching" rumors before they got started, it does not seem likely that he would have spoken only to Staples concerning his June 24 confrontation with Charland. In sum, I do not credit Jeffords and, accordingly, I conclude that Charland had been discharged by Respondent on June 24.

This, then, leads to consideration of the motivation for Charland's discharge. It is undisputed that Charland had begun distributing authorization cards on approximately June 16. Moreover, Staples testified, credibly and without contradiction, that earlier he had been warned by Jeffords that "anybody talking union around here" would be fired. Jeffords admitted that he had been aware of Charland's union activity when they met on June 24. Charland testified credibly that, during that meeting, Jeffords had begun cursing at him for having initiated organizing activity behind Jeffords' back; that Jeffords had threatened to close the job before allowing employees to become unionized; and that Jeffords had stated that Charland was "through for good [since] we've got ways of taking care of things like this." These facts establish, at least, a *prima facie* case that Charland had been terminated because of his distribution of union authorization cards.

As found above, there is no objective support for the various assertions made by Jeffords regarding Charland's performance as a truckdriver, and I do not credit Jeffords's testimony with regard to those matters. Indeed, Jeffords did not deny having told Askren that Charland's driving habits were being used as a "pretense" to discharge him. That admission, coupled with Jeffords' admission to Charland, during their June 24 conversation, that the latter was "through" because he had been campaigning to obtain representation for the employees, constitutes "an outright confession of unlawful discrimination. It eliminated any further question concerning the intrinsic merits . . . of [Charland's discharge] . . . ." *N.L.R.B. v. L. C. Ferguson and E. F. Von Seggern d/b/a Shovel Supply Company*, 257 F.2d 88, 92 (5th Cir. 1958). Respondent argues that its failure to take action against Staples negates any finding of unlawful motivation concerning Charland's termination. "However, it is well established that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." *Nachman Corp.* v. *N.L.R.B.*, 337 F.2d 421, 424 (7th Cir. 1964).

Therefore, I find that Respondent discharged Charland because he had been attempting to organize its employees, thereby violating Section 8(a)(3) and (1) of the Act. Moreover, I credit Charland and Staples and, accordingly, find that Jeffords did interrogate Staples concerning the identities of the employees who were involved in the organizing campaign and did threaten, during his conversation with Charland, to close the job down before allowing the employees to become unionized, thereby violating Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Wayne Construction, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local 959, State of Alaska, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; International Union of Operating Engineers, Local 302, AFL-CIO; and Laborers' International Union of North America, Local 942, AFL-CIO, are each labor organizations within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning the union activities and sympathies of their coworkers and by threatening to close down the Metlakatla Island breakwater construction job before allowing employees to become unionized, Wayne Construction, Inc., violated Section 8(a)(1) of the Act.

4. By discharging Edward Lewis Charland on June 24, 1980, because he was attempting to organize employees, Wayne Construction, Inc., violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Wayne Construction, Inc., engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Inasmuch as the Metlakatla Island breakwater construction project has been completed, the General Counsel has not sought an order reinstating Charland. However, Wayne Construction, Inc., will be required to make Charland whole for any loss of earnings he may have suffered by reason of his unlawful discharge, with backpay to be computed on a quarterly basis, making deductions for interim earnings, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), enforcement denied on different grounds 322 F.2d 913 (9th Cir. 1963), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent Wayne Construction, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall:

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[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Interrogating its employees concerning the union sympathies and activities of their coworkers.

(b) Threatening to close down projects before allowing its employees to become unionized.

(c) Discharging or otherwise discriminating against its employees with regard to hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of labor organizations, or for engaging in activities protected by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Make Edward Lewis Charland whole for any loss of pay he may have suffered as a result of his discriminatory discharge on June 24, 1980, in the manner set forth above in "The Remedy" section of this Decision.

(b) Preserve and make available to the Board and its agents all payroll and other records necessary to compute the backpay rights set forth in "The Remedy" section of this Decision.

(c) Post at its Seattle, Washington, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Wayne Construction, Inc., to insure that said notices are not altered, defaced, or covered by any other material. In addition, Wayne Construction, Inc., shall mail one copy of the attached notice to each employee who was employed by it on the Metlakatla Island, Alaska, breakwater construction site from June 24, 1980, until completion of that project, upon receipt thereof from the Regional Director for Region 19.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Twin County Trucking, Inc. *and* **Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America** *and* **Local 1964, International Longshoremen's Association, AFL-CIO.** Cases 22-CA-9984, 22-CA-10185, and 22-RC-8201

December 8, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On May 19, 1981, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Twin County Trucking, Inc., Neptune and Tinton Falls, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities and the union activities of other employees.

(b) Threatening to castrate employees because they have engaged in union activities.

(c) Offering promotions, wage increases, and other benefits to employees in order to defeat a union organizing drive.

(d) Telling employees that their union activities are acts of futility.

(e) Telling striking employees that they would never be hired again.

(f) Urging employees to select as their bargaining agent a labor organization other than the one they have selected and telling them that the only union which the Company would recognize is one which met company approval.

(g) Threatening to discharge employees, close the plant, or merge the business with another company if employees selected a union as their bargaining agent.

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[1] In its post-hearing brief, Respondent alleges that the Administrative Law Judge exhibited bias and prejudice against it, and on this ground moved for a rehearing of this case before a different administrative law judge. Respondent contests the Administrative Law Judge's credibility resolutions, contending that he uniformly credited the testimony of the General Counsel's witnesses and discredited the testimony of its witnesses. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Nor do we find merit in Respondent's contention that, because the Administrative Law Judge generally discredited Respondent's witnesses and credited the General Counsel's witnesses, his credibility resolutions are erroneous or attended by bias or prejudice. *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656 (1949). Respondent further alleges that the Administrative Law Judge demonstrated bias when in an off-the-record discussion at the hearing, prior to Respondent's presentation of its evidence, the Administrative Law Judge expressed his opinion as to the ultimate merits of the case. However, Respondent did not object on the record to the alleged discussion, and did not comply with our procedures for requesting disqualification of an administrative law judge. Sec. 102.37, Rules and Regulations of the National Labor Relations Board, Series 8, as amended. See *Sanford Home for Adults*, 253 NLRB 1132, fn. 1 (1981). Respondent's motion is denied accordingly.

Respondent further moves to reopen the hearing to admit additional exhibits. Respondent seeks to introduce an affidavit of Respondent's owner, Joseph Lee, and letters written by Respondent's attorney, which Respondent claims demonstrate that Respondent agreed to reinstate the unfair labor practice strikers. However, these proposed exhibits all postdate the hearing and are relevant only as to the amount of backpay due the discriminatees. Since this issue is to be decided at the compliance stage of these proceedings, we hereby deny this motion.

Additionally, Respondent moves to strike the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(3) of the Act. Respondent contends that the General Counsel has withdrawn these charges and therefore the Administrative Law Judge lacked jurisdiction to make these findings. However, the record indicates that the 8(a)(3) violations found by the Administrative Law Judge were charged in Case 22-CA-10185, and these charges were never withdrawn. Only certain charges in Case 22-CA-9984 have been withdrawn by the General Counsel. Therefore, this motion is also denied.

[2] In the second paragraph of the portion of his Decision entitled "The Unfair Labor Practices Alleged," the Administrative Law Judge stated that, by April 1, 1980, union adherents had collected 21 signed authorization cards. In fact, as noted in fn. 7 of his Decision, the Union had collected 22 signed cards by this time. We hereby correct this inadvertent error.

[3] The Administrative Law Judge dated the bargaining order April 1, 1980, based on his finding that Respondent's unlawful conduct began on or about that date and the Union had attained signed authorization cards from a majority of Respondent's employees by then. The record indicates, however, that Respondent had collected 21 authorization cards, a majority of the 40-employee unit, by March 31, and had previously demanded recognition. Accordingly, we find that Respondent's obligation to bargain with the Union dates from March 31, 1980. See *Hasbro Industries, Inc.*, 254 NLRB 587 (1981); *Cas Walker's Cash Stores, Inc.*, 249 NLRB 316, fn. 3 (1980), and cases cited therein; *Frederick's Foodland, Inc., d/b/a Bucyrus Foodland North and Bucyrus Foodland South*, 247 NLRB 284 (1980).

The Administrative Law Judge found that Joseph Lee's April 8, 1980, agreement with Union Business Agent John Senick to schedule a negotiation session for the next week constituted *de facto* recognition of the Union. This finding is unnecessary in light of the fact that Respondent's bargaining obligation commenced on March 31, 1980.

We have substituted the Order below in lieu of the Order provided by the Administrative Law Judge in order to correct certain inadvertent errors and to conform to the remedy recommended by the Administrative Law Judge. Member Zimmerman finds no practical difference in this case between a bargaining order dated March 31 and one dated April 1.

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(h) Granting employees wage increases in order to defeat a union organizing drive and unilaterally establishing wage increases and changes in working conditions without first bargaining in good faith with the unit bargaining agent concerning such changes; provided that nothing herein shall be construed to require the Respondent to rescind any increase in wages or benefits which it has heretofore granted.

(i) Refusing to reinstate unfair labor practice strikers upon their unconditional request for reinstatement.

(j) Discouraging membership in or activities on behalf of Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any labor organization, by discharging employees, either before or after they have gone on strike, or otherwise discriminating against them in their hire or tenure.

(k) Refusing to recognize and bargain collectively with the aforementioned labor organization as the exclusive collective-bargaining representative of all of Respondent's full-time and regular part-time truck drivers, platform workers and mechanics employed at the Respondent's Neptune and Tinton Falls, New Jersey, terminals, exclusive of office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Upon request, bargain with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive collective-bargaining representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time truck drivers, platform workers, and mechanics employed at Respondent's Neptune and Tinton Falls, New Jersey, facilities, exclusive of all office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

(b) Offer Darren Brown, Kevin Brown, Anthony Coffero, Steven Cole, Daniel Florio, Joseph Fontana, Frank Harrington, Thomas Henville, John Hewlitt, Joseph Hildebrandt, Stafford Hoffman, James La Pointe, Ray La Pointe, and Brian O'Connor full and immediate reinstatement to their former positions of employment, or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges they previously enjoyed, and make them whole for any loss of pay or benefits which they have suffered by reason of the discrimination found herein, with interest, in the manner described in the section of the Administrative Law Judge's Decision entitled "Remedy."[4]

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at Respondent's places of business at Neptune and Tinton Falls, New Jersey, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that Case 22-RC-8201 be, and it hereby is, severed from Cases 22-CA-10185 and 22-CA-9984; that the election conducted therein be, and it hereby is, set aside; and that the petition therein be, and it hereby is, dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

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[4] Member Jenkins would compute interest on backpay in the manner set forth in his partial dissenting opinion in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT coercively interrogate employees concerning their union activities and the union activities of other employees.

WE WILL NOT threaten to castrate employees because they have engaged in union activities.

WE WILL NOT offer our employees promotions, wage increases, or other benefits in order to defeat a union organizing drive.

WE WILL NOT tell employees that their union activities are acts of futility.

WE WILL NOT threaten to discharge employees, to close the plant, or to merge the business with another company if employees select a union as their bargaining agent.

WE WILL NOT tell striking employees that they will never be hired again.

WE WILL NOT urge employees to select as their bargaining agent a labor organization other than the one they have selected and tell them that only a union having company approval will be recognized.

WE WILL NOT grant employees a wage increase in order to defeat a union organizing drive.

WE WILL NOT discharge employees, whether or not they are on strike, or otherwise discriminate against them in their hire or tenure, in order to discourage their support of and activities on behalf of Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any other labor organization.

WE WILL NOT unilaterally grant wage increases or make changes in working conditions without first bargaining in good faith with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive collective-bargaining representative of the employees in the bargaining unit described below.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, bargain collectively in good faith with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive collective-bargaining representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time truckdrivers, platform workers, and mechanics employed at our Neptune and Tinton Falls, New Jersey, facilities, exclusive of office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL offer full and immediate reinstatement to Darren Brown, Kevin Brown, Anthony Coffero, Steven Cole, Daniel Florio, Joseph Fontana, Frank Harrington, Thomas Henville, John Hewlitt, Joseph Hildebrandt, Stafford Hoffman, James La Pointe, Ray La Pointe, and Brian O'Connor, and WE WILL make them whole for any loss of earnings they may have suffered by reason of the discrimination practiced against them, with interest.

TWIN COUNTY TRUCKING, INC.

DECISION

FINDINGS OF FACT

STATEMENT OF THE CASE

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before me in Newark, New Jersey, on a consolidated unfair labor practice complaint,[1] issued by the Regional Director for

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[1] The principal docket entries in this case are as follows:

Charge filed by Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (herein called Union or Teamsters) in Case 22-CA-9984 against Respondent on May 19, 1980; original consolidated complaint issued on July 30, 1980; Respondent's answer to original complaint filed on August 8, 1980; charged filed by the Union against Respondent in Case 22-CA-10185 on July 29, 1980; first amended consolidated complaint issued on October 2, 1980; amended answer filed on February 18, 1981; hearing held in Newark, New Jersey, on March 11, 12, and 13, 1981; and briefs filed with me by the General Counsel and Respondent on or before April 27, 1981.

The principal docket entries in Case 22-RC-8201 are as follows:

Representation petition seeking an election in a unit of all full-time and regular part-time drivers, platform workers, warehousemen, mechanics,

Continued

Region 22 of the National Labor Relations Board and amended at the hearing, which alleges that Respondent Twin County Trucking, Inc.,[2] violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act. More specifically, the amended complaint alleges that Respondent offered wage increases to employees to dissuade them from supporting the Union, told employees that their selection of the Teamsters as a bargaining agent was an act of futility, threatened to discharge employees and to close the plant if the Teamsters became the bargaining agent, coercively interrogated employees concerning their union sympathies and activities, discharged Daniel Florio because of his union activities, and failed and refused to reinstate 14 named strikers upon their unconditional application. The General Counsel seeks a so-called *Gissel*[3] bargaining order and a bargaining order restraining Respondent from refusing to bargain by unilaterally changing the wages and other terms and conditions of employment of its dock workers without first bargaining about these issues with the Teamsters. Respondent denies these allegations. It asserts that the Teamsters is not the majority representative of their employees and it has no obligation to recognize and bargain with the Teamsters. The Charging Party contends that the Board should sustain the objections it filed to the election conducted at Respondent's terminal on May 8, 1980, because of the unfair labor practices noted in those objections and other unfair labor practices alleged in the amended complaint. Upon these contentions, the issues herein were joined.[4]

I. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent is a trucking company which is owned and operated by Joe Lee.[5] It maintained a terminal at Neptune, New Jersey, and now operates principally at Tinton Falls, New Jersey. Respondent makes what are essentially local deliveries although its trucks regularly operate in States other than New Jersey. In the spring of 1980, when the events in this case took place, Respondent employed 40 drivers, mechanics, dockworkers, and helpers, all of whom were unrepresented by any labor organization. Most of its warehousemen (referred to in the record as dock workers or platform workers) worked between the hours of 5 p.m. and midnight (or later). It was within the ranks of this group that the Teamsters organizing effort had its inception.

In early March 1980, in response to various complaints that had been discussed among the platform crew, dockworker Anthony Coffero contacted Teamsters Local 584 in Union, New Jersey, and told the Union that Respondent's employees were interested in joining. Coffero spoke by phone with Business Agent John Senick, obtained designation cards[6] from Senick by mail, and began passing them out to other employees at the terminal. By April 1, 1980, Coffero and his associates had collected signed cards from 21 dockworkers, mechanics, and drivers.[7] The parties agree that, on that date, Respondent employed some 40 individuals in this unit.[8] Accordingly, as of April 1, the Charging Party represented a majority of unit employees.[9]

On March 28, Senick sent a letter to Respondent in which he stated that Teamsters Local 478 had been designated as the bargaining agent for its drivers and platform men and that he would like to set up a meeting with company representatives for the purpose of negotiating a contract. On Monday, March 31, Senick received a phone call from Fred Grill, Respondent's terminal manager, who informed Senick that he would like to have a meeting the following week. Senick said he would be available, so Grill told him he would call again to establish a firm date. Later that day, Grill phoned the Union's office and left word that he would not meet with Senick upon advice of his lawyer.

On April 1, Senick spoke by phone with Thomas F. X. Foley, Respondent's attorney. There is a dispute as to

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dispatchers, and helpers, with the usual exclusions, filed by Local 1964, International Longshoremen's Association, AFL-CIO (herein called ILA), on April 14, 1980; Stipulation for Certification Upon Consent Election agreement approved by the Regional Director for Region 22, on April 24, 1980; election held on May 8, 1980; objections to the conduct of the election filed by Teamsters on May 15, 1980; Report on Objections and Challenges issued on July 23, 1980.

[2] Respondent admits, and I find, that it is a New Jersey corporation which operates a warehouse and interstate trucking business in Tinton Falls and Neptune, New Jersey. During the preceding year, it performed trucking services from points and places inside the State of New Jersey to points and places outside the State of New Jersey valued in excess of $50,000. Accordingly, it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Both the Teamsters and ILA are labor organizations within the meaning of Sec. 2(5) of the Act.

[3] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

[4] Certain errors in the transcript have been hereby noted and corrected.

[5] While his name figured prominently in these proceedings, Joe Lee neither testified nor appeared during the course of the 3-day hearing in this case. His absence was unexplained. In accordance with well-settled rules of evidence, I will assume that, had Joe Lee testified, his testimony would support the General Counsel's case.

[6] The union cards used in this campaign were conventional authorization cards which stated on their face:

> I, the undersigned, hereby apply for admission to membership in the above Local Union and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. . . .

The cards also contained other undertakings and provided spaces for the insertion of the date, the name, and other information pertaining to the applicant, and the applicant's signature.

[7] Respondent acknowledged the validity of cards signed by employees Kevin Brown, Fred Brown, Anthony Coffero, Daniel Florio, Joseph Fontana, Frank Harrington, Thomas Henville, John Hewlett, Joseph Hildebrandt, James LaPointe, Raymond LaPointe, Bryan O'Connor, and Donald Randall, and agreed that their cards should be admitted into evidence by stipulation. The General Counsel established through eyewitness testimony that signed cards had been presented to Coffero on or before April 1, 1980, by Eugene Bennett, Darren, Brown, Stephen Cole, Stafford Hoffman, Walter Hughes, Roger Neil, David Summers, Gerald Wardell, and Dennis Winslow. A 23d card, signed by William Dunnkosky, was admitted into evidence. However, Dunnkosky did not begin to work for Respondent until after the strike began and signed his card on April 9.

[8] In addition to the 22 employees whose names are recited in fn. 7 as having signed cards on or before April 1, Respondent also employed the following 18 bargaining unit employees on that date: Douglas Bass, Richard Boucher, George Conklin, John Dangler, Gary Daniel, Robert Harris, Julius Helmlinger, Donald Huey, James Jenkins, John Kelly, John Lowe, John La Belle, Thomas La Belle, Thomas Przybylinski, Donald Sullivan, Daniel Thorpe, Dennis Vitello, and Richard Warth.

[9] Respondent contends that a claim of majority status should be measured against a unit which had six additional employees—Bruce Burns, Gordon Dreher, Brian Gioia, Raymond Meyers, William Maximo, and Alex Mamusis. However, none of these employees was hired until at least April 7, and some were hired after that date.

some of the contents of this conversation and particularly concerning whether or not Senick offered to exhibit the cards then in his possession to a neutral third party for purposes of a card check. There is no doubt that, in the course of this phone conversation, Senick again demanded recognition. At Foley's request, Senick wrote Respondent a second letter, dated April 2, in which he stated that he had in his possession authorization cards signed by a majority of Respondent's drivers and platform men. He again asked that Respondent contact him immediately for the purpose of commencing negotiations.

Shortly thereafter, a sign was posted on the dock notifying dockworkers and drivers that a meeting with Joe Lee would be held on the following Friday morning, April 4. Friday was a holiday and attendance at the meeting necessitated a special trip to the terminal by employees who attended. During the week preceding the meeting, several supervisors had occasion to speak with dockworkers concerning the Teamsters organizing drive. In a conversation at the dock with employee Tony Coffero and several others, Grill stated that there could be trouble at the Company because of the Union drive. He went on to say that, knowing Joe Lee as he did, if the Teamsters came in, Lee would just lock the doors. He also informed employees that, to be eligible to vote in a representation election, an employee had to be at least 18 years of age with 1,000 hours of company service. On another occasion during the same week, dock worker John Kelly asked Grill if Grill knew who brought the Union into the terminal. Grill replied that he was going to get some of his buddies to find out and then "cut his — off."

Night Foreman David Russell informed several of the dockworkers that they did not have to attend the Friday morning meeting. He said that Joe Lee was going to discuss the pros and cons of Local 478 but only those eligible to vote in a representational election could attend. He repeated Grill's statement that only those over 18 years of age with 1,000 hours of company service could vote. Coffero told Russell that he would like to see those eligibility requirements in writing and asked him what was going to happen at the meeting. Russell replied that it was going to come down to the fact that, if the Teamsters got in, Joe Lee would lock the doors and all the employees would be out of work. When asked how Lee could carry this off, Russell replied that Lee could close down and reopen 30 days later under another name. He also suggested that Lee had the option of merging his Company with another company named Castways.

A few days before the meeting, Grill and Russell had occasion to speak privately at the warehouse with dockworker Joseph Hildebrandt. On that occasion, they told Hildebrandt that they were going to restructure the warehouse, keeping five full-time employees and 2 part-time employees in addition to Hildebrandt. At that time, there were two part-time employees and 12–15 others who worked about 35 or more hours a week in the warehouse. They offered Hildebrandt a job as foreman, at an increase of $6.25 (as compared with his current rate of $4 per hour), and told him that he would get an extra 75 cents per hour across the board on Labor Day. They mentioned the names of the dockworkers who would be retained on the payroll as full-time employees. They also asserted that they did not know who had started the unionization effort but whoever did it would be fired and not rehired.

During the conversation, Grill told Hildebrandt that he suspected that Danny Florio had started the union drive. Hildebrandt refused to comment. He told Grill and Russell that he appreciated the confidence that was implied in their offer of a promotion and a raise but informed them that, if the purpose of the meeting were simply to pump him about who started the union drive or to inquire into the specifics of the drive, the conversation was at an end because he would not divulge any such information. Grill told Hildebrandt that he did not care who signed union cards and then reversed his position by asking Hildebrandt if in fact he had signed a card. Hildebrandt replied that he had signed a card and that everyone else had also signed cards.

Throughout the week of March 31–April 4, Russell told employees that unionization was useless, that Joe Lee would never stand for the Teamsters, and that he would go to any length to stop them. On one occasion, just after the dockworkers had punched out for the night, he told them that Lee would simply close the doors, that Lee would not pay the Teamsters wage scale, and that the employees would be out of a job.

During this same period of time, Russell asked dockworker Frank Harrington who started the union effort. Harrington refused to say. He also asked Harrington if he would attend the Friday meeting. Harrington replied that he was committed to Local 478 and that he would not attend. Russell told Harrington that the Company was going to implement a plan for the warehouse which provided for six full-time employees, including a foreman, and two part-timers. He indicated that Harrington was among those who would be retained, that the new wage rate would be $6 per hour, and that Hildebrandt would receive $6.75. Russell also said that Joe Lee was going to have a medical and health plan, paid holidays, and a regular evening lunch period. He then named the other employees who would be retained. When Harrington asked if Coffero would be one of them, Russell said, "No." Russell said again that only those who had 1,000 hours of company time and were over the age of 18 would be eligible to vote on the question of unionization. Harrington responded that this rule would eliminate everyone who joined except Dallas Hoffman and Steve Colley. Russell's only comment was, "That's the law."

As advertised, Lee held a meeting of certain employees on the morning of April 4 in his office at the warehouse. Most truckdrivers attended but Hildebrandt was the only dock worker who showed up. Lee gave the assembled employees an account of what he paid out, stating that his books were open for inspection if anyone desired to see them. He went on to say that, if the Teamsters came in, he would have to pay specified benefits and there was no way he could do so. Lee told his employees that he had other business ventures and could survive without the trucking company. I credit testimony to the effect that Lee threatened on this occasion to close the terminal if the Teamsters came in. He said he had other alternatives, such as merging with Castways, but affirmed that neither Teamster Local 478 nor Local 701 would represent employees in his Company.

Turning to Hildebrandt, Lee said that he was appalled at the treatment that the dockworkers had been getting. He admitted that he had overlooked them but asserted that he was going to make it up to them. He said he had been checking around, and specifically with Hoffman Trucking Company, and had learned that ILA-represented dockworkers at Hoffman's were making $5.25 per hour. He said he was going to make certain dock workers full-time employees and increased their pay to $6 an hour in order to make up for the neglect which they had suffered.[10]

Coffero had a meeting with Senick later on in the day and told Senick what he had heard about the meeting in Lee's office. Coffero had not attended that meeting. He made particular reference to Lee's plan to reduce the number of dockworkers. Senick told Coffero that, if the Company did not put all the men to work on Monday, Coffero should call a strike.

Dockworkers were next scheduled to report for work at 5 p.m. on Monday, April 7. One dockworker, Daniel Florio, had been absent from work the preceding Wednesday and Thursday. When he arrived at the terminal on April 7, Grill asked him why he had been off work. He explained that he had been absent in order to take a government examination as a third-class marine radio operator. Grill also asked him if he had heard anything about the Union. Florio said that he had heard something. Grill replied that he did not care who started the Union as long as the men did not go through with it, because Joe Lee would shut the plant down before letting a union come in. He then told Florio to go and speak with Russell in the office.

When Florio spoke to Russell, Russell told him that he would have to let him go because he had been absent. Florio objected, stating that he had received permission to be off on Wednesday and on Thursday if necessary. Russell retorted that Florio had only asked him for 1 day's leave. Florio explained that he had needed 2 days off—one to study for the examination and the other to take the test, but his explanation was to no avail.

Florio reported his discharge to other dockworkers as they were arriving for work. Another employee, Fred Brown, had also been terminated. When the dockworkers arrived, Grill and Russell held a brief meeting for the purpose of filling them in on changes which the Company was going to make at the terminal. Grill told these workers what had occurred at the Friday meeting which Joe Lee held. The employees were also told that Lee had stated his feeling that dockworkers had been neglected and that he had apologized for the neglect. Grill reported that Lee had been checking other terminals and hoped that the men could sit down and come to a compromise concerning a possible pay increase at the Twin City warehouse. Grill reported that Lee had said at the Friday meeting that he could not absorb the scale in the Teamsters General Freight Agreement and added his own comment to the effect that, the way the men were going then, everyone would be out of work. Grill did say that Lee would be comfortable with the union at Hoffman Trucking Company.

Hildebrandt, Harrington, and Coffero replied. They said that the choice of a union belonged to the employees, not to the Company. Grill and Russell were then asked why Florio and Fred Brown had been fired. Grill stated that Brown had been fired at the request of their insurance company because he did not have a driver's license and was involved in an accident while jockeying trucks around in the terminal yard. He said that Florio had been fired for missing work too often and for being absent without calling in.

Grill announced the Company's plan to employ only five full-time dock workers and two part-timers. He told the employees that, if they did not follow the plan, Joe Lee would turn the key in the door and either sell the Company or merge with Castways. In any event, he would not let Local 478 come in. Various employees objected, saying that this would leave 10 or 12 men out of work. At this point in the meeting, Hildebrandt gave Grill an argument. He said that the new arrangement was fine with him personally since it meant he was getting a raise but questioned Grill as to its effect on other employees who would be out of work. Grill suggested that the men sit down and talk with Joe Lee, asserting that Joe Lee wanted either a company union or a union from the outside that he could live with. Hildebrandt replied that the men wanted the Teamsters but that they would be amenable to negotiating with Lee, stating "We don't want to shoot the works right off. We want to reason with Lee and don't want to kill him with a wage rate he can't pay." Grill replied, "That's not going to happen. There will be five full time [men and] two part-time."

Coffero and others told Grill that the men could not handle that proposal because it would mean being without a job until an opening occurred. Grill's response was, "You do what you have to do and we will do what we have to do." The dockworkers held a brief meeting among themselves and decided to walk out.

On the same evening, they established a picket line in front of the terminal, using homemade signs which read, "Twin County Trucking Company on Strike, Local 478." I credit corroborated testimony in the record that, in the course of that evening, Grill came out to the picket line, told the pickets that he had checked with Joe Lee, and informed them that they were all fired.

Early Tuesday morning, Lee had occasion to speak with Coffero and striking employee Joseph Fontana in the Company's parking lot. Lee asked Coffero why he had not attended the meeting on Friday. Coffero replied that he did not want to hear about any union that Lee might propose. Lee apologized to Coffero and Fontana for the treatment which had been accorded to dockworkers in the past. He made reference to their wage rate and working conditions,[11] including the fact that dockworkers received no regular break during the course of the evening to eat dinner. He said that he was going to make it up to the men, adding that, if Coffero had come to the meeting, he would have seen for himself that Lee was trying to be fair. He said that he had checked around and found that dockworkers in the area were being paid between $5.25 and $5.75 per hour. He stated that, if he could afford $6.25 an hour, he would pay it, and asked Coffero and Fontana to think about going back to work for $6 an hour.[12] Lee told them that the Teamsters were a bunch of gangsters and hardnoses and that he could not deal with them or live with them. He mentioned the ILA and said there was a possibility of having just a warehouse unit apart from the drivers. Coffero replied that this plan would provide no security, arguing that, if the men got rid of Local 478, they had no job security and Lee could then get rid of the them.

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[10] At that time, dock workers were earning between $3.50 and $4 per hour.

[11] One of the major complaints which dockworkers had previously brought to Grill's attention was harsh treatment given them by Night Supervisor Russell. Russell is no longer with the Company

Lee then asked Coffero to call off the strike. Coffero said that he could not do so and told Lee he would have to speak with Senick. Lee then asked Coffero to arrange a meeting with Senick and Coffero did so. A meeting took place at 11 that morning in Lee's office. The upshot of the meeting was that Lee agreed to reinstate Florio and Brown and to pay the men for Monday night. The dockworkers then returned to work Tuesday evening. Senick and Lee also discussed, in general, the terms of the Teamsters standard area agreement. Lee told Senick that he was just starting in business and could not afford the Teamsters wage scale or the Teamsters health and welfare contributions.

I credit testimony in the record to the effect that, in the course of this discussion, Senick told Lee he held authorization cards signed by a majority of the employees in the unit. When Lee questioned this statement, Senick offered to exhibit them to a clergyman for purposes of a card check. He told Lee he did not want to let Lee see the cards personally for fear of company reprisal against card signers. He also asked Lee to bargain with him and Lee agreed to sit down and negotiate. However, Lee told Senick that he wanted to contact his attorney first because he felt that he was personally a poor negotiator. He informed Senick that he would set up an appointment the following week. Senick reported the results of this meeting to the picketing employees. They ceased picketing and returned to work at or before their regular starting time of 5 p.m.

On Tuesday evening, four or five employees were sent home about 8 p.m. One of these was Bryan O'Connor, who carpooled with Coffero and who had to walk home, a distance of about 5 or 6 miles, because Coffero continued working. Coffero objected to Russell about sending men home, claiming it was a breach of the agreement which had been concluded in Lee's office earlier in the day. Russell just laughed. Coffero also brought to Russell's attention the fact that O'Connor would have to walk 6 miles in order to get home. Russell was equally indifferent to this complaint.

On the following morning, April 9, Coffero called Senick and told him what had happened the previous evening. Senick instructed Coffero to call another strike if all of the men did not work on Wednesday evening, adding that he thought the Company was trying to wear the men down gradually and break the Union. At starting time on Wednesday the platform crew began to work as usual. However, about 8 p.m. Russell came to Coffero, asked him not to get upset, but informed him that he was sending men home at that time as he had the previous evening. He told Coffero that the Company was gradually working its way into a system which required five full-time dockworkers and two part-timers. Coffero's response was, "It looks like you are trying to start more trouble." Russell's only comment was, "You do what you have to do and I'll do what I have to do." Coffero held a brief meeting with the dockworkers, after which all of them walked out and reestablished their picket line. This picket line lasted until May 8, when a representation election was conducted at Respondent's terminal. Among those going on at this time were the 14 employees whose names appear in paragraph 25 of the first amended complaint.

I credit corroborated testimony in the record that, shortly after the dockworkers went out on strike for the second time, Grill came out to the picket line and told the pickets again that they were all fired for walking off the job for no reason. A few days after the picketing began anew, Grill went through the picket line and spoke to several pickets in passing. He told them that he was sorry about what had happened and stated that it was a shame the Company and the men could not come to some kind of agreement. However, he warned the pickets that, if the Teamsters came into the plant, Joe Lee would simply close the doors and everyone, including himself, would be out of a job.

On another occasion, Grill spoke with Hildebrandt at the picket line. He said that the men were foolish for going on strike, that they were not going to get anywhere, and that the Teamsters were just a bunch of gangsters who wanted their money. He asked Hildebrandt why he had signed a card and why the dockworkers "were doing something like this." Hildebrandt replied that the men had been receiving ridiculous treatment on the dock and just could not get any relief. Grill insisted that they should have come to him and "we could have worked out something more equitable," adding that the men were just "screwing" themselves because Joe Lee could close the doors. He told Hildebrandt that he could find a job anywhere because he had been in trucking a long time, but the strikers would be out of jobs and so would a lot of employees who were still working.

On April 10, Lee spoke to Harrington near the picket line while Harrington was reading the paper in his car. Lee told Harrington that it was too bad that the trouble had started. He said he had been meaning to put into effect a plan which would pay the dockworkers more money and improve their conditions but he had been occupied in consolidating new business for the Company. He went on to say that it was also too bad that the men went for Teamsters Local 478 because they were a bunch of gangsters. Lee insisted that Local 478 would never be allowed in his Company, insisting that if a union were allowed to come in, it would be a union he approved of. He made specific reference to a "Hoffman Company union." Harrington asked Lee what he meant by a "Hoffman union." Lee replied that it was ILA Local 1964. He explained that Local 1964 was in at the Hoffman Company and that he had some familiarity with it. Harrington replied that the "president of the company doesn't pick the union; the men pick the union." Lee then told Harrington that, if Local 478 got in, he would merge the Company with Castways Freight and turn the key in the door, because Local 478 would never represent the men in his Company.

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[12] At that time both men were making $3.50 an hour.

Harrington had another casual conversation with Lee at the picket line. On one occasion, Harrington told him that "we'll be back in there legally, moving freight for your company." Lee retorted, "Never. You will never work for me again." During the course of another conversation, Lee came out with a trade publication in the trucking industry and informed Harrington of a help wanted ad appearing in the paper for a truck salesman. (Harrington had previously been a truck salesman.) Harrington told Lee that he was not interested because the truck business was "shot" and because he liked the physical work involved in the freight business. He also said he needed a job and intended to stay in the freight business.

On April 14, ILA Local 1964 filed a representation petition seeking an election in the unit for which the Teamsters had made a demand. On April 23, a representation case conference was held at the Board's office in Newark, attended by representatives of Respondent, Local 1964, and Teamsters Local 478, which had intervened. A stipulation for certification upon consent agreement was signed and an election was scheduled for May 8. The Teamsters was represented at the representation case by its attorney, John A. Craner. In the course of the discussions which took place at the conference, Craner told Lee and his attorney, Thomas F. X. Foley, that he was offering to return all strikers to work immediately and unconditionally. Either Lee or Foley replied that they could return only when and if there were openings and informed Craner that there were no current openings.

Several striking employees attended the conference. Upon their return to the terminal at Neptune, they spoke with Grill. Hildebrandt told Grill about the conversation between Craner and Lee at the conference concerning the reinstatement of strikers. Grill said that he would have to see if any openings developed. Although vacancies have occurred from time to time at the terminal since that date, none of the individuals named in the first amended complaint have been reinstated.

At a representation election held on May 8, the tally of ballots revealed that ILA Local 1964 received 19 votes, Teamsters Local 478 received 17 votes, and 10 votes were challenged. The Report on Objections and Challenges recommended that three challenges be sustained, that two be overruled, and that the other five be held in abeyance, pending a determination as to whether the challenged voters were replacements for economic strikers or for unfair labor practice strikers.

II. ANALYSIS AND CONCLUSIONS

A. *Independent Violations of Section 8(a)(1) of the Act*

(a) Grill's statement to several dockworkers during the week of March 31–April 4, to the effect that there could be trouble at the Company because of the Union's drive and that if the Teamsters came in Joe Lee would just lock the doors, is a clear and emphatic threat which violates Section 8(a)(1) of the Act.

(b) During this same period of time, Grill stated to employee John Kelly that he did not know who started the Union but that he was going to get his buddies to find out who was responsible and then "cut his — off." A threat to castrate, whether taken literally or viewed merely as a figure of speech, has an unmistakably coercive impact and violates Section 8(a)(1) of the Act. See *N.L.R.B.* v. *Moss Planing Mill Co.*, 206 F.2d 557 (4th Cir. 1953).

(c) Russell's statement to Coffero on the eve of the Company's meeting that, if the Teamsters got in, Joe Lee would lock the doors and all of the employees would be out of work is also a clear and emphatic threat which violates Section 8(a)(1) of the Act. Russell's elaboration of the way in which Lee could close the business, either by merger with another company or by closing and later reopening under another name, emphasized his remarks and compounds the gravity of his illegal statements.

(d) The statement of Grill and Russell to Hildebrandt, on the occasion when they offered him a promotion and a substantial wage increase, that the Company did not know who started the Union but the employee responsible would be discovered, discharged, and not rehired is a threat which violated Section 8(a)(1) of the Act.

(e) There is little doubt that the restructuring of the warehouse which was decided on immediately upon the receipt of the Union's demand letter, as well as the proposed wage increases which accompanied this reorganization, were part of an effort by Respondent to head off the unionization of the terminal. Accordingly, when Grill and Russell offered Hildebrandt a promotion and a wage increase on or about April 2, their action constituted a promise of benefit aimed at discouraging union activity and violates Section 8(a)(1) of the Act. *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405 (1964). The same findings apply to the actual grant of wage increases which Respondent made to several returning strikers to induce them to abandon the strike.

(f) Grill's question to Hildebrandt as to whether Hildebrandt had signed a union card constitutes illegal interrogation which violates Section 8(a)(1) of the Act.

(g) Grill's statement to Hildebrandt that he suspected that Danny Florio had started the union drive constitutes the creation of the impression that union activities of employees are the subject of company surveillance and violates Section 8(a)(1) of the Act.

(h) Russell's statement to employees that unionization was useless, that Joe Lee would never stand for the Teamsters, and that he would go to any lengths to stop them amounts to a statement that their union activities were futile and thus violates Section 8(a)(1) of the Act.

His further statement that Lee would close the doors and the employees would be out of a job is a threat which violates Section 8(a)(1) of the Act.

(i) Russell's interrogation of employee Frank Harrington as to who started the union drive is coercive interrogation which violates Section 8(a)(1) of the Act.

(j) Russell's statement to Harrington that, under the new plan for the warehouse, Harrington and others would receive a pay increase is a promise of benefit aimed at discouraging union activity and violates Section 8(a)(1) of the Act.

(k) The credited testimony to the effect that Joe Lee, when speaking, to employees at the Friday meeting, told them that if the Teamsters came in he would close the terminal constitutes a threat which violates Section 8(a)(1) of the Act.

(l) Lee's promise, made on the same occasion, to raise wages of dockworkers and make up for the neglect they had suffered, constitutes an illegal promise of benefit which violates Section 8(a)(1) of the Act.

(m) Grill's statement to Florio on April 7, that Lee would shut down the plant before letting a union come in, is a threat which violates Section 8(a)(1) of the Act.

(n) Grill's statement on April 7, to assembled dockworkers, in which he repeated Lee's statement of the previous Friday that he apologized for his neglect of dockworkers in the past and hoped that the men could sit down and work out a compromise on wage increases, is a promise of benefit which violates Section 8(a)(1) of the Act. His further statement on this occasion that, the way the men were going, everyone would be out of work is a threat which violates Section 8(a)(1) of the Act.

(o) Grill's statement to dockworkers on this occasion that Lee would never accept the Teamsters as the employees' bargaining agent constitutes an unlawful interference with the protected concerted activities of employees and violates Section 8(a)(1) of the Act.

(p) Lee's statement to Coffero and Fontana at the picket line on April 8 that he was sorry about past problems among dockworkers concerning wages, lack of a fixed dinner break, and other aspects of their working conditions and that he would make it up to them constitutes a promise of benefit aimed at inducing them to abandon a strike and violates Section 8(a)(1) of the Act.

(q) Grill's statement to pickets during the strike that, if the Teamsters came into the plant, Joe Lee would close the doors and everyone including himself would be out of a job is a threat which violates Section 8(a)(1) of the Act.

(r) Grill's questions to Hildebrandt on the picket line as to why he signed a card and why the dockworkers were "behaving like this" constitutes unlawful interrogation which violates Section 8(a)(1) of the Act.

(s) Grill's further statements to Hildebrandt on the picket line that the dockworkers, by striking, were merely "screwing" themselves because Lee would close the doors and they would all be out of jobs is a threat which violates Section 8(a)(1) of the Act.

(t) Lee's statement to Harrington at the picket line that, if a union were allowed to come in at Twin County, it would be a union which Lee approved of and that the men should select the "Hoffman Company union," namely, ILA Local 1964, is an interference with Section 7 rights of employees which violates Section 8(a)(1) of the Act.

(u) Lee's statement to Harrington at the picket line on this occasion that, if the Teamsters came in, he would merge the business with Castways and turn the key in the door because Local 478 would never represent the Company is a threat which violates Section 8(a)(1) of the Act.

(v) Lee's statement to Harrington at the picket line on another occasion that Harrington would never work for Lee again constitutes a violation of Section 8(a)(1) of the Act.

B. *The Discharge of Daniel Florio*

Daniel Florio was a dockworker who had signed a union card and who had attended a meeting of dockworkers with Union Business Agent Senick which was held on March 18, at Gepps' Bar. While Florio was by no means the most active union supporter, Grill suspected that he was and voiced this suspicion to Hildebrandt on or about April 1. Grill was also heard to say that he would find out who brought the Union into the terminal and would "cut — off."

Florio was fired on April 7, by Russell, ostensibly because he asked for a day off to take a marine radio operator's examination and instead took 2 days off. When Russell was called to the stand, he did not corroborate Respondent's defense. Instead, Russell testified in a rambling manner concerning another and remote occasion on which Florio had been given time off to take another examination. He gave no support to the Company's position that Florio was entitled to be off only on the Wednesday before his discharge and that he was scheduled to return to work on Thursday. Florio testified credibly that he had asked Russell in advance for time off to take the radio operator's examination and had told Russell that he might need 2 days off, one on which to study for the examination and one on which to go to Philadelphia to take the examination. In fact, Florio took off the Wednesday and Thursday prior to his discharge for this excused purpose. Friday was Good Friday and a holiday at Respondent's terminal. Testimony in the record concerning an occasion on which Florio was found drunk in the parking lot related to an incident which was remote in time from the discharge and had no causal connection with it.

The discharge of a suspected leader in the organizing campaign took place against a background of strong union animus. It was effectuated for a purported reason which was not substantiated by record testimony and for a reason which was clearly pretextual, inasmuch as Florio was given permission to be away the day on which he was assertedly absent without leave. The fact that Florio was reinstated on April 8 in no way affects the original illegality of the discharge. Accordingly, by discharging Daniel Florio on April 7, because of his union membership and his union activity, Respondent herein violated Section 8(a)(1) and (3) of the Act.

C. *The Character of the Original Strike On April 7, 1980*

On Friday, April 4, Senick told Coffero that, if Respondent did not put all the men to work on April 7, he should call a strike. It has already been found that Respondent's plan to cut the size of its work force at the dock and to raise the wages of the remaining dockworkers was directly prompted by the onset of the organizing campaign and by Respondent's desire to prevent the Teamsters from coming into the terminal as the bargaining agent of the employees. Accordingly, a strike to protest the implementation of this discriminatively motivated change in wages and working conditions was an unfair labor practice strike.

It is also clear that the striking employees were greatly concerned with the reasons for the discharge of Brown and Florio. They discussed these discharges with Grill and Russell at the meeting of April 7, and questioned these management representatives as to the reasons these two dockworkers had been terminated. There is little doubt that one of the causative factors which prompted this walkout was the discriminatory discharge of Florio and that one of the necessary conditions for calling off that strike was Florio's reinstatement, a condition which Lee agreed to on April 8. Accordingly, I conclude that Respondent's further unfair labor practice in discharging Florio caused or prolonged the April 7 walkout.

I have also credited corroborated testimony that, on the evening of April 7, Grill came to the picket line, told the pickets that he had spoken with Lee, and informed them that Lee had discharged them. Discharging employees because they have gone on strike violates rights protected by Section 7 and 13 of the Act, and no citation of authority is necessary to establish this proposition. Discharging economic strikers before they are permanently replaced is a violation of the Act. *N.L.R.B.* v. *International Van Lines*, 409 U.S. 48 (1972). When Respondent discharged its striking employees on the evening of April 7, it violated Section 8(a)(1) and (3) of the Act. This unfair labor practice also served to prolong the strike which was in progress and to constitute the striking employees as unfair labor practice strikers, if they were not already such from the inception of the walkout.

D. *The Character of the Strike of April 9, 1980*

There is no factual question that the employees who walked out on April 9 did so because Respondent persisted in implementing its plan for revising the operations of the warehouse. This plan, which called for fewer employees and a substantial increase in the wage rates of the dockworkers who remained, was devised and put into effect as a means of counteracting the Teamsters organizing campaign. As indicated above, this action constituted a violation of Section 8(a)(1) of the Act. Hence, a strike to protest the further implementation of this plan constitutes an unfair labor practice strike.

On the first night of the second strike, Grill visited the picket line and told the picketing employees[13] that they were all fired for going on strike without a legitimate reason. As noted above, discharging employees because they have gone on strike is a patent and flagrant violation of the law and discharging economic strikers prior to replacement is equally illegal. When Respondent took this action on the night of April 9, it again violated Section 8(a)(1) and (3) of the Act and its action served to prolong the strike already in progress. Inasmuch as the 14 unfair labor practice strikers thereby became discriminatees, it was not necessary for them to offer reinstatement in order to be entitled to return to their jobs or to receive backpay. *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979).

On April 23, at the representation case conference in Newark, the unfair labor practice strikers, through their attorney, offered fully and unconditionally to return to work. The offer was refused. The refusal to reinstate unfair labor practice strikers upon their unconditional offer to return to work is a violation of Section 8(a)(1) and (3) of the Act. *National Tape Corporation*, 187 NLRB 321 (1970); *Abingdon Nursing Center*, 197 NLRB 781 (1972); *ABCO Engineering Corp.*, 201 NLRB 686 (1973). The refusal by Respondent to reinstate the 14 strikers on April 23 is an unfair labor practice. As it occurred within the period established by the Board in *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962), for considering objections to the conduct of the election,[14] this unfair labor practice also constitutes grounds for setting aside the election which took place on May 8.

E. *The Refusal To Bargain*

1. The majority status of the Teamsters

In *Trading Port, Inc.*, 219 NLRB 298 at 301 (1975), the Board determined that "an employer's obligation under a bargaining order remedy should commence as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the Union's majority." While this holding does not require that a union's majority status be determined as of the same date that the bargaining order commences, it is logical to predicate a finding of majority status based upon the employee complement which existed as of that date.[15] As found above, Respondent embarked upon its campaign of unfair labor practices on or about April 1. The record herein contains a stipulation that some 40 individuals were employed in the bargaining unit on that date.

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[13] This action was directed at all 14 employees named in par. 25 of the first amended complaint.

[14] The representation petition in Case 22-RC-8201 was filed on April 14, 1980.

[15] Par. 16 of the first amended complaint alleges that all full-time and regular part-time truckdrivers, platform workers, and mechanics employed at Respondent's Neptune, New Jersey, terminal, with the usual exceptions, constitutes a unit appropriate for collective bargaining. Respondent states that such a unit could constitute a unit appropriate for collective bargaining but denies that such a unit ever existed. It is clear from the record that the unit did exist, is appropriate for collective bargaining, and was the unit in which Respondent agreed to an election which was conducted on May 8. The facility in question was largely relocated some 4 miles away to a new terminal in Tinton Falls, New Jersey, but this relocation in no way affected the appropriateness of the unit.

I have already found that 22 employees, or a majority of the unit employees, had signed Teamsters designation cards on or before April 1. At the hearing, Respondent leveled individual challenges at only two of these cards, namely, those signed by Walter Hughes and Eugene Bennett.[16] Bennett gave no testimony whatsoever which could impinge upon the validity of the authorization card which he signed on March 18, 1980. In Hughes' testimony, he admitted signing a card on March 28. He testified that Coffero told him on that occasion that everyone was going to join, so he signed the card which Coffero handed to him. Later, when the first strike began, Coffero asked Hughes to go on strike, noting that he had signed a card and asking him if he were going to stick with the other employees. Hughes reportedly protested at that point to Coffero, telling Coffero that he had said that everyone was going to sign when in fact they had not. It was at this point that Hughes told Coffero that he wanted no part of the Union.

Even if Hughes' testimony is credited, it does not depict a misrepresentation of fact by Coffero which prompted Hughes to sign an authorization card. Indeed, Coffero's reported statement to Hughes does not constitute a representation of any current or past fact but was merely an expression of hope for the future of the organizing drive. ("Everyone is going to sign.") As such, it forms no basis for challenging the validity of the card on which Hughes showed an allegiance he was quick enough to pledge until the Union's strike action brought home to him the fact that the Union might call upon him to back up his signature with action. Accordingly, I conclude that since April 1, 1980, the Teamsters was the majority representative of Respondent's employees in a unit appropriate for collective bargaining.

2. The Union's demand for recognition

Since a *Gissel* order is essentially a remedy for a violation of Section 8(a)(1) of the Act, such an order need not be predicated upon subsidiary findings that a union has made a demand for recognition or that an employer has rejected that demand. However, since the General Counsel has alleged that Respondent herein violated Section 8(a)(5) of the Act as well as Section 8(a)(1) and (3), such findings are appropriate in this case and are amply supported by the record. In its letters of both March 28 and April 2, the Teamsters requested recognition. Senick also requested recognition over the phone in talking with Grill and with Foley and in person while talking with Lee on April 8 at an emergency meeting which took place in Lee's office at the terminal. On this latter occasion, Lee negotiated with Senick concerning the return of the striking employees and the reinstatement of Florio and Freddie Brown. As the meeting concluded, Lee agreed to set up a meeting the following week among himself, his attorney, and Senick for the purpose of further negotiating a collective-bargaining agreement. This action constituted a *de facto* recognition accorded to the Teamsters by Respondent as the collective-bargaining representative of its drivers, dockworkers, and mechanics. Later, Respondent withdrew this recognition but without any justification or excuse. (The advent of ILA Local 1964 was in no small part prompted by Respondent's own illegal action and Lee's widely expressed preference for the Union which represented employees at the Hoffman Trucking Company.) Accordingly, I conclude that Respondent herein violated Section 8(a)(1) and (5) of the Act.

3. The appropriateness of a *Gissel* order

In 1969, the Supreme Court declared in *Gissel Packing Co., supra*, that the Board may issue a bargaining order in lieu of directing a representation election in cases where an employer's unfair labor practices are so serious that a fair and free election cannot be held. In the period of time which has elapsed since *Gissel*, this approach to remedying serious unfair labor practices has been repeatedly applied both by the Board and the courts. See, for example, *N.L.R.B.* v. *Broad Street Hospital and Medical Center*, 452 F.2d 302 (3d Cir. 1971); *N.L.R.B.* v. *Easton Packing Company*, 437 F.2d 811 (3d Cir. 1971); *N.L.R.B.* v. *Colonial Knitting Corp.*, 464 F.2d 949 (3d Cir. 1972); *Toltec Metals, Inc.* v. *N.L.R.B.*, 490 F.2d 1122 (3d Cir. 1974); *Frito-Lay Inc.* v. *N.L.R.B.*, 585 F.2d 62 (3d Cir. 1978); *N.L.R.B.* v. *Kenworth Trucks of Philadelphia, Inc.*, 580 F.2d 55 (3d Cir. 1978); *N.L.R.B.* v. *Daybreak Lodge Nursing and Convalescent Home, Inc.*, 585 F.2d 79 (3d Cir. 1978); *N.L.R.B.* v. *Eagle Material Handling, Inc.*, 558 F.2d 160 (3d Cir. 1977); *Electrical Products Division of Midland-Ross Corporation* v. *N.L.R.B.*, 617 F.2d 977 (3d Cir. 1980).

Recently, this doctrine has come under fire in some quarters. In his dissent in *N.L.R.B.* v. *K & K Gourmet Meats, Inc.*, 640 F.2d 460 at 470–471 (3d Cir. 1981), Circuit Judge Gibbons observed:

> It is no secret that at least a significant minority of the members of this court believe that the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), 895 S. Ct. 1918, 23 L.Ed. 2d 547 (1969), erred in interpreting the National Labor Relations Act to permit the National Labor Relations Board to enter a bargaining order as a remedy for unfair labor practices committed in the course of an organizing campaign. Nor is it any secret that those judges who are uncomfortable with the *Gissel* construction of the statute have been signalling the Board vigorously that bargaining orders are unwelcome in this circuit. . . . At the same time the Board is receiving from a different group of judges on this court quite a different signal. . . . These different signals are that we acknowledge the primacy of the Supreme Court in interpreting the Act, at least until Congress speaks, that we acknowledge the primacy of the Board as fact finder, and that if the Board decides to enter a *Gissel* order we will be satisfied with a statement of reasons reasonably identifying for us the basis, among several permissible bases, for choosing that remedy.

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[16] Respondent introduced evidence of misrepresentation relating to assertions made to certain employees who were not card signers but such statements, even if made, could have no possible bearing on the Union's majority status or on the cards which establish that status.

> Until this case, the guerilla warfare against *Gissel* orders has been carried out by insisting that the Board's opinion writing is so opaque that we cannot understand it and remanding. . . . With the present majority a new weapon is resorted to. The majority simply substitutes its fact finding for that of the Board. Perhaps the new tactic reflects a conclusion that finally the Board has devised a formula for stating its reasons satisfactorily. . . .

While a court may be empowered to ignore Board precedent and Board findings or give an "ungenerous reading"[17] to its own precedents, it may not properly ignore what the Supreme Court has done. Accordingly, I set forth the basis upon which the Supreme Court concluded, in *Gissel,* that a bargaining order was warranted in that case because a fair and free election could not be held therein. A comparison of the facts in *Gissel* with the facts in this case amply demonstrates that a *Gissel* order should be ordered herein. *Gissel* involved a series of unfair labor practices committed in a bargaining unit of 47 members during the course of an organizing campaign. Those violations included the discriminatory discharge of two employees, an announcement by the company vice president that union meetings would be placed under surveillance and that reports to the company would be made, concerning the presence of a member of the owner's family in the vicinity of a union meeting, several instances of coercive interrogation, a statement by the company vice president to an individual employee that "I can give you more than they [the Union] can," and another statement by the same individual that he did not want to hear more about "this union stuff." The basis upon which I have concluded that a free and fair election could not be run in this case because of the repeated anf flagrant unfair labor practices of this Respondent is set forth above in sections C, 1, 2, 3, and 4 of this Decision, and I reiterate the conduct found therein in support of a recommendation for *Gissel* order as fully as if I repeated it *in haec verba* at this point in the Decision. I stress also that the illegal discharge of 14 out of 40 members of a bargaining unit, as found in this case, cannot by any stretch of the imagination be regarded as isolated conduct having no bearing on the expression of employee sentiment at the ballot box.

4. The offering and granting of wage increases to bargaining unit employees

In the amended complaint the General Counsel has alleged that the Respondent violated Section 8(a)(1) and (5) of the Act by offering and then granting wage increases to bargaining unit employees without negotiating those increases with their bargaining agent. According to the Board doctrine enunciated in *Trading Port, supra,* an 8(a)(5) violation can be predicated upon such conduct if it occurs at or after the point in time when an erring employer has embarked upon a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the Union's majority status. Such conduct on the part of this Respondent began on or about April 1, 1980, so any unilateral changes in wages or working conditions which were implemented on or after this date without negotiation with the employee bargaining agent amounts to an unlawful refusal to bargain within the meaning of Section 8(a)(5) of the Act.

Prior to the Good Friday meeting which Respondent held with some of its work force, several members of the platform crew, including Hildebrandt and Harrington, were told by company supervisors that their wage rate would be substantially increased and that the size of the dock crew would be substantially reduced. This same message was given to all dockworkers by Grill and Russell on Monday evening, April 7. Most of the dockworkers went on strike on April 9, and some drifted back to Respondent's payroll as the strike wore on. Several returning strikers testified at the hearing that, upon their return or shortly thereafter, they began to be paid at rates considerably in excess of what they had been receiving when they walked out. At the emergency meeting between Lee and Senick which was held on the morning of April 8, agreement was reached to hold another meeting the following week for the purpose of negotiating a contract covering the unit here in question. That meeting was called off. At no time did Respondent negotiate any changes in the wages or manning requirements for its dockworkers with the Teamsters nor, with the exception of an agreement to set up an aborted negotiating session, did it even offer to do so. Both wages and manning requirements are mandatory subjects of bargaining. Accordingly, I conclude that, when Respondent unilaterally implemented the above-recited changes without bargaining, it violated Section 8(a)(1) and (5) of the Act.

Upon the foregoing findings of fact, and upon the entire record herein considered as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent Twin County Trucking, Inc., is now and at all times material herein has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Both Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Local 1964, International Longshoreman's Association, AFL-CIO, are, respectively, labor organizations within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time truck drivers, platform workers, and mechanics employed at the Respondent's Neptune and Tinton Falls, New Jersey, facility, but excluding all office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
4. Since on or about April 1, 1980, Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, has been the exclusive collective-bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law 3

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[17] The phrase belongs to Chief Judge Seitz, dissenting in *N.L.R.B. v. Permanent Label Corporation,* 657 F.2d 512 (3d Cir. 1981).

for purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain collectively with, and by withdrawing recognition from, Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive collective-bargaining representative of its employees in the bargaining unit found appropriate in Conclusion of Law 3 herein; and by unilaterally granting wage increases and making changes in the complement of platform crews without first bargaining in good faith with said Union concerning said changes, Respondent herein violated Section 8(a)(5) of the Act.

6. By discharging Daniel Florio on April 7, 1980; by discharging the employees who went on strike on April 7, 1980; and by discharging Darren Brown, Anthony Coffero, Steven Cole, Daniel Florio, Joseph Fontana, Frank Harrington, Thomas Henville, John Hewlitt, Joseph Hildebrandt, Stafford Hoffman, James La Pointe, Ray La Pointe, and Bryan O'Connor because they engaged in a strike or because of their membership in and sympathy with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Respondent has violated Section 8(a)(3) of the Act.

7. By refusing on April 23, 1980, to reinstate 14 unfair labor practice strikers upon their unconditional request to return to work, Respondent herein violated Section 8(a)(1) and (3) of the Act. Such action also constitutes objectionable conduct warranting the setting aside of an election which was conducted on May 8, 1980, in Case 22-RC-8201.

8. By the acts and conduct set forth above in Conclusions of Law 5, 6, and 7; by threatening to discharge employees, lock the doors, or merge the Company with another company if the Union came in; by threatening to castrate employees because of their union activities; by offering employees promotions, wage increases, and other unnamed benefits in order to defeat the unionization of the Company; by coercively interrogating employees concerning their union activities and the union activities of other employees; by telling employees that their union activities were acts of futility; by urging employees to select as their bargaining agent a labor organization other than the one they had selected and telling them that the only union which the Company would recognize would be one which met company approval; and by telling striking employees that they would never be hired again, Respondent herein violated Section 8(a)(1) of the Act.

9. The strikes which occurred at Respondent's terminal on April 7 and 9, 1980, respectively, were both caused and prolonged by Respondent's unfair labor practices.

10. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions which are designed to effectuate the purposes and policies of the Act. Since the independent violations of Section 8(a)(1) of the Act found herein are repeated and pervasive, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). As discussed more fully above, the recommended Order will provide for a *Gissel* remedy and will provide that Respondent be required to offer full and immediate reinstatement to all of the disciminatees named in paragraph 25 of the first amended complaint and to make them whole for any loss of earnings which they may have sustained by reason of the discrimination practiced against them, in accordance with the *Woolworth* formula,[16] with interest thereon at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. *Olympic Medical Corporation*, 250 NLRB 146 (1980); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I will also recommend that Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

[Recommended Order omitted from publication.]

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[16] *F. W. Woolworth Company*, 90 NLRB 289 (1950).

Mount Desert Island Hospital *and* Malachy Grange. Cases 1–CA–16082 and 1–CA–17599

December 8, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 29, 1981, Administrative Law Judge Wallace H. Nations issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Mount Desert Island Hospital, Bar Harbor, Maine, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Malachy Grange immediate employment in any nursing position for which he is qualified without prejudice to whatever seniority and other rights and privileges he would have enjoyed had it not discriminated against him, dismissing, if necessary to make a position available for him, any employee hired to a position he would have held but for such discrimination. In the event no such vacancy presently exists and no one has been hired for such a position since such discrimination, establish a preferential hiring list headed by Grange. If such a preferential hiring list is established, offer Grange employment immediately upon the development of a vacancy for which Grange qualifies."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to rehire or otherwise discriminate against our employees in regard to hiring or tenure of employment or any term or condition of employment because they engage in concerted activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT blacklist our employees or in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

WE WILL offer Malachy Grange immediate employment in any nursing position for which he is qualified without prejudice to whatever seniority and other rights and privileges he would have enjoyed had we not discriminated against him, dismissing, if necessary to make a position available for him, any employee hired to a position he would have held but for such discrimination. In the event no such vacancy presently exists and no one has been hired for such a position since such discrimination, WE WILL establish a preferential hiring list headed by Grange. If such a preferential hiring list is established, WE WILL offer Grange employment immediately upon the development of a vacancy for which Grange qualifies.

WE WILL make Malachy Grange whole for any loss of earnings he may have suffered as a result of our refusal to reemploy him, with interest.

MOUNT DESERT ISLAND HOSPITAL

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: Upon a charge brought in Case 1–CA–16082 on May 16,

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[1] In affirming the Administrative Law Judge's finding that Malachy Grange's letter to the Bar Harbor Times constituted concerted activity, we note that prior to sending the letter, which included complaints about employee wage levels and working conditions, Grange engaged in discussions with fellow employees regarding alleged deficiencies in pay, benefits, and working conditions at Respondent's facility.

[2] The Administrative Law Judge recommended that Respondent be ordered to employ Grange in any nursing position for which he qualifies, or the first available position. We find, however, that the appropriate remedy is to require Respondent to offer immediate employment to Grange and, if necessary, to dismiss any employee hired since the discrimination against him into a position for which Grange qualifies. We have therefore, in accordance with this finding, modified the recommended Order and substituted a new notice.

Member Jenkins would compute the interest due on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

259 NLRB No. 80

1979, and a charge brought in Case 1–CA–17599 on June 30, 1980, complaints were issued on June 21, 1979, and August 18, 1980. The order and complaint of August 18, 1980, consolidated the two cases and alleges that on three occasions in 1979 and 1980, Mount Desert Island Hospital (Respondent) refused to rehire Malachy Grange, and on one occasion in 1979, attempted to cause another employer to refuse to hire Grange, for the reason that Grange had engaged in protected concerted activities for the purposes of collective bargaining or other mutual aid or protection and for the reason that he filed charges under the Act, and by its actions, Respondent has violated Section 8(a)(1) and (4) of the Act. Respondent's answer and motion to dismiss denies these allegations. A hearing was held on March 17 and 18, 1981, at Bar Harbor, Maine. Briefs were received from both General Counsel and Respondent on or about April 29, 1981.[1]

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is a hospital providing medical services to the general public at its facilities in Bar Harbor, Maine. Respondent has annual gross revenues in excess of $250,000 and annually purchases goods and supplies valued in excess of $50,000 per year from points outside the State of Maine. I find that Respondent is an employer within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Refusal To Rehire Grange During 1979 and 1980*

1. Background and facts

Respondent is a health care institution located in Bar Harbor, Maine, and is licensed for 66 acute patient care beds. In September 1977, Grange was hired by Respondent as a licensed practical nurse (LPN). Commencing around May 1978, Grange engaged in discussions with other staff members pertaining to low pay, poor benefits, job security, and no seniority system, as part of the working conditions at Respondent's hospital. Grange, thereafter, complained about Respondent's working conditions such as staff shortages, by bringing it to the attention of Director of Nursing Louise Dunne, and Assistant Director of Nursing Margaret Sprott. Grange also submitted signed written complaints about working conditions and placed them in the hospital's suggestion box.

Upon receiving no response to these complaints from the hospital's administration, Grange sent a letter to the editor of the Bar Harbor Times on or about July 3, 1978, and it was printed in the newspaper on July 6, 1978. In general, the letter complained about working conditions at the hospital, employee wage levels, and the level of patient care given by the hospital. The exact text of this letter is appended to this decision as "Appendix B [omitted from publication]."

On July 6, 1978, Grange invited Don Snyder, the editor of the Bar Harbor Times, to attend a staff meeting at Respondent's hospital, for the purpose of verifying from the staff employees the working conditions that were referred to in Grange's published letter. At the staff meeting, which was attended by approximately 30 staff employees, the employees stated their complaints for the benefit of the newspaper. The complaints related to low pay and benefits, lack of security, inadequate staffing, and patient care. On July 6, 1978, at Respondent's parking lot, Grange met Respondent's administrator, Charles Lotreck, and introduced himself to Lotreck by stating, "Mr. Lotreck, I am Mal Grange. Did you read my letter and what did you think about it?" Lotreck did not reply.

On July 13, 1978, letters in response to Grange's letter, that appeared in the prior edition of the newspaper, were published in the Bar Harbor Times, and generally supported Grange's criticism of the working conditions at the hospital. On July 20, 1978, additional followup letters in support of Grange's criticism of Respondent's working conditions were published in the local newspaper. On or about July 20, 1978, Grange was responsible for circulating a petition among his coworkers requesting the community and board of trustees of the hospital to investigate the working conditions at the hospital and bring about needed changes. Approximately 105 staff employees signed the petition, including Supervisors Len Sweet, Norma Spurling, and Paula Knutsen. Grange gave a copy of the petition to the Bar Harbor Times and another copy was placed in Assistant Administrator Paul O'Neill's box at Respondent's hospital with an attached note from Grange requesting him to pass the copy of the petition to Respondent's board of trustees. The petition, with an editorial, and additional followup letters were printed in the Bar Harbor Times on July 28, 1978.

During August 1978, at Grange's request, a staff meeting was held at Respondent's hospital, which was attended by the Bar Harbor Times' editor and by Christopher Spruce of the Bangor Daily News. Director of Nursing Dunne, upon being informed that two newspaper reporters wanted to attend the staff meeting, immediately checked for approval from Lotreck. Lotreck denied approval. Dunne stated that her concern was that no one from management should stay at the staff meeting. Lotreck agreed and stated, "You know a lot of people on the board question why Mal Grange has been seen in your office prior to this meeting."

In December 1978, Grange voluntarily left the employ of Respondent to prepare for his state board examinations to become a registered nurse. Grange took the examinations in February 1977 and was notified that he was successful in passing the examinations as of March 1979. During February 1979, Grange phoned Respondent's Director of Nursing Dunne and inquired about summer employment as a registered nurse at Respondent's hospital. Dunne responded that she had a nursing shortage on the night shift and offered Grange a position immediately as a graduate nurse on the night shift beginning in February 1979. Grange declined the offer of immediate appointment because his plans were indefinite.

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[1] Certain errors in the transcript are hereby noted and corrected.

In a letter dated March 13, 1979, from Grange to Dunne, Grange requested an application and consideration for employment. On or about March 27, 1979, Dunne received a phone call from Grange inquiring about prospective summer employment with Respondent. The discussion related to possible nursing positions available and Dunne informed Grange that there were nursing positions available and specifically mentioned the emergency room position on the 3 to 11 p.m. shift. Dunne indicated that she would consider Grange hired pending submission by him of an application. Dunne complied with Grange's request by sending him an application on the following Monday, April 2, 1979. Prior to Dunne leaving on vacation from March 31, 1979, through April 15, 1979, she informed her assistant, Margaret Sprott, that she had a telephone conversation with Grange and discussed the opening position in the emergency room and that as far as she was concerned, Sprott could hire Grange.

On or about April 3, 1979, Grange phoned Respondent's hospital and spoke to Sprott. Grange mentioned that he had spoken to Dunne the previous week and knew that she was now on vacation, but that he had filled out an application and would like to apply for the emergency room, 3 to 11 p.m. shift for the summer of 1979. Sprott replied that she considered Grange hired and inquired as to when he could report. Grange responded that he was not sure of the exact date but that it would be sometime in June. Sprott requested that he notify them of the exact date he would report. Following this telephone conversation, Sprott discussed with staffing secreatry Eileen Holmes putting Grange on the schedule for the 3 to 11 p.m. shift in the emergency room and decided to wait until Grange let them know the exact date he would start. On April 4, 1979, Grange gave his completed application form to Mary Rewa, a nurse at Respondent's hospital, who delivered it to the nursing office.

On or about April 17, 1979, Sprott informed Dunne that she had hired Grange and that he would be informing them of when he could report to work. On April 17, 1979, Dunne informed Lotreck that Sprott had hired Grange while she was on vacation. Lotreck became upset and replied that he did not see how Sprott could have ever done such a thing with all the trouble Grange had caused the hospital the previous summer.[2] Lotreck then instructed Dunne to get in touch with Grange immediately to tell him there would be no position available for him at Respondent's hospital. Dunne phoned Grange on April 17, 1979, and disclosed the contents of her conversation with Lotreck. Dunne mentioned that it was Lotreck's position that Respondent had more than enough applicants for nursing positions and did not anticipate needing Grange. Grange inquired whether anything could be done about it and Dunne replied in the negative.

The final approval of all hiring at Respondent's hospital must be by the hospital's administrator, Lotreck. As noted in the Hospital's Personnel Policy Manual:

> Applicants will be given a preliminary interview by their prospective department head to ascertain their ability to meet the job requirements. Final approval of the administrator is required prior to hiring new personnel.

This policy was in effect at all times relevant to these proceedings.

On April 18, 1979, Dunne informed Lotreck that she had contacted Grange and carried out Lotreck's instructions, but that Grange was upset over Lotreck's decision not to hire him and that Grange might take legal action. On April 18, 1979, a directive was issued by Lotreck to the department heads at the hospital requiring that all applicants for employment go through the personnel department before any final decision is made to hire such applicant. On or about May 2, 1979, Lotreck instructed Respondent's assistant administrator, Paul O'Neill, to contact the administrator of Sonagee Estates and inform him that it would be in the best interest of Sonagee if he did not hire Grange. This action is discussed at a later point in this decision.

In September 1979, Grange went back to Portland, Oregon, which he considered his second home. On March 4, 1980, Grange applied by mail as a registered nurse at Respondent's hospital in emergency room or med./surg., and indicated a willingness as to flexibility in work and hours for summer employment. Respondent's new director of nursing, Dorothy Osborne, responded in a letter dated April 6, 1980, informing that Respondent did not need any summer nurses, nor did it anticipate the need for any nurses, but that it would keep Grange's application on file. Immediately prior to sending this response to Grange's inquiry, Osborne had spoken to Lotreck. Although Lotreck never told Osborne not to hire Grange at this point, Osborne concluded on her own that Lotreck would probably not give final approval to the hiring of Grange while other qualified candidates were available. Because of a prior commitment made at the end of the prior summer's employment, the hospital did hire one LPN, Elizabeth Muckel, as a summer employee. The hospital prefers to hire non-RN's to assist in the summer. Statistics introduced by Respondent indicated that a greater percentage of Respondent's nursing care is delivered by registered nurses in institutions of similar size. The percentage of nursing care delivered by LPN's is lower than at other institutions. With the RN staff at a comparatively high level, and an increase in patient census in the summer, the hospital's position is that it is reasonable to respond to the increased demand by hiring less costly aides and LPN's. There was no evidence presented to show that the hospital hired additional, nonspeciality RN's for regularly scheduled shifts during the summer.

The hospital used the services of The Traveling Nurse Corps (TNC), in the winter of 1979-80. TNC is similar to "Manpower, Inc." in that it can provide experienced registered nurses with speciality skills on a temporary basis. TNC nurses were used to fill vacancies for which the hospital was attempting to hire permanent RN's with speciality skills. No general duty (alternately referred to as med./surg.) nurses were hired from TNC. Only those who had experience in specific speciality skills were requested by Respondent. Specifically, nurses were provided by TNC who had experience in intensive care and obstetrical services as well as those who had experience in supervising a shift on a floor (charge nurse). Both nursing Directors Dunne and Osborne agreed that those RN's with "specialities" are not always able to exclusively practice within these "specialities." Hence, when there are no patients in need of coronary or obstetrical care, RN's with specialities may be assigned to assist in med./surg., or other areas of the hospital.

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[2] Grange's letter, attached as "Appendix B [omitted from publication]," and the public reaction to the letter noted above led to the hospital's decision to terminate its *Capital Fund Drive*, evidently causing the hospital serious financial harm.

On June 14, 1980, Grange visited the Bar Harbor area and spoke to Respondent's staff doctor, William Horner. Dr. Horner informed Grange that as far as he knew there was an opening at Respondent's hospital for a RN on the 3 to 11 p.m. shift in the emergency room. Dr. Horner further stated that the emergency room was busy enough, that it was Respondent's policy to have a full-time nurse in the emergency room on the 7 a.m. to 3 p.m. day shift and 3 to 11 p.m. shift, and that he was concerned that no one had been hired as yet.

On June 17, 1980, Grange approached Respondent's director of personnel, David Matlack, and inquired about the possibility of being hired by Respondent. Matlack replied that Respondent was not hiring any nurses for summer employment, but were seeking to hire nurses who would stay over the winter, particularly speciality nurses. Following his conversation with Matlack, Grange went to speak with Director of Nursing Osborne. Osborne indicated that the hospital was not looking for summer applications and that her most pressing need was night-shift nurses, particularly speciality nurses for full-time employment. Grange countered that he knew that Elizabeth Muckel was being employed for the summer only and was basically a med./surg. nurse. Osborne noted a prior commitment to Muckel.

On or about June 23, 1980, Grange visited Respondent's hospital and met with Osborne again. At this meeting, Grange changed his application from one seeking summer employment to one seeking full-time employment. Osborne responded that she would get in touch with Grange. On June 25, 1980, Grange phoned Osborne to inquire about whether a decision had been made about his job application. Osborne replied that the only kind of nurses Respondent wanted were speciality nurses and that it did not need med./surg. nurses at all. The hospital did not hire any med./surg. registered nurses during the summer of 1980. However, Osborne did provide Grange's name to Maine Coast Memorial Hospital, a hospital of similar size in Elsworth, Maine, located 20 miles from Mount Desert Island Hospital. Grange rejected employment at Maine Coast Memorial and after spending the summer in Bar Harbor, returned to Oregon.

2. Contentions and conclusions

Respondent's initial defense in this proceeding is that Grange's actions were on an individual basis only, and not on behalf of other hospital employees. The record shows this to be clearly wrong. Grange's letter to the Bar Harbor Times clearly makes reference to working conditions of all of the nursing staff. Moreover, his ability to organize a staff meeting attended by a large number of the hospital nurses and subsequent ability to successfully circulate a petition complaining of working conditions reflects the support Grange had from his coworkers. Thus, I find that Grange's actions did constitute concerted activities on behalf of the hospital's employees generally.

The next and most serious question raised is whether Grange's concerted activities are protected under the Act.

An analysis of the discharge or failure to rehire an employee for activities which are protected under Section 7 begins with the Supreme Court's decision in *N.L.R.B.* v. *Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Company)*, 346 U.S. 464, 481 (1953). In that case, the employer discharged striking employees who distributed handbills disparaging the quality of the employer's product and its business policies in a manner reasonably calculated to harm the company's reputation. The Supreme Court held that while Section 7 did safeguard the rights of employees to engage in concerted activities for mutual aid or protection, Section 7 was not intended to "weaken the underlying contractual bonds and loyalties of employer and employee." However, as noted in the dissent by Justices Frankfurter, Black, and Douglas:

> The Board and the courts of appeals will hardly find guidance for future cases from this Court's reversal of the Court of Appeals, beyond that which the specific facts of this case May afford.

As predicted in the dissent in *Jefferson Standard*, the cases following it determining whether a particular activity was protected turn significantly on the facts. Respondent relies on the Board's decisions in *Coca Cola Bottling Works, Inc.*, 186 NLRB 1050 (1980), and *Firehouse Restaurant*, 220 NLRB 818 (1975), two cases in which an employee or employees publicly alleged that their employers' product was harmful to their customers' health. In both cases, the activities were found to be unprotected. It also cites *American Arbitration Association, Inc.*, 233 NLRB 71 (1977), and an advice memoranda issued by the Division of Advice, *University of Southern California Security Department*, 99 LRRM 1728 (1978), wherein it was concluded that remarks made during television interviews by campus security officers which were critical of security conditions on the university campus were not protected. Associate General Counsel Datz concluded that the remarks made "would tend to embarass the university's reputation, community relations, and security."

General Counsel relies on a line of cases including *United Parcel Service, Inc.*, 234 NLRB 223 (1978), *Spring-*

field Library and Museum Association, 238 NLRB 1673 (1979), and *The Reading Hospital and Medical Center*, 226 NLRB 611 (1976). In *Springfield*, an employee of the Association published an article in the union newsletter which stated, *inter alia*, that Respondent's chief administrator was:

> . . . a man who never "lost contact" with working professionals because he never had it to begin with. He is simply a man who, when he lost his job at Forbes & Wallace, was put on a form of welfare-for-the-rich courtesy of his friends on the Board of Trustees.

In that case, Respondent argued that the employee went too far, that her statements were libelous, *per se*, that she insulted a management official, and that such statements by an employee were neither acceptable nor permissable. In reversing the Administrative Law Judge who agreed with Respondent, the Board stated at 1673–74 that:

> Clearly the Administrative Law Judge erred. Specificity and/or articulation are not the touchstone of union or protected concerted activity. Rather, the issue to be addressed is the question of whether or not the comments are related to concerted or union interests. Once the concerted nature of the words is established (as formed by the Administrative Law Judge), Respondent had the burden to show that the words were published with knowledge of their falsity or with reckless disregard of whether they were true or false. In *Letter Carriers*, 418 U.S. at 283, the Supreme Court stated: [footnote omitted]
>
> > But *Linn* recognized that federal law gives a union license to use *intemperate, abusive*, or *insulting language* without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point. [Emphasis supplied.]
>
> * * * * *
>
> In short, Glendon's message to her fellow employees is that they have work-related problems and suggests that one of the reasons for these problems is the manner in which Respondent's administrators are chosen. Respondent's management may very well have been offended by Glendon's "rhetorical hyperbole," but, as the Court said in *Linn, supra* at 63:
>
> > . . . the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.
>
> Since Glendon's article clearly is protected concerted union activity, immune from restraint or interference under state libel laws, *a fortiori* this same conduct is immune from restraint or interference by an employer's disciplinary actions. [Footnote omitted].

Two other cases were cited by Respondent which would support a finding that the letter and subsequent activity of Grange were protected. In *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979), an employee was denied a promotion because of statements made in a letter which was distributed to an assortment of agencies which funded and/or reviewed the employer. The Administrative Law Judge found that portions of the employee's letter criticizing the employer's administration and chairman of the board were unprotected. The Board disagreed, finding that the purpose of the letter was to complain about the discharge of a fellow employee and that the criticism of the employer's operation were merely cited in support of his major contention that the charging party's fellow employee had been wrongfully discharged.

Another case in which the activity of health care employees was found to be protected was *Community Hospital of Roanoke Valley, Incorporated* v. *N.L.R.B.*, 538 F.2d 607 (4th Cir. 1976), enfd. 220 NLRB 217 (1975). The dispute arose in the context of an organizational attempt by the Virginia Nurses Association of registered nurses at Roanoke Hospital. The charging parties were identified as leaders of the organizational effort who had made statements on television to the effect that there was no RN coverage during certain shifts, which charging parties attributed to an ongoing dispute over salaries and benefits. The Administrative Law Judge found, with Board and court approval, that the public outburst was caused by the employer's coercive conduct and that the statements made concerning patient care created no cause for alarm by the employer and, therefore, the statements were protected.

With the teaching of the foregoing cases in mind, I have carefully reviewed the letter of Grange which is at the heart of this controversy. I find that the writing of this letter as well as Grange's subsequent activity, constitutes protected activity. Although the letter does attack the hospital's safety levels and administration, the basis for those attacks is closely tied to the working conditions of the nurses at the hospital. Grange's allegations that "only very minimal patient care is given and safety standards are stretched to the limit and beyond" are immediately tied to working conditions, i.e., poor staffing, overwork, and poor pay. The letter also notes that earlier, nonpublic suggestions and complaints had evidently fallen on deaf ears with the hospital's administration and board of trustees. I believe that it is clear from the tenor of the article that its intention was not to harass, disparage, or harm Respondent, but simply to force the administration to take heed of its employees complaints about wages and working conditions at the hospital.

Respondent, acting through its spokesman, Administrator Lotreck, admitted that the reason Grange was not employed by Respondent in June 1979 was because of the newspaper articles that appeared in the Bar Harbor Times during July 1978, all of which emanated from Grange's initially published letter of July 6, 1978. The rejection of Grange's employment for the summer of 1979 by Lotreck created controversy among the administration's personnel as manifested by the pharmacy, therapeutic, and patient care committee meeting held on April 18, 1979; joint conference committee meeting held on

May 8, 1979; executive committee meeting on May 9, 1979; and medical staffing meeting on May 10, 1979. At the joint conference meeting held on May 8, and attended by Lotreck, among others, Lotreck was quoted in Dr. Robert Beekman's (an observer) testimony to have stated relative to the subject of Grange, that it was an act of incompetence to hire someone who had been a troublemaker, who had stirred up the nurses, who had taken our problems to the newspapers and the public. Lotreck further stated at the meeting that if he had known that Dunne had hired Grange, Lotreck would not have ordered her to tell him that there was no position; but, Dunne had told Lotreck that Grange had only inquired and no position had been offered to Grange. Dunne, who was present at the meeting, accused Lotreck of not telling the truth in a heated discussion that followed, resulting in Dunne nearly offering her resignation.

Respondent urges that the primary reason for Grange not being hired was based on Grange's exit interview which was critical of Respondent's administration. Review of the exit interview reveals on its face that Grange generally liked the hospital, his coworkers, and supervisors, and the nature of his work. It also reveals that he was critical of the hospital's top administration because of working conditions, pay, and the other matters complained about in the letter to the newspaper and the petition subsequently circulated among the nursing staff. I find that from the record as a whole that Respondent refused to rehire Grange for the summer of 1979 and thereafter primarily because of Grange's published letter in the Bar Harbor Times of July 6, 1978, and the concerted activity that resulted therefrom. As noted earlier, the hospital blames Grange and the publicity surrounding the hospital that emanated from his July 6, 1978, article as causing the hospital to prematurely end its capital fund drive. I find that it is unfair to lay the death of the drive solely at the feet of Grange. Had his accusations about working and other conditions at the hospital been unfounded or patently false, the continuing criticism of the hospital that resulted from the article would not have occurred.

Are there any legitimate business reasons for not hiring Grange unrelated to his protected concerted activity which would justify Respondent's refusal to rehire him? Under the recently formulated test in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), where there is a possibility of dual or "mixed" motives in the action taken by an employer, one such being proper under the law, and the other being improper, the burden is upon the:

> . . . the General Counsel [to] make a *prima facie* showing sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

I have heretofore found that Grange's protected activity is a primary reason for the employer not rehiring him. Grange's exit interview urged by Respondent as the reason for not rehiring him does not reflect an employee so unhappy with his position that one would not rehire him for that reason alone. Respondent offered a significant amount of testimony regarding the availability of positions at the hospital for which Grange was not qualified and conversely the lack of positions for which he was qualified. Respondent's Director of Nursing, Osborne, testified that Grange, on or about June 26, 1980, was not hired as a permanent full-time registered nurse because his qualifications did not meet Osborne's standards. This position is weakened significantly because subsequent to Grange's denial for permanent full-time employment by Respondent on or about June 26, 1980, Osborne offered other applicants registered nurses' positions that Grange was qualified to fill. According to the testimony of Osborne's predecessor, Louise Dunne, Grange was qualified during the summers of 1979 and 1980 to fill the nurse position of med./surg. charge nurse and/or general nurse. He was also qualified to be trained as an OB or ICU nurse. Respondent hired an applicant, Stratton, who started on July 7, 1980, as a charge nurse. She had never previously been employed by Respondent. Whatever may be the actual case with regard to the hospital's desire to hire only nurses with specialized training, I find the true state of affairs with respect to Grange to be that the hospital would not voluntarily rehire him regardless of his qualifications. Accordingly, for all the reasons set forth above, I conclude that Respondent's refusal to rehire Grange constitutes a violation of Section 8(a)(1) of the Act.

The General Counsel has also alleged that Respondent has violated Section 8(a)(4) of the Act in that the first charge filed in this proceeding by Grange was also reason for the hospital's refusal to rehire him subsequently. I cannot find any substantial evidence in this record to support this charge. As I have noted above, it is my finding that the hospital made a virtually irrevocable decision not to rehire Grange as a result of his protected concerted activities. Certainly the filing of a charge with the Board by Grange in 1979 did nothing to change the hospital's position; however, there is no evidence to establish that it modified or strengthened this position. Accordingly, I cannot find that Respondent has violated Section 8(a)(4) of the Act.

B. *Blacklisting of Grange*

Respondent's administrator, Lotreck, on or about May 2, 1979, instructed his assistant administrator, Paul O'Neill, to contact the administrator of Sonagee Estates Nursing Home and to inform him that it would be in the best interest of Sonagee if he did not hire Grange. In view of the fact that nursing positions in the small community of Bar Harbor, Maine, are limited, Respondent could naturally assume that Sonagee would be one of the few prospective places of employment in the immediate area that Grange could possibly apply. According to the uncontroverted testimony of Richird Collier, administrator at Sonagee, he received a telephone call from O'Neill on or about May 4, 1979, and was informed by O'Neill that Grange was not going to be hired at Respondent's hospital as he was a troublemaker who has caused the hospital a lot of grief. He suggested that Collier not hire Grange. Collier immediately informed his director of nursing, Donna Cameron, about O'Neill's telephone conversation. The sum and substance of this conversation was also communicated by Collier to Grange on May 7, 1979. On May 9, 1979, Collier then communicated the content of his telephone conversation with O'Neill to Dr. Robert Beekman. The testimony clearly reflects an attempt by Respondent to blacklist Malachy Grange from employment with an prospective employer in the Bar Harbor, Maine, area. As I have found that Respondent has refused to rehire Grange because of his protected concerted activity, I likewise find that the attempt to blacklist Grange in Bar Harbor was motivated by this same concerted activity. Respondent's action in this regard further violated Section 8(a)(1) of the Act. *Harold Jackson, a sole proprietor, d/b/a Truck and Trailer Service*, 239 NLRB 1070 (1978), and *Professional Ambulance Service, Inc.*, 232 NLRB 1141 (1977). The fact that, subsequently, Respondent referred Grange to another hospital for employment does not change my finding. It is entirely consistent with Respondent's desire to get Grange out of Bar Harbor that it find him a job in some other community.

III. THE REMEDY

As I have found that Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act by refusing to rehire and attempting to blacklist Malachy Grange, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that by attempting to blacklist Malachy Grange with a prospective employer in the Bar Harbor, Maine, area, Respondent restrained and coerced its employee in the rights given to him in Section 7 of the Act and in violation of Section 8(a)(1) of the Act. I recommend that it cease and desist from attempting to blacklist Malachy Grange.

I have found that Respondent unlawfully refused to rehire Malachy Grange because he engaged in protected concerted activities in violation of Section 8(a)(1) of the Act. I recommend that Respondent be ordered to reemployee Grange at its Bar Harbor, Maine, hospital facility in any nursing position for which Grange is medically qualified. If no such position exists at this time, I recommend that Respondent be ordered to offer Grange employment for the first available nursing position for which he is qualified. I shall further recommend that Respondent be ordered to make Grange whole for any loss of earnings he may have suffered as a result of Respondent's unlawful refusal to hire him since June 1979, less net earnings to which shall be added interest to be computed in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

On the basis of the above findings of fact and the entire record in this case, I make the following.

CONCLUSIONS OF LAW

1. Mount Desert Island Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By refusing to rehire its former employee, Malachy Grange, since June 1979 because of his protected concerted activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) of the Act.

3. By attempting to blacklist its former employee, Malachy Grange, with a prospective employer in the Bar Harbor, Maine, area, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(4) of the Act as a separate violation of the Act by refusing to rehire its employee Malachy Grange.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[3]

The Respondent, Mount Desert Island Hospital, Bar Harbor, Maine, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to rehire or otherwise discriminating against employees in regard to hiring or tenure of employment or any other term or condition of employment because they engage in concerted activities protected by Section 7 of the National Labor Relations Act.

(b) Attempting to blacklist its employees or in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Employ Maiachy Grange at its Bar Harbor, Maine, hospital facility in any nursing position for which Grange is medically qualified. If no such position exists at this time, employ Grange for the first available nursing position for which Grange is qualified.

(b) Make Malachy Grange whole for any loss of earnings he may have suffered as a result of Respondent's refusal to reemploy him in the manner set forth in this decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this remedial Order.

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[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Post at its hospital facility, copies of the attached notice marked "Appendix."[4] Copies of said notice on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Malcolm Boring Co., Inc., B. C. Malcolm and Bruce C. Malcolm *and* Local 12, International Union of Operating Engineers, AFL-CIO

Off-Shore Drilling and Allied Workers Division of the National Maritime Union of America, AFL-CIO *and* Local 12, International Union of Operating Engineers, AFL-CIO. Cases 31-CA-9751 and 31-CB-3586

December 8, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 2, 1981, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the Charging Party and Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust, hereinafter the Intervenor,[1] each filed exceptions and a supporting brief, and Respondents B. C. Malcolm and Malcolm Boring Co., Inc., filed a brief in answer thereto.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

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[1] On September 4, 1980, the Regional Director for Region 31 granted the motion to intervene filed by Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust.

[2] The Charging Party and the Intervenor have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In finding Respondents Malcolm Boring and B. C. Malcolm a single employer, the Administrative Law Judge found, and the record reflects, a substantial degree of functional integration between the operations of the two Companies, including a high degree of employee interchange. Thus, B. C. Malcolm is the name of the sole proprietorship under which Billy C. Malcolm does business, and he, along with his wife, owns all of the stock of Malcolm Boring. The record further reflects in this regard that Respondents maintain a common pool of employees who are each day assigned by Billy C. Malcolm to either field or shop work; and that when a particular employee is sent to the field to perform construction work, he is placed on the payroll of Malcolm Boring, but if assigned to the yard to perform maintenance, repair, and fabrication work, he appears on the payroll of B. C. Malcolm. Such assignments are made as the need arises and are based upon the relative skill level of any particular employee. The record is thus indicative of Respondents' common ownership and management and central control of labor relations. Despite the finding of single-employer status, the Administrative Law Judge correctly concluded that the employees of Malcolm Boring and the employees of B. C. Malcolm each constitute a separate unit, and also correctly relied upon the ambiguity of the relevant contract language as well as upon the practice of 3 years' duration of not applying the collective-bargaining agreement with Malcolm Boring to employees working on the B. C. Malcolm payroll. In so finding, and apparently seeking to further buttress his conclusion that separate units are appropriate herein, the Administrative Law Judge inaccurately characterized the nature of Respondents' businesses and the manner in which they interact. Thus, in the context of his analysis with respect to unit scope, the Administrative Law Judge described the B. C. Malcolm business as being "substantially different" from the Malcolm Boring business, and appeared to indicate that this difference required each Company to recruit and hire individuals with certain skills of use only to one Company or the other. A perusal of the facts in support of the Administrative Law Judge's single-employer finding clearly shows his later characterizations of Respondents' businesses to be erroneous. Thus, B. C. Malcolm not only supplies the machinery with which Malcolm Boring performs construction work, but also keeps such equipment operational with an object of minimizing "down time" in the field. In addition, and equally important, is Respondents' utilization of a common pool of employees to meet their staffing requirements, as well as the fact that these employees are often used interchangeably as field or yard personnel, likewise indicative of the commonality of Respondents' purposes. Finally, it should be noted that Malcolm Boring leases almost all of its equipment from B. C. Malcolm, and that the greatest percentage of B. C. Malcolm's leasing, repair, and fabrication business is with Malcolm Boring. To the extent that the Administrative Law Judge's analysis with respect to unit scope detracts from his single-employer finding, we do not rely thereon. However, as indicated above, this error does not affect the result herein. For, we agree with the Administrative Law Judge's ultimate conclusion that, in light of the evidence as to the intent of the parties, the employees of B. C. Malcolm are in a separate bargaining unit from the employees of Malcolm Boring.

Finally, since the record reflects that Billy C. Malcolm and his wife own all the stock of Malcolm Boring, we need not reach the issue of whether a "substantial" stock interest by them would likewise exclude any of their children from the appropriate unit herein. See, generally, *Cerni Motor Sales, Inc.*, 201 NLRB 918 (1973).

In dismissing the complaint herein, Member Fanning finds it unnecessary to rely on *A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc.*, 250 NLRB 217 (1980).

[3] In the absence of exceptions, we adopt, *pro forma*, the dismissal of certain allegations that Respondents violated Sec. 8(a)(1) of the Act.

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lations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard at Los Angeles, California, on September 9, 10, 15, 16, 17, 18, 23, and 24 and November 12 and 14, 1980. On February 6, 1981, I granted the motion of the National Maritime Union and reopened the hearing. By order dated February 24, I approved a stipulation relating to the receipt in evidence of NMU's Exhibit 1 and closed the hearing.

The charges in Cases 31-CA-9751 and 31-CB-3586 were filed on January 31, 1980, by Local 12, International Union of Operating Engineers, AFL-CIO, herein called Local 12. An order consolidating those cases and a complaint issued on March 28, 1980. The complaint alleges that Malcolm Boring Co., Inc. (herein called Malcolm Boring), B. C. Malcolm and Bruce C. Malcolm,[1] all of whom are alleged to be single employers, violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, as amended. The complaint also alleges that Off-Shore Drilling and Allied Workers Division of the National Maritime Union of America, AFL-CIO (herein called NMU), violated Section 8(b)(1)(A) and (2) of the Act. On September 4, 1980, the Regional Director for Region 31 of the Boand granted the motion to intervene of Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holidays Savings Trust and Operating Engineers Training Trust (herein called the Operating Engineers Trusts).

ISSUES

The primary issues are:

1. Whether Malcolm Boring, B. C. Malcolm and Bruce Malcolm, Inc., constitute a single employer.
2. Whether the bargaining unit in a collective-bargaining contract between Local 12 and Malcolm Boring is broad enough to cover the employees of B. C. Malcolm and Bruce Malcolm, Inc.
3. Whether that contract was an enforceable pre-hire construction industry contract and whether the named employers violated Section 8(a)(5) of the Act by refusing to honor said contract with regard to employees of B. C. Malcolm and Bruce Malcolm, Inc.
4. Whether those employers violated Section 8(a)(1), (2), (3), and (5) and NMU violated Section 8(b)(1)(A) and (2) of the Act when Bruce Malcolm, Inc., and NMU entered into a collective-bargaining agreement.
5. Whether those employers interrogated and threatened employees in violation of Section 8(a)(1) of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs that have been carefully considered were filed on behalf of the General Counsel, Malcolm Boring, B. C. Malcolm, Bruce Malcolm, Inc., NMU, Local 12, and Operating Engineers Trusts.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYERS

Malcolm Boring, a California corporation, with an office and principal place of business in Chino, California, is engaged as a contractor and subcontractor in horizontal boring in the construction industry.[2] The parties stipulated and I find that Malcolm Boring annually purchases and receives goods and services valued in excess of $50,000 directly from suppliers located outside California. Malcolm Boring is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

B. C. Malcolm is a sole proprietorship with an office and place of business in Chino, California, where it manufactures, maintains, and repairs equipment that it rents and occasionally sells to various employers in the horizontal boring business including Malcolm Boring. The parties stipulated and I find that B. C. Malcolm does more than $50,000 a year business with Malcolm Boring, which Company is engaged in interstate commerce on other than an indirect basis. B. C. Malcolm is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Bruce Malcolm, Inc., was a sole proprietorship and now is a corporation with an office and place of business in Chino, California. It is engaged in the business of horizontal boring and pipe jacking.[3] Its business records estsblish that, during the year immediately preceding issuance of complaint, Bruce Malcolm, Inc., had sales in excess of $50,000 to Malcolm Boring. Bruce Malcolm, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Local 12 and NMU are and each is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

Billy Carlisle Malcolm, referred to herein as Billy C. Malcolm, is a principal in two businesses. He is president and, together with his wife, is owner of Malcolm Boring. Malcolm Boring is engaged in the horizontal boring business as a subcontractor for piping contractors and as a contractor for utilities. The horizontal boring work is done at the site of the construction and constitutes construction industry work. Since 1962, Malcolm Boring has had a collective-bargaining agreement with Local 12. That contract began as a pre-hire agreement and contained an 8-day union-security clause that is lawful in the construction industry. As is discussed in detail below, there is a substantial question as to the scope of the bargaining unit covered by the contract.

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[1] On April 25, 1980, Bruce C. Malcolm incorporated as Bruce C. Malcolm, Inc. To avoid confusion with names, all references to the business will be Bruce Malcolm, Inc., and all references to the individual will be to Bruce Malcolm.

[2] Horizontal boring consists of the drilling of a hole under a highway, railway, track, or similar installation so that casings, pipes, and the like can be installed without damaging the installation.

[3] Pipe jacking is a hand mining operation, while horizontal boring involves the use of boring machinery.

Billy C. Malcolm is engaged in business as a sole proprietorship under the name B. C. Malcolm. B. C. Malcolm manufactures, maintains, and repairs equipment that it leases and sometimes sells to various employers in the horizontal boring business. B. C. Malcolm is a manufacturer and supplier of machinery for the horizontal boring business. It is not in itself engaged primarily in the building and construction industry.

Malcolm Boring and B. C. Malcolm maintain separate payrolls. Some employees are on both payrolls. When they work in the field on construction work, they are considered employees of Malcolm Boring and are paid and given fringe benefits in accordance with contract terms. When the same employees works on the fabrication, repair, or maintenance of machinery in B. C. Malcolm's shop, they are placed on the B. C. Malcolm payroll and are paid 80 percent of the contract rate without any fringe benefits.[4]

The General Counsel contends that Malcolm Boring and B. C. Malcolm are part of a single employer, that the employees of both are part of a single bargaining unit encompassed by the contract between Malcolm Boring and Local 12, and that the Employers who constitute the single employer have violated Section 8(a)(5) of the Act by failing to honor the contract with regard to employees of B. C. Malcolm. The Employers, on the other hand, contend that they are not part of a single employer, that the contract between Local 12 and Malcolm Boring covers only Malcolm Boring employees and that there is no refusal to honor the contract. They also argue that there is no obligation for the contract to be honored in that it is a pre-hire construction industry contract and no appropriate showing of majority status has been made.

In addition to having two companies Billy Malcolm has three sons. Two of those sons have chosen to go into the horizontal boring business. One son, William C. Malcolm, does business under the name William Malcolm Construction, Inc. There is no contention that that company is part of the single employer. Another son, Bruce Malcolm, does business under the name Bruce Malcolm, Inc. The General Counsel contends that Bruce Malcolm, Inc., is part of the single employer with Malcolm Boring and B. C. Malcolm. The General Counsel's position is that the employees of Bruce Malcolm, Inc., are covered by the collective- bargaining agreement between Malcolm Boring and Local 12. Bruce Malcolm, Inc., contends that it is not part of a single employer and that in any event it has no employees who could be covered by that bargaining unit.

Bruce Malcolm, Inc., entered into a collective-bargaining agreement with NMU. That agreement contained a union-security clause. The General Counsel contends that Bruce Malcolm, Inc., entered into that collective-bargaining agreement with NMU at a time when it had a duty to honor an outstanding agreement with Local 12 and that, by entering into the contract with NMU, Bruce Malcolm, Inc., and the remainder of the single employer violated Section 8(a)(1), (2), (3), and (5) of the Act, while NMU violated Section 8(b)(1)(A) and (2) of the Act.

B. *The Relationship Between Malcolm Boring and B. C. Malcolm*

1. Factual findings

a. *Interrelation of operations*

There is a substantial degree of functional integration between the operations of B. C. Malcolm and Malcolm Boring. Malcolm Boring performs horizontal boring work on construction sites. The machinery used by Malcolm Boring is supplied by B. C. Malcolm, who manufactures, maintains, repairs, and leases out that equipment. Although B. C. Malcolm has other customers, most of its business is done with Malcolm Boring and almost all of Malcolm Boring's equipment comes from B. C. Malcolm.

There is a substantial amount of employee interchange between the two Companies.[5] Almost all of the boring machine operators and skilled helpers who worked in the field for Malcolm Boring have been assigned on various occasions to work in the shop for B. C. Malcolm. When the employee works in the field, he is carried on the books of Malcolm Boring and receives pay and fringes based on Malcolm Boring's contract with Local 12. When the same employee is assigned to the yard for maintenance, repair, or other work, he is placed on B. C. Malcolm's books and paid 80 percent of the contract rate without any fringe benefits.

B. C. Malcolm and Malcolm Boring share the same office, which is located at 5849 Shaefer Avenue, Chino, California. They also share the same yard, which is located near the office on property belonging to B. C. Malcolm. The office is adjacent to Billy C. Malcolm's home. Malcolm Boring leases office and yard space from B. C. Malcolm.

B. C. Malcolm and Malcolm Boring keep separate books and separate bank accounts. They both use the same bank. They share the services of an office secretary, Hazel Zurich. B. C. Malcolm pays Zurich's salary 1 week a month and Malcolm Boring pays the other 3 weeks. B. C. Malcolm and Malcolm Boring have telephone numbers that differ by one.

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[4] The only exception to this appears to be the payment of certain fringe benefits after a contested claim on behalf of W. C. Malcolm in 1975. William C. Malcolm is a son of the owners of Malcolm Boring and as such could not be part of the bargaining unit. See fn. 17 below.

[5] This procedure was followed until January 1980. In December 1979, Local 12 Business Representative Bob Dye told Billy Malcolm that the Union would strike and close Malcolm Boring down if Local 12 personnel were not used for maintenance work. From that time on, B. C. Malcolm has not manufactured any boring equipment. B. C. Malcolm has shipped out heavy repair work to other concerns and has had minor repair work done by employees of Malcolm Boring. B. C. Malcolm has closed down its payroll.

b. *Common ownership and management*

B. C. Malcolm is the name of the sole proprietorship under which Billy C. Malcolm does business. Billy C. Malcolm averred that, under the California community property law, his wife owns half of the business. Billy C. Malcolm and his wife own all of the stock of Malcolm Boring.

In addition to the common ownership of the two concerns, there is to a substantial degree a common management. As sole proprietor, Billy C. Malcolm has sole control over the affairs of B. C. Malcolm. He decides to whom B. C. Malcolm will rent equipment and makes all management decisions relating to B. C. Malcolm. As president of Malcolm Boring, Billy C. Malcolm also makes management decisions with regard to that Company. In addition to being president, he is on the board of directors. Although his wife and some of his children have at times been corporate officers and on the board of directors, Billy C. Malcolm is clearly in charge. In testifying about the history of his Companies, Billy C. Malcolm averred that in 1962 his accountant advised him to split his business into two parts so that the equipment would be owned personally and he could lease it to the corporation. He averred that he kept his business in two parts because of tax and liability advantages.

c. *Centralized control of labor relations*

Billy C. Malcolm makes all labor relations decisions for B. C. Malcolm. He is the one who does hiring and firing for that Company. When employees report for work each day, Billy C. Malcolm is the one who decides whether to assign them to fieldwork as employees of Malcolm Boring or to shopwork as employees of B. C. Malcolm. If he assigns an employee to shopwork, he supervises the work of that employee. If he assigns the employee to fieldwork, he retains ultimate authority over that employee, but the employee is immediately supervised by a foreman or superintendent on the job. In 1979, Carl Jarnagan was general superintendent and vice president of Malcolm Boring and it was he who supervised crews in the field. At that time Jarnagan also hired employees for Malcolm Boring. In late 1979, Jarnagan resigned as vice president and superintendent and he went back to foreman status. In regard to wages and hours there is complete centralization of control over labor relations. Billy C. Malcolm acknowledged in his testimony that except as limited by contract he is the one who sets wages and hours for both B. C. Malcolm and Malcolm Boring.

2. Analysis and conclusions

In *Blumenfeld Theatres Circuit, et al.*, 240 NLRB 206, 214 (1979), enfd. 626 F.2d 865 (9th Cir. 1980), the Board affirmed the decision of an administrative law judge in which the tests for "single employer" were set forth as follows:

> In *Radio & Television Broadcast Technicians Local Union 1264, IBEW* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), the Supreme Court held that in determining whether enterprises constitute a single employer: "The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership."[16] Though the Board and the courts have not always agreed on how to apply the standards enunciated by the Supreme Court, the decision of the Court of Appeals for the District of Columbia in *Local No. 627, International Union of Operating Engineers, AFL-CIO* [*South Prairie Construction Company and Peter Kiewit Sons' Co.*] v. *N.L.R.B.*, 518 F.2d 1040 (1967), appears to be controlling. In that case the court of appeals reversed the Decision of the Board in *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 206 NLRB 562 (1973). Part of the circuit court's decision was affirmed by the United States Supreme Court in *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976). The Board had made two separate findings. The first was that two entities did not constitute a single employer and the second was that each entity had a separate appropriate bargaining unit for collective-bargaining purposes. The court of appeals disagreed and found both a single employer and a single unit. On appeal the Supreme Court affirmed that part of the court of appeals' decision which found that the two entities were a single employer and reversed and remanded to the court of appeals that part of the decision which related to the unit question.[17] As the Supreme Court has affirmed the circuit Court's decision with regard to the single employer, the language of the circuit court is of particular importance. That circuit court held [518 F.2d at 1045-46]:
>
> *Guidelines for "Single Employer" Status*
>
> In *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 . . . (1965), the Supreme Court, in a *per curiam* opinion affirming a "single employer" holding below, said:
>
>> The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.
>
> The court cited several NLRB decisions including one affirmed in *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F.2d 902 (9th Cir. 1964), cert. denied, 379 U.S. 961 . . . (1965). In *Sakrete*, the Ninth Circuit stated, at 907:
>
>> even if the substantial evidence shows interrelationship of operations, centralized control of

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[16] See also *Sakrete of Northern California, Inc.*, 140 NLRB 765 (1963), enfd. 332 F.2d 902 (9th Cir. 1964) cert. denied 379 U.S. 961 (1965).

[17] On remand the Board issued a Supplemental Decision reported at 231 NLRB 76 (1977) in which it noted that the Supreme Court had affirmed the circuit court's finding that the two entities were a single employer. The Board reconsidered the single-unit question and concluded that, even though the entities were a single employer, separate units were appropriate.

labor relations, or common management only at the executive or top level, we do not agree that this precludes application of the "single employer" concept.

It pointed out that these three criteria "deal not with power and authority, as such, but with its exercise," and that such criteria, "on any level, are considerations in addition to the factor of common ownership or financial control."[8]

Although the Supreme Court in *Radio Union, supra*, commented that the record in that case was more than adequate to show that all of the four "controlling criteria" were present, it does not appear that all four criteria must be present. In one of the NLRB cases cited, *Canton, Carp's, Inc.*, 125 NLRB 483 (1959), the Board observed that it had on several occasions made a finding of a single employer status in the absence of a common labor relations policy, and even when it had been affirmatively shown that each of two corporations held to be a single employer established its own labor relations policy. In another of the NLRB cases cited, *V.I.P. Radio, Inc.*, 128 NLRB 113 (1960), the Board found that there was little or no employee interchange; but 90 percent stock ownership of the second corporation, the same officers and directors, and centralized control of "general labor policy" and operations resulted in a "single employer" holding. In still another cited NLRB case, *Overton Markets, Inc.*, 142 NLRB 615 (1963), the Board noted, at 619, that the circumstances were not "characteristic of the arm's length relationship found among unintegrated companies."[9] Its conclusion that there was a "single employer" for purposes of the Act rested on consideration of "all the circumstances" of the case.

From the foregoing, we conclude that "single employer" status, for purposes of the National Labor Relations Act, depends upon all the circumstances of the case, that not all of the "controlling criteria" specified by the Supreme Court need be present; that, in addition to the criterion of commom ownership or financial control, the other criteria, whether or not they are present at the top level of management, are "controlling" indicia of the actual exercise of the power of common ownership or financial control and that the standard for evaluating such exercise of power is whether, as a matter of substance, there is the "arm's length relationship found among unintegrated companies."

As set forth above, Malcolm Boring and B. C. Malcolm have interrelated operations, common management, centralized control of labor relations, and commom ownership. They meet all of the criteria set forth by the Supreme Court for finding a single employer. Where surrounding circumstances warrant it, the finding of single employer can be made even when all of the "controlling criteria" are not present. In the instant case all of the controlling criteria are present and there are no surrounding circumstances that would interfere with the finding that Malcolm Boring and B. C. Malcolm do constitute a single employer. I find that they are a single employer. It does not follow, however, that the employees of Malcolm Boring and B. C. Malcolm are all part of a single bargaining unit or that they are all covered by Malcolm Boring's collective- bargaining agreement with Local 12. The unit issue is discussed in section D below.

C. *The Relationship Between Bruce Malcolm, Inc., and the Single Employer*

1. Factual findings

a. *Interrelations of operations*

Bruce Malcolm, Inc., and Malcolm Boring are both engaged in the horizontal boring business.[6] The primary interrelation between Bruce Malcolm, Inc., and Malcolm Boring relates to subcontracting. Malcolm Boring is a long established enterprise and Bruce Malcolm, Inc., went into business during the last week of September 1979. During the initial phases of Bruce Malcolm, Inc.'s operation, all of its work was subcontracted from Malcolm Boring. At that time Malcolm Boring had a substantial amount of overflow work that it could not perform, as did many other established employers in the horizontal boring business. Some of that overflow work Malcolm Boring subcontracted to Bruce Malcolm, Inc. Gradually Bruce Malcolm, Inc., began accepting subcontracts from different contractors. From September 1979 through August 1980 Malcolm Boring subcontracted approximately 5 percent of its total work to Bruce Malcolm, Inc. During the same time, those subcontracts amounted to approximately 30 percent of all the work that Bruce Malcolm, Inc., performed.

Some of Bruce Malcolm, Inc.'s employees worked for Malcolm Boring before they went to work for Bruce Malcolm, Inc. However, with two very limited exceptions none of them worked for Malcolm Boring at the same time that they did work for Bruce Malcolm, Inc. One exception applied to Larry Cochell, who was employed by Malcolm Boring. Cochell was a friend of Bruce Malcolm's and on a few occasions he helped Bruce Malcolm with repair work on off-hours and on a Saturday. The other exception applied to a part-time secretary who worked for Bruce Malcolm, Inc., 1 or 2 days a week after January 1980. She was also a part time clerical employee for Malcolm Boring. Those were isolated situations and did not amoumt to a meaningful interchange of employees.[7]

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[8] In a later decision, *N.L.R.B.* v. *Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971), the Ninth Circuit, citing *Sakrete*, said that no one of the four criteria is controlling.

[9] The "arm's length" test makes meaningful the Board's reference in *Canton, Carp's, Inc., supra* at 484, to "realities of commercial organization." It was applied by this court in *American Fed. of Television & Radio Artists* v. *N.L.R.B.*, 149 U.S. App. D.C. 272, 462 F.2d 887 (1972).

[6] Bruce Malcolm also does some pipe jacking work. Malcolm Boring does not engage in that type of business.

Bruce Malcolm, Inc., owns most of the equipment that it uses. Before Bruce Malcolm, Inc., went into business, Bruce Malcolm leased to Malcolm some equipment that it owned. Boring. However, that lease was canceled before the new business was started. There was some loaning and interchange of equipment among various employers in the horizontal boring business, but there is no showing that there was more of that between Bruce Malcolm, Inc., and Malcolm Boring than there was between other employers in that industry.[8] Bruce Malcolm, Inc., did come to the Malcolm Boring yard on various occasions to pick up casings. On those occasions Malcolm Boring was supplying the casing for his subcontractor, Bruce Malcolm, Inc. Other subcontractors who accepted subcontracts from Malcolm Boring used a similar procedure. On one occasion, Bruce Malcolm, Inc., performed some work on his own equipment while he was in Malcolm Boring's yard. That was an isolated incident and occurred because Malcolm Boring had the extra room needed for that type of work.

Bruce Malcolm, Inc., maintains its own office, is located about 3 miles away from the offices of Malcolm Boring and B. C. Malcolm, and maintains its own yard, located 7 or 8 miles from the Malcolm Boring and B. C. Malcolm yard. Bruce Malcolm, Inc., maintains its own books and has a telephone number that is different from that of Malcolm Boring and B. C. Malcolm. Malcolm Boring, Inc., does not have its own contractor's license, but it is in the process of applying for one. It has never used the contractor's license of Malcolm Boring or B. C. Malcolm.

I find that there is no interrelation of operations between Malcolm Boring and Bruce Malcolm, Inc., except to the extent that Malcolm Boring subcontracts some of its work to Bruce Malcolm, Inc. However, the evidence does not establish that the contractor-subcontractor relationship is other than an arm's-length transaction.

b. *Common management*

At one time Bruce Malcolm worked for Malcolm Boring as a boring machine operator. He was also director and vice president of Malcolm Boring. However, before going into business for himself, he quit his job at Malcolm Boring and resigned as a director and vice president.[9]

Billy C. Malcolm manages the operations of Malcolm Boring and B. C. Malcolm. Bruce Malcolm manages the operations of Bruce Malcolm, Inc., and has no control over the affairs of Malcolm Boring or B. C. Malcolm. Billy C. Malcolm has no control over the affairs of Bruce Malcolm, Inc., except to the extent that is implicit in the relationship between a contractor and a subcontractor.

In sum, I find that there is no common management between Bruce Malcolm, Inc., and Malcolm Boring or B. C. Malcolm.

c. *Centralized control of labor relations*

As set forth above, except as he is limited by his collective bargaining agreement with Local 12, Billy C. Malcolm has sole control over wages, hours, and labor relation matters for Malcolm Boring and B. C. Malcolm. Bruce Malcolm neither has nor exercises any authority in that regard.

Bruce Malcolm is the only supervisor of Bruce Malcolm, Inc. He has sole power to hire and fire employees and, in general, is in sole charge of the business including labor relations. Billy C. Malcolm has no authority over labor relations policies for Bruce Malcolm, Inc.[10]

Bruce Malcolm, Inc., has a collective-bargaining agreement with NMU. The General Counsel contends that Billy C. Malcolm was responsible for the execution of that contract and to that extent controlled the labor policies of Bruce Malcolm, Inc. The evidence does not support the General Counsel's contention. Sometime in the summer of 1979, Billy C. Malcolm received a phone call from an ex-employee named Bob Seabury, who was organizing for NMU. Seabury asked whether Billy C. Malcolm could give him the names of some nonunion contractors. Seabury also said that he was not interested in organizing anyone who currently had a contract. Billy C. Malcolm gave Seabury the names of a number of contractors including Bruce Malcolm. At that time Bruce Malcolm had already resigned from Malcolm Boring and was building some equipment that he could use when he began his business. The equipment was being built in a location other than that of Malcolm Boring or B. C. Malcolm. Sometime thereafter Billy C. Malcolm had a meeting at his house in which Seabury spoke to a number of the contractors including Bruce Malcolm, Inc. Bruce Malcolm asked for suggestions from a number of people including his brother, his father, and Ralph Ayalla of A-1 Boring Company. Ayalla was a business acquaintance and competitor of Billy C. Malcolm and Billy C. Malcolm had asked him to give Bruce Malcolm suggestions. On September 21, 1979, Bruce Malcolm met with Seabury and negotiated and executed a collective-bargaining agreement. The contract was effective by its terms from September 21, 1979, to September 20, 1980.

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[7] Cochell testified that he was paid in cash and that Billy C. Malcolm told Bruce not to pay him by means other than cash. Bruce Malcolm averred that it was Cochell who asked to be paid in cash and both he and Billy C. Malcolm denied that Billy C. Malcolm said anything about the means of payment for Cochell. Both Billy C. Malcolm and Bruce Malcolm impressed me as being candid witnesses with good memories. Cochell's demeanor was less impressive and a number of internal inconsistencies within his testimony and with regard to previous statements indicated that his memory was less than completely reliable. Where his testimony conflicts with that of Billy C. Malcolm and Bruce Malcolm, I credit the Malcolms.

On one occasion a crew from Malcolm Boring took over work that had been performed by a crew from Bruce Malcolm, Inc. In that situation, the prime contractor, Irish Construction Company, was put under pressure from Local 12 to remove Bruce Malcolm, Inc.'s nonunion employees from the job. Irish Construction called Malcolm Boring with the result that Malcolm Boring removed its subcontractor, Bruce Malcolm, Inc., from the job and completed the work with its own employees. That constituted a removal of a subcontractor rather than an interchange of employees.

[8] Cochell testified that, in October 1979, he used a crane belonging to Bruce Malcolm, Inc., while he was working for Malcolm Boring and that, on various occasions, he saw Malcolm Boring's markings on trucks used by Bruce Malcolm, Inc. However, I do not believe Cochell was reliable with regard to dates. Bruce Malcolm creditably testified that his lease of equipment to Malcolm Boring ended before he went into business and that after he went into business his equipment had its own markings.

[9] Bruce Malcolm terminated his employment with Malcom Boring on or about August 1, 1979. At that same time he resigned as officer and director, although that resignation was not reduced to a written document until December 1, 1979. Bruce Malcolm is still listed as an individual who is authorized to draw checks on a small cash account for Malcolm Boring. However, Bruce Malcolm credibly testified that he was left on that account as a matter of inadvertence, that he had forgotten about it, and that he did not draw checks on it. Bruce Malcolm acknowledges in his testimony that, in an affidavit he gave to the Board, he stated that his father bid jobs for him. He credibly testified that his affidavit was poorly worded, that his father did not actively bid jobs for him, and that when his father had overflow work that had been bid on, his father requested him to take the job.

[10] As found above, the testimony of Cochell to the effect that Billy C. Malcolm directed Bruce Malcolm to pay cash for Cochell's services has not been credited.

David Frederick, an employee of Malcolm Boring, testified that, in late August or early September 1979, Billy C. Malcolm told him that he (Malcolm) had negotiated a contract for Bruce Malcolm with NMU, that Bruce Malcolm was going to try that union, and that B. C. Malcolm was considering signing with NMU or having his sons or other partners trying out the NMU if it worked with Bruce. Billy C. Malcolm denied that the conversation even took place. He denied that he told Frederick that he (Malcolm) had negotiated a contract for Bruce Malcolm and he denied that he in fact negotiated such a contract. As set forth above, I believe that Billy C. Malcolm was a candid and credible witness. Frederick on the other hand, was not always candid. In a deposition he stated that in early summer of 1979, Bruce Malcolm told him that he (Bruce) intended to go into business for himself. In his testimony at the hearing, Frederick denied any recollection of the conversation. He also testified that it first came to his attention in October 1979 that he was not getting paid union scale for his work in the yard. By that time he had been working both in the field and the yard for a substantial period of time and it is difficult to believe that he was so unaware of his pay. As between Frederick and Billy C. Malcolm, I credit Billy C. Malcolm.

In sum, I find that there was no centralized control of labor relations between Bruce Malcolm, Inc., and Malcolm Boring or B. C. Malcolm.

d. *Common ownership*

As set forth above, Billy C. Malcolm and his wife own Malcolm Boring and B. C. Malcolm. Bruce Malcolm has no financial interest in those concerns. Bruce Malcolm and his wife are the sole owners of Bruce Malcolm, Inc. Billy C. Malcolm and his wife have no financial interest in Bruce Malcolm, Inc. In sum, there is no common ownership, nor are there common officers, directors, or property.

2. Analysis and conclusions

The principles of law set forth above in section B,2, must be applied to the instant situation. The evidence establishes that there is interrelation of operations, common management, common centralized labor relations, and common ownership between Malcolm Boring and B. C. Malcolm. The conclusion follows that they are a single employer. The evidence is just as clear, however, that there is no interrelation of operations, no common management, no centralization of labor relations, and no common ownership between Bruce Malcolm, Inc., and either Malcolm Boring or B. C. Malcolm. There is a family relationship and there is an arm's length contractor-subcontractor relationship, but neither of those relationships can form the basis for a finding of single employer. I find that Bruce Malcolm, Inc., is a separate employer and is not a single employer with Malcolm Boring or B. C. Malcolm.

In order to find that Bruce Malcolm, Inc., and NMU violated the Act as alleged in the complaint, it is necessary as a condition precedent to find that the Bruce Malcolm, Inc., is a single employer with Malcolm Boring. The refusal- to-bargain allegation is predicated on the proposition that Bruce Malcolm, Inc., had a bargaining obligation and a collective-bargaining contract with Local 12 because it was a single employer with Malcolm Boring who did have such an obligation and contract. There is no allegation or proof that Bruce Malcolm, Inc., as a separate employer had an obligation to bargain or honor a contract with Local 12. As the single-employer theory has not been established, the 8(a)(5) refusal-to-bargain allegation against Bruce Malcolm, Inc., must be dismissed. The allegations that Bruce Malcolm, Inc., violated Section 8(a)(1), (2), and (3) and that NMU violated Section 8(b)(1)(A) and (2) of the Act are predicated on the theory that Bruce Malcolm, Inc., and NMU entered into a collective bargaining agreement containing a union-security clause at a time when Bruce Malcolm, Inc., had an obligation to bargain and honor a collective-bargaining agreement with Local 12. As Bruce Malcolm, Inc., did not have any such obligation toward Local 12, there is no showing that its contract with NMU was unlawful.[11] It follows that the 8(a)(1), (2), and (3) violations alleged against Bruce Malcolm, Inc., and the 8(b)(1)(A) and (2) violation alleged against NMU must be dismissed.

D. *The Scope of the Bargaining Unit*

1. The collective-bargaining contract and the practices thereunder

Malcolm Boring was incorporated on July 31, 1961. At that time and through the mid-1970's, Malcolm Boring's work was limited to drilling bore holes and it employed only two classes of employees. One was the operator who ran the machinery and the other was a helper who assisted the operator. Also in the early days of its operation, Malcolm Boring owned only a small amount of equipment and mostly small tools. Sometime in 1962, on the advice of his accountant, Billy C. Malcolm split the business into two parts. He owned the equipment personally and leased it to the corporation.

On March 1, 1962, Malcolm Boring entered into a short-form agreement with Local 12 under which they agreed to be bound by the terms of the applicable multiemployer agreement and to any renewals and extensions thereof unless written notice was given 60 days prior to the termination of the applicable agreement. At the bottom of the short-term agreement were a number of boxes indicating what type of agreement was intended. The box next to "construction" was checked. The box next to "shop" was left blank. The master labor agreement to which the parties bound themselves was the Southern California General Contractors and Local 12 agreement which ran from June 15, 1962, to June 1, 1965. A covering letter from the Union, as well as the language of the contract, made it clear that the contract covered the Los Angeles, but not the San Diego, area. The master labor agreement was between a number of different contractor associations and Local 12. By its terms, it covered all work within the geographical area of the contract falling within the recognized jurisdiction of Local 12. The coverage clause of the contract stated that it would cover not only a great number of specified types of work, but also "work in the contractors' yards, and shops which is performed on equipment operated by employees covered by this Agreement." Although Billy C. Malcolm owned the equipment and B. C. Malcolm was in existence, B. C. Malcolm did not have any payroll. No payroll was set up for B. C. Malcolm until 1976.

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[11] It is noted that Bruce Malcolm, Inc., is an employer engaged primarily in the building and construction industry and that, therefore, the prehire agreement is not in itself unlawful.

When Malcolm Boring signed the short-form agreement in 1962, none of its employees was a member of Local 12. Within a week after the signing two employees joined the Union.[12]

Over the years Malcolm Boring had considerable difficulty in obtaining skilled workmen through the Union's hiring hall. As a result Malcolm Boring hired unskilled employees and trained them. Under the practice that developed the unskilled employees were not entitled to join the Union and were not covered by the union contract. The general practice was for Malcolm Boring to train the inexperienced men for about 2 years. When an employee reached certain degree of proficiency, Billy C. Malcolm went to Local 12 and sought to have the Union accept the employee into membership.[13] When an employee became sufficiently skilled, he was brought into the Union and became eligible for the wages and benefits set forth in the contract. Billy C. Malcolm credibly testified that his experience was that, from 1962 until 1977 or 78, the Union only took skilled operators into membership and that he had to practically fight on a number of occasions in order to get the Union to take someone into membership. At the point that an employee joined the Union, he was considered a skilled helper and as such was entitled to coverage by the contract.[14]

The next master labor agreement was from July 1, 1965, to July 1, 1969. Malcolm Boring was bound by that agreement under the terms of the short-form agreement that it signed in 1962. The work covered by that contract was substantially the same as that covered in the previous contract. It specifically mentioned work in the contractors' yards and shops, which was performed on equipment operated by employees covered by the agreement. During the term of that contract, B. C. Malcolm still did not have a yard and employees on the payroll. Malcolm Boring continued to "put people in the Union" when they reached a certain degree of proficiency at which time they were paid contract rates and benefits.

The situation remained substantially unchanged until the master labor agreement of July 1, 1974, to July 1, 1977.[15]

Malcolm Boring was bound by that master labor agreement through its execution of the 1962 short-form agreement. At that time, Malcolm Boring had not yet given any notice of cancellation. The new master agreement had some changes with regard to the unit, but it continued to include work in the contractors' yards and shops.

During the terms of the new contract, Malcolm Boring's business was expanded. Before that time, Malcolm Boring restricted its work to the drilling of the bore holes. During this period the work expanded to include the digging of pits from which the bores were made, the putting of pipes in the holes, and various filling operations. Malcolm Boring began to use more unskilled labor than it previously had. While there had only been two classes of employees (operators and operators' helpers) there was added a third classification of unskilled laborers. As a result, sometime in 1977 Local 12 insisted that Malcolm Boring sign a contract with the Laborers Union. Malcolm Boring signed such a contract. Some problems were presented because many classifications overlapped in both the laborers and Local 12 contracts. Prior to the Laborers contract Malcolm Boring hired unskilled men who remained nonunion until they were qualified, at which time they would be taken into Local 12 and treated as operators under the union scale. After Malcolm Boring signed the Laborers contract, it recruited employees from the Laborers Union.[16] When those employees became sufficiently trained, they were made operators and switched to Local 12. Basically there were three classes of employees. The first was the unskilled worker, who was primarily hired for muscle power. The second was the semiskilled helper, who assisted the operator, and the third was the skilled operator. The Laborers union claimed jurisdiction over the unskilled worker, Local 12 claimed jurisdiction over the operators, and both Unions had arguable claims for jurisdiction over the helpers.

Before January 1976 the repair and maintenance work on equipment used by Malcolm Boring was performed on a more or less hit-and-miss basis. Some of it was farmed out to other employers and some of it was done by members of the Malcolm family.[17] In some cases, employees were hired and put on the payroll. Most of the work was done by Ralph Ayalla, who had his own welding shop and billed Malcolm Boring for the work. The situation changed in 1976 when B. C. Malcolm set up its own payroll. At that time, Billy C. Malcolm intended to try to sell some of his boring equipment and to take his sons in as partners. His plans did not work for a number of reasons including the fact that his sons wanted to go into business on their own. From then on, B. C. Malcolm had employees of its own, who worked at the B. C. Malcolm shop. The work those employees performed was substantially different from the work performed by the employees of Malcolm Boring. Malcolm Boring employees worked on construction work in the field. The skills required ranged from those of ditchdiggers to those of skilled boring machine operators. The work performed by employees of B. C. Malcolm was done in the shop and ranged from the tidying up of the place and the washing of equipment to skilled mechanic's work. The B. C. Malcolm business was also substantially different from the Malcolm Boring business. Malcolm Boring performed construction work. B. C. Malcolm fabricated, maintained, repaired, and leased out construction equipment. The equipment was leased to a number of contractors in addition to Malcolm Boring.

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[12] The record is unclear as to how many employees Malcolm Boring had at that time. At one point in this testimony, Billy C. Malcolm averred that those were the only two employees he had. Shortly thereafter, he averred that he usually had four or five employees during the early part of his operations. Still later he averred that he did not remember exactly how many employees he had at the time he signed the Local 12 contract but, normally at that period, he had two boring machines and each machine took two employees to run it. He averred that to the best of his recollection he had four men working at that time, but he did not remember how skilled or unskilled two of them were.

[13] David Frederick credibly testified that at a certain point in his employment Billy C. Malcolm asked him whether he would like to join the Union and, when he said that he would, Billy C. Malcolm took care of it and he became a member.

[14] On one occasion Local 12 demanded that there be a certain number of operating engineers on a job and insisted that two men who were performing laborers' work at that time join Local 12. Two of the men did join Local 12.

[15] That was the next contract that was put into evidence.

[16] In addition to hiring employees from the Laborers Union, Malcolm Boring also hired some nonunion employees at particular jobsites.

It is contended that, because Malcolm Boring had signed the short-form agreement in 1962 and had not notified the Union to the contrary, it became bound by the master labor agreement of July 1, 1977, to June 15, 1980.[18] However, the new master labor agreement for Southern California substantially changed the bargaining unit from that which had appeared in prior contracts. While the prior contracts had been between employers and Local 12, the new master labor agreement was between employers and a number of different unions, only one of which was Local 12. Various Carpenter unions, Laborer unions, and Teamster unions were also lumped together in the contract. Article II,A, provided that the employers recognized the unions as "the sole and exclusive collective bargaining representatives of all employees and persons employed to perform work covered by this agreement." Article I,B,5, stated, "This agreement shall cover and apply to all work falling within the recognized jurisdiction of the Unions signatory to this agreement." There followed three subparagraphs describing the work covered. Subparagraph (a) provided:

> It shall cover work on building, heavy highway, and engineering construction, including the construction of, in whole or in part, or in improvement or modification thereof, including any structure or operations which are incidental thereto, the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities . . . including without limitation the following types of classes of work:

Subparagraphs (b) and (c) set forth a large listing of different types of construction industry work.[19] Subparagraph 6 covered:

> All work performed in the contractors' warehouses, shops or yards which has been particularly provided or set up to handle work in connection with a job or project covered by the terms of this agreement.

The language of that section appears to indicate that the preceding section, insofar as it covered fabrication, maintenance, and repair, was limited to such work on the jobsite. Subparagraph 6 went beyond that and covered some shopwork. However, it would not cover the shopwork in question in this case. Here the B. C. Malcolm shop was not set up to handle work in connection with a particular job or project. However, the new contract did have an appendix that was entitled "Operating Engineers Craft, Special Working Rules and Wage Scales." That appendix contained a clause which stated that, in addition to the basic agreement coverage, the agreement would include work in the contractors' yards and shops. B. C. Malcolm and Malcolm Boring claimed that that clause did not apply to them because the original 1962 short-form agreement between Malcolm Boring and Local 12, which was the underpinning of the subsequent agreements was solely a construction contract and not a shop contract as indicated by the check in the box next to construction and blank left after the box for shop. Local 12 contends that the effect of checking the box next to the shop agreement was to allow the company to vary certain starting times and overtime rates in the shop as provided by section W of the appendix to the contract. However, it is difficult to see how the 1962 short-form agreement could have anticipated the language in the 1977 contract. It is more reasonable to assume that the short form agreement meant just what it said, that construction was covered and shop was not. At the very least, the language is ambiguous and it is necessary to examine the practices of the parties to understand what they meant by it.

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[17] Some of the work was done by the sons of the owners of Malcolm Boring who, because of their relationship to the owner of the business, could not be considered employees in an appropriate bargaining unit. Children of persons holding a substantial stock interest in a closely held corporation must be excluded from bargaining units of that corporate employer. *Foam Rubber City #2 of Florida, Inc. doing business as SCANDIA*, 167 NLRB 623 (1967).

[18] The Southern California master agreement does not include San Diego County. On September 27, 1978, Malcolm Boring signed a short-form agreement with Local 12 covering the San Diego area. The box for "Master Construction Agreement" was checked; the box for "Master Shop Agreement" was not. It was actually signed in San Diego County, while Malcolm Boring was doing some work there. The short-form agreement specifically states on the bottom,"San Diego Horizontal Earth Boring." The full agreement to which the short-form agreement refers specifically limits the coverage of the contract to San Diego County. Therefore, it can have no application to B. C. Malcolm, who does no work in that county. However, the only contract alleged in the complaint is the one that was entered into September 27, 1978, which would be the San Diego contract. In fact, the General Counsel's contentions are keyed to the 1962 short-form agreement which covers the area where B. C. Malcolm works rather than the September 27, 1978, short-form agreement which only covers the San Diego area.

[19] The contract provided that, when the employer was making work assignments, he would assign work in accordance with existing intercraft agreements between the Unions and that, where there was no such agreement, then past practice or prevailing practice in the locality would apply.

As set forth above, the practice that developed over the years was for Malcolm Boring to apply the contract only to those employees who reached a certain level of skill as operators. Such employees joined Local 12 and became eligible for contract benefits at the same time. Until the incidents in question in this case, Local 12 does not appear to have demanded contract coverage for lesser skilled employees. Nor is there any indication that the Union insisted on enforcement of the union-security clause for those employees. Until the incidents in question in this case, there is no indication that either Local 12 or Malcolm Boring made any effort to apply the contract to B. C. Malcolm shop employees. The first situation in which the question arose was about June 21 or 23, 1979. At that time, Bruce Malcolm was still an official of Malcolm Boring. He was working on a Malcolm Boring job in Anaheim, California, when Local 12 Business Agent Novak spoke to him. Novak said that he had a grievance from an employee named Newton about a difference in wages that was paid in the yard and in the field. Bruce Malcolm told Novak that 80 percent of the field wages were paid while an employee was in the yard and there were no fringes paid, but that the employee kept working steadily when it rained and when work was slow. Novak replied by saying that it was not a bad deal.

In mid-October 1979, David Frederick made a complaint about his pay to Local 12 Business Representative Robert Dye. Frederick was one of the employees who did fieldwork on the Malcolm Boring payroll at full contract rates and also did shopwork on the B. C. Malcolm payroll at 80 percent of contract rate without fringe benefits. Frederick explained the situation to Dye. In December 1979, Dye went to the Malcolm Boring office and discussed the matter with Billy C. Malcolm. Billy C. Malcolm explained the structure of B. C. Malcolm and Malcolm Boring and in effect confirmed what Frederick had told Dye previously. Dye took the position that the contract covered shopwork and Billy C. Malcolm took the position that it did not.[20] That dispute led to this litigation.

By letter dated January 28, 1980, Malcolm Boring notified the Union that it desired to bargain separately for a new agreement at the expiration of the contract in 1980. The letter also asked for a copy of the current contract for Southern California and for the Union's position with regard to what was timely notice of termination. By letter dated January 30, 1980, Malcolm Boring notified the engineering contractors association that the association did not have authority to represent the company in collective bargaining. By letter dated February 22, 1980, Malcolm Boring notified Local 12 of the termination of both the San Diego and the Southern California agreements to be effective on the applicable termination dates of those contracts. In that letter Malcolm Boring offered to negotiate and asked that a meeting be scheduled. By letter dated March 24, 1980, Local 12 acknowledged receipt of Malcolm Boring's letter canceling the contract. Local 12 referred to Malcolm Boring's letter as "Letter of cancellation of your Short Form Agreement for Construction." Local 12 notified Malcolm Boring that its agreement was tied to the terms of the master agreement which did not terminate until July 1, 1980, for Southern California and June 15, 1980, for San Diego. Local 12's letter also stated that Local 12 would hold Malcolm Boring's letter until the conclusion of the term of the master agreements and, at that time, Local 12 would contact Malcolm Boring for the purpose of collective bargaining.

On December 31, 1980, the attorneys for Local 12 wrote to the attorneys for Malcolm Boring a letter[21] which stated in part:

> Because Local 12 no longer represents a majority of Malcolm's employees, it has decided to disclaim interest in bargaining for these employees. Therefore, Malcolm Boring shall be considered a nonsignatory employer and shall be treated accordingly.

2. Analysis and conclusions

Malcolm Boring and B. C. Malcolm constitute a single employer. However, that does not answer the question whether the two parts of the single employer had single or separate bargaining units. As the Board held in *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76, 77 (1977), enfd. 595 F.2d 844 (D.C. Cir. 1979):

> In determining whether a single employer exists we are concerned with the common ownership, structure, and integrated control of the separate corporations; in determining the scope of the unit, we are concerned with the community of interests of the employees involved.
>
> Section 9 of the Act gives the Board considerable discretion in determining appropriate units. Section 9(b) of the Act empowers the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." The mandate of that section "to assure to employees the fullest freedom" indicates that our primary concern is the degree of common interests of the employees involved. The ultimate unit determination is thus resolved by weighing all the factors relevant to the community of interests of the employees. Where, as here, we are concerned with more than one operation of a single employer, the

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[20] Dye testified that, during this conversation, Billy C. Malcolm told him that he was going to go out of business and was going to lease his equipment to his son Bruce. However, Gannon, another union representative who was at the meeting, made contemporaneous notes in which he quoted Billy C. Malcolm as saying that he would be going out of business and leasing his equipment to a son other than Bruce. I believe that Dye was confused with regard to the names of the sons. Dye testified that Billy C. Malcolm told him that Bruce Malcolm was an officer of Malcolm Boring. Billy C. Malcolm averred that he did not tell Dye that Bruce Malcolm was an officer but he might have told him that Thomas Malcolm was. At that time Bruce Malcolm had his own business. I believe that Dye was again confused with regard to the names.

[21] On the stipulation of the parties the letter was received as evidence as a late-file exhibit and was marked NMU Exh. 1. The stipulation went to the question of authenticity and all parties reserved their rights to argue or challenge in their briefs the relevancy or any other matters relating to that exhibit.

> following factors are particularly relevant; the bargaining history; the functional integration of operations; the differences in the types of work and the skills of employees; the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and the extent of interchange and contact between the groups of employees.

The facts with regard to those criteria are set forth in detail in the discussion of the single-employer issue above and will not be repeated here. However, other considerations of particular importance must be mentioned. The skills needed by the employees of B. C. Malcolm are substantially different from those of the employees of Malcolm Boring. That is so because the work of the two Companies is of a very different nature. Malcolm Boring is wholly engaged in a construction business. The skills required of the employees are those of construction workers on the construction site. B. C. Malcolm fabricates, maintains, repairs, and leases equipment to construction firms. Its employees need skills appropriate to those tasks and the work is performed in the shop. Malcolm Boring is a construction industry employer and B. C. Malcolm is not. B. C. Malcolm is not simply a minor adjunct of Malcolm Boring. It is a substantial business in its own right[22] and leases equipment to a number of other construction firms in addition to Malcolm Boring. Malcolm Boring signed a short-form agreement with Local 12 in 1962 and it is alleged that, through that short-form agreement, it is bound by the Southern California Master Labor Agreement of July 1, 1977, to July 15, 1980. That master labor agreement is a construction industry agreement and it contains an 8-day union-security clause that is lawful when applied to "an employer engaged primarily in the building and construction industry."[23] It is unlawful when applied to an employer who is not engaged primarily in the building and construction industry.[24] The original contract between Malcolm Boring and Local 12 was a pre-hire agreement which incorporated a union-security clause. That also could be lawful only where the employer was primarily in the building and construction industry. The Southern California Master Agreement of 1977–80 contains clauses limiting the right of employers to subcontract onsite construction work to other employers. Those clauses could not have any meaning with regard to B. C. Malcolm who does no onsite work.[25] If the employees of B. C. Malcolm are lumped into the Malcolm Boring bargaining unit and covered by the master labor agreement, the nonconstruction employees of B. C. Malcolm would not only be bound by a pre-hire contract where the majority representation status could arguably be attributed to the union-security clause, but would also be subject to the requirement that they join Local 12 on the eighth day after their employment.

Moreover, it is basic Board policy to accept the voluntary agreement of the parties as to the scope of the unit. As the Board held in *A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc.*, 250 NLRB 217, 220 (1980):

> In resolving disputes over the scope of a bargaining unit, the Board's starting point consistently had been its policy of accepting voluntary agreements between parties on unit scope, whether made as part of a voluntary recognition agreement or entered into in a Stipulation for Certification Upon Consent Election. In light of this policy, the Board's analysis of such a dispute includes an examination of the agreed-upon unit and an examination of the circumstances surrounding the alleged agreement on unit scope to determine whether it in fact reflects the intent of the parties and constitutes a voluntary agreement.

In that case, the Board found that the two parts of a single employer had separate bargaining units in a "double-breasted operation," where one of the parts performed nonunion construction work and the other performed union construction work.

In determining what the agreement was with regard to the scope of the unit, it is necessary to consider both the contract and the practice of the parties. In the instant case, there is a serious question whether there even is a contract. In 1962 Malcolm Boring signed a short-form agreement with Local 12. It bound itself to an agreement with that union and with no other. The Southern California Master Labor Agreement of 1977–80, which is the key contract in this case, has an entirely different bargaining unit from the one agreed to by Malcolm Boring in 1962. The 1977–80 Southern California Master Labor Agreement is an agreement between employers and a number of different unions including Carpenters, Laborers, and Teamsters. Even assuming that the Local 12 part of the master labor agreement can be severed from the remainder of the agreement in such a way as to be binding on Malcolm Boring, there are serious ambiguities with regard to the scope of the unit. The 1977–80 master labor agreement did not contain in the basic unit description language that had appeared in prior agreements concerning coverage of the contractors' yards and shops. Similar language was used in the 1977–80 agreement but it was included in an appendix related to special working rules for the operating engineer craft. There is serious doubt as to whether the parties ever intended that shop employees as opposed to construction employees should be covered in light of the fact that the short-form agreement signed by Malcolm Boring in 1962 had the box for construction checked but not the box for shop. In view of all these ambiguities it is particularly important to look to the practice of the parties.

Malcolm Boring traditionally hired unskilled employees. When those employees obtained a sufficient degree of skill, they were permitted to join Local 12 and to enjoy coverage by the contract. That practice was followed openly over the years. The evidence does not establish that the practice was a result of deception or misrepresentation by Malcolm Boring. On occasions Malcolm Boring had to argue with Local 12 before Local 12 would accept the fact that employees had sufficient skills to be allowed to join the Union. An argument could be made that Local 12 considered the contract to be a members-only agreement that did not apply to nonmembers. Looking at the situation more favorably from Local 12's point of view, Local 12 required employees to have a certain degree of skill before joining the Union and, when they had attained that degree of skill, they also were eligible for coverage under the contract. In any event, the practice was for the contract to cover skilled construction employees of Malcolm Boring. B. C. Malcolm shop employees were never covered. In sum, I do not believe that the General Counsel has established that the voluntary agreement of the parties, as construed in the light of their practices, included shop employees in the scope of the unit.

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[22] From July 1979 through June 1980 B. C. Malcolm's volume of business from rental and sales of equipment was approximately $228,780. From August 1979 through July 1980 Malcolm Boring's volume of business from construction industry work was approximately $1,283,165.

[23] Sec. 8(f) of the Act.

[24] Sec. 8(a)(3) of the Act.

[25] Sec. 8(e) of the Act.

Under all these circumstances, I find that the employees of B. C. Malcolm are in a separate bargaining unit from the employees of Malcolm Boring and that any contract that Malcolm Boring had with Local 12 did not apply to the employees of B. C. Malcolm. In light of that finding, I recommend that the allegation that Malcolm Boring and B. C. Malcolm refused to bargain with Local 12 in violation of Section 8(a)(5) of the Act be dismissed.[26]

E. *The 8(a)(1) Allegations*

Paragraph 11 of the complaint alleges that in or about October 1979 Billy C. Malcolm violated Section 8(a)(1) of the Act by stating to employees at the Chino facility "that he intended to end his construction boring business, in order to discourage activity on behalf of or in support of the IUOE." David Frederick testified that, in August or September 1979, Billy C. Malcolm told him that he had negotiated a contract for Bruce Malcolm with NMU, that Bruce was going to try that Union, and that B. C. Malcolm was considering signing with that Union. As set forth above, Billy Malcolm denied that that conversation took place and I have credited Billy C. Malcolm. Larry Cochell testified that, in June 1979, Billy C. Malcolm told him that Malcolm Boring would be closing down in January 1980. Cochell also testified that in late September or October 1979 Billy C. Malcolm told him that he was going to turn the boring business over to the boys and start a pipe business.[27] Billy C. Malcolm testified that he never told Cochell that he would close down his boring business. As between Billy C. Malcolm and Cochell, I credit Billy C. Malcolm.[28]

Paragraph 12 of the complaint alleges that in or about October 1979 Billy C. Malcolm interrogated an employee at the Chino facility regarding his union sympathies and membership. Larry Cochell testified that, in the latter part of September or early October 1979, Billy C. Malcolm spoke to him in the shop and asked him what his thoughts were on the NMU. He averred that Billy C. Malcolm mentioned some of the benefits of the NMU. Although I have some doubts as to Cochell's credibility, Billy C. Malcolm did not testify with regard to that conversation and I credit Cochell. However, in the entire context of the situations, as set forth above, I do not believe that that one isolated question interfered with, restrained, or coerced Cochell or any other employee in the exercise of his rights guaranteed by Section 7 of the Act.

Paragraph 13 of the complaint alleges that in or about October 1979 Bruce C. Malcolm interrogated an employee at the Chino facility regarding his union sympathies and membership. Cochell testified that, about the first of October 1979, Bruce C. Malcolm asked him what his thoughts were about the NMU and told him that he had signed a contract with that Union. As found above, Bruce C. Malcolm was not a single employer with Malcolm Boring or B. C. Malcolm. At that time Bruce C. Malcolm had his own business and Cochell was not his employee. Bruce C. Malcolm and Cochell had been friends and it appeared that Bruce C. Malcolm was merely asking Cochell's advice concerning his new business. I do not believe that Bruce C. Malcolm's question in any manner interfered with, restrained, or coerced Cochell or any other employee in the exercise of rights guaranteed by Section 7 of the Act. I shall recommend that all of the 8(a)(1) allegations in the complaint be dismissed.

CONCLUSIONS OF LAW

1. Malcolm Boring, B. C. Malcolm and Bruce Malcolm, Inc., are, and each is, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 12 and NMU are and each is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not established by a preponderance of the credible evidence that Malcolm Boring, B. C. Malcolm, Bruce Malcolm, Inc., or NMU violated the Act as alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[26] As the United States Supreme Court held in *N.L.R.B.* v. *Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO* [*Higdon Construction Co.*], 434 U.S. 335, 345 (1978): "The employer's duty to bargain and honor [an 8(f)] contract is contingent on the union's attaining majority support at the various construction sites." The Board has held that that duty also applies where a union attains majority status in a bargaining unit consisting of a permanent stable work force which moves from jobsite to jobsite. *Precision Striping, Inc.*, 245 NLRB 169 (1979), enforcement denied 642 F.2d 1144 (9th Cir. 1981). The General Counsel contends that the Union did secure majority status in such a permanent stable work force. As to part of that argument, the General Counsel lumped together the construction and nonconstruction employees, deleted from the unit employees who had not worked a certain number of days within a given period, and counted as part of the bargaining unit workers who were the sons of the owner. However, in view of the conclusions reached above, there is no need to decide the question of majority status.

[27] It is noted that Local 12 Business Agent Dye did not contact Malcolm Boring concerning its claim that shop employees were covered by the contract until December 1979.

[28] Even if Cochell were credited, it would be clear that the alleged threat had nothing to do with Local 12's claim that the contract covered shop employees. The threat allegedly occurred in October 1979 and Local 12's claim was made in December 1979.

ORDER[29]

The complaint is dismissed in its entirety.

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[29] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Ditzler Mechanical Contractors, Inc. ***and*** **Francis X. McGowan and Local Union No. 598, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Party to the Contract.** Case 19-CA-11634

December 9, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 10, 1981, Administrative Law Judge Frederick C. Herzog issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Ditzler Mechanical Contractors, Inc., Albany, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge: On August 1, 1979, a charge was filed by Francis X. McGowan, an individual (hereinafter referred to as the Charging Party), against Ditzler Mechanical Contractors, Inc. (hereinafter referred to as the Respondent), alleging that the Respondent violated Section 8(a)(1) and (2) of the Act. Based thereon a complaint was issued by the Regional Director for Region 19 of the National Labor Relations Board on August 17, 1979, alleging that the Respondent violated Section 8(a)(1) and (2) of the Act. The Respondent's answer to the complaint admitted certain factual allegations but denied any wrongdoing.

Thereafter, in February 1980, the Respondent entered into an informal settlement agreement. The Charging Party did not join in this agreement. However, in May 1980, the Regional Director withdrew his previous approval of the settlement agreement and reinstated the original complaint based on his assertion that the Respondent had failed to comply with the terms of the settlement agreement. The Respondent's answer was, by letter, also reinstated.

The case was heard before me at Richland, Washington, on November 4, 1980. The General Counsel appeared through counsel. The Charging Party appeared in person. As a party to a collective-bargaining agreement with the Respondent, Local Union No. 598, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (hereinafter referred to as the Union), appeared through counsel. However, the Respondent did not appear at the hearing. Its counsel, in a telephone conversation with me, stated that the Respondent's decision not to appear was consciously made and was not based on any scheduling conflict. I advised her that we would go forward with the hearing; she voiced her agreement and understanding.

Thus, while not all parties were present at the hearing, it is clear that each party had an opportunity to be present, to participate, to present evidence, and to examine and cross-examine witnesses. Based on the record thus compiled, as well as my review of the briefs filed by counsel for the General Counsel and the Union, I make the following:

FINDINGS OF FACT

I. COMMERCE

The Respondent is an Oregon corporation with its primary offices and place of business in Albany, Oregon, where it is engaged as a plumbing contractor. During the 12 months preceding the issuance of the complaint herein, it had gross sales and services valued in excess of $500,000. During that same period, it sold and shipped goods, or provided services to customers outside the State of Oregon or sold and shipped goods or provided services to customers within the State of Oregon (with said customers themselves being engaged in interstate commerce by other than indirect means), all of which had a total value in excess of $50,000. Additionally, during the 12 months preceding the issuance of the complaint herein, it purchased and caused to be delivered at its facility within the State of Oregon goods and materials valued in excess of $50,000 directly from sources outside the State of Oregon or from suppliers within the State of Oregon which in turn obtained such goods and materials directly from sources outside said State.

Based on the foregoing admitted allegations of the complaint, I find that the Respondent is engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is undisputed and I find that the Union, Local Union No. 598, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

A. *The Issues Presented for Determination*

The complaint alleges that the Respondent violated Section 8(a)(2) and (1) of the Act by virtue of the fact that one of its supervisors and agents also served as the president of the Union and established its policies and procedures, and participated in the affairs and meetings of the Union. Additionally, the question regarding the appropriate remedy for such actions is presented.

The Union asserts several arguments disputing the General Counsel's contention that a prior settlement agreement between the Regional Director and the Respondent should be set aside or that unfair labor practices have been committed.

B. *The Conduct Upon Which the Complaint is Based*

The Respondent herein is a contractor with its home office at Albany, Oregon, some 35 miles south of Portland, Oregon. However, it also operates in the area of southeastern Washington, primarily in the tri-cities area of Pasco, Richland, and Kennewick. In order to carry out its operations in southeastern Washington it has an office located in the tri-cities area.

For 2-1/2 years prior to the hearing herein, such operations were headed by William "Billy" James Elam. During this 2-1/2 year period Elam served as the Respondent's "general foreman" and, as was judicially admitted by the Respondent's answer to the complaint herein, Elam was the Respondent's superintendent at all times material herein, acting as the Respondent's agent and supervisor within the meaning of Section 2(11) and (13), respectively, of the Act. While Elam testified that he spent a substantial portion of his time performing the actual manual labor associated with the Respondent's operation as a small contractor, it is clear that he served for approximately 2-1/2 years without layoff or interruption as the coordinator and head of the Respondent's general operations in southeastern Washington. This involved coordination of several projects at various times. It appears that such projects involved crews of anywhere from one to six employees, as well as foremen. The foremen were deemed to be responsible for the day-to-day operations on the various jobsites, and each foreman reported directly to Elam. Elam reported only to Ditzler, and Ditzler made the 5-hour drive from the home office in Albany, Oregon, to the tri-cities area only once each week.

The General Counsel's complaint herein is based on the fact that throughout this period of time Elam was serving as the superintendent for the Respondent, he also served as the president of the Union with which Ditzler had a collective-bargaining relationship. Apparently, Ditzler has entered into successive collective-bargaining agreements with the Union since approximately 1972. While the collective-bargaining agreement which was effective at the time of the hearing herein was not offered in evidence, Elam testified that it was a 3-year contract providing for a termination date in June 1982.

As he had done while testifying about his responsibilities and duties as superintendent for the Respondent, Elam also sought to down-play the importance and significance of his role as the president of the Union. Thus, throughout his testimony and that of other witnesses for the Union, the office of the presidency of the Union was depicted as largely ceremonial. It was admitted that Elam presides over membership meetings of the Union, but it was disputed that he had any real input in the collective-bargaining process, in the resolution of grievances, or in recruiting new members for the Union. Instead, his role as presiding officer of the Union's meetings was portrayed as one lacking in discretion, governed only by Robert's Rules of Order, and giving him no more power or authority within the Union than that of any other rank-and-file member. In this connection it was noted that Ditzler is a small contractor and that its collective-bargaining agreement with the Union is only one of some 106 such agreements which the Union and its 2,000 to 2,100 members have within the Union's jurisdiction.

C. *Discussion and Conclusions*

1. First of all, the Union contends that the settlement agreement herein should not have been set aside by the Regional Director and that I may not properly make findings based on conduct which was merged into the settlement agreement. I disagree. Despite difficulty in determining exactly how this settlement agreement was breached,[1] it is clear from Elam's testimony that the settlement agreement's provisions included, as a minimum, a requirement that he elect to divest himself of one of the offices he held. It is equally clear from Elam's testimony that he failed and refused to abide by this provision, for, as he testified, he became indignant when told about the terms of the agreement. Therefore, he decided to continue in both positions. At the time of the hearing herein, he was still the Respondent's superintendent and he was still the Union's president.

Indeed, the Union's position herein is not that Elam has satisfied the terms of the settlement agreement, but that the General Counsel has failed to prove that it should be set aside. Alternatively, the Union asserts that, even if the General Counsel has done so, the law does not require such an election between offices by a low-level supervisor in the building and construction industry.

The Respondent's postsettlement conduct is shown through the testimony of Elam to warrant the Regional Director's action in setting aside the settlement agreement. For the Respondent failed to abide by the terms of the agreement and, instead, obstinately continued the very conduct which had been the subject of the settlement agreement; i.e., continuation in both offices. Obviously, where the Respondent fails to abide by an agreement and engages in further conduct contrary to the terms of the agreement, the Regional Director has no choice but to set it aside under the terms of Section

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[1] This difficulty is caused by the fact that the counsel for the General Counsel failed to place into evidence the notice to employees which, presumbly, was attached to the settlement agreement itself, which is in evidence as G.C. Exh. 1(i). Absent the notice to employees, I am unable to tell with precision just what the terms of the settlement agreement were.

101.9(e)(2) of the Board's Statements of Procedure, Series 8, as amended. *World-Wide Press, Inc.*, 242 NLRB 346 (1979); *Tompkins Motor Lines, Inc.*, 142 NLRB 1, 3 (1963), enforcement denied on other grounds 337 F.2d 325 (6th Cir. 1964); cf. *Henry I. Siegel Co., Inc.*, 143 NLRB 386, enfd. 328 F.2d 25 (2d Cir. 1964); *United Dairy Co.*, 146 NLRB 187 (1964).

Thus, I find and conclude that the General Counsel should prevail on the threshold questions of whether or not the Respondent engaged in further unfair labor practices following approval of the settlement agreement, and that those unfair labor practices are sufficient to warrant setting aside that agreement.[2]

2. The Union contends that the General Counsel's case must fall because there is no evidence of intent to improperly influence employees or members of the Union by or on behalf of the Respondent by Elam. However, this argument is without merit for such a showing is irrelevant. *Janesville Products Division, Amtel*, 240 NLRB 854, 860 (1979), and cases cited therein. Instead, the proper inquiry is whether or not there has been such a mingling of supervisory and employee-representative functions as to deny the Respondent's employees rights under the Act to be represented in collective-bargaining matters by individuals who have a single-minded loyalty to their interests. *Jeffrey Manufacturing Company, Screw Conveyor Division*, 208 NLRB 75 (1974). The facts in this case demonstrate such a "mingling" of supervisory and employee representative functions as to make the violation of the Act seem obvious.

In light of the fact that Elam was the overseer, not merely of the Respondent's employees, but also of the Respondent's foremen, Elam must be found to be a "high-level" supervisor, not a simple or low-level "master mechanic." *Welsbach Electric Corporation*, 236 NLRB 503 (1978). Further, his long and uninterrupted tenure as superintendent for the Respondent's entire operations in southeastern Washington belies any claim that Elam was no more than a "transitory" supervisor, typical of the building and construction industry. *Nassau and Suffolk Contractors' Association, Inc.*, 118 NLRB 174, 184 (1957); *Detroit Association of Plumbing Contractors*, 132 NLRB 658, 659 (1961).

The duties of the president of a local union affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada are set forth in the latter's constitution. Similarly, the constitution of the Union sets forth the duties of its president. The provisions of the said constitutions differ only slightly on this subject matter. Each provides for the president to preside over all meetings of the local union and to do so under Robert's Rules of Order, though the International Union provides further that he do so in accord with commonsense. Each constitution provides that the president of the local union "*shall have a general supervisory control over all matters pertaining to the general welfare of the Local Union.*" (Emphasis supplied.) Finally, it is provided that the president shall be an *ex officio* member of all committees; the local constitution provides that he should do so "with voice" but no vote, while the International Union's constitution provides that he shall be "over" all committees.

Under these circumstances, it appears quite evident that prudent employees of the Respondent would, when exercising their right to freely engage in union activities without interference from their employer, experience some degree of inward restraint. Before taking issue with the views expressed by Elam in any of the workings of the various committees of which he is necessarily a member, any employee of the Respondent would think twice, for the duties of a union officer, vested with "general supervisory control over all matters pertaining to the general welfare of the Local Union," are manifestly much greater than "ceremonial."

Based on the considerations set out above, I find and conclude that the Respondent violated Section 8(a)(2) and (1) of the Act by permitting its supervisor and agent to continue to hold office as the president of the Union.

THE REMEDY

The record in this case contains no evidence indicating that Elam, the Respondent, or the Union has, in fact, cooperated in such a way as to actually deny employees rights. Additionally, there is no evidence that the Union has been so infused with the Respondent's presence as to justify a finding that the Union has been "dominated" by the Respondent. If such evidence existed it would warrant the revocation of the Union's certification. *Abilene Area Sheet Metal Contractors*, 236 NLRB 1652 (1978). Instead, the evidence here merely indicates supervisory participation in union affairs.[3]

Under such circumstances including my consideration of the fact that the Respondent has not complied with an informal settlement agreement which must have contained, at the least, a cease-and-desist provision, it is necessary to set aside the existing collective-bargaining agreement between the Respondent and the Union.[4] *Bisso Towboat Company, Inc.*, 192 NLRB 885 (1971); *Janesville Products Division, Amtel, supra; Abilene Area Sheet Metal Contractors, supra*. However, the evidence shows that the Union had an established relationship with the Respondent for some years before Elam's employment as a supervisor. The record evidence, moreover, affords no basis for questioning the majority status of the union. Thus, requiring that Elam, the supervisor, be separated from the administration of the Union and participation in its affairs, and requiring that the collective-bargaining agreement be set aside, will suffice to remedy the 8(a)(2) violation found herein.[5] More specifically, I do not find

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[2] In this connection I have considered the Respondent's presettlement conduct only as background evidence. See discussion *Jake Schlegal, Jr., d/b/a Aurora and East Denver Trash Disposal*, 218 NLRB 1, 9 (1975).

[3] I do not regard the evidence that Elam participated in the adjustment of grievances as a member of a committee for the Union as having sufficient probative value to base any findings thereon.

[4] In light of the fact that the Union participated in the hearing herein such a finding is warranted.

[5] The General Counsel's statements of position regarding the remedy in this matter have been less than helpful to me. At the hearing I inquired of her regarding the General Counsel's position on whether or not the collective-bargaining agreement between the parties should be set aside. She responded that, not having previously thought of the matter, she would reserve comment and answer my inquiry in her brief. However, the brief fails to answer this issue. Instead, it merely points out, accurately, that

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it necessary that the Respondent withdraw and withhold recognition from the Union. *Jeffrey Manufacturing Company, supra*. By setting aside the collective-bargaining agreement between the parties, it should be expressly understood that the Respondent is not thereby required to depart from, or vary, any of the substantive terms, conditions, and benefits for employees currently in effect. *Bisso Towboat Company, supra.*

Conclusions of Law

1. The Respondent is an Employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By permitting a supervisor to serve as the president of the Union, thereby necessarily involving him in the establishment of the Union's policies and procedures and requiring his participation in the affairs and meetings of the Union, the Respondent has interfered with the administration of the Union in violation of Section 8(a)(2) and (1) of the Act.

4. The Respondent did not violate the Act in any manner other than as specified above.[6]

ORDER[7]

The Respondent, Ditzler Mechanical Contractors, Inc., Albany, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Assisting and encouraging membership in Local No. 598, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, by permitting any supervisor, as defined in Section 2(11) of the Act, to serve as the president of the labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form a labor organization, to join or assist Local Union No. 598, United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, or any other labor organization, to bargain collectively through a representative of their choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities, except to the extent permitted by Section 8(a)(3) and Section 8(f) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its offices in Albany, Oregon, and in the tricities area of the State of Washington copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return by mail to the Regional Director for Region 19, immediately upon receipt from him, copies of the attached notice, marked "Appendix," for posting by the Union, should it desire to do so.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not permit General Foreman and Superintendent William "Billy" James Elam or any other supervisor to serve as a union officer or representative.

We will not give effect to our current collective-bargaining agreement with Local 598, and we will not change the wages and other conditions of employment under the contract.

We will not unlawfully interfere with the operation of any union of your choice.

We will not in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

Ditzler Mechanical Contractors, Inc.

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there is no issue of "domination" involved in this case and states that the General Counsel seeks the "usual remedies," making no effort to brief or argue the question of just what they may be. Instead, the General Counsel's brief goes on to state, "It should be further noted that this is not a limited request and General Counsel further seeks any and all remedies deemed necessary and appropriate by the Adminstrative Law Judge."

[6] All outstanding motions inconsistent with these Conclusions of Law are hereby denied.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Custom Manufacturing Company (Successor to Zion Industries, Inc.—Curtain and Drapery Division); Bobbe Drapery Products Co., Inc.; Concepts in Drapery Design, Inc.; and Their Agents Frank Florence and Roberta Florence; and Interior Concepts, Inc., and Its Agents Terry Sterling, Frank Florence, and Roberta Florence *and* **The International Chemical Workers Union, Local 665.** Cases 13-CA-13630, 13-CA-13796, and 13-CA-13998

December 10, 1981

SECOND SUPPLEMENTAL DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On April 2, 1981, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. Respondent Interior Concepts, Inc., filed limited cross-exceptions and an answering brief to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The extensive prior litigation in this proceeding is described in considerable detail in section I of the Administrative Law Judge's Decision. It suffices for our purposes here that the Board found that the named Respondents in the earlier proceedings violated Section 8(a)(1), (3), and (5) by various conduct and that the Board ordered those Respondents to make whole the Union and the employee discriminatees in accordance with the Board's Order. Both the Board's Decision and Order[1] and its Supplemental Decision and Order[2] were enforced by the United States Court of Appeals for the Seventh Circuit.[3]

The sole issue before the Board now involves whether Respondent Interior is an *alter ego* of the named Respondents in the earlier proceedings and thus liable on the judgments in such proceedings.

The Administrative Law Judge has provided a comprehensive review of the record evidence including, *inter alia*, the ownership, management, business purpose, organization, and operation of the companies involved in this proceeding. Only limited exceptions have been filed to the Administrative Law Judge's factual findings.[4] It would serve no purpose to repeat or, in view of the extensive and detailed nature of such evidence, to attempt to summarize this evidence at the outset of this Decision and Order. The gravamen of this case is whether such evidence shows that Interior is an alter ego of Custom, Bobbe, and Concepts. Respondents urged and the Administrative Law Judge found the evidence fails to establish such alter ego status. The General Counsel excepts to the Administrative Law Judge's findings and contends that the credited record evidence supports a legal conclusion that Interior is an alter ego of Custom, Bobbe, and Concepts. We agree with the General Counsel.

The Administrative Law Judge found that the record evidence satisfied various indicia of *alter ego* status. Significantly, the Administrative Law Judge found both substantially identical ownership and substantially identical management in the four corporations. Thus, she found that, at the time Interior began operations in January 1976, 75 percent of its stock was owned by Roberta Florence, who owned all of the stock of Bobbe and Concepts and whose husband owned half of Custom's stock. With respect to the management of the four corporations, the Administrative Law Judge found that Frank Florence was an officer of all four companies, and that he managed the first three corporations on a day-to-day basis, performed selling functions for all four corporations, incorporated Interior, and by the end of 1979 was receiving the same salary from Interior as Interior's president, Terry Sterling. Similarly, Sterling, who served as salaried controller and office manager for Custom, Bobbe, and Concepts, continues to perform or supervise at least some of the functions he performed for the earlier three companies in his position as Interior's president.

Other indicia of Interior's *alter ego* status found by the Administrative Law Judge included evidence that Sterling and Frank Florence solicited and obtained business for Interior while they were still on the payroll of Concepts and before Interior formally began operations. Furthermore, one of Interior's first customers was Benjamin Brothers, which had been a customer of Custom and a major customer of Bobbe and Concepts, and to which Interior provided substantially the same services (except fabrication) which Benjamin Brothers had received from the other three corporations. Also, Roberta Florence handled all of the billing functions for both Concepts in Drapery and Interior. Finally, the Administrative Law Judge found that the Florences, Sterling, and two installers, who constituted the entire final payroll of Concepts, were transferred to Interior's payroll without any break in their employment.

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[1] 220 NLRB 1256 (1975).

[2] 230 NLRB 691 (1977).

[3] Unpublished decision 96 LRRM 2394 (1976), and judgment of April 20, 1979.

[4] Respondent Interior has excepted to the Administrative Law Judge's finding that Sterling and Frank Florence were spending a substantial amount of time soliciting business for Interior while they were still on the payroll of Concepts in early 1975 and to her finding that there is a substantial identity of ownership and management between Interior and the other three named Respondents. The record supports these findings by the Administrative Law Judge.

Despite the Administrative Law Judge's finding that the foregoing evidence satisfied various indicia of *alter ego* status, she nevertheless relied on other "countervailing considerations" to conclude that Interior was not an *alter ego* of the other three corporations. In so concluding, the Administrative Law Judge found that Interior differed from the other three corporations because Interior never employed production employees, Interior's facilities were much smaller and at a different location, and Interior's customers (except for Benjamin Brothers) and its suppliers are different. Further, the Administrative Law Judge pointed out that the principal business shifted from manufacturing drapes to be used in private residences to sales to institutions and commercial establishments of products manufactured by others. In short, the Administrative Law Judge relied on changes in business operations to find that Interior is not an *alter ego* of the other three corporations.[5]

In assessing the changes in business operations for the purpose of determining Interior's status as an *alter ego* of Custom, Bobbe, and Concepts, it must be taken into account that a substantial portion of these changes took place in Custom's successor *alter egos*, Bobbe and Concepts. Thus, Custom manufactured draperies from its own materials for residential customers and marketed the product through department stores. When Custom was no longer in an economic position to carry an inventory of materials, Bobbe was incorporated and continued the business by manufacturing draperies from customers' materials. A consequence of this change was a loss of residential business and a shift to institutional customers which was continued by Concepts. Another consequence of these changes in business operations from Custom to Concepts—and carried forward in Interior—was the transformation from a manufacturer to a broker of draperies materials and goods.

When viewed against the background of the changes in business operations from Custom to Concepts, the changes from Concepts to Interior do not represent an abrupt shift but another step in the evolution of the drapery business from manufacturer to broker and from residential to institutional customers. In each instance, the principals of all four corporations applied their expertise in the drapery business to the economic conditions available to them. There was no real hiatus between Concepts and Interior, which was consistent with the pattern of discontinuing one drapery business and commencing a new scaled-down operation in the earlier three corporations.[6] In short, although Interior downplays the scope and effect of the foregoing record evidence showing both a connection between, and carryover from, the business operations of Concepts and Interior, the point remains that it was a spinoff of the former businesses tempered by the economic resources available to the principals at each given time. Thus, the changes in business operations revealed by this record can be characterized fairly as having:

> . . . amounted essentially to evolutions, extensions and developments merely, such as could characteristically be expected to occur in the particular business field and in the economic era involved, without having so changed the nature of the enterprise and its job situations as to cause it to be outside the bounds of legitimate remedial area in respect to the discriminatees.[7]

In sum, we find that Interior is an *alter ego* of Custom, Bobbe, and Concepts. As such, we find that Interior is derivatively liable to provide the remedies ordered by the Board including backpay due the discriminatees.[8]

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[5] The Administrative Law Judge also found that the evidence failed to establish that Interior was set up for the purpose of evading the Act and that there was no transfer of assets. Although she acknowledged that these two factors were not necessary elements to find *alter ego* status, she nevertheless weighed them along with the other changes described above in reaching her conclusion that Interior was not an *alter ego* of the other three named corporations. We find the Administrative Law Judge's reliance on these factors to be misplaced.

[6] Custom's operations were discontinued in August 1974, the same month that Bobbe was incorporated. Similarly, Bobbe went out of business and Concepts commenced operations, both in February 1975. As more fully discussed by the Administrative Law Judge, Concepts was winding down its business at the same time Interior was being incorporated in August 1975. We also note that, just as the change from Bobbe to Concepts in February 1975 coincided with the issuance of one of the complaints and the filing of the charges that resulted in another of the complaints here, Concepts was ceasing business and Interior was formed while these cases were before the Board.

[7] *N.L.R.B.* v. *Ozark Hardwood Company*, 282 F.2d 1, 6 (8th Cir. 1960). The only reasons offered by Interior for the changes in the corporate entity were the need for a fresh start and Continental Bank's concern that its interest might be affected by other creditors. But there is no contention, or evidence to show, that such changes could not have been handled within the framework of Concepts. The absence of such evidence, coupled with the substantial identity of ownership and management of the corporations, undermines Interior's contention that it is not an alter ego.

[8] *Custom Manufacturing Company (successor to Zion Industries, Inc.—Curtain and Drapery Division); Bobbe Drapery Products Co., Inc., and Con-*

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CONCLUSIONS OF LAW

1. Interior Concepts, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Interior Concepts, Inc., is an *alter ego.*

3. As the *alter ego* of Custom Manufacturing Company (Successor to Zion Industries, Inc.,—Curtains and Drapery Division); Bobbe Drapery Products Co., Inc.; and Concepts in Drapery Design, Inc., Interior Concepts, Inc., is derivatively liable for backpay due discriminatees as part of the Board's remedy for unfair labor practices as set forth in 220 NLRB 1256 (1975) and 230 NLRB 691 (1977).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Interior Concepts, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, as an *alter ego* of Custom Manufacturing Company (Successor to Zion Industries, Inc.—Curtain and Drapery Division); Bobbe Drapery Products, Co., Inc.; and Concepts in Drapery Design, Inc., shall make whole the discriminatees named in the Board's Supplemental Decision and Order set forth at 230 NLRB 691, 692, in the amount and manner described therein.

DECISION

NANCY M. SHERMAN, Administrative Law Judge: This case was heard before me in Chicago, Illinois, on November 17, 1980, pursuant to a backpay specification and notice of hearing issued on May 16, 1980. The backpay specification alleges that Interior Concepts, Inc. (Interior Concepts), is an *alter ego* of other corporations which are named in the specification and which in April 1979 were judicially directed to pay certain sums required by a Supplemental Decision and Order of the Board issued in July 1977.

Upon the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel and by counsel for Interior Concepts and by its agents Terry Sterling, Frank Florence, and Roberta Florence, I hereby make the following:

FINDINGS OF FACT

I. THE PRIOR LITIGATION

On October 2, 1974, The International Chemical Workers Union, Local 665 (the Union), filed a charge against "Custom Manufacturing Co., Successor to Zion Industries, Drapery Div." (Custom), docketed as Case 13-CA-13630, which alleged, *inter alia*, that "the above-named employer" had "discriminated against Union members and officers." On November 20, 1974, a complaint bearing this docket number was issued against Custom. The complaint contained no allegations that Custom had unlawfully terminated employees or failed to make contractually required payments, but did allege, *inter alia*, that at all material times "Frank Florence occupied the position of President of [Custom], and has been and is now an agent and supervisor of" Custom.

On November 27, 1974, the Union filed against Custom another charge, which was docketed as Case 13-CA-13796. The charge alleged, *inter alia*, that "the Employer" had "through its agents and officers unilaterally terminated the Accident & Insurance Plan, the Life Insurance Plan, and the Pension Plan." On February 6, 1975, a complaint with the docket number 13-CA-13796 was issued against Custom. The complaint alleged, *inter alia*, that at all material times Frank Florence "occupied the position of president of the Respondent, and has been and is now an agent and supervisor of Respondent, acting on its behalf." The complaint further alleged that Custom had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act) by unilaterally changing existing wage rates, benefits, and conditions of employment by failing and/or ceasing to make payments and contributions into and discontinuing the pension plan described in a collective-bargaining agreement between the Union and Custom.

On February 13, 1975, the Union filed a charge, docketed as Case 13-CA-13998, against Custom and Bobbe Drapery Products (Bobbe). The charge alleged that "the above-named Employer, through its officers and agents," had unlawfully transferred and/or closed down "its" Zion, Illinois, facility. On April 22, 1975, the Union filed an amended charge in Case 13-CA-13998, against Custom, Bobbe, Concepts in Drapery Design, Inc. (Concepts in Drapery), Frank Florence, and Roberta Florence. The amended charge alleged, *inter alia*, that "the above-named Employer, through its officers and agents," had unlawfully transferred and/or closed down "its" Zion, Illinois, facility. That same day, the Union filed an amended charge in Case 13-CA-13796 against Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence, alleging, *inter alia*, that "the Employer has through its agents and officers unilaterally terminated the Accident & Insurance Plan, and Life Insurance Plan, and the Pension Plan." On April 24, 1975, the Union filed a first amended charge in Case 13-CA-13630 against Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence. The charge alleged, *inter alia*, that "the above-named Employer" had "discriminated against union members and officers."

On April 30, 1975, a complaint was issued with the docket number 13-CA-13998. The caption named Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence." The body of the complaint stated that Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence would be referred to as "Respondents, collectively." The complaint alleged, *inter alia*, that the initial charge had been served

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cepts in Drapery Design, Inc., Southeastern Envelope Co., Inc., and Southeastern Expandvelope, Inc. (Diversified Assembly, Inc.), 246 NLRB 423 (1979).

on "Respondent Custom" and "Respondent Bobbe"; that the first amended charge had been served on "Respondents"; that Bobbe was the *alter ego* to Custom; that Concepts in Drapery was an *alter ego* to Custom and Bobbe; and that Custom, Bobbe, and Concepts in Design were "employers" within the meaning of the Act. The complaint further alleged that at all material times Frank Florence was president of Custom and was an agent and supervisor of Custom, Bobbe, and Concepts in Drapery; and that Roberta Florence was at all material times president and an agent of Bobbe and Concepts in Drapery. Also, the complaint alleged that "Respondents" had violated the Act by unilaterally terminating a collective-bargaining agreement between Custom and the Union, and by terminating "all its [sic] employees employed at its Zion, Illinois, facility, and thereafter [failing] and [refusing] to offer employment to those employees at its Chicago, Illinois, facility."[1]

Also on April 30, 1975, the Regional Director issued a pleading whose caption named Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence." The docket numbers on the pleading were 13-CA-13640 and 13-CA-13796, and it was entitled "Amended Consolidated Complaints and Notice of Hearing." The body of the complaint stated that the corporations named in the caption "[A]nd Their Agents Frank Florence and Roberta Florence" were "herein called Respondent Custom, Respondent Bobbe, Respondent Concepts, Respondent Frank Florence, and Respondent Roberta Florence, respectively, and Respondents collectively." The complaint alleged, *inter alia*, that the first amended charges in both cases had been served "on Respondent Custom; Respondent Bobbe; Respondent Concepts [in Drapery]; Respondent Frank Florence and Respondent Roberta Florence." The complaint further alleged that Bobbe was an *alter ego* to Custom; Concepts in Drapery was an *alter ego* to Bobbe and Custom; and "Respondents" Custom, Bobbe, and Concepts in Drapery were "employers" engaged in commerce within the meaning of the Act. Also, the complaint alleged that at all material times Frank Florence was president of "Respondent" Custom and an agent and supervisor of "Respondents" Custom, Bobbe, and Concepts in Drapery; and that at all material times Roberta Florence was president of and an agent and supervisor of "Respondents" Bobbe and Concepts in Drapery. The complaint further alleged that "the Respondents" had violated the Act by, *inter alia*, unilaterally changing existing wage rates, benefits, and conditions of employment by failing and/or ceasing to make payments into, and discontinuing, the pension and insurance plans described in a collective-bargaining agreement between Custom and the Union.

About May 23, 1975, a single answer was filed to both April 30 complaints. This answer was captioned "Respondent's Answer to Complaint"; stated that Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence" would be collectively referred to as "Respondent"; and contained averments ascribed to "Respondent." The end of the answer names Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence," and is signed by counsel as "[t]heir" attorney. By letter to the Regional Director dated June 24, 1975, counsel stated, *inter alia*, "On behalf of the Respondents . . . we hereby withdraw the 'Respondent's Answer to Complaint.'" On June 30, 1975, William G. Kocol, counsel for the General Counsel, filed a motion for an order transferring the proceeding to the Board and for summary judgment. The motion stated, *inter alia*, that "the Respondent" had filed and then withdrawn an answer, and that, if the Board issued an order transferring the case to itself, Kocol intended to file a supplemental brief as to an appropriate remedy.

On July 8, 1975, the Board issued an order transferring the proceeding to itself and a Notice To Show Cause why the Motion for Summary Judgment should not be granted. The order stated that the complaints alleged unfair labor practices by "Respondents," that an answer had been filed by "Respondents," and that "Respondents" had subsequently withdrawn "their" answer. The affidavit of service of this document states, *inter alia*, that copies were served by regular mail on Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence, respectively. No party filed a response to the Notice To Show Cause. Kocol filed a brief which sometimes referred to the opposing party as "Respondents" but at one point referred to "the doubtful continued viability of Respondent's business operation were it to incur" certain additional expenses, and requested that "the Board order Respondents to offer employment at its [sic] Chicago, Illinois, facility to those employees who were employed at the Zion, Illinois, facility, and to pay backpay until such offer of reinstatement." The certificate of service attached to this brief avers that copies were mailed to, *inter alia*, Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence, respectively.

On October 14, 1975, the Board issued a Decision and Order, reported at 220 NLRB 1256, in these three cases. The Decision initially stated that Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence [are] herein called the Respondent." The Decision went on to state that the complaints alleged unfair labor practices by "Respondent." The Board then stated that the action of "Respondent" in withdrawing its answer meant that the allegations of the complaint must be deemed admitted. Part I of the Board's "Findings of Fact," headed "The Business of the Respondent," refers by name to Custom, Bobbe, and Concepts in Drapery, but does not refer by name to Frank Florence or Roberta Florence. Nor are the Florences referred to by name in any of the other findings of fact, which usually refer to "Respondent" in the singular but sometimes use the plural. Part V of the Decision, entitled "The Remedy," states, *inter alia*, that backpay and contributions to the pension and insurance plans are to be paid by "Respondent." The Board's Conclusions of Law state that Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence, is an employer engaged in commerce within the meaning of" the Act. These Conclusions of Law further state that "Respondent" had engaged in certain unfair labor practices which included refusal to make payments to the pension and insurance plan as provided in the collective-bargaining agreement with the Union and the termination of and failure and refusal to offer reinstatement to employees. The Board's Order states, in part:

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[1] The word "its" is used as a pronoun for "Respondents'" in other portions of the complaint as well.

> Respondent, Custom . . . Bobbe . . . Concepts in Drapery . . . its officers, agents, including Frank Florence and Roberta Florence, successors, and assigns, shall:
>
> * * * * *
>
> [2](d) Pay into the pension plan and insurance plan all due and owing payments and contributions as provided in the collective-bargaining agreement with the Union.
>
> (e) Offer all employees in the appropriate unit who were terminated at its Zion, Illinois, facility employment at its Chicago, Illinois, facility, paying their travel and moving expenses if they accept the offer of employment, and make said employees whole for any losses they incurred by reason of the discrimination against them in accordance with the section of this Decision entitled "The Remedy."

Paragraphs 2(g) and (h) of the Order required the posting and mailing of notices. Each notice was to bear the typewritten names of Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence," and contained a blank to be executed by "Representative" and "Title." The affidavit of service of this Decision indicates, *inter alia*, that copies were sent by regular mail to Custom, Bobbe, Concepts in Drapery, Frank Florence, and Roberta Florence, respectively.

On July 19, 1976, the Board, by Deputy Associate General Counsel Elliott Moore, filed with the Court of Appeals for the Seventh Circuit an "Application for Summary Entry of a Judgment Enforcing the Board's Order." Frank Florence and Roberta Florence were not named in the caption of the application, which designates Custom, Bobbe, and Concepts in Drapery as "Respondent." The body of the application states that the Board's order had been issued against "Respondent, Custom . . . Bobbe . . . Concepts in Drapery Design, Inc., and their agents Frank Florence and Roberta Florence, its officers, agents, successors, and assigns." The application requested a judgment against "Respondent, Custom . . . Bobbe . . . Concepts in Drapery Design, Inc., and their agents Frank Florence and Roberta Florence, its officers, agents, successors, and assigns." Attached to the application were copies of a proposed judgment whose caption named as "Respondent" (in addition to Custom, Bobbe, and Concepts in Drapery) "their agents Frank Florence and Roberta Florence," and which called for a judgment against "Respondent, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence, its officers, agents, successors, and assigns." The proposed judgment constituted an almost verbatim copy of the Board's Order. Apparently, no opposition to the application was filed. On August 23, 1976, the United States Court of Appeals for the Seventh Circuit entered the judgment proposed by Board counsel.[2]

On February 17, 1977, the Regional Director issued a document entitled "Backpay Specifications and Notice of Hearing" bearing all three Board docket numbers, and naming in the caption Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence." The document recited that a Board Order had been issued against Custom "*et al.*," and that the court of appeals had "enforced in full the backpay provisions of the Board's Order." The document contained certain allegations regarding the amount due from "Respondent," including allegations regarding the amount owed to each discriminatee and to the Union's pension and welfare fund. The total amount claimed was $35,791.90, plus interest. So far as relevant here, the affidavit of service states that the "Backpay Specifications" was served solely on "Custom Manufacturing Company c/o Frank Florence & Roberta Florence," and on a member of the law firm Goodman and Goodman, Ltd. By letter dated February 18, 1977, which recited the docket numbers of all three cases, this law firm advised the Regional Director that it did not represent "the Respondent." By telegram dated March 18, 1977, counsel for the General Counsel advised Frank and Roberta Florence that an answer to the backpay specifications had been due on March 8, 1977, and that failure to file an answer immediately would necessitate the filing of a Motion for Summary Judgment.[3] By letter dated March 22, 1977, to "Frank Florence & Roberta Florence/Frank Florence & Associates . . . Dear Mr. & Mrs. Florence," Carl Tominberg, counsel for the General Counsel, stated:

> . . . your answer to the Backpay Specification was due on March 8, 1977. Unless you file your Answer immediately I will be forced to move for Summary Judgment. To the extent that your Answer fails to deny the allegations of the Backpay Specification . . . you shall be precluded from introducing any evidence [controverting such allegations.]

No response to the backpay specifications was filed. On April 6, 1977, Tominberg filed with the Board a "Motion To Transfer Proceedings to the Board and Motion for Summary Judgment." The caption of the motion named Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence." The body of the motion requested summary judgment, for failure to file an answer to the backpay specifications, against Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence." So far as relevant here, the affidavit of service with respect to this motion named only "Custom Manufacturing Company c/o Frank Florence and Roberta Florence." On April 20, 1977, under the same caption and with the same docket numbers as those set forth in the motion, the Board transferred the proceedings to itself and directed that cause be shown before May 4, 1977, why the Motion for Summary Judgment should not be granted. So far as relevant here, the affidavit of service states that the show-cause notice was mailed by registered mail to "Custom Manufacturing Company c/o Frank Florence and Roberta Florence" only and by regular mail to Bobbe and Concepts in Drapery.

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[2] Thereafter, the clerk of the court returned the original appeal record to the Board. The clerk's covering letter, dated February 25, 1977, states that the title of the cause is "National Labor Relations Board, Petitioner, Custom Manufacturing Company, etc., *et al.*, Respondents."

[3] The copy of this telegram in the Board's formal file in Washington, D.C., is almost illegible. My description is based mostly on the description in the Board's 1977 Supplemental Decision and Order herein (230 NLRB 691) and on the description in the General Counsel's April 1977 Motion for Summary Judgment. The Board's Decision states that the General Counsel "telegraphically advised Respondent's agents, Frank and Roberta Florence."

No response was filed to the April 20, 1977, show-cause notice. On July 7, 1977, the Board issued a Supplemental Decision under the same caption and with the same docket numbers as those in the April 6, 1977, motion. 230 NLRB 691. The Decision stated, *inter alia*, that the Board's October 1975 Order had directed that Custom, Bobbe, Concepts in Drapery, "and their agents Frank Florence and Roberta Florence, herein called the Respondents, make whole certain employees and the [Union's] pension and insurance fund." In view of the absence of any response to the General Counsel's motion and the Board's show-cause notice, the Board found the allegations of the backpay specifications to be true.[4] The Board's ruling on the Motion for Summary Judgment states, *inter alia*, that the Board "orders the payment [of the amounts set forth in the Specifications as net backpay and as payments due and owing to the contractual pension plan] jointly and severally by Respondents." The Order itself states, in part:

> [T]he National Labor Relations Board hereby orders that the Respondents, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence, make whole the discriminatees named below, by payment to them of the amount following their names and by payment to the [union] pension plan . . . the amount following its name.

So far as relevant here, the affidavit of service of this Supplemental Decision and Order recites that copies were served on Custom "c/o Frank Florence & Roberta Florence," Bobbe, and Concepts in Drapery.

On March 19, 1979, Deputy Associate General Counsel Moore filed on behalf of the Board an application to the Seventh Circuit for a supplemental judgment enforcing the Board's July 1977 Order. The caption named as "Respondents" Custom, Bobbe, Concepts in Drapery, and their agents Frank Florence and Roberta Florence." The application stated that the 1977 Board Order had been issued against "Respondents, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence." Further, the application stated that the Board had ordered "Respondents, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence" to make whole the discriminatees by payment to them of "the amount following their names and by payment to the [Union] pension plan . . . the amount following its name." Also, the application alleged that "the Respondents" had committed unfair labor practices. The application requested a supplemental judgment summarily enforcing the Board's 1977 Order, and requiring "Respondents, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence" to comply therewith. So far as relevant here, the certificate of service with respect to this application recites service on the law firm Dorfman, DeKoven, Cohen, and Laner (described in the certificate of service as counsel for "Respondents"); Custom "c/o Frank Florence & Roberta Florence," Bobbe; and Concepts in Drapery. On April 20, 1979, the Seventh Circuit entered a "Supplemental Judgment Enforcing a Supplemental Order of the National Labor Relations Board." This judgment, in the form requested by Board counsel, named in the caption "Custom . . . Bobbe . . . [Concepts] in Drapery . . . and their agents Frank Florence and Roberta Florence, Respondents"; and required "Respondents, Custom . . . Bobbe . . . Concepts in Drapery . . . and their agents Frank Florence and Roberta Florence [to] make whole the discriminatees named below, by payment to them of the amount following their names and by payment to the [union] pension plan . . . the amount following its name."

II. THE INSTANT PROCEEDING

A. *Jurisdiction; Matters Established by the Pleadings*

On May 16, 1980, the Acting Regional Director issued the backpay specification and notice of hearing which gave rise to the proceeding before me. The specification alleged, *inter alia*, that Interior was an *alter ego* of Custom, Bobbe, and Concepts in Drapery and was obligated to pay to the employees and the Union funds the sums specified in the Board's July 1977 Order and the Court's 1979 judgment. On June 2, 1980, Attorneys Richard L. Marcus and Irving M. Geslewitz, on Interior's behalf, filed a motion to dismiss the May 1980 backpay specification for lack of jurisdiction.[5] Interior asserted that the Court's April 1979 judgment was final and did not remand the proceedings to the Board, and that the Board had failed, before issuing the May 1980 backpay specification, to apply to the court for leave to adduce additional evidence that Interior was an *alter ego* of the other three corporations. Further, the motion asserted that the Board's Rules and Regulations do not provide for a proceeding of the nature described in the May 1980 backpay specification. On July 31, 1980, this motion was denied by Administrative Law Judge William A. Gershuny on the authority of *N.L.R.B.* v. *C.C.C. Associates, Inc.*, 306 F.2d 534 (2d Cir. 1962). See also *Coast Delivery Service, Inc.*, 198 NLRB 1026 (1972).

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[4] In the form signed by the Board members, the Supplemental Decision states, *inter alia*, that "Respondents [sic] counsel's law firm advised that it no longer represented the Respondents." (As printed in the Board's bound reports, the first word in the quoted material is Respondents'.") The letter in fact referred to "the Respondent."

[5] The face of this May 1980 backpay specification indicates that efforts were made to serve, *inter alia*, Concepts in Drapery, Custom, and Bobbe "c/o" the Florences, and the Florences individually. None of these was named in the certificates of service filed by Interior's counsel in connection with his motion and reply memorandum.

The caption of the May 1980 backpay specification set forth the docket number of all three cases and named Custom; Bobbe; Concepts in Drapery; "and their agents Frank and Roberta Florence"; and "Interior Concepts, Inc., and its agents Terry Sterling, Frank and Roberta Florence." The backpay specification alleged, *inter alia*, that in October 1975 the Board had ordered "Custom, Bobbe, Concepts [in Drapery], their agents Frank and Roberta Florence, and successors and assigns" to pay into the pension plan and the insurance plan all due and owing payments, and to make whole employees who had been discharged from the Zion, Illinois, facility for any losses they incurred as a result of "Respondent's" discrimination against them. The backpay specification further alleged that the Board's July 1977 Supplemental Decision and Order ordered "Respondents Custom, Bobbe, Concepts [in Drapery] and their agents Frank and Roberta Florence" to make payments totalling $35,791.90, plus interest to 10 named employees and the Union's insurance and pension funds "for Respondents [sic] violations" of the Act. In addition, the backpay specification alleged that Bobbe and Concepts in Drapery were successive *alter egos* of Custom, and that "[T]he Florences by Roberta Florence and/or by Frank Florence have been, at all times material herein, shareholders of 50 percent or more of the stock in Custom, Bobbe, and Concepts [in Drapery], and, at all times material herein, were controlling owners or the owner of Custom, Bobbe, and Concepts [in Drapery]." Attorney Geslewitz filed an answer to the backpay specification as Interior's attorney, in which answer he admitted all the allegations set forth in this paragraph except the *alter ego* allegations.[6] At the hearing before me, Attorney Geslewitz appeared on behalf of Interior and on behalf of the Florences in their capacity as its agents. Geslewitz then admitted the *alter ego* allegations set forth in this paragraph.

B. *The Businesses Operated by Custom, Bobbe, Concepts in Drapery, and Interior*

1. Custom

Custom was organized in 1967 and incorporated in 1969, several years before the marriage of Frank and Roberta Florence. Initially, Frank Florence owned all of Custom's stock. In 1972, one Ben Rubin bought 50 percent of Custom's shares. Until 1973, Custom was located on Western Avenue in Chicago, Illinois. During this period, Custom was a profitable operation. In July 1973, Custom leased, and moved its entire operations to, a Zion, Illinois, plant previously occupied by the drapery division of Zion Industries, Inc. Custom did not purchase the plant building in Zion, about 25 miles from Chicago, but did purchase Zion Industries' equipment, sewing equipment, inventory, and fixtures. In addition, Custom moved its Chicago equipment to the Zion plant. In order to obtain capital to purchase and operate the business in Zion, Custom borrowed $150,000 from Continental Illinois Bank (Continental). To secure this loan, Continental retained a security interest in all of Custom's assets, including its inventory, fixtures, machinery, and accounts receivable. The loan was personally guaranteed by Rubin, his wife, and Frank Florence.[7]

When operating the plant, Zion Industries had had a collective-bargaining agreement with the International Chemical Workers Union, Local 665 (the Union) covering factory and warehouse employees. Custom hired about 50 of these former Zion Industries employees, recognized the Union, and either assumed the existing collective-bargaining contract or executed a new one. The Board found in the unfair labor practice proceeding that Custom entered into a collective-bargaining agreement effective from July 1, 1974, to June 30, 1976 (220 NLRB at 1257-58). The unopposed February 1977 backpay specification states that in July 1973 "Respondent ceased" making payments into the Union's pension and welfare fund.

Frank Florence was Custom's president and treasurer, and directed Custom's business on a day-to-day basis. In August 1973, Terry Sterling became Custom's salaried controller and office manager, in which capacities he "sat in on most of the labor relations," oversaw the billing and the invoices, had the orders processed, kept track of making payments on payables, made credit information, and organized the office. He was never an officer or shareholder in Custom, and is no kin to the Rubins or the Florences.

Between 85 and 90 percent of Custom's business consisted of manufacturing draperies from its own fabrics to be hung in private residences. The homeowner would select a fabric from a sample on display at Custom's factory or (more often) at a retail store. If the selection was made at a retail store, a salesperson would take down the customer's dimension and fabrication specifications and forward the order to Custom, which would make the draperies and bill the store. Inferentially, the store had to pay Custom whether the homeowner paid the store or not. If the selection was made at Custom's own factory, someone from Custom's office would take down the measurements. Custom would then manufacture the draperies and bill the homeowner directly. On occasion, Custom's employees would also install the draperies. Custom did not sell raw fabric, but on occasion, if a customer wanted a set of draperies and also wanted a few yards of the drapery material to make something else, Custom would include that yardage as part of the sale. About 10 to 15 percent of Custom's business came from Benjamin Brothers, Custom's only nonretail customer. Benjamin Brothers is a hotel furnishing supplier which puts together packages of furniture, fixtures, draperies, and other items which would go into the rooms of a hotel which is being opened up, remodeled, or refurbished. As described in greater detail *infra*, section II,B,4, the fabric for draperies ordered by Benjamin

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[6] The certificate of service attached to this answer names only the union representative.

[7] The Florences were married in 1972. Roberta Florence had received moneys from her former husband, who was killed in an accident, and had to raise three children from that marriage. Frank Florence told Continental that, because of these circumstances, he would not "allow" his wife to sign on the loan. Continental agreed.

Brothers was supplied by it to Custom, which fabricated and installed them.

According to a partly unaudited statement by Custom's accountants, between Custom's commencement of operations in July 1973 and May 31, 1974, Custom lost over $117,000.[8] About June 1974, Continental asked Custom to set up a collateral account into which all accounts receivable moneys were to be directly deposited, to discontinue purchasing any more inventory, and to reduce Custom's receivables and inventory. Custom agreed. Funds were transferred by Continental from this collateral account to cover Custom's payroll and other necessary expenses, but the bulk of the money in this account was retained by Continental to pay Custom's note, mostly the interest. Frank Florence testified that, at the end of June 1974, 50 percent shareholder Rubin, who is no kin to either of the Florences, "skipped out . . . he just took off like a bird . . . I could kill him."

About this same time, Continental said that, because of the amount of money which Custom owed to its landlord, to Zion Industries, and to others, it would be best to continue operating as a newly formed corporation. In July or August 1974, Custom as such went out of business, and all the employees were "let go."[9] On an undisclosed subsequent date, Custom was dissolved as an Illinois corporation.

During the calendar year 1974, Custom lost more than $200,000. During that calendar year, Frank Florence, who devoted his full time to the business, and Rubin, who according to Custom's tax return also did so, received as salaries from Custom $12,287 and $12,000, respectively.

2. Bobbe

The new corporation formed because of Continental's request (and, according to Frank Florence, because "we felt it was maybe a way to start up new business") was Bobbe. Because of Custom's losses and Frank Florence's personal guarantee of Custom's debt to Continental, he had no money and all of Bobbe's capitalization was provided by his wife, Roberta, who incorporated Bobbe and owned all the stock. Roberta Florence was Bobbe's president but took no active role in the business. Frank Florence was Bobbe's vice president and secretary and managed it on a daily basis. Sterling was Bobbe's salaried controller and office manager, in which capacities he performed the same duties, including labor relations duties, which he had performed for Custom. He was never an officer of Bobbe. Bobbe operated from the same plant in Zion as Custom had, and, with Continental's permission, used machinery which had been pledged by Custom but had not yet been sold. Bobbe, like Custom, manufactured and sometimes installed made-to-measure draperies. However, because Bobbe had no money with which to maintain an inventory, Bobbe manufactured draperies from fabric supplied by the customer. Of Bobbe's four suppliers, three had been suppliers of Custom. Although Bobbe had fewer customers than Custom, practically all Bobbe's customers had also been customers of Custom. Among these retained customers was Benjamin Brothers, which represented a substantial part of Bobbe's business. With the Union's "permission," Bobbe recalled on various dates between August 10 and November 2, 1974, about 14 of the approximately 51 unit employees laid off by Custom. Also, Bobbe hired one bargaining unit employee (John Popelka, a warehouse employee) who had not been on Custom's payroll when it shut down; recalled two installers (Trinidad Soria, who is Frank Florence's son-in-law, and Steven Scalf) who had worked for Custom in nonunit jobs; and recalled as a supervisor Mildred Popelka, who had been a supervisor for Custom. The Board in effect found in the unfair labor practice proceeding that Bobbe was bound by the July 1974 collective-bargaining agreement; but the unopposed February 1977 backpay specification alleged that, while Bobbe was in operation, no payments were made into the contractually described pension and welfare funds. As previously noted, the November 1974 charge herein names Custom and complains of the failure to make such payments.

Bobbe's operations lost money. Continental asked the Florences to sell off whatever equipment they could and to move operations from Zion to a smaller space. As proffered reasons for this request, Continental expressed fear that Bobbe's landlord would distrain Custom's equipment, in which Continental had a security interest, for nonpayment of rent, and further said that unnecessary utility expenses were being incurred because the Zion plant was much larger than was needed for the curtailed manufacturing operation. Much of the remaining equipment was sold, and, with Continental's permission, the unsold equipment was moved to a plant on Schubert Avenue in Chicago. In February 1975, Bobbe surrendered its corporate charter to the State of Illinois. During the 6 months Bobbe was in business as such, Frank Florence received $13,605 and Roberta Florence received nothing. Roberta Florence had invested $5,000 in the business, and its losses amounted to about $4,300.

3. Concepts in Drapery

When operations were moved from Zion at Continental's request, a new corporation, Concepts in Drapery, was set up in February 1975 to operate the business while it was located on Schubert Avenue. Roberta Florence furnished all the capital, owned all the stock, was the corporate president, took an active management role, and worked parttime preparing all the invoices and handling all the billing functions. Frank Florence was vice president and secretary or treasurer, ran the factory, and did selling on the telephone. Sterling was the salaried controller and office manager, and performed the same labor relations and other duties he had performed when on Custom's and Bobbe's payrolls. In addition, he helped run the factory and sell off the pledged equipment. He owned no stock in and was not an officer of Concepts in Drapery. Nor did he perform any selling for that corporation. Installers Scalf and Soria, both nonunit personnel, moved from Bobbe's to Concepts in Drapery's payroll, as did Supervisors Mildred Popelka and Ella Stewart and warehouseman John Popelka. This warehouseman was the only unit employee who was moved between these payrolls. In February and March 1975, Concepts in Drapery hired eight factory workers who had never worked in the Zion plant. The Board found in the unfair labor practice case that Section 8(a)(3) and (1) had been violated since February 1, 1975, by the termination of the Zion employees and by the failure and refusal to offer them employment in the facility on Schubert Avenue in Chicago. 220 NLRB at 1258, 1259. The unopposed February 1977 backpay specification alleged that eight named employees (all of whom had been on Custom's payroll and four of whom had been on Bobbe's payroll) would have accepted employment at the Schubert Avenue facility. The Board's judicially enforced backpay order specifies their names and the amounts due them.

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[8] Interior's brief attributes Custom's losses "primarily" to the difficulty in training the former Zion employees to operate the automatic equipment brought over to Zion. While Custom did have such difficulties in connection with training employees, the record fails to show the extent to which such training problems contributed to Custom's losses over a period of 10 months.

[9] This was not the termination action found unlawful in the unfair labor practice case. Further, because the amount due to the union funds is based upon hours worked, no part of the required payments into these funds is attributable to the period covered by this 1974 separation.

Concepts in Drapery, like Bobbe, manufactured draperies from the customer's own fabric and sometimes installed them. Practically all of its customers, including Benjamin Brothers (a major customer), had been customers of Custom and/or Bobbe. Most of the suppliers of Concepts in Drapery had also been suppliers of Custom, and all of them had been suppliers of Bobbe.

As previously noted, in April 1975 the Regional Director issued complaints against Custom, Bobbe, Concepts in Drapery, "and their agents" the Florences, alleging, *inter alia*, that employees at the Zion plant had been unlawfully terminated and that economic provisions in a collective-bargaining agreement had been unlawfully dishonored. On July 8, 1975, these complaints were sustained by the Board, which ordered that the laid-off employees and the pension and insurance plans be made whole. By letter dated July 17, 1975, to Custom "c/o Concepts, Inc.," Continental formally demanded payment in full of all of Custom's remaining obligations to Continental. The amount owed consisted of more than $110,000, plus interest. After receiving this demand letter, Concepts in Drapery's management proceeded to finish off, deliver, and install orders which were in process. On August 1, 1975, manufacturing operations were discontinued, and on or before August 4 all bargaining unit employees were permanently laid off. The unopposed February 1977 backpay specification sets forth the August 1 date as the date when amounts due as backpay and as payments into the pension and welfare funds ceased to accrue. However, after August 1, installers Scalf and Soria remained on the payroll; they installed draperies which had been manufactured by Concepts in Drapery, corrected some errors in installation, and did some repair work. Sterling and the Florences tried to collect all of Concepts in Drapery's remaining receivables, out of which they and the installers received their salaries, and also tried to collect Custom's remaining receivables. The remaining equipment was sold on or before August 4, 1975, and the proceeds were remitted to Continental via the collateral account. By October 1975, all of Custom's collectible accounts receivable were collected, and the amounts so collected were so remitted to Continental. After that time, no payments were made to Continental on the outstanding debt, which as of August 1975 totalled about $110,000, including interest. The orders which remained unfilled when Concepts in Drapery stopped manufacturing were given to Drapemaster, a competitor, which billed the customers directly and paid Concepts in Drapery nothing for the business.[10]

Concepts in Drapery never made any profits. After its February 1975 formation, Frank Florence received from it a total of $9,000 and Roberta Florence received from it a total of about $3,000.

4. Interior

It is unclear from the record whether the corporate charter of Concepts in Drapery ever actually lapsed. On August 19, 1975 (2 months after the withdrawal of the answer to the unfair labor practice complaint against Custom, Bobbe, Concepts in Drapery, "and their agents" the Florences and 18 days after Concepts in Drapery ceased manufacturing operations), the Illinois secretary of state, at Frank Florence's request, issued a corporate charter to Interior. The articles of incorporation do not state that the corporation's purposes include any kind of manufacturing, but do state that such purposes include, "To sell and supply, at wholesale or retail, all kinds and descriptions of material, fabrics and all other related products incidental to the decorating of hotels, motels, residential properties, commercial and office properties."

The Florences, Sterling, and installers Soria and Scalf remained on Concepts in Drapery's payroll until the end of its last payroll period, December 29, 1975, on which date they were the only persons still working for that corporation. Interior's first payroll period did not begin until January 4, 1976, on which date its entire work force consisted solely of the five persons who had been on the payroll of Concepts in Drapery until the end of December 1975.[11] Moreover, Interior's acquisition of a lease at its first location, on Peterson Avenue in Chicago, did not take place until sometime in January 1976.

However, before January 1976, Concepts in Drapery personnel who were still on that corporation's payroll solicited orders and performed work for Interior. Thus, Frank Florence, who appeared to be in his fifties, testified that the only thing he had ever done in his life was to manufacture or sell draperies; that, with the early August 1975 sale of the last of Custom's pledged machinery, he knew that he would have no equipment to manufacture draperies; that by the time Interior was incorporated in mid-August, he knew it was going to be a selling company in the drapery business; that obtaining the kind of business handled by Interior takes about 6 to 8 months; and that he and Sterling began looking for such business "probably [in] September, October, November." In addition, Interior's records reflect that Benjamin Brothers was billed on December 3, 1975, for certain services, and that, ordinarily, this customer would not be billed until after the services were performed.[12] Also, Interior's records show that Slater Company, an office supply company, was billed for various amounts on December 4 and 9, 1975, and on January 7 and 13, 1976; and that it would have been billed before services were performed.[13] Further, Interior's records disclose two additional orders, billed respectively on November 3, and December 3, 1975, for customers who would ordinarily have been billed before services were performed. These were Interior's only orders billed before January 1976. However, Frank Florence testified that in late 1975 he "probably" solicited orders for Interior from some prospective customers who did not order anything. Furthermore, Frank Florence testified, and Interior's brief states (pp. 12–13), that by October 1975 all of Custom's collectible accounts receivable had been collected. Also, Frank Florence testified that the process of winding down the orders received by Concepts in Drapery was "pretty well finished by October" 1975. In view of the foregoing testimony by Frank Florence and the largely documentary evidence regarding Interior's billings between early November 1975 and early January 1976, and for demeanor reasons, I do not accept Frank Florence's testimony that in November and December 1975 Sterling and the Florences were "basically" collecting receivables for Custom and Concepts in Drapery, or Sterling's testimony that, from the time Concepts in Drapery ceased production until the end of 1975, Frank Florence simply collected all the remaining accounts receivable. For similar reasons, I do not accept Sterling's testimony that, for 5 to 6 months before Interior was started up, "pretty much" all his working time was taken up by collecting receivables; taking down, moving, and setting up the equipment which had been sold; doing "paper work"; and packing and moving records.[14] Rather, I find that at least by early October, while still on the payroll of Concepts in Drapery, Sterling (who admittedly did selling for Interior) and Frank Florence were spending a substantial amount of time in soliciting business for Interior.

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[10] Frank Florence and Sterling testified that they wanted to arrange for the satisfactory completion and installation of all draperies on order, partly to avoid being sued and partly to make sure of collecting the full amounts due from customers to whom only partial deliveries had been made before Continental's demand and the cessation of manufacturing operations.

[11] These two installers continued to work for Interior until July 1980, a month or two after the issuance of the instant May 1980 backpay specification. Thereafter, they began to work for a firm called Complete Drapery Service, which Frank Florence testimonially described as "the new company." The record contains no other information about Complete Drapery Service.

At the time of Interior's incorporation, Roberta Florence owned 75 percent of Interior's stock and Sterling owned 25 percent. Thereafter, Sterling annually acquired from Roberta Florence 6 percent of the outstanding stock; at this rate, Sterling would not have acquired a controlling interest in the corporation until 1981, and would not have acquired all the stock until about 1989. In June 1980, after the issuance of the instant backpay specification seeking to render Interior liable for the more than $35,000 in question, Sterling purchased all of Roberta Florence's remaining stock, which was thereupon put in escrow for her inferentially until Sterling paid for it. Also in June 1980, Frank and Roberta Florence withdrew from their corporate offices as Interior's treasurer (possibly) and vice president, respectively. Sterling has at all times been president of Interior, and also performs selling functions for it. As president, he takes care of all credit arrangements for jobs, checks the contracts, verifies estimates, makes collections, and makes sure the job orders are processed to the salesmen. Frank Florence has at all times worked for Interior as a salesman. His 1976 salary was $26,000, substantially more than he had received during his last year on Custom's payroll or when he was on the payroll of Bobbe or Concepts in Drapery. By the end of 1979, Frank Florence was being paid at the rate of $44,800 a year (the same rate as Sterling) and Roberta Florence, who took no management role in Interior but has at all times worked in Interior's office, was being paid at the rate of $12,600 a year. As of November 1980, Interior's sales averaged $150,000 a month.

Interior has never manufactured draperies or any other product, employs no production or maintenance employees, and has never had any factory or workshop area nor any space for establishing such an area. The only machinery owned by Interior is office machinery and its only nonmanagerial personnel are salespersons, office workers, and installers. Interior is a contractor and subcontractor which receives orders from various commercial enterprises and fills such orders by obtaining products manufactured by others. As of the November 1980 hearing, about 30 percent of Interior's total volume consisted of the sale and installation of draperies and an additional 30 percent consisted of the sale and (inferentially) installation of what Interior President Sterling described as "related products"—that is, such products as blinds, shades, and woven woods. As of that date, the remaining 40 percent of Interior's volume consisted of building specialty products—for example, washroom equipment sold to general contractors; projection screens sold to schools and audio visual areas; grab bars and "I.V." and cubicle tracks sold to hospitals; and ashtray urns, medicine cabinets, and mailboxes sold to the construction industry. In addition, Interior sells to some of its customers, at a profit, raw fabric which Interior has purchased from other firms. Advertising distributed by Interior to its customers does not name any manufacturers or suppliers of draperies, but does name the manufacturers or suppliers of a number of building specialty products available through Interior. Where the products ordered from Interior consist of draperies, Interior customarily measures the job; orders the drapery rods; selects a fabric and a fabric supplier; orders the desired fabric sent to a drapery fabricator, which fabricates the draperies; schedules the installation; takes the rods and draperies out to the jobsite; and installs them. Interior's profit is obtained from putting this "package" together. Sterling testified that the number of draperies specified on a single order handled by Interior is much larger than the number specified on a single order filled by Custom, Bobbe, and Concepts in Drapery; an Interior order might call for 150 or 200 pairs of draperies all the same size, while a single order filled by Custom, Bobbe, and Concepts in Drapery would amount to draperies for a single private home or a single room in such a home. As to the number of draperies called for by an order handled by the old corporations, Sterling did not specifically except Benjamin Brothers; but, because Benjamin Brothers is a hotel supply firm, I infer that at least on occasion it ordered many more draperies than would be specified on an order proceeding from a homeowner.

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[12] The first page of Interior's accounts receivable ledger for Benjamin Brothers sets forth amounts due from Benjamin Brothers to Concepts in Drapery for September and October 1975 billings.

[13] Sterling testified that Interior stopped doing business with Slater because of credit problems, and eventually wrote off what Slater still owedas a bad debt. The ledger shows that Interior obtained business from Slater between early December 1975 and August 1977, during which period Slater paid Interior about $19,730. The bad debt, written off in February 1978, amounted to about $448.

[14] The records of Custom, Bobbe, and Concepts in Drapery were stored on Interior's premises.

Whereas the customers of Custom, Bobbe, and Concepts in Drapery were mainly large department stores and other retail outlets, Interior's customers are largely commercial and institutional users, such as construction companies, office buildings, hospitals, universities, and government agencies. Of Interior's approximately 74 customers (about 25 of which it acquired before July 1976), only one, Benjamin Brothers, had been a customer of Custom, Bobbe, or Concepts in Drapery. As of November 1980, Benjamin Brothers provided Interior with 10 percent of Interior's business. When doing business with Custom (which ordinarily manufactured draperies from its own fabrics) as well as Bobbe and Concepts in Drapery (both of which always manufactured draperies from fabric supplied by the customer), Benjamin Brothers had provided the material for the draperies. When doing business with Benjamin Brothers, Custom, Bobbe, or Concepts in Drapery would measure the windows, determine whether new rods were required, and advise Benjamin Brothers of the yardage requirements. Then Benjamin Brothers would order the material and send it to Custom, Bobbe, or Concepts in Drapery for fabrication and installation. When doing business with Interior, whose business with Benjamin Brothers as of November 1980 had been limited to draperies, Benjamin Brothers orders the material (at least sometimes from the source recommended by Interior) and sends it to a fabricator (usually and perhaps always the fabricator recommended by Interior), which fabricator bills Benjamin Brothers directly for fabrication. Interior's responsibility is to make sure that the job is completed and acceptable to Benjamin Brothers' hotel customer. Interior's responsibilities include the installation of the draperies, which had also been done by Custom, Bobbe, and Concepts in Drapery when they did business with Benjamin Brothers.

Of Interior's approximately 59 suppliers, about 6, including Benjamin Brothers, had been suppliers for Custom, Bobbe, and/or Concepts in Drapery. Kirsch, one of these six, is one of the largest curtain rod manufacturers in the country, and the kinds of curtain rods purchased from it by Interior are different from the kinds purchased from it by Custom, Bobbe, and Concepts in Drapery. Draperies purchased by Interior are made of materials which meet commercial code fire retardance standards; whereas draperies manufactured by Custom, Bobbe, and Concepts in Drapery were made of decorative materials. Four of Interior's suppliers had been competitors of Custom, Bobbe, and Concepts in Drapery; one of these former competitors was Drapemaster, to which Concepts in Drapery had transferred some of its orders without cost.

No assets were ever transferred from Custom, Bobbe, or Concepts in Drapery to Interior or the Florences.

C. *Analysis and Conclusions*

"To determine whether one legal entity is the *alter ego* of another, the Board looks to the ownership, management, business purpose, operation, equipment, customers, and supervision of the two businesses. Where some of these listed indicia are 'substantially identical,' the Board will find an *alter ego* status. However, not all of these standards have to be satisfied; centralized control of labor relations or identical corporate ownership is not crucial to the finding of an *alter ego*." *Blake Construction Co., Inc./M & S Building Supplies, Inc.*, 245 NLRB 630, 634 (1979). See also, *Crawford Door Sales Co., Inc., and Cordes Door Company, Inc.*, 226 NLRB 1144 (1976); *N.L.R.B.* v. *Tricor Products, Inc. and/or C & J Pattern Co.*, 636 F.2d 266 (10th Cir. 1980).

The Board has held that a finding of *alter ego* status requires the presence of substantially identical ownership between the enterprises in question. *Clinton Foods, Inc., d/b/a Morton's I.G.A. Foodliner*, 240 NLRB 1246, fn. 2 (1979), affd. in this respect 663 F.2d 223 (D.C. Cir. 1980). I agree with the General Counsel that this ownership criterion is met here. Thus, at the time Interior began operations in January 1976, 75 percent of its stock was owned by Roberta Florence, who owned all of the stock of Bobbe and Concepts in Drapery and whose husband owned half of Custom's stock. Interior does not appear to dispute that it met the "substantially identical ownership" criterion as of January 1976. *Blake Construction, supra; Crawford, supra; Sturdevant Sheet Metal & Roofing Co., Inc., et al.*, 238 NLRB 186, 187-188 (1978). Interior does contend that the effect of Roberta Florence's stock ownership on Interior's status with respect to the other three corporations has been nullified by Sterling's purchase, after Interior received the instant May 1980 backpay specification seeking to hold it answerable for the sums owed by the old corporations, of all the stock still owned by her. Further, Interior points out that even before this purchase, Sterling already owned 44 percent of Interior's stock. However, assuming that when it began operations Interior was answerable for the backpay and union fund payments which were owed by the old corporations and which had been tolled before Interior's incorporation, Interior would not be absolved of liability because of subsequent changes in the identity of its stockholders. *Gateway Service Co.*, 209 NLRB 1166 (1974); *Topinka's Country House, Inc.*, 235 NLRB 72, 73-74 (1978); *Miller Trucking Service, Inc., and/or Miller Trucking Service, Inc., a Subsidiary of Tulsa Crude Oil Purchasing Company*, 176 NLRB 556 (1969), approved in this respect 445 F.2d 927, 930 (10th Cir. 1971). Moreover, if Sterling fails to pay for the stock, its ownership will revert to Roberta Florence.

Furthermore, there has been substantial identity of management in the four corporations. Frank Florence was an officer in Custom, Bobbe, Concepts in Drapery, and (for a period which ended after the 1980 issuance of the instant backpay specification) Interior. He managed the first three corporations on a day-to-day basis; performed selling functions for all four corporations;[15] incorporated Interior; and, by the end of 1979, was receiving the same salary from Interior as did Interior President Sterling. Moreover, when serving as salaried controller and office manager for Custom, Bobbe, and Concepts in Drapery, Sterling had duties which included sitting in on most of the labor relations, overseeing the billing, having orders processed, keeping track of making payments on payables, collecting receivables, making credit collection information, and organizing the office. While it is true that he performed selling functions for Interior but had not done so for Concepts in Drapery or (so far as the record shows) the other two corporations, the record directly shows that as Interior's president he continues to make collections and takes care of all credit arrangements for jobs; and I infer that as Interior's president he continues to perform or supervise at least some of the other functions he previously performed as the other corporations' controller and office manager.

Furthermore, Sterling and Frank Florence solicited and obtained business for Interior while they were still on the payroll of Concepts in Drapery and before Interior formally began operations. Also, one of Interior's first customers was Benjamin Brothers, which had been a customer of Custom and a major customer of Bobbe and Concepts in Drapery, and to which Interior provided substantially the same services (except fabrication) which Benjamin Brothers had received from the other three corporations. In addition, Roberta Florence handled all the billing functions for Concepts in Drapery and then for Interior. Moreover, the Florences, Sterling, and the two installers, who constituted the entire final payroll of Concepts in Drapery, were transferred to Interior's payroll without any break in their employment.

However, countervailing considerations lead me to conclude that the record fails preponderantly to show that Interior occupies *alter ego* status with respect to the other three corporations. Thus, the evidence fails to show that Interior was set up for a purpose of evading the labor law responsibilities of Custom, Bobbe, and Concepts in Drapery.[16] Further, there was no transfer of assets from Concepts in Drapery to Interior.[17] Also, Interior has never employed any production employees, the kind of employees with respect to whom the other three corporations' unfair labor practices were committed. Moreover, Interior's facilities are much smaller than and have a location different from those of the other corporations. In addition, except for Benjamin Brothers, Interior's customers are all different from the other three corporations' customers and are all in different kinds of businesses; and most of Interior's suppliers are different from the suppliers of the other three corporations and many are in different kinds of businesses. Finally, while the principal business of the other three corporations was the manufacture of draperies to be used in private residences (which business included their sale and installation), Interior's business consists of the sale to institutions and commercial establishments of products manufactured by others, with about 30 percent of its volume consisting of the sale and installation of draperies and about 30 percent consisting of the sale and installation of related products. Cf. *Co-Op Trucking Co., Inc., and C & E Warehouse, Inc., and S & S Trucking Co., a Partnership*, 209 NLRB 289, 830–831 (1974).

The General Counsel's able brief seeks to minimize the significance of the differences between Interior's business and the business of the other three corporations on the ground that Interior "is today the business enterprise that Custom would have become if there had been no technical changes in corporate form . . . the change from Concepts [in Drapery] as a seller of labor to Interior as a broker of other companies' materials was . . . dictated by Continental Bank's demands . . . resulting in the sale of all the remaining manufacturing equipment. All that Concepts [in Drapery] had left went to Interior—business knowledge, expertise in the drapery products field, an important customer—Benjamin Brothers—to begin in the commercial area of the drapery products field, and a few months of time and payroll to begin development of this new aspect of the drapery business. The changes in business operations that . . . finally resulted in Interior's business operations would have occurred regardless of any changes in corporate form and could have been handled within the corporate framework of Custom, Bobbe, or Concepts" in Drapery.[18] However, almost any small corporate owner who has lost all his assets in a prior unfortunate corporate venture will seek to improve his economic future by taking advantage of his previously acquired expertise and business contacts and of any time left over from winding down the affairs of his failed business. In the circumstances of this case, I conclude that such activities by Frank Florence did not render Interior an *alter ego* of the other three corporations. The cases cited by the General Counsel in this connection do not call for a different result. In *Southeastern Envelope Co., Inc.*, 246 NLRB 423, 425-428 (1979), a large part of the new corporation's work consisted of manufacturing the same product in the same way for the same customer as the old corporation. In *Watson Meat Co., d/b/a Ideal Meat Co., Inc.*, 234 NLRB 1115 (1978), both corporations boned meat, although the old corporation owned the meat and also made sausage, whereas the new corporation boned meat owned by its customers.[19] In *Rushton & Mercier Woodworking Co., Inc., and Rand & Co., Inc.*, 203 NLRB 123 (1973), enfd. 502 F.2d 1160 (1st Cir. 1974), cert. denied 419 U.S. 996 (1974), both corporations manufactured the same products, although the old corporation manufactured on a volume basis and the new corporation manufactured custom orders. The Board's and the court's opinions do not reveal the exact nature of the "changes, additions, expenditures, task-adaptations, etc. which came to exist in *N.L.R.B.* v. *Ozark Hardwood Co.*, 282 F.2d 1, 6 (8th Cir. 1960). However, I do not believe that the differences between Interior and the other corporations can be fairly described, in the court's words, as "essentially . . . evolutions, extensions and developments merely, such as could characteristically be expected to occur in the particular business field and in the economic era involved, without having so changed the nature of the enterprise and its job situations as to cause it to be outside the bounds of legitimate remedial area in respect to the discriminatees."[20]

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[15] The record directly shows this for Concepts in Drapery and Interior only. However, from his testimony in this connection and the probabilities of the situation, I infer that he also performed at least some selling functions for Custom and Bobbe.

[16] However, I do not agree with Interior that such a showing is essential to an *alter ego* finding. *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union, AFL–CIO*, 417 U.S. 249, 259, fn. 5 (*alter ego* cases involve "a mere technical change in the structure or identity of the employing entity, *frequently* to avoid the effect of the labor laws, without any substantial change in its ownership or management"; (emphasis supplied)); *Tricor, supra* at 270. I need not and do not determine whether the issuance of the 1980 backpay specification, more than 3 years after Interior's incorporation, motivated the Florences' resignation from their corporate offices and the agreement for immediate sale to Sterling of Roberta Florence's stock. None of the parties to these transactions testified to the reasons therefor.

[17] However, I do not agree with Interior that such a transfer is essential to an *alter ego* status. See, e.g., *Dee Cee Floor Covering, Inc., et al.*, 232 NLRB 421, 426 (1977); *Marquis Printing Corporation and Mutual Lithograph Company*, 213 NLRB 394, 401 (1974). If such a transfer were necessary, it is difficult to see why Interior admitted that Bobbe and Concepts in Drapery occupied *alter ego* status with respect to each other and Custom.

[18] Bobbe returned its corporate charter to the State about 6 months before Interior's incorporation, and Custom's formal dissolution may also have occurred before Interior's incorporation. Further, the record fails to show whether the kind of business engaged in by Interior was wholly within the scope of any of the other three corporations' corporate charters.

If eventually affirmed, my conclusion that Interior is not the *alter ego* of the other three corporations means that the Union and the unlawfully discharged employees will as a practical matter be unable to collect anything from any of them.[21] At the outset of the hearing, I suggested that the Board Orders and Court judgments previously issued in these cases might render the Florences personally liable for the required payments. Arly W. Eggertsen, counsel for the General Counsel, replied negatively. While counsel is an able attorney, I am doubtful whether his assertions in this respect would preclude the Board and the court from otherwise interpreting their own Orders and judgments, respectively. For reasons which are unclear to me, Attorney Geslewitz has chosen in his brief to urge that the Florences are not personally liable.[22] It is true that corporate officers and agents are not ordinarily liable for backpay or other monetary remedies. However, under some circumstances they are so liable. See, e.g., *Wayne Electric, Inc.; and Electrical Installation and Service*, 241 NLRB 1056 (1979), and cases therein cited. Further, at least if the 1975-1979 Orders and judgments unambiguously impose monetary liability on the Florences personally, such a requirement could not be negated by any failure of the 1980 record to show such liability. The 1980 record fails to show that no monetary orders and judgments should have been entered against the Florences; and, in any event, at this point in the proceedings even such a showing might do the Florences no good. See *Wayne Electric, supra*. I express no views as to whether the prior orders and judgments do impose monetary liability on the Florences personally.[23] I have referred to the issue, and have set forth procedural facts which I regard as possibly relevant to its disposition, only because the Board's interpretation of its own Orders might speed up the final disposition of this 6-year-old proceeding.

Conclusions of Law

Interior Concepts, Inc., is not the *alter ego* of Custom Manufacturing Company (Successor to Zion Industries, Inc.—Curtain and Drapery Division); Bobbe Drapery Products Co., Inc.; or Concepts in Drapery Design, Inc.

[Recommended Order for dismissal omitted from publication.]

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[19] This change is remarkably similar to the change between Custom's operations and those of its admitted *alter egos* Bobbe and Concepts in Drapery. Custom manufactured draperies primarily from its own materials, whereas the other two corporctions manufactured draperies from customers' materials.

[20] However, as previously noted, the backpay period terminated with the cessation (not claimed to be unlawful) of manufacturing operations and before Interior's incorporation. No contention is made that Interior should be required to offer reinstatement to the discriminatees or to bargain with the Union.

[21] In any event, a finding that Interior is an *alter ego* to Custom might render Interior liable for Custom's debt to Continental, a sum which likely exceeds the sums due under the Board's Order.

[22] Geslewitz appeared on behalf of Interior and Sterling and the Florences as Interior's agents. A determination that the Florences are personally liable could not be adverse to Interior's interests, and, indeed, might well benefit Interior if it were found liable for the amounts in question.

[23] As a practical matter, any such liability would probablv have to be discharged by Roberta Florence. See fn. 7 and attached text *supra*.

Consolidated Dress Carriers, Inc., Greenberg's Express Inc., GRG Delivery Inc., Clothing Carriers Corp., Dynamic Delivery Corp., JHT Leasing Corp., and Trucking Personnel, Inc. *and* **Local 20408, United Warehouse Industrial and Affiliated Trades Employees Union. Case 2-CA-15783**

December 10, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On March 27, 1981, Administrative Law Judge Howard Edelman issued the attached Decision in this proceeding. Thereafter, Respondents Consolidated Dress Carriers, Inc., Greenberg's Express Inc., GRG Delivery Inc., Clothing Carriers Corp., A Dynamic Delivery Corp., and JHT Leasing Corp., herein collectively denominated Respondents, filed exceptions and a supporting brief. Respondent Trucking Personnel, Inc., herein denominated Respondent Trucking, filed cross-exceptions and a supporting brief, as did the Charging Party.[1] Both Respondents and the Party in Interest, Cloak & Dress Drivers & Helpers Union, Local 102, International Ladies' Garment Workers' Union, AFL-CIO, filed answering briefs to the Charging Party's cross-exceptions. Finally, the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Consolidated Dress Carriers, Inc., Greenberg's Express Inc., GRG Delivery Inc., Clothing Carriers Corp., Dynamic Delivery Corp., JHT Leasing Corp., and Trucking Personnel, Inc., New York, New York, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not discourage membership in or activities on behalf of Local 20408, United Warehouse Industrial and Affiliated Trades Employees Union, and Cloak & Dress Drivers & Helpers Union, Local 102, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization; or interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended, by failing and refusing to reinstate our striking employees to their former positions, or to other substantially equivalent jobs for which such employees are reasonably well qualified, upon their unconditional offer to return to work; or discriminate against our employees in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 20408 and Local 102, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

We will offer our striking employees who made unconditional offers to return to work immediate reinstatement to their former jobs or, if those jobs are no longer available, to substantially equivalent jobs, without prejudice to their seniority or other rights, and make them whole for any loss of earnings they may

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[1] Respondents' motion to strike the Charging Party's cross-exceptions is hereby denied as lacking merit.

[2] Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

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have suffered by reason of the discrimination against them, with interest.

CONSOLIDATED DRESS CARRIERS, INC., GREENBERG'S EXPRESS INC., GRG DELIVERY INC., CLOTHING CARRIERS CORP., DYNAMIC DELIVERY CORP., JHT LEASING CORP., AND TRUCKING PERSONNEL, INC.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge: This case was heard before me on April 29 through May 1, June 10, 11, 12, 17, and September 9, 1980.

On August 29, 1978, complaint issued in Case 2-CA-15783 upon charges filed by Local 20408, United Warehouse, Industrial and Affiliated Trades Employees Union, herein called Local 20408. The complaint was amended on January 11, April 7 and May 7, 1980, during the course of the hearing herein. The thrust of the complaint alleges that Consolidated Dress Carriers, Inc., Greenberg's Express Inc., GRG Delivery Inc., and Clothing Carriers Corp., collectively called Respondent or Respondent corporations, violated Section 8(a)(3) of the Act by refusing to reinstate striking employees following their unconditional offers to return to their former positions of employment because said employees joined Local 20408 and participated in a strike on behalf of Local 20408 and because said employees sought assistance from Cloak & Dress Drivers & Helpers Union, Local 102, International Ladies Garment Workers' Union, AFL-CIO, herein called Local 102.

Briefs were filed by counsel for General Counsel and counsel for Respondent. Additionally, counsel for Respondent filed a reply brief. Upon consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Consolidated Dress Carriers, Inc., Greenberg's Express Inc., GRG Delivery Inc., Clothing Carriers Corp., and Dynamic Delivery Corp., herein called Respondent Consolidated, Greenberg's, GRG, Clothing, and Dynamic, respectively, have maintained their principal office and place of business in New York, New York, and have been, at all times material herein, engaged in providing trucking and related services in the garment industry.

At all times material herein, Respondents Consolidated, Greenberg's, GRG, Clothing, and Dynamic derived gross revenues in excess of $50,000 for trucking services performed directly outside the State of New York.

At all times material herein, Respondent JHT, a New York corporation, has maintained its principal office and place of business in New York, New York, and has been, at all times material herein, engaged in the business of leasing and servicing trucks to Respondents Consolidated, Greenberg's, GRG, Clothing, and Dynamic.

At all times material herein, Respondent JHT annually, in the course and conduct of its business operations, purchased goods and materials valued at in excess of $50,000, or performed services for employers who derive income exceeding $50,000 directly from outside the State of New York.

At all times material herein, Trucking Personnel, Inc., herein called Respondent Trucking, a New York corporation, has maintained its principal office and place of business in New York, New York, and has been, at all times material herein, engaged in the business of providing and performing labor services and related services.

At all times material herein, Respondent Trucking, annually in the course and conduct of its business operations described above, derived gross revenues in excess of $50,000 for services performed directly outside the State of New York.

Respondents Consolidated, Greenberg's, GRG, Clothing, Dynamic, JHT, and Trucking[1] admit and I find that each of them are and have been at all times material herein employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

Local 20408, is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The evidence established that in July 1978 Local 20408 had collective-bargaining agreements with various employers covering approximately 200 employees. These agreements contained *inter alia,* provisions relating to wages, health benefits, pensions, grievance procedures, job classifications, etc. Additionally, the National Labor Relations Board issued a Certification of Representation to Local 20408 on at least four separate occasions, e.g., *John F. Boyle Company,* 222 NLRB 1309 (1976).[2]

I find Local 20408 is a labor organization within the meaning of Section 2(5) of the Act.

Respondent admits and I find that Local 102 is a labor organization within the meaning of Section 2(5) of the Act.

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[1] On May 1, 1980, General Counsel moved to amend the complaint to include as additional Respondents, Greenberg's Express Inc., GRG Delivery Inc., Clothing Carriers Corp., Dynamic Delivery Corp., and JHT Leasing Corp. The amendment alleged that the above-named Respondents, including Consolidated Dress Carriers, Inc., and Trucking Personnel, Inc., were at all times material herein, a single and/or joint employer. On May 7, 1980, I issued an order granting General Counsel's motion to amend the complaint. Said order was appealed to the Board by Respondent Consolidated on May 28, 1980. The appeal was denied by the Board on June 2, 1980.

[2] Respondent, in its answer and throughout the course of the hearing herein, denied the labor organization status of Local 20408. Respondent in its reply brief admits the labor organization status of Local 20408.

A. *Whether Respondents Consolidated, Greenberg's, GRG, Clothing, Dynamic, JHT, and Trucking Constitute a Single or Joint Employer*

At all times material herein and up through July 27, 1978, Consolidated, Greenberg's, GRG, Clothing, and Dynamic were engaged in providing trucking services in the garment industry. JHT was engaged solely in the business of leasing trucks and related trucking equipment to Consolidated, Greenberg's, GRG, Clothing and Dynamic. Trucking was engaged primarily in providing handlers or laborers and helpers to Consolidated, Greenberg's, GRG, Clothing, and Dynamic.[3] Trucking supplied well over 90 percent of all handlers, laborers, and helpers utilized by Consolidated, Greenberg's, GRG, Clothing, and Dynamic. Over 85 percent of Trucking's total business during 1978 involved the supplying of labor to the aforementioned corporations. The remainder of Trucking's business involved supplying labor to various other corporations not involved in this proceeding.

The officers of Consolidated, Greenberg's, GRG, Clothing, Dynamic, and JHT were Hyman Ruff, president, Thomas Gambino, vice president, and Joseph Gambino, secretary-treasurer. Ruff and the two Gambinos were the sole shareholders of the aforementioned corporations; Ruff owning 25 percent of the stock and the Gambinos owning 37-1/2 percent of the stock in each of the aforementioned corporations. The sole officer of Trucking was Hyman Ruff who was president. The sole shareholders of Trucking were Hyman Ruff and his wife.[4]

Consolidated, Greenberg's, GRG, Clothing, Dynamic, JHT, and Trucking all maintained their sole office and principal place of business at the same location, 141 West 35th Street, New York City. The premises at 141 West 35th Street consisted of a storefront, behind which was a large warehouse area. In the back of the warehouse area was a mezzanine which was used as an office facility by Consolidated, Greenberg's, GRG, Clothing, Dynamic, JHT, and Trucking. The warehouse area was utilized by Consolidated, Greenberg's, GRG, Clothing, and to some extent Dynamic. The bulk of Dynamic's operation, which was slightly different than that of Consolidated, Greenberg's, GRG, and Clothing, in that it delivered finished goods to retailers rather than to manufacturers, was conducted at a separate warehouse located nearby. Additionally, other warehouse facilities were maintained in and about the area of West 35th Street and were utilized more or less equally by Consolidated, Greenberg's, GRG, Clothing, and Dynamic. JHT maintained a single warehouse facility at West 23rd Street.

The storefront sign above the facility located at 141 West 35th Street stated the name "Consolidated Dress Carriers, Inc." No other corporate name appeared over this storefront facility.

Trucking first came into existence sometime in 1975. Trucking is essentially a manpower type operation.[5] As a prerequisite to its existence, Ruff was required to obtain permission from Thomas and Joseph Gambino. When Trucking first commenced its operation, some of the clerical employees employed on the payrolls of the six other Respondent corporations previously named herein, were transferred to Trucking's payroll.[6]

Ruff and the Gambinos were in overall charge and ran the day-to-day operations for Consolidated, Greenberg's, GRG, Clothing, Dynamic, and JHI. Ruff was generally responsible for the operations of Trucking. However, Joe Gambino did authorize loans to employees and adjust grievances of employees supplied by Trucking to Consolidated, Greenberg's, GRG, Clothing, and Dynamic.

Consolidated, Greenberg's, GRG, Clothing, and Dynamic each had a small complement of employees on their individual payroll. These employees were office workers, truckdrivers, and supervisors. Trucking had on its individual payroll a small complement of office workers. The office workers for the aforementioned six Respondent companies share the office facilities in the mezzanine of 141 West 35th Street facility including the office equipment, described in detail below. Consolidated, Greenberg's, GRG, Clothing, and Dynamic employed virtually no helpers, handlers, or laborers on their payroll. These employees were supplied exclusively by Trucking. Moreover, the overwhelming majority of the total work force of Consolidated, Greenberg's, GRG, Clothing, and Dynamic consisted of helpers, handlers, and laborers supplied exclusively by Trucking.

Jules Alterman, a supervisor within the meaning of Section 2(11) of the Act, was in charge of all warehouse employees, i.e. drivers, helpers, handlers, and laborers, working out of the 141 West 35th Street facility.[7] Alterman was directly responsible to the Gambinos and Ruff. Alterman, although he was on the payroll of Dynamic, spent the majority of his time at the 141 West 35th Street facility, which was not Dynamic's primary facility. His duties included determining how many laborers, helpers, and handlers were required on a daily basis by Consolidated, Greenberg's, GRG, Clothing, and Dynamic and informing Trucking of the number of such workers required. Trucking then supplied the required number of workers. Alterman assigned all production employees working out of the 141 West 35th Street facility their daily work. Customers of Consolidated, Greenberg's, GRG, Clothing, and Dynamic would call in to Alterman for pickups or deliveries. Alterman would accept such orders on behalf of corporations and assign the work to the employees, directing them to make the appropriate pickup and deliveries for all Respondent corporations.

At the 141 West 35th Street facility, Alterman punched the timecards of all the employees working out of this facility, both as they reported to and left work each day. In addition, he would authorize overtime work and distribute the weekly paychecks to the employees. All the employees assigned by Trucking to the aforenamed Respondent corporations, all received Trucking paychecks.

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[3] A "handler" or "laborer" is an employee who performs delivery service in and around the garment center using handtrucks and racks to transport garments and materials.

[4] The record did not disclose the percentage of shares owned by Ruff and his wife.

[5] A manpower operation supplies workers or laborers to various employers requiring such services.

[6] The record does not contain the names of these employees nor the corporation by whom they were employed.

[7] It was stipulated during the course of the hearing that Alterman was a supervisor within the meaning of Sec. 2(11) of the Act.

Alterman possessed authority to, and did in fact, fire several employees assigned by Trucking personnel to various Respondent corporations operating out of the 141 West 35th Street facility.

Employees furnished by Trucking to Consolidated, Greenberg's, GRG, Clothing, and Dynamic were totally interchangeable although charged by Trucking to one of Respondent corporations. Respondent Trucking's personnel records establish that during the period of January 1 through July 27, 1978, the date of the strike herein, each specific employee set forth in the complaint as an alleged discriminatee was charged exclusively to one specific Respondent corporation.[8] Thomas Gambino and Jules Alterman testified that Trucking employees supplied and charged to one of Respondent corporations would be assigned to work on a day-to-day basis for other Respondent corporations. Interestingly, 52 of the striking employees set forth in the complaint and supplied by Trucking were charged to Dynamic. However, Gambino and Alterman testified that little or no Dynamic business transpired at the 141 West 35th Street facility. Therefore, since these employees concededly worked out of the 141 West 35th Street facility they must have performed work for Consolidated, Greenberg's, GRG, and Clothing, and in view of the testimony of Gambino and Alterman, above, I conclude such work was performed on an interchangeable basis as between these corporations.

Personnel supplied by Trucking applied for loans through Alterman and Joseph Gambino. Joseph Gambino, and presumably Thomas Gambino and Ruff, had final approval as to whether such loans would be granted. Such loans were repaid by means of deductions made from the employees' weekly Trucking paycheck. In addition, Joseph Gambino adjusted grievances of personnel supplied to Respondent corporations by Trucking whenever necessary.

Murray Pines was in overall charge of the office facility located in the mezzanine at 141 West 35th Street. Pines was on the payroll of Consolidated. He was directly responsible to the Gambinos and to Ruff. Pines supervised the work of approximately 10 office employees who were on different Respondent corporation payrolls. As in the case of laborers, the office workers were fully interchangeable. For example, employee Charles Chodash was on Consolidated's payroll, however, he operated the IBM programer for Consolidated, Greenberg's, GRG, Clothing, and Dynamic. Anthony Mascia was on the payroll of GRG, however, he was in charge of workmen's compensation matters for Consolidated, Greenberg's, GRG, Clothing, and Dynamic. Additionally and significantly, Lucy, another employee, was paid by Trucking but charged to one of five Respondent corporations. She was the keypunch operator for Consolidated, Greenberg's, GRG, Clothing, and Dynamic.

The warehouse equipment, handtrucks, racks, and automotive trucks at the 141 West 35th Street facility were completely interchangeable. The automotive trucks were either leased from JHT or owned by one of Respondent corporations. A truck either owned by one of Respondent corporations or leased from JHT would display the name of any one of Respondent corporations for advertising purposes. The trucks were used interchangeably by each Respondent corporation operating out of the 141 West 35th Street facility. Although each corporation owned racks and handtrucks, such racks and handtrucks were also used interchangeably. Some of these racks were marked "Consolidated" and some "Dynamic."

Additionally, Consolidated paid entirely for cleaning service and rubbish removal at the 141 West 35th Street facility. Respondent corporations, including Trucking, shared the use of the photocopy machine located in the office at 141 West 35th Street. Trucking was not billed for the use of the machine nor for the cleaning service and rubbish removal.

Consolidated, Greenberg's, GRG, Clothing, and Dynamic regularly performed trucking services for each other on a daily and interchangeable basis. For example, Consolidated might perform a delivery received by Greenberg's or vice versa. Clothing or any one of the other Respondent corporations might perform a pickup for Dynamic; however, inasmuch as Dynamic delivered merchandise to the retailer, whereas the other corporations did not, such delivery would be deposited at Dynamic's warehouse where Dynamic would make the delivery to the retailer. Respondent corporations did not bill each other for the services performed. Rather, annually the officers of the corporations would meet and allocate informal amounts due from one corporation to the other. These were called offsets.

The 141 West 35th Street facility was leased by Consolidated. Greenberg's, GRG, Clothing, JHT, and Dynamic had an informal agreement with Consolidated wherein they utilized the facility. On an annual basis, informal arbitrary offsets would be charged against each corporation for its share of the rent. Trucking had a lease arrangement for its office space with Dynamic. Dynamic billed Trucking on an annual basis for the rental of space at 141 West 35th Street facility. This billing included office expenses, stationery, etc. The amount of this billing was determined arbitrarily by the Gambinos and Ruff. There was no specific special allocations either in the office or warehouse at the 141 West 35th Street facility. The space was used interchangeably.

B. *Collective-Bargaining Agreements with Local 102*

Respondents Consolidated, Greenberg's, and Clothing, as members of an employer association, were parties to an associationwide collective-bargaining agreement with Local 102, covering a bargaining unit which included all drivers, handlers, and helpers. Pursuant to the terms of the agreement, handlers and helpers received a wage of $4.25 and $4.98 per hour, respectively, as of June 1978.

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[8] Respondent Trucking's personnel records establish for the period January 1, 1978, thru July 27, 1978, that 6 employees were charged to Consolidated, 1 to Greenberg's, 4 to GRG, 3 to Clothing, and 52 to Dynamic.

The handlers and helpers supplied to Respondent corporations by Trucking received wages considerably less than those provided by the Local 102 contract. In this connection, employees Ulrick Tovar and Ernest Joseph earned $2.75 per hour and Lucien Simon received $2.65 per hour.

C. *The Strike*

Sometime in June 1978, Ulrick Tovar, charged by Trucking to Dynamic but working out of the 141 West 35th Street facility and four or five other employees, also working out of the same facility, met with Matthew Eason, president of Local 20408, at that Local's office.[9] The employees indicated to Eason that they were unrepresented and were interested in representation by his union. Eason gave the employees authorization cards to sign and other authorization cards to distribute to their fellow employees.

Sometime during late June or early July 1978, about 2 weeks after the initial meeting, Eason met with approximately 50 employees working out of the 141 West 35th Street facility. During the intervening time between the meetings, these employees had signed Local 20408 authorization cards and at this time the cards were turned over to Eason. A total of 44 individuals, alleged as discriminatees by General Counsel, signed authorization cards for Local 20408. All the employees listed as their address the address of their employer, 141 West 35th Street facility.[10]

On July 10, Eason filed a representation petition with Region 2 of the National Labor Relations Board seeking to represent a unit of "truckdrivers, pushmen, rackmen and warehousemen, delivery men and messengers employed by Consolidated and/or Trucking at 141 West 35th Street."[11] A representation hearing on that petition took place on July 27, 1978.[12]

On July 27, 1978, Eason was present at the 141 West 35th Street facility sometime during the late morning hours. He was involved in a strike which was taking place at a nearby facility not involved in this proceeding, about a block away. Eason observed Thomas Gambino standing in front of the 141 West 35th Street facility. He approached Gambino and asked him whether he would consent to an election or recognize Local 20408. Gambino turned and walked away. As Gambino was walking away, an employee employed by Respondent at the 141 West 35th Street facility came over to speak with Eason. Gambino observed this, went over to the employee, and pushed him away from Eason stating to the employee that he was paying him to work and not to talk. Eason told the employee that Gambino had refused to speak with him and that if this was the way Gambino was going to act then the men should go on strike. Eason then began to gather the employees working at 141 West 35th Street facility together and informed them that the Employer had refused to talk to him and indicated to them that they should strike. At this time, those employees left their work stations and commenced picketing. Eason, who had union picket signs in his automobile, which he testified were customarily kept there, distributed picket signs to the employees and picketing commenced in front of the 141 West 35th Street facility. The picket signs distributed by Eason to the employees were preprinted standard union picket signs which stated, "Notice to the Public, Local 20408 Strike." Underneath the printing, the signs had crayoned in or penciled in the word "Consolidated." During the course of the day as employees working at the 141 West 35th Street facility returned from their morning pickup or delivery, they left work and joined the picket line. The picketing continued until about 6 p.m. During the course of the day, approximately 60 of the alleged discriminatees participated in the picketing.

On July 28, picketing continued throughout the day at the same location, in the same manner, approximately 65 pickets took part in the picketing.

On July 28, Sidney Gerstein, manager of Local 102, received word that a strike was in progress at the premises of 141 West 35th Street facility. Gerstein advised union representative Donald McDaniel to visit the premises. McDaniel, in the company of Local 102 representatives Ted Theus and Patrick Dyer, visited the 141 West 35th Street facility about midday. At this time, the Local 102 representatives spoke with some of the striking employees and informed them that Local 102 had a collective-bargaining agreement with Consolidated. They told the strikers that they were covered by this agreement and were entitled to get the benefits of this agreement which included higher wages and improved fringe benefits.

Following the Local 102 representatives' conversation with the strikers, Local 102 Representative Theus, spoke with Eason who was present at the picket line. Theus told Eason that Local 102 represented the employees of Consolidated. Eason replied that he would let that be determined (presumably by the NLRB by a resolution of the pending representation petition). Theus then asked Eason if he would object if he (Theus) tried to get the employees to report to work. Eason replied that he had no objection.

Shortly after Eason's conversation with Theus, Eason spoke to the striking employees. He related to them his conversation with Theus and informed them that he had no objection to their returning to work.

Shortly after Eason's meeting with the striking employees, he observed Thomas Gambino in front of the 141 West 35th Street facility. At this time he asked Gambino, "Why don't you put the workers back to work. . . They were not aware they had a union. . . . [presumably a reference to Local 102] It's not fair to take it out on them. . . . Put them back to work and let it be resolved before the Labor Board." Gambino turned without responding and walked away.[13]

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[9] As set forth above, 52 of the 66 striking employees were charged to Dynamic although, according to the testimony of Thomas Gambino and Jules Alterman, very little work for Dynamic was performed at the 141 West 35th Street facility.

[10] Thirty-six employees listed Consolidated as their employer, four listed Trucking Personnel as their employer, two listed Thomas Gambino as their employer, one listed Consolidated-Trucking as his employer, and one listed Consolidated-Dynamic as his employer.

[11] Case 2-RC-18035.

[12] This hearing did not close. Further proceedings on the petition were apparently blocked pending final disposition of the instant case.

About 5 p.m. on July 28, McDaniel spoke with Hyman Ruff in the office of the 141 West 35th Street facility. McDaniel told Ruff that "The men wanted to come back to work." Ruff responded that "[h]e wouldn't put them back to work now, he had to speak to his attorney."[14]

On July 31, early in the morning, pursuant to a prior arrangement between the striking employees and Local 102 representatives, approximately 65 strikers reported to the Local 102 office. At this time, various Local 102 representatives explained to the striking employees the advantages of joining Local 102 and the expected benefits (higher wages and improved fringe benefits) that Local 102 could provide for them. Union authorization cards were then distributed to the employees who filled them out, signed them, and returned them to the Local 102 representatives. Sixty-five of the sixty-six alleged discriminatees signed Local 102 cards at this time.[15]

It was agreed between the Local 102 representatives and the striking employees that they would apply for reinstatement at 141 West 35th Street in small groups of 10 and 12 employees.

On July 31, John Rooney, Local 102 business agent, who normally dealt with Hyman Ruff in connection with the existing Local 102 contract, arrived at the 141 West 35th Street facility before any of the striking employees. Sometime between 8:30 and 9 a.m. that morning, Rooney met with Ruff in his office. At this time according to Rooney's testimony, he told Ruff, "there [are] men outside. They want to go back to work . . . Would you put them back to work?" According to Rooney, Ruff replied, "[N]o I have to see my lawyer first."[16]

Ulrick Tovar, who had accompanied Rooney with a group of 10 to 15 striking employees to 141 West 35th Street, testified that he arrived at the premises with the striking employees about 8:30 a.m. He saw Joe Gambino standing by the door of the premises. According to Tovar, the employees all stated, "We're coming back, we're coming back to work." Joe Gambino replied, "Wait a minute . . . I don't want you to come back to work, I don't want you any more over here."[17]

Striker Lucien Simon testified that when his group of employees arrived at the 141 West 35th Street facility following the arrival of Tovar's group, he observed Joe Gambino standing by the front door and heard him say, "No, no job, I don't want you anymore."

On July 31, some time during the day following the unsuccessful attempts by Rooney and the strikers to obtain reinstatement, Thomas Gambino and his attorney met with Sidney Gerstein at the office of Local 102. According to Gambino's testimony, "Gerstein mentioned something about the people coming to work for us. . . He talked about the people that were on strike. I told him the people did not work for Consolidated, this was a very legal thing involving the NLRB and something we had to discuss with a lawyer to determine. . . legally what it was all about." Gambino later testified that, "In essence he [Gerstein] said the people—he wanted us to put the people to work." Gambino replied that it was a legal thing pending before the NLRB.

On August 1, Tovar and approximately 10 to 12 other striking employees again returned to the 141 West 35th Street facility around 8:30 or 9 a.m. According to Tovar, Joe Gambino was by the front door. The employees stated to Gambino, "We come back to work, Local 102 is sending us back to work." Joe Gambino responded, "No we don't want you to work."[18]

On August 2, a number of striking employees contacted Eason at his office and advised him of their efforts to return to work and the refusal by Respondents' representatives to reinstate them. Eason then filed the instant charge herein.

On August 2, Eason sent Consolidated and Trucking a mailgram indicating that each of the discriminatees individually applied for reinstatement. The mailgram set forth as follows:

> Local 20408 represents all of the employees who you have discharged as a result of the work stoppage on July 27, 1978. Alternatively, each of them

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[13] Thomas Gambino testified that he did not recall this conversation taking place. My impression of Thomas Gambino was that his testimony was often evasive, and at times I believe he was less than forthright. This was particularly true as to questions put to him concerning the operation of Respondent Trucking. I have concluded, as described below, that Respondents Trucking, Consolidated, Greenberg's, GRG, Clothing, Dynamic, and JHT constitute a single highly integrated operation, a single employer within the meaning of the Act. Therefore, as one of the principles of this single employer, I conclude that Gambino was intimately aware of the operating details of Respondent Trucking, and his denials during cross-examination of knowledge of such details were designed, I believe, to be consistent with Respondent's defense that Respondent Trucking was neither a single nor a joint employer with Respondent Consolidated, *et al.*, and not truthful. My general impression of Eason's testimony was that he was at all times responsive and forthright. Moreover, Eason's testimony is consistent in this respect with the testimony of McDaniel, Rooney, and Tovar and consistent with the admissions by Gambino himself in connection with his similar conversation with Gerstein, described below. Accordingly I credit Eason.

[14] At the time of this hearing Hyman Ruff was deceased. However, the Board has held that such hearsay evidence is admissible although subject to careful evaluation. *Calandra Photo, Inc., and Irvin C. Levin, its Agent and Member of its Board of Directors,* 151 NLRB 660, 671 (1965). In this case, the testimony of McDaniel is consistent with the admissions of Thomas Gambino in connection with a subsequent but similar conversation with Local 102 Manager Gerstein. Moreover, I found McDaniel at all times during his testimony to be generally responsive and forthright. Accordingly, I credit McDaniel.

[15] An examination of the 65 Local 102 authorization cards indicates that 63 were dated July 31. Two were dated July 30. Inasmuch as July 30 was a Sunday, and there is no evidence that any union solicitation or meeting took place on that date, I conclude that the cards were merely inaccurately dated and that the correct date should have been July 31.

[16] As previously noted, at the time of this hearing Hyman Ruff was deceased. For the same reason I credited McDaniel concerning an almost identical conversation with Ruff described above in fn. 14. I also credit Rooney.

[17] Joseph Gambino was not called to testify during the course of this hearing. Tovar generally impressed me as a credible witness. He was at all times during his testimony responsive and forthright. Moreover, his testimony is consistent with that of Eason, McDaniel, and Rooney, and with the admissions of Thomas Gambino described below. Accordingly, I credit Tovar.

[18] As previously noted, Joseph Gambino did not testify during the course of this hearing for the reasons set forth in fn. 17. I credit Tovar.

does individually hereby unconditionally apply for reinstatement.

III. ANALYSIS AND CONCLUSION

A. *Single-Employer Relationship*

A critical issue is presented in this case as to whether Trucking and Consolidated, *et al.*, constitute a single or joint employer.[19] A supplementary issue is also presented as to whether Consolidated, constitute a single or joint employer.

The Supreme Court held in *Radio & Television Broadcast Technicians, Local Union 1264, International Brotherhood of Electrical Workers AFL-CIO, et al.* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), that in determining whether enterprises constitute a single employer: "The controlling criteria, set out and elaborated in the Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership." The Board in *Blumenfeld Theatres Circuit, a Partnership; Blumenfeld Enterprises, a Division of Cinerama, Inc; Rafic Oakland Theatre, a Partnership*, 240 NLRB 206, 214, 215 (1979), held that a "single employer" status, for purposes of the National Labor Relations Act, depends upon all the circumstances of the case, that not all of the single 'controlling criteria' specified by the Supreme Court [in *Radio & Television Broadcast Technicians, supra*] need be present. . . ."

In the instant case, there is common ownership. In connection with Consolidated, *et al.*, the officers and stockholders are identical. Ruff owned 25 percent of each corporation and Thomas and Joseph Gambino owned 37-1/2 percent of the stock of each of the above corporations. Additionally, the officers were identical: Hyman Ruff, president; Thomas Gambino, vice president; and Joseph Gambino, secretary-treasurer.

There is also common ownership between Trucking and Consolidated, *et al.* In Trucking, Ruff was in effect the sole owner and president.[20] Thus, Hyman Ruff owned effectively 100 percent of the shares of Trucking and 25 percent of the shares of Consolidated, *et al.* Ruff's ownership of 25 percent of the shares of Consolidated, *et al.* represents substantial ownership in view of the fact that no one shareholder owned more than 37-1/2 percent of the stock of these companies. The Board found common ownership in determining single-employer status where an individual owns substantially all of the stock in one corporation and a substantial portion, although less than a majority, of the stock in such other corporation. *A & T Glass Company*, 231 NLRB 998 (1977); *L. H. & J. Coal Company Inc.*, 228 NLRB 1091, 1092 (1977).

The evidence also establishes that there was common management between Consolidated, *et al.*, and Trucking. Ruff and the Gambinos occupied the same offices with respect to Consolidated, *et al.*, and all three individuals were responsible for the day-to-day operations of these corporations. Although Ruff was the sole officer of Trucking, the evidence established that Joseph Gambino granted loans to employees on Trucking's payroll. The evidence also established that Joseph Gambino adjusted grievances of employees on Trucking's payroll.

Common management is further established by the duties of Alterman. Alterman was directly responsible to Ruff and the Gambinos. He was in overall charge and supervised production employees working out of the 141 West 35th Street facility, whether they were on Trucking's payroll or the payrolls of Consolidated, *et al.* In this respect, he assigned all such employees their daily work. He punched the timecards of all employees when they reported to and left work each day, he authorized and directed overtime, and distributed all weekly paychecks. Additionally and significantly, the evidence establishes that on occasion Alterman fired employees of Trucking personnel as distinguished from advising Ruff that Consolidated, *et al.*, no longer wanted a particular individual supplied by Trucking to perform work for them.

Common management is further established by the duties of Murray Pines. Pines was in overall charge of the office at the 141 West 35th Street facility which employed office clericals on the payrolls of Consolidated, *et al.*, and Trucking. He admittedly supervised all clericals on Consolidated *et al.*, payrolls and, since he was the only supervisor in the office, it is presumable that in the absence of Ruff or the Gambinos he supervised the three employees employed on the payroll of Trucking as well.

The evidence established that there existed in all of Respondent corporations, including Trucking, a centralized control of labor relations. In this connection, the evidence established that the officers of Consolidated, *et al.*, were identical; namely, Ruff and the Gambinos. All had equal authority to hire, fire, determine the wages, and other working conditions of their employees, and to adjust grievances. As the president and sole officer of Trucking, Ruff also possessed all of these functions with respect to employees on Trucking's payroll. Additionally, the evidence established that Joseph Gambino adjusted grievances of employees on Trucking's payroll.

The evidence also established that Consolidated, *et al.*, and Trucking constituted a totally integrated operation engaged in the transportation of goods in the garment industry. In this connection, Consolidated, Greenberg's, GRG, Clothing, and Dynamic were the corporations that were engaged in the actual physical transportation of goods. JHT was admittedly created solely for the purpose of supplying equipment to Consolidated, Greenberg's, GRG, Clothing, and Dynamic. The evidence established that Trucking similarly was created essentially for the purpose of supplying labor to Consolidated, Greenberg's, GRG, Clothing, and Dynamic. In this connection, permission was required from the Gambinos to Ruff as a prerequisite to the formation of Trucking. Additionally, upon the formation of Trucking, employees were transferred from Consolidated, *et al.*, to staff Trucking's office personnel. Further, with the exception of the skeletal force of production employees maintained by Consolidated, Greenberg's, GRG, Clothing, and Dynamic, Trucking furnished substantially all of the production employees (laborers, handlers, and helpers) to these corporations. That Trucking was created solely to supply labor to these Respondent corporations is established by the evidence that substantially all labor supplied by Trucking was supplied to Respondent corporations herein.

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[19] Consolidated, *et al.*, is used to designate Consolidated, Greenberg's, GRG, Clothing, Dynamic, and JHT.

[20] As set forth above, the record indicates to some extent that Ruff and his wife were the sole owners of Trucking. There is no indication as to what if any percent of the ownership was vested in Ruff's wife. In view of the marital relationship and in view of the fact that Ruff's wife did not take part in any of the day-to-day operations of Trucking, I conclude that Hyman Ruff was, effectively, the sole shareholder.

The integration of the total operation is further established by the complete interchangeability of the office and production employees.

The evidence established that there was total interchange with respect to the employees supplied by Trucking and charged to Consolidated, Greenberg's, GRG, Clothing, and Dynamic. In this respect, the testimony of Thomas Gambino and Alterman established that Trucking employees supplied and charged to one company would be assigned to work on a day-to-day basis for other Respondent corporations. Further, 52 of the 66 striking employees supplied by Trucking were charged to Dynamic. However, these employees all worked out of the 141 West 35th Street facility, where Dynamic carried out little or no business. Therefore, these employees charged to Dynamic must have performed work for Consolidated, Greenberg's, GRG, and Clothing on an interchangeable basis.

The evidence also established interchangeability as to office employees. In this connection, Charles Chodash, an employee on Consolidated's payroll, was the IBM programer for Consolidated, Greenberg's, GRG, Clothing, and Dynamic. Lucy was an employee on Trucking's payroll but charged to one of Respondent corporations. She was the keypunch operator for Respondent corporations. Anthony Mascia, an employee on the GRG payroll was in charge of workmen's compensation matters for Consolidated, Greenberg's, GRG, Clothing, and Dynamic.

That Trucking and Consolidated, *et al.*, shared a single warehouse and office facility located at 141 West 35th Street is further evidence to establish the integrated nature of the entire operation. Significantly, the only corporate name appearing on the storefront or anywhere else at this facility was that of Consolidated.

Further establishing the integrated nature of the operation herein is the interchangeability of office and warehouse equipment. In this connection, the evidence established that office equipment such as the IBM installation and a photocopy machine were utilized by all Respondent corporations, including Trucking. Additionally, there was but a single cleaning and rubbish removal service which was paid for by Consolidated. The evidence also established that in the warehouse, racks and pushcarts, owned by different Respondent corporations and used to make deliveries, were freely interchanged as were automotive trucks which were owned outright or leased by different Respondent corporations from JHT. Such trucks might contain arbitrarily on the side panel the name of any one of Respondent corporations for advertising purposes.

Still further establishing the integrated nature of the operations was the informal manner by which operating costs were handled by Respondent corporations. The evidence established that rather than one corporation submitting a bill to another corporation for actual rent, labor costs, or use of equipment incurred by one company on behalf of the other, the principals, namely, Ruff and the Gambinos, would meet annually in an informal manner and decide on "offsets" to be allowed by one corporation against the other.

The Board in *A & T Glass, supra*, found a single-employer relationship existed based on common ownership, centralized control of labor relations policy, and a highly integrated business operation. In reaching this conclusion, the Board noted that the business, as in the instant case, was held out to the public as a single business. Additionally there existed, as in the instant case, considerable integration of the two businesses which was shown through occupancy of the same building, sharing of office space, advertising one another's services on vehicles, integration of employees, and the fact that the employees of both corporations used equipment and materials owned by the respondent, Glass, to perform outside work.

In *Land Equipment Incorporated; and Equipment Service Rentals, a Single Employer*, 248 NLRB 685 (1980), the Board found two companies constitute a single employer where one company supplied labor to another company that was its only customer and existed solely for the purpose of supplying said second company with labor at less than the prevailing wage rate.

The Board has consistently found joint-employer relationships existed between manpower corporations and the corporations for whom they supply labor.

In *Manpower, Inc., of Shelby County and Armour Grocery Products Co., Division of Armour and Company*, 164 NLRB 287 (1967), the Board found a joint-employer relationship existed between Manpower, Inc., and Armour. Among the factors relied on by the Board in reaching this conclusion was that Armour's dispatcher informed the drivers supplied by Manpower, their starting time, assigned them their runs, supplied them with a manifest which set forth their time of departure, approximate time of arrival, day of return, etc. In addition Armour's dispatcher adjusted grievances. Moreover of the seven drivers furnished Armour by Manpower only one driver had made a trip for another company.

In *Manpower, Inc. and Avis Rent-A-Car System, Inc.*, 226 NLRB 1 (1967), the Board found a joint-employer relationship existed between Manpower and Avis. Among the factors relied on by the Board in reaching this conclusion was that Avis directed, disciplined, and discharged employees supplied by Manpower pursuant to a contract arrangement between the employers.

In both cases, the Manpower companies and their joint employers were separately owned and controlled corporations. There was no common supervision or sharing of office space or equipment. Nor was there any degree of integration between the two corporations.

In view of my conclusion that common ownership, common management, and centralized control of labor relations exist, and that Respondent corporations herein represent a totally integrated operation which share facilities, freely interchange employees and equipment, I conclude that Respondent Trucking, Consolidated, Greenberg's, GRG, Clothing, Dynamic, and JHT constitute a single employer within the meaning of the Act.

B. *The Economic Strike*

There is no dispute that a strike commenced on July 27, 1978, accompanied by picketing. Picketing commenced on July 27 at Respondent's 141 West 35th Street facility and ended July 28. Thereafter, no further picketing took place. There is also no dispute that the strike was an economic strike. The complaint alleged the strike to be an economic strike. Moreover, during the course of the hearing it was stipulated by all parties that the strike was an economic strike. Indeed, the evidence supports the complaint allegation and stipulation. The evidence established that the strike commenced following a conversation between Eason and Thomas Gambino during which conversation Eason asked Gambino to consent to an election or recognize Local 20408. When Gambino declined, Eason urged the employees to go out on strike and commence picketing.

C. *The Identity of the Strikers*

The complaint alleged that 66 individuals took part in the strike described above. These named individuals are alleged as discriminatees in view of alleged unconditional offers to return to work and Respondent's unlawful refusal to reinstate them. Although Respondent's counsel concedes that the above strike did take place, he does not concede that the 66 individuals set forth in the complaint participated in the strike. Thus, the burden of establishing the identity of the strikers falls on General Counsel. In this connection, Respondent's payroll records establish that during the calendar year commencing in 1978 until the week ending July 28, 1978, all 66 alleged discriminatees worked exclusively for Respondent corporations; namely, Consolidated, Greenberg's, GRG, Clothing, and Dynamic. There is no dispute that these employees worked out of the 141 West 35th Street facility. In any event, the testimony of Eason, and employees Tovar, Simon, and Joseph established that all strikers worked out of the 141 West 35th Street facility. Moreover, well prior to the commencement of the strike, 42 of the alleged 66 strikers signed Local 20408 authorization cards and on July 31, 65 of the 66 strikers signed Local 102 authorization cards, all setting forth as the address of their employer the 141 West 35th Street facility. Respondent's records further establish that on July 27 all 66 alleged discriminatees were scheduled to work, but that only 8 alleged discriminatees in fact worked a full 8-hour day.[21] The remaining 58 alleged discriminatees all worked less than an 8-hour day. The payroll records further show that, on July 28, 65 of the 66 alleged discriminatees performed no work for Respondent. The 66th alleged discriminatee, Joseph, worked 3 hours for Respondent that day. Thereafter, according to Joseph's uncontradicted testimony, he ceased work and commenced picketing.

Joseph further testified that he observed approximately 65 employees picketing on that day. Striker Lucien Simon testified that on July 28, approximately 60 to 70 employees working out of 141 West 35th Street facility and alleged as discriminatees picketed. Matthew Eason, Local 20408 president, testified that on July 28 over 60 employees picketed.

The evidence established that on July 31 the strikers met in the office of Local 102 where 65 of the 66 strikers alleged as discriminatees signed Local 102 authorization cards. The only striking employee who did not execute a Local 102 card was Jean-Charles Gesner.

In view of Respondent's payroll records which establish that the 66 strikers were scheduled to work on July 27, that prior to the end of July 28 all of these employees had ceased work, and that no striker resumed work until at least after the week ending August 4, 1978; in view of the testimony of Simon, Ernest, and Eason, which establishes between 60 and 70 employees picketed on July 27; and July 28; in view of the 65 signed Local 102 authorization cards signed by the striking employees; and in view of the fact that Respondent did not submit any evidence to dispute that any of the alleged discriminatees took part in the strike, I conclude that the 66 individuals named in the complaint ceased work on July 27 and concertedly engaged in an economic strike.

C. *The Unconditional Offers To Return to Work*

The Board law with respect to economic strikers and their right to reinstatement upon making an unconditional offer to return to work is rather well settled. Strikers, whether economic or unfair labor practice strikers, retain their status as employees under Section 2(3) of the Act. See *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

An economic strike is deemed to be protected activity under Section 7 of the Act. However, an employer is free in such circumstances to hire permanent replacements for economic strikers at any time prior to their unconditional offer to return to work. It is an unfair labor practice for an employer to refuse reinstatement to striking employees following an unconditional offer by the striking employees to return to work, or to discharge striking employees prior to the time their jobs are filled by permanent replacements. *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967); *N.L.R.B.* v. *United States Cold Storage Corp.*, 203 F.2d 924 (5th Cir. 1953), cert. denied 346 U.S. 818; *Carter Carburetor Corp.* v. *N.L.R.B.*, 140 F.2d 714 (8th Cir. 1944).

An employer who refuses to reinstate striking employees upon their unconditional offer to return must establish that his action was based on legitimate and substantial business justification, i.e., where the strikers' jobs have been replaced by permanent replacements or where the job has been eliminated by legitimate and bona fide reasons other than labor relations. *N.L.R.B.* v. *Fleetwood Trailer, supra*; *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Moreover, the right to reinstatement does not expire when an unconditional offer is made, although a lawful permanent replacement has been hired for the job in question, or it has been eliminated for some legitimate, bona fide reason. The right to reinstatement continues when the job becomes available and until the striker obtains other regular and substantially equivalent employment. *Fleetwood Trailer, supra*; *The Laidlaw Corporation*, 171 NLRB 1366 (1968).

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[21] Those alleged discriminatees working a full 8-hour day were Jean Balan, Jean H. Charles, Luma Calixte, Robergeau Duverger, Joseph E. Ernest, Edouard St. Vil, Lucrece Ulysse, and Rigeur Videau.

The issue that must first be determined is whether the strikers made unconditional offers to return to work.

The evidence established that the first offer made on behalf of the strikers to return to work occurred during Eason's conversation with Thomas Gambino sometime in the afternoon of July 28. In this connection, Eason's credited testimony established that he asked Thomas Gambino in front of the premises at the 141 West 35th Street facility, "Why don't you put the workers back to work. . . . They were not aware they had a union. . . . It's not fair to take it out on them. Put them back to work and let it be resolved before the Labor Board." Gambino's response to this offer was to turn and walk away. The substance of the offer sets no conditions for return. For example, the offer is not conditioned on increased wages, benefits, or any other improvement in working conditions. Nor does the offer suggest that it was conditioned on reinstatement of all strikers. Cf. *American Optical Company*, 138 NLRB 681 (1962). Accordingly, I conclude that the offer by Eason was an unconditional offer made on behalf of all striking employees to return to work.

Respondent's counsel contends that Eason had no authority to make such offer on behalf of the striking employees because they had withdrawn and revoked their membership in Local 20408 at the time the offer was made.

There is no doubt that Eason was authorized expressly or impliedly by the striking employees to make such offer on their behalf. This is established by the evidence that shortly before the strike, 42 of the 66 striking employees, a majority of the striking employees, signed Local 20408 authorization cards. It is further established by the evidence that the strike which commenced on July 27 was organized and supervised by Local 20408. In this connection, every picket carried a Local 20408 picket sign throughout the entire course of the strike. The Board has held that where striking employees have signed union authorization cards, and joined in a strike under union supervision, a general agency is created which empowers the union through its representatives to offer to return to work on behalf of all of the striking employees without obtaining specific authorization from the employees to do so. *I. Posner, Inc.; Posner Distributing Corp; and Posner Beauty and Barber Supply Corp.*, 133 NLRB 1567, 1570 (1961); *F. M. Homes, Inc.*, 235 NLRB 648, 649, fn. 4.

Respondent's counsel bases his contention that the striking employees had revoked their membership in Local 20408 on the testimony of striker Ulrick Tovar who testified in response to Respondent's counsel's questions that following his conversation with Dyer on July 28 it was his intention to be a member of Local 102 rather than Local 20408. However, such revocation was never conveyed by Tovar to Eason. Moreover, there is no evidence that any of the striking employees had effectively communicated any intention to revoke membership in Local 20408 to Eason or other 20408 representatives. Moreover, the striking employees continued picketing with Local 20408 signs notwithstanding their conversations with Local 102 representatives throughout the course of the day. This would negate any subjective intention by the employees to revoke their membership in Local 20408.

Neither does the evidence establish that Local 20408 abandoned the striking employees prior to Eason's offer made to Gambino on July 28, as a result of the strikers' conversations with Local 102 representatives. Rather, the evidence establishes that Eason, at all times during the strike and thereafter, was primarily concerned with obtaining reinstatement of the striking employees, and that, if he was unable to obtain it, he was willing, without abandoning the support or representational claim of Local 20408, to enlist the aid of Local 102 to this end. This is evidenced by Eason's conversation on the afternoon of July 28 with Ted Theus, Local 102 representative. In this respect, Theus told Eason that Local 102 had a contract with Consolidated and represented the striking employees. Eason replied he would let that be determined, presumably, by the pending representation petition filed by Local 20408. Theus asked Eason if he would object if he tried to get the employees back to work and Eason stated that he had no objection. This conversation clearly indicates that Local 20408 had not abandoned its claim for representation. On the contrary, Eason asserted that this was a matter to be determined. Clearly too, the conversation established that Eason was enlisting the aid of Local 102 to obtain reinstatement of the striking employees. This is further established when following his conversation with Theus he spoke to the striking employees and related to them this conversation. It is noted that the present representation petition filed by Local 20408 is still pending as of this date. Had Local 20408 intended to abandon the striking employees or its representational claim, surely a withdrawal of the petition would have been requested.

That Local 20408 had not abandoned the striking employees or its representational claim is further evidenced by Eason's filing the instant charge with the NLRB and by his subsequent offer on behalf of all striking employees to return to work on August 2.

The evidence established that about 5 p.m., on July 28, following the Local 102 representatives' discussions with the striking employees described above, Local 102 Representative McDaniel spoke with Hyman Ruff. The conversation took place in Respondent's office at 141 West 35th Street facility. McDaniel told Ruff that "The men wanted to come back to work." Ruff refused to put the men back to work claiming he had to speak to his attorney. The offer to return to work made by McDaniel was clearly unconditional. However, I conclude that such offer was unauthorized and without any legal effect since the offer was made at a time prior to the striking employees signing Local 102 authorization cards and at a time when picketing was still in progress on behalf of Local 20408. Thus, at this time Local 102 was not authorized to represent the striking employees.

On July 31, immediately following the Local 102 meeting with the striking employees, 65 of the 66 striking employees signed Local 102 authorization cards and specifically authorized Local 102 to request reinstatement on their behalf. Local 102 Representative Rooney met with Hyman Ruff in his office at 141 West 35th Street facility. During this meeting Rooney told Ruff "[T]here [are] men outside. They want to go back to work. . . Would you put them back to work?" Ruff replied he had to see his lawyer first. In view of the authorization cards signed by 65 of the 66 striking employees and in view of the specific authority given by the striking employees to request reinstatement on their behalf, I conclude that Rooney had the authority to request reinstatement on behalf of the striking employees. I also conclude that Rooney's statement to Ruff, described above, was an unconditional offer to return to work made on behalf of the striking employees and that Ruff's reply to Rooney was a refusal to reinstate the striking employees. *I. Posner, Inc.*, and *F. M. Homes, Inc., supra.*

On July 31, following Rooney's unconditional offer, described above, Thomas Gambino met with Local 102 Manager Sidney Gerstein. During this meeting Gambino admitted that "Gerstein mentioned something about the people coming to work for us. He talked about the people that were on strike. . . ." Gambino later admitted, "In essence he [Gerstein] said the people—he wanted us to put the people to work." Gambino's reply was that it was a legal thing and would have to be settled through a pending National Labor Relations Board proceeding, an apparent reference to the representation petition then pending before the Region filed by Local 20408. Gambino did not question Gerstein's authority to request reinstatement. Based on the same reasoning as applied to Rooney's unconditional offer to return to work, I conclude Gerstein had the authority to make such offer on behalf of the striking employees. I also conclude that Gerstein's offer was an unconditional offer to return to work made on behalf of the striking employees, and that Gambino's response was a refusal to reinstate the striking employees.

A further unconditional offer to return to work was made by a group of the strikers themselves. In this connection, the evidence established that following their meeting at 8:30 a.m. on July 31 at Local 102's office the striking employees in groups of 10 to 15 employees walked from the offices of Local 102 to Respondents' West 35th Street facility. As the first group of striking employees approached the facility, they stated to Joseph Gambino who was standing in front of the facility, "We're coming back. We're coming back to work." Joe Gambino replied, "Wait a minute. . . . I don't want you to come back to work. I don't want you anymore over here." The same offer was made by Tovar on August 1, followed by the same response from Gambino. There is no question that the employees' offers to return to work were unconditional and that Joe Gambino's response was a clear refusal to reinstate and I so conclude.

Gambino's refusal to reinstate the strikers is further evidenced by the testimony of Lucien Simon, striking employee, who approached the facility on July 31 with one of the groups of strikers that followed Tovar's group. Simon testified that when he approached the 141 West 35th Street facility, he observed Joe Gambino standing by the front door and heard him say, "No, no job, I don't want you anymore."

Respondent's counsel contends that all offers to return to work made by Local 102 Representatives Rooney and Gerstein and by the striking employees on July 31 and August 1 were conditioned on reinstatement pursuant to the terms of the Local 102 contract with Consolidated. This contention is based on the testimony of strikers Ernest Joseph, Lucien Simon, and Ulrick Tovar, as well as the testimony of Eason which is all to the effect that on July 28 during the strike, and again on the morning of July 31 during the Local 102 meeting, the striking employees were informed by Local 102 representatives that Local 102 had a contract with Consolidated, that the striking employees were covered by this contract, and that, pursuant to this contract, they were entitled to higher wages and increased fringe benefits and would receive such increases upon their return to work.

Whether the striking employees would have returned to work unconditionally, at the same rates of pay and under the conditions of employment that existed prior to their strike, had Respondent made such offer of reinstatement is conjectural. Such offer by Respondent was never made.

Neither can it be argued that Respondent refused to offer reinstatement because it believed the offers were conditional upon the strikers receiving the Local 102 contract benefits as there is no evidence to establish that Respondent's representatives were aware at any time during which the offers to return to work were made, of the conversations between Local 102 representatives and the striking employees concerning the strikers' expectations as to wages and working conditions upon return to work. Indeed, conditions for reinstatement were never questioned by Respondent's representatives when the offers to return to work were made. For the same reason, it cannot be argued that the offers to return to work were conditioned on reinstatement of all strikers. A reasonable interpretation of the offers themselves does not imply such a condition. If Respondent believed such condition was being imposed he could have questioned Rooney, Gerstein, or the strikers themselves in this regard or offered reinstatement to selected strikers. Respondent did neither. Rather Respondent without discussing the offers to return to work simply refused them. I therefore reject Respondent's counsel's contention that the offers to return to work were conditional.

Finally, a further unconditional offer to return to work was made on behalf of the striking employees through Eason's August 2 mailgram addressed to Consolidated Dress Carriers, Trucking Personnel, 141 West 35th Street, which stated: "Local 20408 represents all of the employees who you have discharged as a result of the work stoppage on July 27, 1978. Alternatively, each of them does individually hereby unconditionally apply for reinstatement." The mailgram was sent by Matthew Eason, president, Local 20408. I conclude that the failure to respond to this offer was a further refusal to reinstate the striking employees following an unconditional offer to return to work.

D. *Permanent Replacements*

Respondent's counsel contends that as of July 31, 1978, there was a decline in business and no work was available after replacements had been hired.

The Supreme Court has held that an employer who refuses to reinstate economic strikers who make unconditional offers to return to work has the burden of proving that the strikers have been permanently replaced. *N.L.R.B.* v. *Fleetwood Trailer Co.*, and *N.L.R.B.* v. *Great Dane Trailers, supra.*

Respondent's payroll records and the testimony of Thomas Gambino established that as of July 27 Respondent had work available for all 66 striking employees. Respondent submitted no evidence to establish that permanent replacements were hired. While the testimony of Thomas Gambino and employees Simon and Joseph establish that an undetermined number of individuals were performing work formerly performed by the striking employees, there is no evidence to establish the number of such individuals nor their status as "permanent replacements." Nor did Respondent submit evidence to establish a business decline or an elimination of jobs. I therefore reject Respondent's contention.

Accordingly, I conclude that there is insufficient evidence to establish that Respondent had secured any permanent replacements or that there existed a substantial business justification for denying reinstatement to the striking employees between July 27 when the strike commenced and August 2 when the last offer to return to work was made. I further conclude that in view of the unconditional offers to return to work made by and on behalf of the striking employees Respondent violated Section 8(a)(1) and (3) of the Act when it refused reinstatement following such unconditional offers. *N.L.R.B.* v. *Fleetwood Trailer Corp.; N.L.R.B.* v. *Great Dane Trailer Inc.; N.L.R.B.* v. *Cold Storage, Carter Carburetor Corp.* v. *N.L.R.B., supra.*

E. *Offers of Reinstatement by Respondent*

Respondent counsel contends that as work became available offers of reinstatement to the striking employees were communicated to the employees by mailgrams. The evidence does indeed establish that 53 mailgrams offering reinstatement to the striking employees were sent by Respondent Trucking Personnel during the period of September through November 1978. However, each and every mailgram sent to a striking employee required that he report to work immediately, the day following the day the mailgram was sent. An example of such mailgram is the mailgram sent to Ernest Joseph on October 18 which states, "Report to work at 141 West 35th Street, New York City on Thursday, October 19th at 8:00 a.m." The Board has held that an offer of reinstatement by an employer to an employee must allow a reasonable amount of time to consider whether to accept such offer. *Murray Products Inc.*, 228 NLRB 268 (1977); *Harrah's Club*, 158 NLRB 758, 759, fn. 1 (1966). There is no per se rule as to the period of time that will constitute reasonable notice to the discriminatee. *Penco Enterprises, Inc., Penco of Ohio and Acoustical Contracting and Supply Corp.*, 216 NLRB 734 (1975). Rather, the Board examines the factual circumstances of the particular case to determine what constitutes a reasonable time. The Board stated in *Fredeman's Calcasieu Locks Shipyard, Inc.*, 208 NLRB 839 (1974), that an offer that demands that an employee accept and return to work on the day he receives it would, except in unusual circumstances, be an unreasonable condition to which we would not require strict compliance by the employee; nor would we find such an offer to have terminated the backpay period. In the instant case, the strikers made several unconditional offers to return to work all of which were rejected by Respondent. For Respondent now to require strikers to return to work the morning after receipt of the mailgram is in my opinion an unreasonable period of time. I therefore conclude that Respondent's offers of reinstatement to the striking employees did not constitute reasonable notice or allow reasonable time for the striking employee to consider whether to accept such offer and accordingly it finds Respondent's offers to be invalid.

If it were ultimately determined that Respondent's offers of reinstatement were valid, then I would conclude that there is insufficient evidence to establish that the mailgrams containing the offers of reinstatement were received by the discriminatees. In this connection, Tovar, Joseph, and Simon all testified that they did not receive the mailgrams purportedly sent to them. Moreover, there is no evidence that the remaining employees did receive such mailgrams. Accordingly, I would conclude that with respect to the issue of whether the offers of reinstatement by Respondent were communicated to the discriminatees, the record is incomplete and that such issue should be left for the compliance stage of this proceeding. *Woodlawn Hospital*, 233 NLRB 782, 791 (1977); *Standard Materials Inc.*, 237 NLRB 1136 (1978).

CONCLUSIONS OF LAW

1. Respondent Consolidated, Greenberg's, GRG, Clothing, Dynamic, JHT, and Trucking are individually employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 20408 and Local 102 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent Consolidated, Greenberg's, GRG, Clothing, Dynamic, JHT, and Trucking constitute a single employer within the meaning of the Act.

4. On July 27, 1978, the employees whose names are set forth below in Appendix A [omitted from publication] ceased work and concertedly engaged in an economic strike which strike continued until on or about 6 p.m. on July 28, 1978.

5. On July 28 and 31, and August 2, 1978, unconditional offers to return to work were made by and on behalf of all employees set forth below in Appendix A [omitted from publication].

6. Respondent, by failing and refusing to reinstate the employees set forth below in Appendix A [omitted from publication] to the positions held by them prior to the

July 27, 1978, strike, has violated Section 8(a)(1) and (3) of the Act.

7. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take the following affirmative action designed to effectuate the policies of the Act. My recommended Order will require Respondent to offer each and every employee whose name is set forth below in Appendix A [omitted from publication] reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges. In addition, Respondent shall make whole the said employees for any loss of earnings they may have suffered by reason of the unlawful discrimination or refusal to reinstate them, by paying to them a sum of money equal to the amount they normally would have earned from the date of their initial unconditional offer to return to work on July 28, 1978, until the date Respondent offers them reinstatement, computed in the manner set forth by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), together with interest thereon, as computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Payroll and other records in possession of Respondent are to be made available to the Board or its agents to assist in such computation.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[22]

The Respondent, Consolidated Dress Carriers, Inc., Greenberg's Express Inc., GRG Delivery Inc., Clothing Carriers Corp., Dynamic Delivery Corp., JHT Leasing Corp., and Trucking Personnel, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of Local 20408, United Warehouse Industrial and Affiliated Trades Employees Union, and Cloak & Dress Drivers & Helpers Union, Local 102, International Ladies' Garment Workers' Union, AFL-CIO, herein called Local 20408 and Local 102, respectively, or any other labor organization; or interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act by failing and refusing to reinstate its striking employees to their former positions, or to other substantially equivalent jobs for which such employees are reasonably well qualified, upon their unconditional offer to return to work; or by discriminating against employees in any other manner in regard to their hire or tenure of employment or any other term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 20408 and Local 102 or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to the employees set forth in Appendix A [omitted from publication] immediate reinstatement to their former jobs or, if those jobs are no longer available, to substantially equivalent jobs, without prejudice to their seniority or other rights, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its office located at 141 West 35th Street, New York City, New York, copies of the attached notice marked "Appendix B."[23] Copies of said notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Gerson Electric Construction Company *and* James Jennings. Case 13–CA–20580

December 10, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On August 31, 1981, Administrative Law Judge William A. Gershuny issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge: A hearing was held on July 23–24, 1981, on complaint issued December 19, 1980, alleging a single violation of Section 8(a)(1) and (3) of the Act. At issue is whether Respondent unlawfully laid off electrician Jennings because of his efforts to enforce a contract provision concerning starting times on the job.

Upon the entire record, including my observation of witness demeanor, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent, an electrical contractor, with annual shipments of goods interstate in excess of $50,000, is an employer engaged in commerce within the meaning of the Act.

II. LABOR ORGANIZATION INVOLVED

The International Brotherhood of Electrical Workers, Local 134, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. UNFAIR LABOR PRACTICES

In the relevant period of 1980, Respondent was an electrical contractor with several dozen jobs proceeding concurrently in the Chicago area under a labor agreement with IBEW Local 134. That contract contains a grievance-arbitration procedure, a provision for appointment of job stewards by the Local Union business agent, a provision absolutely banning any discrimination against stewards "for the faithful performance of their duties" to insure compliance with the contract, a provision giving contractors virtually unfettered rights to lay off employees or transfer them from job-to-job within the geographical jurisdiction of the Local Union, and a provision giving no seniority protection to workmen such as those here.

Two of Respondent's jobsites are involved in this case. At the Transportation Building on South Dearborn Street, Respondent obtained permission from a Local Union business agent to vary the contract starting time and begin work at 7 a.m. On September 23, 1980, six electricians, including Jennings, were referred by the Local Union to this job. In his 1 week on the job, Jennings, who was not the steward, complained to another business agent about the starting time and had heated discussions with Foreman Morton as to the availability of toilets and water, the safe use of the staircase and manlift, his right to drink coffee on the job, and his right to leave the jobsite to put money in parking meters. On September 30, Jennings and another employee were transferred to the Hampton House job site in South Chi-

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[1] In his exceptions, the General Counsel contends that the Administrative Law Judge failed to make any findings concerning the testimony offered by employee James R. Hicks, which tended to establish that Respondent did in fact plan to rid itself of employee James Jennings for reasons proscribed by the Act, and that the Board should therefore reverse the Administrative Law Judge's Decision concluding that Jennings had not been unlawfully discharged. We find no merit in the General Counsel's contention. Inasmuch as the Administrative Law Judge based his findings upon his "observation of witness demeanor," we conclude that it is implicit in his general statement regarding credibility that he has discredited Hicks' testimony, since it conflicts with the facts as described by Respondent's officials, whose testimony, his Decision makes clear, he has completely credited. *Kimball Tire Co., Inc.*, 240 NLRB 343, 344, fn. 5 (1979). Therefore, in considering the General Counsel's exceptions to certain credibility findings made by the Administrative Law Judge, we have also reviewed his implicit resolution with respect to Hicks. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III, par. 2, of his Decision, the Administrative Law Judge found that Jennings and another employee were transferred from Respondent's Transportation Building jobsite to its Hampton House jobsite on September 30, 1980. The record reveals that Respondent transferred two employees from the Transportation Building, but only Jennings was assigned to the Hampton House site. The error is hereby corrected.

Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). That decision concerns identifying the cause of discharge where a genuine lawful and genuine unlawful reason exist. Where, as here, the asserted unlawful reasons (Jennings' activities) were not to any degree a motiviating factor in Respondent's decision, only one genuine reason remains—the lawful one. The attempt to apply *Wright Line* in such a situation is futile, confusing, and misleading.

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cago. It is noteworthy that counsel for the General Counsel makes no contention here that this transfer was violative of the Act; that no grievance was filed by Jennings; that a discrimination charge was filed by Jennings with OSHA based on his safety complaints; and that Jennings later filed an intraunion charge against Foreman (and Union member) Morton which did not refer to a starting time dispute with Morton.

The Hampton House job, commenced in 1978, but interrupted from June until September 22, 1980, because of a contract dispute with the owner, consisted of the rehabilitation of an occupied apartment building and its conversion to condominium apartments. Between September 22 and 30, the work was performed by Foreman (and union member) Hammersmith and two electricians; on September 30, because of manpower needs, Jennings was transferred to the job where he remained for 3 days until October 3, when the job again was temporarily shut down by Respondent for reasons and under circumstances detailed below. At this jobsite, as in the case of the other, Respondent earlier had obtained permission from a local business agent to begin work at 7 a.m.

Upon reporting late to the Hampton House job, Jennings briefly met with Foreman Hammersmith, was briefed on the work to be done and, in turn, talked about his "problems" with Foreman Morton on the last job. Hammersmith advised Jennings not to be concerned because, here, he started with a clean slate. Jennings met with the two other electricians, who were working as a team installing new metering for each apartment, briefly discussed and agreed to go along with the 7 a.m. starting time and, apparently, was "elected" steward by default. Jennings advised Hammersmith of his intent to raise the starting time issue at the next Local Union meeting. That meeting was held on October 2 and Jennings did not demand an 8 a.m. starting time until Friday morning, October 3, when he met with Hammersmith.

Later, during the morning of October 3, Hammersmith advised Jennings and the two other electricians that the job again was to be shut down and that Respondent's personnel manager had been asked to determine if there were other Respondent jobs to which the three men might be transferred. Jennings complained that Respondent was out to get him and that he wanted a layoff rather than a transfer. Temporary positions were found for the other two, more senior electricians, but none was available for Jennings who, thereafter, was laid off. On the same day, Respondent laid off 10 other electricians from other jobs.

Jennings was aware of the effects of a layoff, as opposed to a transfer. In the former case, he would be entitled to unemployment compensation, but could be returned to work only through the Local Union's referral system. In the latter case, he would continue to work within the Local Union's geographical jurisdiction at the same rate of pay and at the same position and could be returned to work at Hampton House when the job was resumed.

The Friday morning decision to temporarily close down the Hampton House job, as credibly testified to by Respondent's officials, followed discussions on Thursday morning between Hammersmith and Project Manager Sembinini concerning difficulties in gaining access to several occupied apartments at the same time to permit wiring and nondelivery of custom metering and fire-escape lighting materials. It was then decided to shut down the job until the problems could be resolved, despite the fact that the work had only recently resumed and Respondent was anxious to retain the good will of the customer.

Several days later, the apartment access problem was resolved, overdue deliveries were received, and work was resumed on October 8, 1980, the following Wednesday. Because the two other electricians were working for Respondent on another site, they were reassigned to the Hampton House job. Later, five other electricians were put on the job and remained until its completion on February 3, 1981.

Again, it is noteworthy that Jennings did not grieve this layoff, because, admittedly, he felt it was legal.

I am unable to credit Jennings' testimony for a number of reasons. First, I am left with the clear impression that his court room version of the facts was tailored to meet counsel's legal theory as opposed to representing his best recollection of past events. In this regard, it is interesting that, in 1980, he filed no grievance under the labor agreement because he was convinced that the October 3 layoff was "legal," despite the fact that, if, as contended now, the layoff were because of his efforts as a steward to enforce the starting provisions of the contract, it clearly would have violated article VIII of the contract which provides: "Under no circumstances shall stewards be discriminated against for the faithful performance of their duties as such"; that the starting time controversy with Foreman Morton of which much was made at the hearing was not referred to in his written intraunion charge against Morton; and that his OSHA discrimination charge was based on a contention that the layoff was motivated because of his safety complaints at the earlier jobsite. Second, his testimony represents overstatements and exaggerations. In this connection, Jennings went to great lengths to establish knowledge by Foreman Hammersmith of Jennings' safety and contract complaints and his difficulties with Foreman Morton at the first jobsite, testifying that, after arriving 1 hour late at the Hampton House job, he bared his prior work history to Hammersmith for 2 hours before commencing work. This testimony is contradicted not only by Hammersmith, but also by coemployee Hicks and seeks, unsuccessfully, to convince me that a foreman would be so interested in the tale as to permit 3 hours of nonproductivity at $15.15 an hour at a job which recently resumed after a lengthy shutdown over a price dispute with the owner. Third, Jennings sought hard to establish that he was steward on this 3-day, three-man job and had full knowledge of Respondent's access to materials and its ability to continue the job uninterrupted. Of course, on the first day of his 3 days on the job, he was 1 hour late, related his work history to the foreman for 2 hours and apparently spent considerable time away from his work area visiting the other two electricians to discuss appointment of a steward, telephoning the Local Union office and busying himself with the weekly steward report forms. On the third day, he spent part of his day in discussions with Foreman Hammersmith about the starting time, another part in discussion with Hammersmith and Sembinini concerning the prospects of a transfer or a layoff and another part completing a weekly steward report (of which the Local Union has no record), leaving the jobsite 1 hour early. His ability to testify as to availability of materials and Respondent's ability to continue the job is wholly unconvincing.

Assuming without deciding that this slender evidentiary thread satisfies the General Counsel's burden, under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), of establishing a *prima facie* case, I nevertheless find and conclude that Jennings' activities were not to any degree a motivating factor in Respondent's October 3 decision and that the job would have been closed down and Jennings laid off regardless of any protected activity on his part.

There is no doubt whatever in my mind that Respondent's operational decisions were motivated solely by business considerations. The apartment access problems and material shortages were real, as were the uncertainties as to the time of their solution. That they came several days after the closure has no bearing on Respondent's motives to close down in the first place. Nor is there doubt as to the *bona fides* of Respondent's efforts to transfer the three employees to other positions. Here, again, the record clearly portrays that effort, despite the fact that Respondent was in the process that very day of laying off 10 other electricians at other locations.

On the record here, it is impossible to conclude that a contractor of this size would jeopardize its contract with the building owner and its relations with the Local Union which supplies its workmen simply because a steward voiced complaints over a starting time previously approved at both jobsites by the Local Union itself. The complaint must be dismissed.

Upon the foregoing findings of fact, conclusions of law, the transcript as corrected, and the entire record, including an exceptionally able closing argument by counsel for General Counsel who waived the filing of a post-trial brief, and, pursuant to Section 10(c), I hereby issue the following recommended:

ORDER[1]

It is ordered that the motion of the counsel for the General Counsel to correct the transcript be, and the same hereby is, granted.

IT IS FURTHER ORDERED that the complaint be, and the same hereby is, dismissed.

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[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Kaiser Steel Corporation *and* International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1492. Case 20-CA-15515

December 11, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On July 30, 1981, Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

AMENDED CONCLUSION OF LAW

In accordance with our finding in the second paragraph of footnote 2, *supra* we hereby amend the Administrative Law Judge's Conclusion of Law 4 to read as follows:

"4. By refusing to permit such striking employees to remove their personally owned tools from its Napa plant in order to impair their ability to obtain other employment during the strike and under circumstances where, absent a strike, Respondent normally permits its employees to remove their tools for their own purposes, Respondent has interfered with, restrained, and coerced employees in the exercise of rights protected by Sections 7 and 13 of the Act, and has discriminated against employees with respect to their terms and conditions of employment in order to discourage membership in, or activities on behalf of, labor organizations, and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Kaiser Steel Corporation, Napa, California, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

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[1] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[2] In finding that Respondent violated Sec. 8(a)(3) and (1) of the Act by enforcing its policy of refusing to permit its striking employees to remove their personally owned tools from Respondent's Napa, California, facility, we do not rely on the Administrative Law Judge's comment at par. 7 of the section entitled "Analysis and Conclusions" that *Fraley & Schilling, Inc.*, 211 NLRB 422 (1974), is dispositive of the case herein. We regard that case as distinguishable and rely instead on the remainder of his analysis.

We also note that, at par. 6 of the section entitled "Analysis and Conclusions," the Administrative Law Judge inartfully characterized Respondent's policy with respect to the removal of personally owned tools during the course of a strike. The record more accurately reflects that, absent a strike, Respondent normally permits its employees to remove their tools for personal use.

Chairman Van de Water and Member Hunter find it unnecessary to rely on *Gary-Hobart Water Corporation*, 210 NLRB 742 (1974), inasmuch as there is no "no-strike" clause at issue herein.

259 NLRB No. 85

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1492 (herein called Machinists), filed an original and amended unfair labor practice charge on July 22 and August 26, 1980,[1] respectively, against Kaiser Steel Corporation (herein called Kaiser). After an investigation, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Kaiser on August 27.

I heard the matter at Vallejo, California, on February 10, 1981.

The General Counsel and Kaiser each filed timely post-trial briefs which I have carefully considered.

Question Presented

Did Kaiser violate Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by its admitted actions in prohibiting employees engaged in a protected strike from removing their personally owned tools from its struck plant premises, where its admitted primary motivation was to "pressure" strikers to abandon the strike by making it impossible for them to use their tools to obtain interim employment elsewhere, and under circumstances where Kaiser otherwise permits employees to remove their tools from the plant for their own use?

FINDINGS OF FACT

There are no material disputed questions of fact. The findings below derive from the uncontradicted and credited testimony of the witnesses and the parties' stipulations.

There were four witnesses. Kaiser's personnel manager, Michael Brundy, testified, *inter alia*, that Kaiser has "a policy during strikes not to allow tools to be removed basically to pressure employees into accepting [Kaiser's proposed] agreement terms and going back to work,"[2]

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[1] All dates are in 1980 unless otherwise specified.

[2] Brundy also testified that another reason for preventing removal of tools, although of lesser significance to Kaiser, is the desire to minimize

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and that this policy was implemented during a strike in July, as well as in some individual cases during strikes in 1974 and 1977, but that the policy has never been put in writing nor otherwise generally published. Machinists Business Representative Samuel Willis testified, *inter alia*, that he had never heard of such a policy until he learned that Kaiser had applied it during the July strike. Employees Robert Martin and James Boyles testified, *inter alia*, that Kaiser's agent, Brundy, refused to permit them to remove their tools during the July strike. I credit all of that testimony as just summarized in the main text, and make certain supplemental findings below.

Kaiser makes steel products at a plant in Napa, California,[3] where it employs about 850 employees who are represented by 8 craft unions, including the Machinists.

Kaiser requires its 50–70 journeymen machinists to furnish their own tool sets to use in connection with their normal work, just as it does its welders and electricians who are represented by other craft unions. These sets are normally stored in the plant. The tool sets owned by its journeymen machinists have a typical value of at least $2,500 per set. Except when they are on strike, Kaiser permits its employees to take their tools out of the plant. The record does not suggest that Kaiser claims any right to, or does, place any restrictions on, the use to which the employees may put those tools when they are thus removed.

In July, the Machinists and other craft unions including the Boilermakers were bargaining with Kaiser for new labor agreements to replace ones which had recently expired in their respective units. On July 11, the Boilermakers called a strike and established picket lines at the Napa plant. Employees represented by the Machinists honored the picket line and refused to work until the Boilermakers strike was called off on July 24.[4]

On July 14, journeyman machinist Martin located a job with another employer to tide him over during the strike. The job likewise required that he furnish his own tools. He went to Kaiser's plant on the same day to remove his toolset and Personnel Manager Brundy refused to allow him to do so. When Martin pressed the issue, Brundy said to him: "The only way that you're going to get any tools off this yard is if you terminate. That's up to you." Martin told fellow journeyman machinist Boyle about his experience and, together, they returned to the plant for a second try. Brundy again refused to permit either of them to remove their tools. After further discussion, however, Brundy permitted Martin and Boyle to enter the plant to apply a preservative to their toolsets so they would not rust while in disuse.

Analysis and Conclusions

The General Counsel, citing *Erie Resistor*,[5] argues that Kaiser's admitted actions were "inherently destructive" of important employee rights under Section 7 of the Act, especially the right to strike, which is also the subject of special recognition in Section 13 of the Act.[6]

Kaiser, dismissing the quoted phrase above as mere "buzz words,"[7] argues that Kaiser simply used an "economic weapon" at its disposal by impounding strikers' tools during the strike. Kaiser analogizes its actions to another use of "economic weapons" legitimately reserved to employers—that of the lockout. Kaiser further argues that employees' rights under the Act have never been held to include the "right" to obtain outside employment during a strike without interference by the struck employer. Kaiser thus claims that the Act does not prohibit its tool-impoundment tactic.

Neither party has called my attention to strict decisional precedent. My own research discloses no cases which are factually the same, but I believe that the Board's decision in *Fraley & Schilling, Inc.*, 211 NLRB 422 (1974), is arguably pertinent. In that case, there was a strike by drivers for the employer, including some who were "owner-operators" who had title to trucks sold to them by the employer, but who also had entered into "exclusive lease-back" arrangements with the employer. During the strike, the employer sought to "repossess" the trucks stored by the owner-operators at their homes or at other locations away from the employer's terminal. Other owner- operators who did not join the strike were permitted to keep their trucks where they normally stored them. The Board found that the employer's conduct in this regard violated Section 8(a) (3) and (1) of the Act.

Although it is not clear that the striking owner-operators intended to use the trucks to gain revenues from hauling for other firms, the employer, in attempting to repossess the trucks, told one owner-operator that he would not be permitted "to use the truck elsewhere." *Id.* at 436.

Although the employer in *Fraley & Schilling* committed numerous independent violations of Section 8(a)(3) and (1) of the Act, the Board did not link its finding of a violation in the truck repossession instances to such additional violations. The Board merely concluded that it

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the possibility of sabotage or theft. I do not find it necessary, in view of my ultimate disposition, to determine whether these latter considerations played any role whatsoever in prompting the development of Kaiser's tool impoundment policy during strikes.

[3] In calendar year 1979, Kaiser sold and shipped from its Napa plant goods and materials valued in excess of $50,000 directly to customers outside California.

[4] Kaiser would characterize the Machinists actions as a direct economic strike; the General Counsel would characterize their behavior as a "sympathy strike"; i.e., a withholding of services calculated to help the Boilermakers achieve their own economic aims. Both parties acknowledge, however, that the appropriate label for the Machinists strike participation is irrelevant to a resolution of the central issue herein since, under either label, the refusal by Machinists to work was concerted activity protected by the Act. See, e.g., *Gary-Hobart Water Corporation*, 210 NLRB 742 (1974), enfd. 511 F.2d 284 (7th Cir. 1975), cert. denied 423 U.S. 925 (1975).

[5] *N.L.R.B.* v. *Erie Resistor Corp., et al.*, 373 U.S. 221 (1963).

[6] Sec. 7 of the Act guarantees to employees, *inter alia*:

> . . . the right to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all such activities . . . .

Sec. 13 of the Act states:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

[7] Kaiser's br., p. 4.

was "discriminatory" to "penalize" strikers in a "term or condition of employment" by repossessing the trucks. *Id.* at 423. No extended rationale was offered for this legal conclusion and, therefore, its applicability to the instant case is not entirely clear.

The facts in the instant case are seemingly less favorable to Kaiser on the point at issue than those in *Fraley & Schilling* were to that employer. There, the employer at least had a colorable claim to have the trucks used only in connection with his own work since he had an "exclusive lease-back" arrangement with the owner-operators. By contrast, Kaiser has not introduced evidence which would suggest that the machinists tools were to be used "exclusively" in connection with work at Kaiser. Indeed, to the contrary, the fact that nonstriking employees are permitted to remove their tools from the plant justifies the inference that they may be used by such nonstrikers for other employment.

Accordingly, I would sustain the complaint herein on the strength of the Board's disposition of *Fraley & Schilling*. My further analyses and conclusions below address Kaiser's arguments on their merits should a reviewing body determine that this is a case of first impression.

Kaiser stresses that its motive was not "antiunion" or "hostile," citing its longstanding "amicable" bargaining relationship with the Machinists. This much may be acknowledged: Kaiser's tool-impoundment actions were not shown to have been part of any broader attempt to "bust" the Machinists and to remove it as a bargaining agent. Cf. *Fraley & Schilling, supra*. Rather, Kaiser was simply exploiting its position as a *de facto* possessor[8] of the tools belonging to its employees to make it more difficult for them to obtain employment in their trade elsewhere during the strike—and thus to make them more tractable to Kaiser's bargaining demands.

Kaiser insists on this latter point, characterizing its actions as merely an effort to use "economic weapons" at its disposal to aid in achieving its collective-bargaining aims. And Kaiser places ultimate reliance on the admonition of the Court in *Brown Food Store*[9] that "the Act does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.'" (*Id.* at 283.) Kaiser further correctly notes that employers have been sustained in the use of certain "economic weapons" which impinge on the exercise of statutory rights, such as the use of postimpasse lockouts (*American Ship Building, supra*), and even lockouts while continuing to operate the business with replacements (*Brown Food, supra*).Thus, Kaiser would apparently have me hold that once an employer's actions against strikers may be characterized as the use of "economic weapons" which are merely employed in furtherance of some bargaining aim, such conduct is beyond the reach of the Act's proscriptions.

I reject Kaiser's position. Neither *Brown Food* nor *American Ship Building* took the Board out of the business of performing the "delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *Erie Resistor, supra* at 229. Indeed, the Court in *Brown Food* adhered to the view that the Board must, in the exercise of its proper function, engage in such balancing tasks (*id.* at 282; see also *American Ship Building, supra* at 309).

Accordingly, while the Board may not be an "arbiter of the sorts of economic weapons the parties can use," neither may it abdicate its balancing task where, as I conclude below, Kaiser's choice of "economic weapons" conflicts with important employee rights under the Act. As the Court has recognized, this is an "often delicate" task, and it is especially so where the Court has not clearly defined the extent to which the "economic" impact of an employer's actions on the exercise of protected rights by employees may properly influence the "balancing" process.

It is clear, however, that the Board need not be blind to the potential economic impact on the exercise of employees' rights of permitting an employer to wield certain weapons. Indeed, it was with a view to the likely economic consequences that the Court was moved to conclude in *Brown Foods* that unless employers faced with "whipsaw" strike tactics were permitted to lock out union-represented employees and to continue to operate their business with replacements, they would be virtually helpless to respond to such tactics.[10] Given those unique economic realities, the Court therefore found it "wholly consistent with a legitimate business purpose" for the employer to have locked out nonstriking employees and continued its operations with replacements. *Id.* at 285.

Accordingly, the question presented here by Kaiser's attempt to prevent strikers from obtaining work elsewhere is not disposed of in Kaiser's favor merely by labeling Kaiser's actions as the use of an "economic weapon," nor by establishing that Kaiser was merely attempting to enhance its relative bargaining strength in its tool-impoundment tactic, and was not trying to achieve a total removal of the Machinists as the employees' bargaining agent. Instead, in assessing the legality of Kaiser's efforts to preclude strikers from gaining other employment during the strike, I must take into account the potential of that action for "creating visible and continuing obstacles to the future exercise of employee rights."[11]

In doing so, I start with the observation—to me an inescapable one—that Kaiser's tool-impoundment was a plain and visible act of discrimination directed against strikers—and only strikers—which would necessarily be viewed by them as punitive. Strikers could draw no other conclusion from the fact that Kaiser permits employees to remove their tools, including for use in outside work, unless they exercise their right to strike. It is further inescapable in my view that such discrimination necessarily discourages or tends to discourage the future exercise of such protected rights—a consequence which it could be presumed that Kaiser intended,[12] even absent the candid concession of Kaiser's agent, Brundy, that Kaiser specifically intended that its tool-impoundment tactic would have a direct impact on strikers' choices whether to remain on strike. See also in this regard Kaiser's acknowledgement on brief (pp. 2-3) that:

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[8] See fn. 15, *supra*.

[9] *N.L.R.B. v. Brown et al., d/b/a Brown Food Store*, 380 U.S. 278 (1965); see also *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965), on which Kaiser also relies.

[10] *Id.* at 284–285, in which the Court sympathized with the "dilemma" of an employer-member of a multiemployer bargaining group in such a situation, noting that the whipsaw strike "enjoys an almost inescapable prospect of success" unless a nonstruck employer-member may defensively lock out unionized employees and continue to operate with replacements.

[11] *Portland Willamette Company v. N.L.R.B.*, 534 F.2d 1331, 1334 (9th Cir. 1976).

> The primary purpose of this policy is to make it difficult for its striking employees to find interim employment elsewhere during the strike, with the intended result that said employees would be economically induced to terminate their strike on terms more favorable to Kaiser.

Thus, it is evident that if employees whose trade requires them—as the machinists' trade frequently does—to furnish their own tools as a condition of employment, then surely they will be inhibited in future striking by the knowledge that Kaiser will seize their tools and thus minimize their chances of securing outside employment during a strike.

It is properly noticeable in an administrative law system which deals regularly with the phenomena of strikes and other disputes surrounding the collective-bargaining process that strikers normally seek outside earnings during a strike. Thus, it has been observed that "Strikers certainly must support themselves during a strike and other employment is often the best, if not their only means of doing so."[13] It is therefore appropriate to take into account in this analysis the fact that Kaiser's actions, if permitted, would virtually preclude machinists from exercising the traditional option of seeking outside employment in their trade during a strike.

Moreover, I envision a number of additional troubling prospects in giving Kaiser license to impair the outside employment prospects of strikers by impounding their tools. Thus, if Kaiser's position is correct, then it seems equally open to it to use other "economic" measures to prevent strikers' employment elsewhere. For example, Kaiser could presumably use its economic influence in a community to discourage other businesses from hiring employees who have gone on strike against it—in short, to engage in an attempt to "blacklist" strikers in the community.[14] Or, to the extent that it were held that Kaiser may impound the tools which its strikers store in its plant, nothing would then seem to prevent it from sending agents to strikers' homes, garages, or other places where they might store tools in order to seize the tools and hold them hostage as a device to gain bargaining "leverage."[15]

Kaiser also emphasizes on brief (p. 2) that "Kaiser did not prevent employees from removing their tools at the end of their last shift prior to the strike, which many did." The potential legal significance of this information eludes me. If Kaiser's analogy to the lockout in *American Ship Building* is correct, then the presence or absence of a strike-in-progress is irrelevant; and Kaiser would presumably enjoy the right to impound tools on the eve of a strike—or even sooner; i.e., at whatever point at which a bargaining impasse has been reached and Kaiser decides to "bring its economic pressure to bear in support of its bargaining position." *Id.* at 308. Accordingly, Kaiser's failure to impound tools before the strike started does not affect the question of the legality of its admitted actions.

Kaiser argues predictably that the legality of its actions should not be determined solely by reference to the economic disadvantage which those actions visit on strikers. And it is true, as the Court observed in *American Ship Building, (supra* at 313):

> . . . there is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes.

But resort to these and similar comments by the Court, rendered in the context of weighing the legality of an employer's actions taken as part of the exercise of his traditional prerogative to manage his own business, is suspect in the context of this case. In the first instance, as noted above, Kaiser was not performing a traditional business-management function when it told strikers that they could not retrieve their own property from its plant. Traditional business considerations (e.g., prevention of sabotage or theft) were admittedly subordinate to its desire to prevent strikers from working elsewhere. Secondly, as an empirical matter, an employer's effort to interfere with a striker's ability to find interim work elsewhere is not the sort of "economic disadvantage which frequently attend[s] bargaining disputes." Accordingly, the Court's observations in those cases do not dictate the result herein.

While attempts to draw parallels between the rights of strikers and those of struck employers carry with them certain inherent difficulties, it must be recognized that there is a certain one-sidedness in Kaiser's position. At bottom, Kaiser suggests that employers should not only be privileged in continuing to operate with permanent replacements during a strike,[16] thereby maintaining their own flow of earnings, but that they should also be privileged in taking further measures to ensure that strikers not similarly be able to obtain earnings during a strike.

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[12] *The Radio Officers' Union of the Commercial Telgraph Union, AFL [A. H. Bull Steamship Co.]* v. *N.L.R.B.*, 347 U.S. 17,45 (1954); see also *Erie Resistor, supra* at 227-228.

[13] *Connecticut Foundry Company*, 247 NLRB 1514, 1518 (1980).

[14] An employer may not, for the purpose of punishing an employee for exercising his Sec. 7 rights, seek to prevent another employer from hiring the employee. *The Armstrong Rubber Company*, 215 NLRB 620, fn. 1 (1974).

[15] Kaiser nowhere argues that it had some right under property law to refuse to release the machinists' tools upon demand. Indeed, although it need not be determined herein, Kaiser's actions almost certainly involved a tortious conversion of its employees' tools which Kaiser merely held in a form of bailment for their mutual benefit. Kaiser would argue here—correctly, in my view—that its status as a civil or criminal law violator does not, *per se*, determine whether or not it violated employee rights under the Act. Thus, it would argue equally in the hypothetical situation just posed that nothing in the Act prohibited it from seizing employees' tools wherever they might be found.

[16] An established right of struck employers. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344-346 (1938), although Kaiser did not choose to exercise it during the strike involved herein.

In reality therefore, Kaiser seeks recognition of an entirely new arsenal of economic weaponry for use by struck employers. And, unlike the defensive lockout tactics legitimized by the Court in *Brown Food* and *American Ship Building* as measures which were appropriately tailored to unique business needs,[17] Kaiser's actions were not developed in response to any extraordinary challenge by the striking union. Neither did its impoundment of tools merely involve decisions about how, and under what circumstances, it would "manage its enterprise." *American Ship Building, supra* at 311. Instead, Kaiser sought to reach beyond internal management measures to measures designed to harm employees' options in finding other work in their trade during the strike.

It is not easy to discern precisely what "legitimate interest" of Kaiser's in seizing strikers' tools it is that should be "balanced" against the demonstrable harm to employees' traditional striking rights which were occasioned by Kaiser's actions. Kaiser would presumably claim that it is sufficient to show that Kaiser was merely trying to enhance its bargaining position by its actions. This "business interest" is, however, of an entirely different character than the unique purposes which were served by the respective employers' lockout actions in *Brown Food* and *American Ship Building*. One need not deny the legitimacy of such an interest as Kaiser rests on herein, but it is clearly one which is common to every struck employer; and it is difficult to assume that the Court intended in the cited cases to give blanket approval to any and all "economic" tactics by employers against strikers, without regard to their long-range potential for discouraging the use of the statutory right to strike.

In the final analysis, if the balancing function of the Board is to have substance, it must include an assessment of the economic impact on employees—and hence on their exercise of protected rights—of "weapons" chosen by employers to achieve for themselves the greatest possible bargaining leverage. If Kaiser may take advantage of the fortuities of its tool-storage arrangement to prevent the removal of those tools from its plant for use by strikers in interim employment elsewhere, there is no obvious reason why Kaiser could not with equal claim of legitimacy under the Act take other measures to prevent strikers from working elsewhere. And, if an employer may impair or frustrate entirely strikers' abilities to find other employment while the employer remains free to operate his business through the use of permanent replacements, then the exercise of the right to strike will be hollow indeed. For the obtaining of other employment by strikers has been the primary means by which they survive a strike of any substantial duration; and they will not exercise the right to strike if it means that they must bankrupt themselves to do so.

Congress, in exhibiting "repeated solicitude" for the right to strike,[18] did not thereby purport to guarantee that strikers would feel no economic pinch, or that they would always be successful in their striking aims, but it was at least contemplated that: "[a] legitimately-employed strike . . . in great measure implements and supports the principles of the collective bargaining system."[19]

The use of "weapons" calculated to render it difficult or impossible for strikers to obtain earnings elsewhere during a strike would render most striking economically futile from the employees' standpoint, and would thus eliminate the exercise of a right deemed important by Congress in "implement[ing] and support[ing]" the goals which Congress had in mind in establishing a national system of collective bargaining. *Ibid.*

Accordingly, I must conclude that Kaiser's actions were inherently destructive of important rights guaranteed to employees by Sections 7 and 13 of the Act. I must further conclude that Kaiser's claim of business justification—the desire to achieve leverage in collective bargaining—does not outweigh the considerations of public policy which are reflected, *inter alia*, in the "special deference" Congress gave to the right to strike including by the "positive command of Section 13 that the right to strike is to be given a generous interpretation within the scope of the . . . Act."[20]

CONCLUSIONS OF LAW

1. Kaiser is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Machinists is a labor organization within the meaning of Section 2(5) of the Act.

3. Employees represented by the Machinists were engaged in concerted striking activity protected by Sections 7 and 13 of the Act when, between July 11 and July 24, 1980, they honored a primary economic strike and picketing and refrained from entering Kaiser's Napa plant to perform their normal work there.

4. By refusing to permit such striking employees to remove their personally owned tools from its Napa plant in order to impair their ability to obtain other employment during the strike and under circumstances where Kaiser normally permits its nonstriking employees to remove their tools for their own purposes, Respondent has interfered with, restrained, and coerced employees in the exercise of rights protected by Sections 7 and 13 of the Act, and has discriminated against employees with respect to their terms and conditions of employment in order to discourage membership in, or activities on behalf of, labor organizations, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Kaiser violated Section 8(a)(1) and (3) of the Act by its tool-impoundment tactic against strikers, I shall recommend that Kaiser be ordered to cease and desist from those, or like or related, actions; and that it take certain remedial action, including the posting of a remedial notice to its employees at its Napa plant.

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[17] Maintenance of the integrity and bargaining effectiveness of a multiemployer group faced with whipsaw strikes (*Brown*); control over the timing of a business shutdown after bargaining impasse and where employer reasonably apprehended that the union would defer striking until time most damaging to employer (*American Ship Building*).

[18] *Erie Resistor, supra* at 233.

[19] *Id.* 233–334, citing legislative history.

[20] *Id.* at 234–335.

There is a question whether Kaiser should also be subjected to a "make whole" order. The proof at the hearing revealed that employees Martin and Boyles were prohibited from removing their tools, but Martin further testified that he was able to locate another toolset to use on the interim job which he had secured. Boyles states that he made two unsuccessful efforts to find interim work,[21] but then gave up, "knowing that I couldn't get a job because I couldn't get my tools." The General Counsel's brief is silent as to the appropriate remedy for the violation which he alleged. *Fraley & Schilling* does not provide clear guidance on this question.[22]

It strikes me as entirely appropriate, in the present circumstances, however, that Kaiser be ordered to make whole any strikers who were impaired in their ability to obtain earnings during the strike by Kaiser's refusal to let them remove their tools from the plant. Neither does it appear to be fatal to the propriety of such a make-whole order that no specific employee was shown at the unfair labor practice stage of these proceedings to have been denied some available job because of Kaiser's unlawful practices, especially where it would have been "futile" for strikers to have attempted to find such work when Kaiser was wrongfully impounding their tools. See, e.g., *Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO (Hancock-Northwest, J. V.)*, 247 NLRB 1250, 1251 (1980), and authorities cited. The complaint attacked Kaiser's general prohibition against removal of tools by strikers, and Kaiser admits that it was acting pursuant to a general policy and not merely withholding tools from particular individuals. Under those circumstances, I would not preclude the General Counsel from showing at the compliance stage, if the facts may so reveal, that strikers, including Boyles and others, were injured financially by Kaiser's refusal to release their tools. I have therefore provided in my recommended Order that Kaiser make any such employees whole, with interest, in accordance with established Board policies for the computation of backpay.[23]

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein, I issue the following recommended:

ORDER[24]

The Respondent, Kaiser Steel Corporation, Napa, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Penalizing employees who are engaged in a lawful economic strike by discriminatorily refusing to permit them to remove their tools from its plant in order to prevent them from obtaining interim work elsewhere.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Sections 7 and 13 of the Act, or discriminating against them with respect to their terms and conditions of employment in order to discourage membership in or activities on behalf of a labor organization.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Make whole with interest any employees who suffered losses of earnings during the period July 11-24, 1980, because they were prevented, in furtherance of Kaiser's unlawful tool-impoundment policy, from removing their tools to work at interim jobs.

(b) Preserve and, upon request, make available to the Board or its agents, all records which would aid in establishing the identities of striking employees in the period July 11-24, 1980, and any such employees who attempted unsuccessfully to remove their tools from Kaiser's Napa, California, plant.

(c) Post at its Napa, California, plant copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms duly provided by the Regional Director for Region 20, after being duly signed by Kaiser's authorized representative, shall be posted immediately in conspicuous places, including in all places where notices to employees are customarily posted, and shall remain posted for 60 consecutive days thereafter. Kaiser shall take reasonable steps to ensure that such notices are not altered, defaced, nor covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply with it.

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[21] Boyles' lack of success in the two job-search contacts he mentioned was because those firms had no openings—not because he had no tools.

[22] In that case, the administrative law judge did not clearly explicate why he found it appropriate that employees Clark and Woods be made whole for losses sustained in connection with the discriminatory repossessions, but not for periods while they were on strike (211 NLRB at 444). It may be that the Board, in adopting this portion of the administrative law judge's remedial recommendations—believed that the employer's "exclusive lease-back" rights would not have permitted striking owner-operators to use the trucks to gain independent earnings.

[23] *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); and *Florida Steel Corporation*, 231 NLRB 657 (1977). See also *Olympia Medical Corporation*, 250 NLRB 146 (1980).

[24] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[25] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Holiday Inn of Santa Maria *and* Culinary Alliance and Bartenders Union, Local No. 703, Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO. Cases 31-CA-8817 and 31-CA-9593

December 11, 1981

DECISION AND ORDER

By Chairman Van de Water and Members Jenkins and Hunter

On July 28, 1981, Administrative Law Judge James T. Barker issued the attached Decision in this proceeding. Thereafter, the General Counsel filed an exception.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exception and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Holiday Inn of Santa Maria, Santa Maria, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not, by inferring a threat to their job security, instruct our employees not to contact or consult with the Union, or representatives thereof, concerning problems or matters relating to their terms and conditions of employment, without first consulting with supervision or management with respect thereto.

We will not constructively discharge employees for contacting the Union concerning overtime pay or any other matter relating to their wages, hours, or terms and conditions of employment.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

We will offer Paul Flores, who was constructively discharged on March 2, 1979, immediate and full reinstatement to his former position or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

We will make Paul Flores whole for any loss of earnings, plus interest, he may have suffered as a result of having been constructively discharged.

Holiday Inn of Santa Maria

DECISION

Statement of the Case

James T. Barker, Administrative Law Judge: This case was heard before me at Santa Maria, California, on January 20, 21, 22, 28, and 29, 1981, pursuant to an order consolidating cases, consolidated amended complaint and notice of hearing issued on July 22, 1980, by the Regional Director of the National Labor Relations Board for Region 31. The charge in Case 31-CA-8817 was filed by the Culinary Alliance and Bartenders Union, Local No. 703, Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, hereinafter called the Union, on March 13, 1979, and was duly served upon Respondent; and the charge in Case 31-CA-9593 was

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[1] The General Counsel has excepted to the failure of the Administrative Law Judge to state, in his Conclusion of Law 4, that by constructively terminating Paul Flores on March 2, 1979, Respondent violated Sec. 8(a)(1) and (3) of the Act. The evidence supports the conclusion that Respondent's conduct violated said section, and the analysis of the Administrative Law Judge clearly indicates that his omission was by inadvertence only. We hereby modify the Administrative Law Judge's Conclusions of Law accordingly.

[2] In par. 1(c) of his recommended Order, the Administrative Law Judge included a broad cease-and-desist order against Respondent. We find it unnecessary to impose such a broad order against Respondent. As the General Counsel has not demonstrated that Respondent has a proclivity to violate the Act, or that Respondent has engaged in such widespread or egregious misconduct as to demonstrate a general disregard for its employees' fundamental statutory rights, a broad order is not warranted here. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). Accordingly, we will modify the Administrative Law Judge's recommended Order by substituting narrow cease-and-desist language for the broad language used by the Administrative Law Judge. There is no need to similarly modify the Administrative Law Judge's notice, since it already contains narrow cease-and-desist language.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

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filed by the Union on December 4, 1979, and service on Respondent was duly accomplished.[1] The parties were represented by counsel at the hearing and were provided full opportunity to make opening and closing statements, to examine and cross-examine witnesses, to introduce relevant evidence, and to file briefs with me. Counsel for the General Counsel and counsel for Respondent filed briefs with me.

Upon the basis of the entire record, the briefs filed in this matter, and my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all material times Respondent has been a corporation duly organized under the laws of the State of California, with an office and principal place of business located in Santa Maria, California, where it is engaged in the operation of a hotel providing food and lodging to guests.

In the course and conduct of its business operations, Respondent annually purchases and receives goods or services in excess of $2,000 from sellers or suppliers located within the State of California, which sellers or suppliers receive such goods in substantially the same form directly from outside the State of California. Additionally, in the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $500,000.

Upon the foregoing facts, which are not in dispute, I find that at all times material herein Holiday Inn of Santa Maria has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent concedes, and I find, that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The consolidated complaint gives rise to the following basic issues:

1. Whether Respondent violated Section 8(a)(1) and (3) of the Act by reducing the pay of Paul Flores on or about February 1, and by constructively discharging Flores on or about March 2.
2. Whether Respondent unlawfully terminated Deborah Mastriano on or about November 28, in violation of Section 8(a)(1) and/or (3) of the Act.
3. Whether Respondent violated Section 8(a)(1) of the Act by threatening to terminate Flores if he took complaints to the Union; by instructing employees in a meeting to bypass the Union and register any complaints directly with management upon threat of termination; and by separately instructing an employee to bypass the Union and take complaints directly to management.

Respondent denies the commission of any unfair labor practices and affirmatively contends, in substance, that Flores' termination was voluntary and not constructively caused. Further, Respondent asserts that Mastriano was terminated because she was grossly insubordinate and, in any event, the General Counsel failed in this proceeding to establish a *prima facie* showing that Mastriano's protected concerted activity was a substantial or motivating factor in her termination.

B. *Pertinent Facts*

1. Background facts

Stock ownership of Respondent is vested in seven stockholders, none of whom has professional training or experience in the operation of a hotel or restaurant enterprise. Prior to 1978 management of the Santa Maria facility was vested in a professional manager, with oversight and ultimate operational authority residing in the seven-member board of directors. In November 1978 the professional manager resigned following disclosures of improprieties in the operation of the hotel, including its restaurant and bar facility. In close conjunction with this event three of the stockholders, representing a 64-percent ownership of the total outstanding shares, formed an executive committee to assume control of the enterprise. Roger Ikola, a medical doctor specializing in the practice of pediatrics, became one of the members of the executive committee. Dr. Ikola's stock ownership was slightly in excess of 20 percent of the outstanding shares. For a transitional period of approximately 5 days, the day-to-day management of the hotel was vested in an interim manager. Key personnel had left following the departure of the prior manager and other personnel resigned in the aftermath. Then, the interim manager resigned for reasons of ill health. To conduce to the orderly conduct of business, Dr. Ikola identified the key personnel remaining in the various phases of the hotel operation and met with them. Deborah Mastriano was one of the individuals who attended this meeting at which Dr. Ikola outlined the problems confronting the hotel. He instructed the individuals present to report directly to the executive committee on matters pertaining to the operation of their area of responsibility and to take direction from the executive committee. After the meeting, Dr. Ikola met separately with Mastriano who had been identified to him as a senior employee assigned to the bar operation. Dr. Ikola charged Mastriano with the responsibility of eliminating the theft of liquor and other impermissible practices in the bar which had come to Dr. Ikola's attention. It was in this framework that Bruno Fava was employed to become manager of the Santa Maria facility.

At the time he was selected by the executive committee to become manager of the Santa Maria hotel operation, Fava had completed approximately 18 years of professional training in all phases of hotel management. Prior to assuming managership of Respondent's operations in December 1978, Fava had served approximately 10 years as general manager of the Vandenberg Inn, a principal hotel operation situated in Santa Maria. For approximately 6 months in 1977-78, Deborah Mastriano had worked as a waitress at the Vandenberg Inn.

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[1] Unless otherwise specified, all dates herein refer to the calendar year 1979.

The members of the executive committee hired Fava with knowledge of his track record of successful management at the Vandenberg Inn. At the outset, the board of directors instructed Fava to bring the operation under control by developing a chain of command, coordinating closely with the owners as a management team, employing good personnel, and running a "tight ship" in order to avoid the breakdown of discipline and proper supervision, which had contributed to the thefts of supplies and other breaches leading to citations and warnings by health authorities and the Holiday Inns of America, Inc., as well as to a substantial diminution in revenues. Union considerations played no part in either the decision of management to employ Fava as manager or in the formulation of instructions to him.

At pertinent times, Respondent and the Union were parties to a collective-bargaining agreement effective from April 1, 1975, until March 31, 1980. The agreement contained a union-security provision. The relationship between the Union and Respondent was a generally harmonious one. The Vandenberg Inn was a party to the collective-bargaining agreement during the period of time Bruno Fava served as manager there and in that capacity Fava had contacts with Ted Zenich, who served as secretary/treasurer of the Union. Bruno Fava assisted in negotiating the collective-bargaining agreement which became effective in 1975 for a term of 5 years, and he became co-chairman together with Ted Zenich of the Health and Welfare Trust Funds created and maintained pursuant to the collective-bargaining agreement.

Fava assumed management of Respondent's hotel operation with a commitment to a concept of systems management calculated to assist management in carefully controlling the purchase and depensing of food and beverages; the utilization of overtime or premium hours; and the acquisition and disposition of physical property. In the initial weeks of his tenure, Fava devoted his principal efforts to correcting the most pressing problems constituting a threat to the retention of the franchise. He recruited his uncle, Frank Fava, an experienced chef with approximately 50 years of experience in the restaurant industry, to serve as executive chef and to assume direct responsibility over the operation of the kitchen and restaurant facility. Fava had served in the capacity of executive chef under Bruno Fava at the Vandenberg Inn. Soon thereafter Bruno Fava removed the timeclocks which had been in use under previous management and instituted the use of daily timesheets requiring employees to sign in and out and to receive independent verification from supervision of hours claimed as overtime. Moreover, Fava instituted a system of ticket control in the cocktail lounge and dining room. Fava had a reputation in the community for running a "tight ship" and some of the personnel at Respondent's facility had worked under him at previous times at the Vandenberg Inn. A quantum of job-related apprehension concerning the future course of events existed among Respondent's employee complement during the early days of Fava's tenure as manager, and Fava was aware of this.

During the initial days of his managership at Respondent's Santa Maria facility, Fava looked for departmental leadership to the department heads and senior employees who remained after the transition in management. Thus, Deborah Mastriano served as bar manager, Richard Castaneda as chef, and until October 1979 Constance Antoigue remained as sales and catering director.[2] Antoigue possessed responsibility for booking and catering of all banquets, for hiring banquet personnel and scheduling their work, and for overseeing their performance in serving banquets. Castaneda relinquished his responsibilities as head of the kitchen operation when Frank Fava assumed his duties as executive chef.

In the spring of 1979 Antoigue, Phyllis Slaughter, and Lisa Ziemba conversed together concerning the advantages or disadvantages of continued union representation of the employees. As a result of their conversation, they agreed to speak with employees to determine their reaction. At the time in question Slaughter was serving as the head waitress on the night shift in the dining room and Ziemba was the dining room hostess. She is the daughter of one of the stockholders of Respondent. Antoigue spoke with approximately 10 employees and inquired whether they were satisfied with the Union and whether they desired to continue to be union members. She had received no instruction from Bruno Fava to undertake this endeavor but she did tell him of her activity. Fava neither encouraged nor discouraged the process.[3]

2. The alleged proscribed conduct

a. *The employee meeting*

During the first week of December 1978, Bruno Fava called a meeting of employees. The meeting was held in one of the banquet rooms and was attended by dining room, kitchen, and bar personnel. Department heads such as Constance Antoigue, Richard Castaneda, and Deborah Mastriano attended the meeting. Prior to calling the meeting, Fava had received information indicating that employees were contacting the investors directly concerning matters taking place in the transition, and he had received information indicating a quantum of employee resistance to his hire as manager and a fear of losing their jobs.

At the outset of the meeting, Fava introduced himself as the new manager of the establishment and informed the employees, in substance, that the operation was in a state of transition and that effort was being devoted to remedying problems and conditions which had accumulated under the previous management. Fava assured the employees that he was making no major changes but asserted that it was necessary for the employees to work as a team. Fava introduced the department heads and stated that he was organizing the operation on a chain-of-command concept which should be followed both in making suggestions for improving the operation and for lodging complaints. Fava admonished the employees to follow the chain of command by communicating first with the department heads. He added that his door was open to employees for discussion and that, if they could not receive satisfaction from their department heads, they were free to consult with him. Fava added that the employees should follow the chain-of-command concept in seeking to resolve their work-related problems and should consult first with him before going to the Union. Fava stated that if the employees did not follow his instructions, their job would be in jeopardy.[4] In this context he stated that he had known and dealt with Ted Zenich for a number of years. Fava added that Richard McGuinness would be limited to 2 days a month in which to collect dues on the premises. The employees posed questions to Fava during the course of the meeting, and he gave answers. The comments made by Fava in the early portion of the meeting followed a format he had used on previous occasions in prior years at other facilities.[5]

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[2] The parties stipulated that at relevant times Antoigue was a supervisor within the meaning of the Act. Prior to becoming sales and catering director in October 1978, she had served as a waitress in the dining room.

[3] The foregoing is based on a composite of the testimony of Diane Antoigue, Linda Stout, and Cheryl Barr. The thrust of Antoigue's testimony is to the effect that this undertaking was a voluntary one and not at the directive of management. The testimony of Linda Stout provides an inadequate basis to support a finding that the activity was undertaken pursuant to instructions from Bruno Fava.

b. *Castaneda seeks time off*

During the months of December 1978 and January 1979, Castaneda was working long hours. He communicated his desire for time off to Frank Fava who, in effect, requested Castaneda's forebearance. Finally, in late January Castaneda spoke with Mrs. Roger Ikola, the wife of one of the principal stockholders, and stated his desire to take some time off. Mrs. Ikola stated that she would speak with Bruno Fava concerning the matter. The following day Bruno Fava approached Castaneda and told him that he had the following day off and to have a "nice day." A few days later Bruno Fava approached Castaneda and told him not to speak with Mrs. Ikola about time off but to talk with Frank Fava. Subsequently, Castaneda observed Frank and Bruno Fava speaking together in Frank Fava's office. Thereafter, Frank informed Castaneda not to talk to Mrs. Ikola but to speak with him.[6]

c. *Flores contacts the Union*

Paul Flores was employed in the capacity of a cook in Respondent's operation from June 1977 until March 2, 1979, with an interruption of service between November 1977 and April 1978. Flores was compensated on an hourly basis until May 1978 when he was placed on salary and informed by the then chef that he would earn $700 per month. In the fall of 1978, Flores' salary was raised to $750 per month. Prior to December 1978, Flores occasionally worked overtime, and he was compensated for his overtime work. Flores was a member of the Union.

Incident to Frank Fava becoming executive chef, Flores commenced working a longer workweek than the 5-day week which had previously prevailed. This intensified schedule of work lasted through December and into January and motivated Flores to approach Frank Fava seeking both a reduction in his total hours and Sundays off for religious observance. Flores also informed Frank Fava that his paychecks had not included overtime compensation. Fava told Flores he would look into the matter, but suggested that Flores speak directly to Bruno Fava. Flores did not do so.

On or about January 20 Flores received his paycheck and approached Brenda Guisinger, one of three bookkeepers then employed.[7] He informed Guisinger that his check did not contain overtime compensation which was due him. Guisinger said that she would look into the matter and she informed Bruno Fava of Flores' complaint. Fava examined Flores' personnel file, and Fava noted that Flores was a salaried employee. He asserted that it was not the policy to pay overtime to salaried employees but instructed Guisinger to check with Frank Fava. Guisinger did so, and Frank Fava confirmed that Flores had worked overtime. Guisinger transmitted this information to Bruno Fava and Fava instructed her to pay Flores. Guisinger went to her office and calculated the amount which she believed was due Flores and spoke with Flores informing him of the amount to which she believed he was entitled. Flores became upset and spoke to Guisinger in a loud voice. He claimed that the amount was quite insufficient and that the Union was "going to hear about it." Guisinger responded that she had perhaps miscalculated the amount and noted that she was in the process of learning her job.[8] Guisinger reported to Bruno Fava the fact that Flores was upset and that she had apparently miscalculated the amount due Flores. Bruno became visibly upset and alluded to the fact that salaried employees were not paid overtime. However, he instructed Guisinger to pay Flores. Guisinger took the matter to one of the more experienced payroll bookkeepers who calculated the sum due Flores, and Guisinger learned that she had, in fact, erred in her earlier calculations.[9]

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[4] Fava had met earlier with department heads and had issued essentially the same instructions to them.

[5] The foregoing is based upon a composite of the testimony of Bruno Fava, Constance Antoigue, Richard Castaneda, Cheryl Barr, Steven Oclaray, Elinor Bewlay, and Linda Stout. I have also considered the testimony of Deborah Mastriano. I credit the testimony of Fava and Antoigue denying the testimony of Mastriano, Bewlay, and Stout to the effect that Fava stated, in terms, that employee resort to the Union would result in their termination. The testimony of Castaneda and Barr supports, by implication, Fava's denial of any statement so explicit in terms or meaning, for their testimony, like that of Oclaray, reveals that Fava appealed to the employees to come first to him with their problems before going to the Union. Nothing in his remarks *per se* foreclosed resort to the Union.

[6] The following is based upon the credited testimony of Richard Castaneda. I have also considered the testimony of both Bruno and Frank Fava with respect to the series of conversations which they had concerning Castaneda's time off. I do not credit the testimony of Castaneda to the effect that in separate conversations both Frank Fava and Bruno Fava instructed him not to go to the Union concerning time off. In the first instance, I discern no predicate for the instruction which Castaneda asserts was issued to him by Frank and Bruno Fava. Castaneda had not sought to invoke union aid nor had the Union on the terms of the collective-bargaining agreement been alluded to in the conversations between Castaneda and Bruno and Frank Fava. Moreover, Frank Fava specifically and credibly denied his admonishing Castaneda about union contacts, and Bruno Fava impliedly denied having issued such an instruction. I am convinced upon my observation of Castaneda as he testified before me at the hearing that he rationalized that portion of his testimony relating to warnings issued by the Favas against union contacts, and I do not credit it.

[7] Paychecks were normally received on the 5th and 20th of each month.

[8] Guisinger had previously handled accounts receivable and was in the process of learning payroll at the time in question. She also worked at the front desk.

Subsequently, during the height of the lunch hour, between 12:15 p.m. and 1:15 p.m., Bruno Fava went into the kitchen as part of his normal daily routine. As he entered the kitchen, he observed order tickets placed at the cook's station by waitresses awaiting Flores' attention. At the same time, he observed Flores speaking on the telephone and heard him ask for Ted Zenich. The phone at which Flores was speaking was located proximate to the kitchen entrance which Fava had used and, upon hearing Flores speaking, Fava told Flores to put the phone down and go to his work station. Fava added that the kitchen was busy, and he should make his phone calls on his own time. Nothing further was said. Subsequently, at approximately 2 p.m. or soon thereafter, Fava returned to the kitchen and spoke with Flores. He apologized for shouting at him earlier and explained that he had done so because the phone call had taken place during a busy period. Fava asserted that Flores should have waited until the proper time to inform the Union of any problems, rather than celling during the peak luncheon period. Fava then asked Flores if he was satisfied with the overtime compensation reflected in the revised check. Flores stated that he was.[10] At this point in the conversation, Fava told Flores that he was going to have to put him "back on to a contractual wage." Fava stated that he was doing this because it was his understanding, in substance, that the hours of salaried employees tended to offset and balance out and therefore they were not compensated for overtime on those occasions when they worked extra hours. Flores indicated his acquiescence in Fava's decision. As Fava and Flores conversed together they were observed by Castaneda from across the kitchen.[11]

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[9] The foregoing is based on a composite of the testimony of Paul Flores, Frank Fava, Bruno Fava, and Brenda Guisinger. To the extent that the testimony of Flores departs from that of the other witnesses, particularly Guisinger and Frank Fava, as to chronology of events surrounding his protest to Guisinger over the amount of overtime pay initially calculated, I reject Flores' testimony. Moreover, I specifically credit the testimony of Frank Fava to the effect that he advised Flores to speak directly with Bruno Fava concerning his overtime claim, and I do so upon my conviction that Frank Fava testified accurately and credibly that it was not his practice to become involved in matters of pay and compensation but routinely left those to front office resolution. Additionally, I credit Guisinger's testimony that, in speaking with Bruno Fava, she did not tell Fava that Flores had threatened to contact the Union over the overtime issue. I found Guisinger to have been a credible and reliable witness who manifested no bias by endeavoring to shape her testimony or shade the truth. I am convinced that when she reported to Bruno Fava that Flores was upset over the amount of overtime pay proffered she was concerned not with Flores threat to contact the Union but with the accuracy or inaccuracy of her own computation of the pay figure. She was inexperienced in payroll work and her reaction to Flores' remarks were entirely self-oriented. I conclude that, consistent with Guisinger's testimony, her accounting of her discussion with Flores on the matter was as terse and abbreviated as her testimony would suggest, and that Fava's response was as direct and as instructive as his testimony and that of Guisinger indicate. Contrary to the General Counsel, Bruno Fava's testimony is not devoid of any support for the finding that he instructed Guisinger to place Flores on "union scale." He testified quite directly that when he learned that Flores was on salary he felt a precedent he had established with respect to Castenada was being ignored and decided it was time to put Flores on the contractual rate. While Fava's testimony was sometimes imprecise and conceptual in nature, it is a fair inference, which I have indulged, that, as Guisinger testified, he translated his reaction into a specific directive.

[10] I am convinced that Flores so stated because he felt disinclined to challenge Fava on the issue at that time.

[11] The foregoing is based primarily upon the credited testimony of Bruno Fava. I have considered the testimony of Paul Flores and Richard Castaneda only to the extent that it is consistent with the foregoing findings. I have also considered the testimony of Frank Fava insofar as it serves to fix the time of the directive given Flores by Bruno Fava relating to his use of the telephone. In this latter connection, I specifically reject the testimony of Flores and of Castaneda to the effect that the directive and confrontation transpired prior to the lunch period. With respect to this facet of the case, Castaneda impressed me as a witness endeavoring diligently to assist Flores and the Union in the prosecution of the instant case. As against Flores' recollection of the time sequence, the convincing testimony of Bruno Fava finds credible and persuasive support in that of Frank Fava, and I am convinced that their testimony was not fabricated. With respect to the substance of Fava's remarks, I credit his version for I am unable to conclude that a manager of his experience, sophistication, and long-term involvement in dealing with collective-bargaining representatives would have articulated the direct threat which the testimony of Flores describes. I find that Flores embellished his testimony to serve his own pecuniary interest and that Fava's admonition to him was communicated in the terms which Fava testified it was. Contrary to the General Counsel, nothing in Fava's pretrial affidavit or his witness stand testimony with respect thereto lends credence to the contention that Fava eavesdropped on the conversation before pouncing on Flores with malice of forethought, so to speak. Fava's testimony establishes that his statement to Flores was direct and brief, and Flores' testimony supports this. Moreover, nothing in Flores' testimony suggests that he first dialed information for the number of the "Culinary Union" prior to placing his phone call wherein he requested to speak to Zenich. Upon this record, I am unable to indulge the assumption which the General Counsel requests. Nor do I indulge the General Counsel's interpretation of the reference "reaffirmed" contained in Bruno Fava's pretrial affidavit. The interpretation warranted by the record as a whole, and the one which I apply, is that the reaffirmation alluded to was of his earlier decision and instruction to Guisinger and had no reference to any earlier comment to Flores. In sum, taking into consideration the state of mind of both Fava and Flores at the time the telephone conversation transpired, and evaluating the experience and insight into the areas of permissible dialogue which Fava undoubtedly brought to the instant occasion, I conclude that the testimony of Bruno Fava is a more reliable gauge of the content of the exchange than is that of Flores'.

Moreover, the testimony of Castaneda attributing to Frank Fava a combination of adverse comments concerning Flores' call to the Union and admonitions to Castaneda not to contact the Union is rejected. Fava credibly denied these attributions, and my observations of Fava's personality and nature convinces me that, contrary to Castaneda, Fava did not allude to Flores as "a little bastard" and state that Flores had called the Union.

In crediting the testimony of Bruno Fava with respect to his reapproachment to Flores at approximately 2 o'clock on the afternoon in question, I have evaluated the evidence establishing that Flores was bona fidely convinced that he was entitled to overtime and, in that context, have weighed the acquiescence of Bruno Fava in directing the payment of any proper amount due Flores. In this connection, however, the evidence preponderates in favor of a finding, which I make, that prior to January 20 Bruno Fava had not theretofore been aware of Flores' status as a salaried employee and, as a matter of management predilection, reached a conclusion before the telephone episode that Flores, as a salaried employee, was required either to honor flexibility in the work schedule without resort to overtime or, on the other hand, be treated as an hourly employee and be accorded overtime. In a related sense, I credit Guisinger and the inferences drawn from the testimony of Bruno Fava that Fava spontaneously evinced surprise and dissatisfaction of the concept of compensating on a salaried basis a cook in Flores' job category. In concluding that Fava spoke to Flores in a conciliatory tone on the afternoon of the day in question and on that occasion advised Flores that he was being placed on hourly compensation, I credit Bruno Fava. I base this credibility resolution upon a further finding supported by the credited testimony of Bruno Fava and Brenda Guisinger that before the telephone incident and prior to speaking with Flores in the afternoon Fava had reached the decision to place Flores on hourly wages.

d. The alleged termination of Flores

The contractual wage rates in effect in January and February 1979 provided for compensation of the following classifications at the hourly rates shown:

Dinner cook—$4.25.5
Second cook—$4.04
Broiler cook—$3.82
Fry cook—$3.60

When the telephone incident occurred Flores was receiving a salary of $750 per month, or $4.37 per hour based on a workweek of 40 hours. The paycheck which Flores received on February 5 representing his compensation for the pay period January 16 through January 31 represented compensation at $4.25 per hour. This rate was used by Guisinger in an effort to comply with Fava's instruction to pay Flores at union scale. In checking the payroll on payday Fava noted the rate and called the three payroll clerks into his office and admonished them that he had directed Flores be put on union scale. Accordingly, Guisinger applied the contractual wage applicable to the fry cook classification in preparing Flores' next paycheck. Subsequently, on February 20 Flores received his paycheck covering the 2-week period February 1 through February 15, and it reflected an amount representing an hourly rate of $3.60 per hour. Upon a receipt of his paycheck on February 20, he protested to Bruno Fava who instructed him to speak to Frank Fava. He did so and Frank Fava showed him the contractual rate schedule. Flores protested that he was being given the "bottom figure" which he characterized as "ridiculous" in light of his experience. Frank Fava agreed to pay him $3.75 per hour. Flores walked away.

Soon thereafter Flores, spoke with Frank Fava in Fava's office and told him that he was giving him 2 weeks' notice. Flores stated that he was working too hard, that too much work was expected of him, and that the pay he was receiving as a result of the adjustment resulted in his "not making enough money." Fava responded by noting, in substance, that improvements had been made in the operation and staffing of the kitchen operation and that an employee had been hired to make salads and cold sandwiches, thus easing the work burden for Flores. Fava did not endeavor further to dissuade Flores but advised him that, if a qualified employee became available in the next 2 weeks, he would employ him. He added that if this occurred, he would have to terminate Flores.

On February 27 Frank Fava hired a breakfast cook whom he considered fully qualified. Fava instructed the new employee to commence work the following day, and he told the payroll department to prepare Flores' checks. Flores was compensated at the rate of $3.75 per hour for his work through February 28, and another check was issued dated March 2, 1979, compensating Flores for 16 additional hours of work at the rate of $3.75 per hour.

Flores credibly testified that he gave notice of his intention to resign because he felt that in so doing he could "jar" Fava into raising his wages to an hourly rate more akin to that represented by his previous salary. Fava credibly testified that he hired a replacement for Flores when a qualified applicant presented himself because qualified help was in short supply. When Flores proffered his resignation, he had not secured employment elsewhere, nor had he secured another job on March 2 when he left Respondent's employ.

As found, the three paychecks received by Flores on February 2, 20, and 28, respectively, reflected hourly wage rates of $4.25, $3.60, and $3.75. Upon learning of these variations in hourly pay rates, Bruno Fava verbally chastised the staff, comprised of one experienced payroll clerk and two relatively inexperienced clerks.[12]

e. *Mastriano terminated*

(1) Employment history

Deborah Mastriano was employed by Respondent from May 1978 until November 28, 1979, when she was terminated. She was employed as a bartender on the day shift and, as found, Mastriano served as bar manager.

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[12] The foregoing is based on a composite of the credited testimony of Frank Fava, Paul Flores, Brenda Guisinger, and documentary evidence of record. In crediting the testimony of Paul Flores regarding his motivation in giving his 2 weeks' notice, I have evaluated the suggestive nature of a key question leading to Flores' specification of his rate of pay as a force in his decision. Nonetheless, being convinced that the total context of Flores' testimony is such as to establish his wage rate as a factor in his decision, I have reached the findings of fact above made. However, in all other respects I credit Flores' testimony only to the extent that it is consistent with the foregoing findings. Initially, I became convinced as I observed Paul Flores testify at the proceeding before me that Flores was lacing his testimony liberally with rationalizations and extenuations which he knew to be harmful to the defenses being interposed by Respondent and fully supportive not only of his own pecuniary interest in this matter but also of the rationale of antiunion propensities on the part of Bruno Fava so foundational to the General Counsel's case. Flores' attributions to Bruno Fava and Frank Fava of direct, undisguised, and blatant expressions of hostility toward the Union and union-based motivation for the removal of Flores from salary and a reduction of his equivalent hourly wage rate exemplify the excesses of Flores' testimony, and this testimony is rejected. Moreover, my separate evaluations of Frank Fava and of Bruno Fava, as I observed them testify before me, provides insufficient foundation for the conclusion that either of them harbored resentment or hostilities toward the Union, or toward the concept of collective representation. Nor does this evaluation of them and their sworn testimony support the conclusion that either of them was so naive and lacking in judgment or self-control as to have articulated in specific terms the improper, union-related motivation for their wage actions, as Flores' testimony suggests. Particularly is this so here where Flores has manifested by his own actions a disposition or willingness to seek the assistance of the Union in matters pertaining to his own employment. In crediting the testimony of Frank Fava with respect to the exchange between him and Flores signifying Flores' severance, I do so for the reason that I consider Fava's account both of the conversation wherein Flores gave notice of his intention to quit, and of the severance interview, to be intrinsically credible. Moreover, Fava's accounts comport with the logical realities that then pertained. Fava had worked diligently to improve the operation of the kitchen, and had made demands on himself and other kitchen personnel to achieve the objective of bringing the kitchen into compliance with health codes and the demands of the Holiday Inn International. Further, he had assisted Flores in improving his cooking techniques. Moreover, qualified help was in short supply. I reject Flores' testimony to the effect that, when he proffered his resignation, Frank Fava was virtually unresponsive and merely acquiescent. I further reject the inferences of Flores' testimony that his relationship with Fava became strained due to the fact that Frank Fava had learned that he, Flores, had endeavored to contact the Union concerning his wages. Rather, I credit the testimony of Frank Fava to the effect that Flores advised him of his intentions to resign, that he endeavored to dissuade him and warned him that he, Fava, would hire a qualified applicant if one became available.

This position, which she held from November 1978 until approximately November 19, 1979, required her to schedule hours of other bartenders, order liquor for bar use, and inventory liquor stocks. During her term of service as bar manager, she had occasion to hire one bartender without clearance from her superior. Her duties as a bartender required her to pour drinks and wait on customers, to cut citrus fruits, and to maintain the cleanliness of the tables and bar. When Bruno Fava assumed managership of the hotel facility in early December 1978, he assumed responsibilites for scheduling the hours of work of all bar personnel and rescinded the right of Mastriano to hire. At the outset of her employment in 1978, Mastriano was compensated at a rate of approximately $4.78 per hour and was increased in her hourly pay when she assumed her responsibilities as bar manager. When Fava became manager of the motel facility, he reduced Mastriano's rate of pay to that provided for bartenders in the collective-bargaining agreement. Mastriano learned of this reduction in her hourly rate on December 20, the first payday following Fava's assumption of management of the hotel facility. Fava explained that her previous compensation had been above union scale and that she had been relieved of her responsibilities to schedule work. Fava added that he would wait and see how she performed her duties as a bartender. Mastriano's hourly rate of pay was raised in May 1979 pursuant to her request when she learned that the night bartender was being paid at a rate above her wage rate.[13]

During the period of her employment at the Vandenberg Inn in 1977 and 1978, as found, Mastriano worked first on the night shift as a waitress and then transferred to the day shift in the same capacity. Marlene Perez was serving in the capacity of coffeeshop manager, and Bruno Fava maintained overall supervision of the coffeeshop and restaurant operation. In the spring of 1978, at a time when Mastriano was working on the day shift in the coffeeshop, Perez was made supervisor of the coffeeshop and this distressed Mastriano. Moreover, Perez and Mastriano carried on a dialog for a period of days concerning the timely completion of side work prior to the end of the scheduled shift. For her part, Mastriano communicated her opposition to the installation of Perez as supervisor of the day shift. Perez had worked at the Vandenberg Inn for a longer period than Mastriano.

On an occasion in May 1978, just prior to the commencement of the lunch shift, Mastriano, Perez, and Bruno Fava sat together at a table in the dining area to discuss the matter. During the discussion, Mastriano became suddenly excited and exclaimed that she wanted to quit. Bruno Fava invited her to do so and she arose and threw a set of keys across the table. Her termination was effectuated that day, and other personnel, including Fava, handled the luncheon shift.[14]

Approximately 6 weeks after Fava assumed management of Respondent's operation, he had occasion to complete a verification of employment form on behalf of Mastriano. The form was submitted to Fava by a bank where Mastriano was seeking a loan. In completing the form, which Fava signed, the following remark was entered: "A very dedicated and responsible person. The remark was written on the face of the form by Bruno Fava.

During the early part of 1979, Fava complimented Mastriano with respect to the ease with which she had gained proficiency as a bartender and the good relationships that she had established with customers. In August 1979 Mastriano verbally informed Fava of her intention to leave her job and to move from the Santa Maria area. Fava attempted to dissuade her from this course of action, advising her that it would be a mistake for her to leave her friends. Fava added that she was doing a very good job as a bartender and there were many opportunities available to her in Santa Maria. Fava advised her to stay on. Mastriano took some time off commencing August 10 and went to San Diego for approximately 4 days during which time she looked for a job. She returned to Santa Maria on August 14 to attend the funeral of a very close male friend. Following the funeral, she went to the Holiday Inn and spoke with Fava who advised her to stay in her current position and to report to work the following day. Mastriano followed Fava's advise.[15]

(2) The prelude events

In the summer of 1979 Bruno Fava presented to the executive committee a plan to expend $60,000 in refurbishing the bar and cocktail lounge with the essential objective of improving its ambiance and seating capacity. In addition, Fava recommended that a stage and dance floor be constructed so that entertainment could be featured. The executive committee approved Fava's recommendation, and construction activities incident to remodeling and refurbishing the existing area commenced in early August. Incident to this a decision was also reached to install a computer bar system which metered the pour of liquor and beverages and conduced to the careful control of drink content and ratio of liquor costs to revenues. This concept was adopted by the executive committee and the remodeling effort continued until the end of October. In the interim, a banquet room adjacent to the dining room was set up as a temporary lounge. The grand opening of the new bar and cocktail lounge occurred on November 2, at which time all construction activity had ceased and only the installation of those connections and fittings to the computer bar remained to be accomplished. This involved work in a backroom separated from the bar by a common wall.

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[13] The foregoing is based on the credited and undisputed testimony of Deborah Mestriano.

[14] The foregoing is based on a combination of the testimony of Marlene Perez and Deborah Mastriano. In those instances wherein the testimony of Mastriano differs from that of Perez, I have credited Perez. In this aspect of her testimony, as in others, Mastriano impressed me as tending to embellish and extend her account in a manner which would redound strongly to her advantage and to portray Bruno Fava in an unfavorable light. To the extent that Mastriano's testimony suggests that Fava's attitude and directives were the precursor to her own emotional outburst and severance of employment, I reject it.

[15] The foregoing is based on the credited and undisputed testimony of Deborah Mastriano. While I am convinced that Mastriano overstated the effusiveness with which Fava complimented her in her capacity as a bartender, Fava did not testify in contradiction of Mastriano and I am convinced that the essential thrusts of Mastriano's testimony in this regard is accurate.

In the meantime, and in keeping with the decision of management to modify the character and focus of the bar and cocktail lounge operation, a decision was made to purchase uniforms to be worn by the cocktail waitresses and by Mastriano as a bartender. Dr. Ikola, as a member of the executive committee, made the decision because he considered the wearing of diverse types and style of street clothing by bar and cocktail lounge personnel detracted from the quality image management desired to establish.[16] In this connection, Dr. Ikola, accompanied by his wife and daughter, traveled to Los Angeles and visited a uniform supply shop. Ikola had his daughter model the uniforms and he took pictures of the four that he considered the most appropriate. He returned to Santa Maria with a sample uniform and the photographs which he had taken. At least three of the female employees of the bar operation, including Mastriano, participated in trying on and perusing the sample uniform. This was hurriedly done but resulted in the approval of the participants of the uniform modeled. From the photographs submitted to the executive committee a uniform was selected and ordered. In excess of $1,000 was expended in purchasing the uniforms.[17]

The uniforms arrived just prior to the November 2 opening of the refurbished bar and cocktail lounge. Mastriano tried on her uniform at home on November 2 prior to reporting to work and found the uniform too abbreviated and revealing to suit her. She took her uniform to work and in a conversation with Fava and other personnel she lodged her objections. In substance, Mastriano informed Fava that the uniform was too revealing at the top and so abbreviated in length that it inhibited her from stooping or bending over and performing the incidental bar duties required of her. One of the participants in the conversation suggested that a ruffle be sewn to the uniform and Fava acquiesced, believing that the additional ruffle would be applied only at the neckline. In the meantime, the cocktail waitresses wore their uniforms on duty. Linda Low and Jan Kuhule manifested their distress at having to wear them, and did so both to Mastriano and to Antoigue.

In due course, Mastriano wore her uniform, as modified by a ruffle at the neckline and a fringe ruffle applied to the lower portion of the uniform. When Fava observed this, he stated, in effect, that Mastriano had modified the entire appearance of the uniform and that he had given his approval to modifying only the top portion thereof. Albert Lavoie, who at that time was serving as a business agent of the Union and who visited Respondent's facilities frequently in furtherance of his duties, spoke with Mastriano who was wearing her uniform as modified by the ruffles. She took the initiative in informing Lavoie that she objected to the uniform as too revealing. Lavoie suggested that Mastriano speak with Fava concerning the matter, and he stated that he would also talk with Fava. Lavoie did so immediately thereafter, informing Fava that Mastriano had spoken to him and had objected to the uniform as too revealing. Lavoie asked Fava if the uniform were a standard one, and Fava said that it was standard, but had been modified by the ruffles. He further told Lavoie that the issue was essentially moot because he had given Mastriano permission to place ruffles on the uniform.[18]

During the next week on a daily basis, Mastriano communicated to Fava her objection to wearing the uniform. Her objections would be lodged in the form of comments relating to her embarrassment over having to wear the uniform, the unfavorable reactions of her friends and customers, and the fact that the male night bartender did not have to wear a uniform. As a result of these conversations, on or about November 15, Fava instructed Mastriano that she could wear her slacks and blouse, as she had requested. Prior to taking this action, Fava had communicated to Dr. Ikola the complaints of Mastriano and others concerning the uniforms and Dr. Ikola had instructed Fava to make the decision he considered appropriate. He added that he would prefer the uniforms to be worn, if possible.[19]

In the month of October, Fava received reports that Mastriano was rolling dice with customers and that significant amounts of money were changing hands. It had been acceptable practice in the bar and during the luncheon period for customers to roll dice with the cocktail waitress for the tip. The reports which Fava received indicated that Mastriano's dice-rolling activities went beyond this practice. In late October he encountered Mastriano in the bar area rolling dice for substantial amount of money. Later he spoke with Mastriano and instructed her that this was an impermissible practice and directed her to cease. Despite his directive to Mastriano, Fava had the impression that Mastriano continued her practice.[20]

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[16] Dr. Ikola credibly testified that cocktail waitresses and bar personnel were wearing clothing of their own choice and, in his opinion, this portrayed a "no class" operation.

[17] The foregoing is based upon a composite of testimony, including that of Dr. Ikola and that of Deborah Mastriano. The essential aspects of the above findings are not in dispute.

[18] The findings with respect to the conversation between Lavoie and Mastriano are based on a composite of their credited testimony, but I have principally relied on the testimony of Lavoie. In addition, the findings with respect to the conversation between Lavoie and Fava are based upon a composite of their testimony. I am convinced that Fava was inaccurate in his recollection that his conversation with Lavoie did not take place until on or about November 15 and subsequent to the time when he had instructed Mastriano that she could cease wearing the uniform. Because Lavoie was a frequent visitor to Respondent's facility, I am convinced that the conversation between Mastriano and Lavoie would have transpired at a time earlier than the time fixed by Fava for their exchange. Implicit in this finding is the further conclusion that Lavoie spoke to Fava on the matter immediately subsequent to his conversation with Mastriano.

[19] The foregoing findings are based on the credited testimony of Bruno Fava, as augmented by that of Dr. Ikola. Specifically, I credit the testimony of Fava to the effect that his directive to Mastriano that she could cease wearing the uniform transpired in mid-November. In this connection I have considered and credited the testimony of Lisa Ziemba, Kelly Connell, and Brenda Guisinger to the effect that during the final week of her employment while on duty Mastriano wore street clothes and not her uniform. I credit the testimony of Debbie Mastriano only to the extent that it is consistent with the above findings. Moreover, I reject the testimony of Richard McGuinness and Ted Zenich to the extent that it infers that Mastriano was still wearing her uniform on duty on or about November 27 when they had conversations with her.

[20] The credited testimony of Bruno Fava supports the foregoing. I have considered the testimony of Deborah Mastriano, Richard McGuinness, and Ted Zenich and conclude that their testimony supports the

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Incident to the installation of the new computer bar, Mastriano expressed her opinion to Fava that the customers would not respond favorably to this method of dispensing drinks. Mastriano expressed the feeling that her customers would prefer to see the bartender physically pour the drink. Fava stated his disagreement.

In mid-November McGuinness visited Respondent's facility in one of his routine visits. He was approached by Fava who showed him a list of bartender duties which he had posted and which he had called to the attention of the bar personnel. McGuinness took no exception to the content of the posting. In the course of this conversation, Fava told McGuinness that Mastriano was failing to cut citrus fruits, prepare juices, stock and rotate liquor, and to maintain the general cleanliness of the area in back of the bar. Fava also noted that Mastriano had complained about her uniform. He emphasized that Mastriano's rolling of the dice was too constant and consistent and that he was going to have to change this. He asked McGuinness as a representative of the Union to speak with Mastriano. McGuinness noted that he felt the construction which was then taking place incident to the installation of the computer bar system rendered it very difficult to maintain the cleanliness of the back bar area. McGuinness agreed, however, to speak with Mastriano and he did so on the same day or the day following. In effect, he summarized the nature and substance of Fava's complaints. Mastriano denied the accuracy of Fava's evaluation concerning the condition of the back bar area and her performance of her bartending duties. Additionally, Mastriano asserted that she had ceased rolling dice a week earlier, and she reiterated to McGuinness her objections to the uniform and requested his evaluation of its propriety. McGuinness stated that he felt the uniform was "very attractive" but agreed that without the lace it "would be just a little bit too revealing." McGuinness added that he wished to maintain harmony between management and the Union and its membership. He counseled Mastriano to do all she could to fulfill her duties. During the conversation, McGuinness formulated the impression that Mastriano was upset and very disturbed about something extraneous to the content of their conversation. Mastriano declined to explicate her feelings in this regard.

Following his conversation with Mastriano, McGuinness returned to his office and communicated Fava's complaints and Mastriano's responses to Ted Zenich. He told Zenich that he had studied the list of bartender's duties which Fava had posted and which Fava had requested the bartenders to sign. McGuinness stated that he considered the list satisfactory. He also told Zenich that there appeared to be something disturbing and upsetting Mastriano which he did not reveal to him.[21]

On Saturday, November 17, Fava called Mastriano at her home and requested her to come to the bar to assist in the installation of the dispensing system of the computer bar. Mastriano countered that the installer was scheduled to come in the following evening. Fava contradicted her and stated that installation was to take place that evening. Mastriano communicated her reluctance to come in as requested, and Fava responded that he and the maintenance man would handle the matter themselves. On Monday, November 19, Mastriano reported for duty and spoke with Fava. She told Fava that she wished no longer to be bar manager and to be expected to report for work on weekends when she was not scheduled for duty. She stated her desire to be relieved of responsibility for ordering supplies and scheduling hours of work. Fava stated he would comply with Mastriano's wishes and would handle these matters. Thereafter, Fava took responsibility for these duties. The schedule which he prepared for November 26 changed Mastriano's reporting time from 10 a.m. to 11 a.m. and she was later told that there was no need to open the bar at the 10 a.m. hour.[22]

In the week that followed, Mastriano noted a cooling of Fava's attitude toward her. For his part, Bruno Fava formed the impression that, following his directive to Mastriano to cease wagering on the roll of the dice, she had became reticent and cool in her attitude, and the frequency of her complaints about work-related matters had increased.

On November 20 Mastriano complained to Fava that she had not been compensated for 3 hours of overtime work. (Mastriano had received her paycheck the previous day.) Fava explained that he had offset the 3 hours of overtime which Mastriano had worked against a like amount of time off which she had taken. Mastriano was not satisfied with this explanation and Fava offered to pay the overtime.

The following day Zenich appeared at Fava's office. He stated that he wished to talk to Fava. Zenich rarely came in person to the facility. At the outset of the conversation, Zenich broached the subject of Mastriano's uniform. Fava responded that that was no longer an issue because Mastriano had been authorized to wear street clothes. Fava was irritated and raised his voice a bit. He asked Zenich the real nature of his business, and Zenich inquired about the 3 hours' overtime. Fava offered his explanation for withholding the 3 hours of overtime pay.

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finding that Fava spoke to Mastriano concerning her rolling of dice. To the extent that the testimony of the latter three individuals suggests that Fava's chastisement of Mastriano pertained solely to her practice of rolling dice for tips, I reject it. The General Counsel introduced no evidence to counter the credited testimony of Bruno Fava to the effect that Mastriano was gambling for significant amounts of money in the bar area of the facility. In his pretrial affidavit Fava did not single Mastriano out as the offender among employees in this regard, but notwithstanding, the totality of the evidence establishes that she did gamble on the roll of the dice and Fava admonished her.

[21] The foregoing is based primarily on the credited testimony of Richard McGuinness, as supported by the testimony of Deborah Mastriano. The testimony of Bruno Fava supports in essential aspects the nature and tenor of McGuinness' testimony. In finding that the conversation transpired in mid-November, and not on or about November 27 as the testimony of McGuinness, Zenich, and Mastriano suggests, I do so on the conviction that the incident transpired in the 2-week period when Mastriano was wearing her uniform, as well as the further finding that Mastriano ceased wearing her uniform at least 1 week prior to her November 28 termination.

[22] The foregoing is based on the credited testimony of Deborah Mastriano which is not contradicted. The testimony of Bruno Fava supports the finding that the computer bar installation transpired on the approximate date testified to by Mastriano.

Zenich said that Fava would have to pay it. Fava said that it was his word against Mastriano's but that he would pay the overtime. At this point in the conversation, Zenich alluded to Fava's criticism of Mastriano for rolling dice and failing to properly perform all her bartender duties. Fava responded to these comments and Zenich stated that it appeared to him that Fava was harassing Mastriano. Fava also commented that if Mastriano was going to get upset "about every little problem" that perhaps Zenich should find her a job somewhere else. Following some small talk, the meeting ended.[23]

After his conversation with Fava, Zenich instructed Mastriano to meet with him in his office the following morning. Mastriano met with Zenich at approximately 9 a.m. on November 22.

At the outset of the conversation, Mastriano expressed the conviction that she was "going to get it" because she had come to the Union's office. Mastriano told Zenich that after he, Zenich, had left the Holiday Inn after speaking with Fava, Linda Guisinger and Lisa Ziemba had come to her and told her that following Zenich's departure from the Union Bnuno had gone into the dining room and remarked, "This big-titted broad, all she knows how to do is wiggle her ass and roll dice." Mastriano produced for Zenich's benefit a napkin on which she had entered some abbreviations to assist her in recalling the contents of Fava's alleged statement.[24] In context of this, Mastriano then described in some detail incidents of alleged sexual harassment of her by Fava. She further told Zenich that she had resisted these advances, and she expressed the opinion that her rejection of Fava in this respect had led to Fava's criticism of her work-related activities and conduct.[25] Zenich asked Mastriano why she did not bring these matters to his attention earlier, and Mastriano answered that she was afraid of losing her job if she came to the Union. She expressed her conviction that Fava would find a way to terminate her because she had put a hem on her uniform. Zenich instructed Mastriano to go to work. He also advised her that if Fava did terminate her that she should advise Fava that she had informed him, Zenich, of Fava's sexual harassment of her.[26]

(3) The events of November 28

On November 28 Mastriano worked as a bartender on her normal 11 a.m. to 6 p.m. shift. She was dressed in slacks and a blouse. Brenda Riley came on duty at 3 p.m. on the afternoon of November 28. Her shift overlapped that of Mastriano and continued on into the night shift of Kelly Connell, who relieved Mastriano as bartender at 6 p.m. Riley had had no previous experience as a cocktail waitress when she entered Respondent's employ at the end of September 1979. Riley testified that she experienced criticism and disharmony when working with Mastriano which she did not experience under other bartenders.

On the afternoon of November 28 when Riley reported to work, she went to the back area of the bar and put her coat away and quickly surveyed the bar area. She observed only a few customers and she then proceeded to the restroom. She was gone approximately 3 or 4 minutes. As she returned she was informed by a male member of the band that Mastriano was upset with her. Riley approached Mastriano to explain her absence. Mastriano stated that in her absence she had had to serve some customers. Riley apologized. At approximately 5 p.m., Joaquin (Zorro) Razo and Edith Souza entered the bar and occupied a table proximate to the waitress station located near one end of the bar. Razo and Souza arrived at a time when Riley had left the bar area for the purpose of obtaining fresh coffee. It was Riley's normal routine to obtain a fresh pot of coffee preparatory to the influx of evening customers. At this point in time, approximately 10 or 15 customers were in the bar and cocktail lounge. Razo and Souza sat for a time at the table without being waited upon. Finally, Mastriano went from behind the bar to the table and served a round of drinks to Razo and Souza. She remained at the table talking and rolling dice with Razo and Souza. She sipped on a glass of wine as she did so. When Riley returned with the pot of coffee, she was again told by a member of the band who was seated in the cocktail lounge that Mastriano was upset with her. Thereupon, Riley approached Mastriano and asserted that she had informed Mastriano that she was going to get coffee. At 5:30 p.m., Connell reported to the bar preparatory to commencing his bartending duties at 6 p.m. Upon entering the bar area, Connell walked directly to the waitress station at the bar. As he reached the station, Mastriano approached him from the table area situated in the cocktail lounge proximate to the waitress station. Referring to Riley, Mastriano called Riley a "bitch" and stated that she had been "sitting on her ass." Mastriano appeared to be "upset" or "agitated." Connell detected the odor of liquor on her breath. Riley overheard Mastriano's comments and he thereafter gave her explanation to Connell regarding her absence from the bar area. Connell left the bar and went to the office area to obtain his bank of money for the night shift. This accorded to his normal routine. Connell's departure for the office occurred at approximately 5:40 p.m. In the ensuing several minutes Mastriano intermittently returned to her work station behind the bar and mixed drinks. She would then return to the table occupied by Razo and Souza. On one occasion, she left that table, went behind the bar, mixed drinks, and handed them across the bar to Razo as he stood across the bar near his table. Prior to completing her shift at 6 p.m., Mastriano had taken the proceeds and checks constituting her "bank" from the cash register and had placed the bank on the surface of the working area of the bar near the cash register. Normal routine would have required Mastriano to take the bank directly to the office and deposit it there. When he assumed his bartending duties at 6 p.m., Connell observed Mastriano's bank resting on the work surface where he normally placed his liquor bottles. Mastriano remained in the bar and sat with Razo and Souza at the table they had been occupying. In the interim, however, she received a telephone call from Zenich who asked Mastriano how her workday had gone. Mastriano said that the day had been "hectic" and stated that she "did not know what [was] going to happen" when she turned her bank into the office. After he assumed his bartending duties, Connell observed Mastriano rolling dice. Above the other sounds in the bar, Connell could hear Mastriano's voice and could also hear laughter coming from the table. A round of drinks for Raza and Souza were ordered by Mastriano through Riley with instructions to charge the drinks to Fava's A and P account.[27] Connell was aware that Mastriano was off duty, and in his own mind questioned the propriety of an off-duty bartender seeking to charge a customer drink to Fava's A and P account. Accordingly, he questioned Riley, asking her if the charge was intended to go on "Bruno's A and P account." Riley answered in the affirmative. Connell rang up the order on the ticket. Later, Riley placed another order of drinks for the same customers and, in the process of ringing up the order, Connell detected an error in the key annotation specifying the waitress ordering the drinks. Connell placed the ticket beside the cash register awaiting an appropriate time to discuss the matter with Riley. This transpired at approximately 6:45 p.m. Mastriano remained at the table in the bar and her bank remained behind the bar where she had placed it. Subsequently, at approximately 7:05 p.m., Connell had occasion to discuss the ticket with Riley and in the course of that discussion he observed Bruno Fava enter the cocktail lounge through the main entrance. Fava approached the waitress station as Riley and Connell discussed the ticket in question.[28]

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[23] The foregoing is based upon the credited testimony of Bruno Fava, as supported in substantive aspects by that of Ted Zenich. As the testimony of Zenich confirms in essential aspects the testimony of Fava regarding the context of their conversation, I find the portion of Fava's pretrial affidavit suggesting that the conversation related solely to the question of uniforms insufficient to warrant a rejection of Fava's testimony concerning this meeting. I specifically credit Fava's testimony that the conversation transpired on or about November 21. I have considered the testimony of Ted Zenich concerning this conversation, and I reject it to the extent that it is inconsistent with the above findings. I also specifically reject the testimony of Deborah Mastriano to the effect that incident to this conversation between Fava and Zenich, Lisa Ziemba came running into the bar and said that Fava was "all upset" at Mastriano because she had gone to the Union. Not only does this accounting have no other evidentiary foundation but in its recorded context is pure hearsay for the purpose of establishing Fava's asserted resentment against Mastriano for having consulted with the Union.

[24] Mastriano testified that Guisinger and Ziemba had reported Fava's alleged statement to her soon after it purportedly occurred. Both Guisinger and Ziemba credibly deny this.

[25] The incidents of sexual harassment alluded to by Mastriano were the subject of her independent testimony. Bruno Fava denies the conduct attributed to him. If it occurred, the conduct would have been substantial and not insignificant in character.

[26] The testimony of Ted Zenich and Deborah Mastriano forms the basis for the findings with respect to the substantive content of the meeting. I do not credit the testimony of Zenich and Mastriano to the effect that this meeting transpired on November 28.

Fava entered the bar area without prior knowledge of Mastriano's whereabouts or presence there. He knew that she had worked that afternoon and that her shift terminated at 6 p.m. Fava entered the bar area at approximately 7:05 p.m. He walked directly to the waitress station where Connell and Riley were speaking together. Fava did not observe Mastriano's presence in the bar. He spoke briefly to Connell and Riley and inquired how the cocktail hour was proceeding. Connell responded and then continued his discussion with Riley concerning the A and P tab. Fava, who was present, noted that the tab had a notation indicating that the charges on the check had been made to his A and P account. He commented, rhetorically, that he had just come in and Connell answered that he did not know anything about it. He said that it was not his and motioned to the table where Mastriano was seated. Fava turned and observed Mastriano seated at a table near the waitress station. He then took the ticket and walked in the direction of the bandstand. Mastriano approached him and asked to speak with him. Fava listened and Mastriano stated that Riley had let some customers wait unattended for 10 minutes and she had purchased some drinks for them. Mastriano told Fava, in substance, that Riley had sat and conversed with a member of the band instead of attending to her tables. She referred to Riley as a "broad" and a "bitch." Fava then went to the far end of the bar. He motioned for Connell to join him there. Connell did so, and Fava asked Connell again for a further explanation. Connell started to comment but was interrupted by Mastriano who walked quickly the full length of the bar from her table to where Fava and Connell were conversing. As she approached she addressed Connell and instructed him to tell Fava what she had told Connell earlier. Connell started to recount for Fava's benefit the statement which Mastriano had earlier made concerning Riley. However, Mastriano interrupted him, and she spoke in a still louder tone of voice. Mastriano repeated the phrase, "Tell Bruno what I told you," several times in progressively louder tones each time. She appeared highly agitated. Connell was unable to complete his statement to Fava. Connell continued his effort to give an accounting to Fava. Mastriano persisted in her loud interruptions and Fava interjected with the instruction to Mastriano to quiet down and permit Connell to explain. Fava stated that he could only listen to one person at a time. Finally, Connell addressed Mastriano and stated that if she would "shut up" he would be able to comply with her request. Customers where in the bar, and Mastriano's voice had reached a very high pitch. Finally, Fava raised his voice and addressed Mastriano. He stated, in substance, that she should keep her voice down and speak when she was spoken to. He added that he wanted to complete his discussion with Connell. At this point, Mastriano repeated several times in a very agitated manner the question, "What are you going to do, fire me?" In the process she touched Fava once or twice on the arm as she spoke. Finally, Fava responded, "Sweetheart, if that is the way you want it, you're fired. Go." Throughout this interlude Riley was standing nearby.[29] Mastriano responded, "I'll get you for this." She repeated this statement and added, "I'll have your ass for this." Fava walked away and as he did so Mastriano shouted that she was going to the Union. Fava responded, "Fine. Go ahead." Fava proceeded directly to his office.[30]

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[27] For the purpose of maintaining good customer relations and to serve the business interest of management, an advertising and promotions account was maintained. This account, known as "Bruno's tab," or "the house tab," or the "A and P account," was used for the purpose of expressing gratitude to a good customer, or for the purpose of soothing an irate customer with a valid complaint against the quality of service rendered. Some discretion in this regard resides with the bartender. Off duty bartenders have no authority to charge drinks to the A and P account.

[28] The foregoing is based on the credited testimony of John Kelly Connell, Brenda Riley, and Ray Biggs. I have considered the testimony of Deborah Mastriano and Joaquin Razo and credit it only to the extent that it is consistent with the foregoing findings. I am convinced that Mastriano engaged in liberal rationalization and exaggeration in testifying concerning this event, and I conclude upon my observation of him as he testified that Razo, despite his testimony to the contrary, had only a vague recollection of the precise details of the incidents concerning which he testified. Moreover, I am convinced that, contrary to his testimony, he was fully aware of Mastriano's interest in the proceeding and that he testified in a manner designed to assist Mastriano. I reject his testimony. On the other hand, I am convinced upon my observation of Connell as he testified concerning salient events that he endeavored to recount the incidents in which he was a participant accurately and without bias to the interest of any party. I found him a fully credible and convincing witness. Further, despite his association with Bruno Fava, I am convinced as I observed him testify that Ray Biggs gave an accurate and credible description of the activities of Mastriano and Razo which he witnessed in the time period described above. I credit Biggs. Finally, I conclude that Riley endeavored accurately to recall and describe the events involving her on the evening of November 28. From a compositive testimony, I conclude that her accounting is essentially accurate, although I infer that her absence from the bar area during the time period approximating 5 p.m. was longer than she recalled. Finally, I have considered the testimony of Bruno Fava with respect to the time of his arrival and ingress into the bar area, and as it further relates to the degree of latitude granted bartenders in the use of A and P tabs. I credit him in this regard.

Mastriano walked back to her table and spoke briefly with Razo and Souza. She informed them that she had been terminated. She then went to Fava's office and knocked on the door. Fava was inside the office seated at his desk. He had locked the door. He was upset and was endeavoring to gain his composure. Upon hearing the knock at the door, Fava walked over to the door, unlocked it, and opened it. He observed Mastriano who put her foot in the door in order to prevent Fava from closing it. Through the partially opened door, Mastriano said, "I have now got you." In so stating she laughed. Fava responded, "Get out. Please get out." He was able to close the door.[31]

Soon thereafter, Fava placed a telephone call to the Coachman Bar to determine if Ted Zenich was there. He knew that Zenich frequently patronized the Coachman Bar. He learned that Zenich was at the bar, and he went directly to the Coachman and spoke with Zenich. He gave his version of the events which had transpired earlier that evening resulting in the termination of Mastriano. Zenich expressed skepticism that Fava's explanation represented the true reason for terminating Mastriano. Zenich told Fava that Mastriano had spoken to him about Fava's harassment of her and proceeded to recount several incidents of sexual harassment of Mastriano involving Fava. Fava told Zenich that these claims were preposterous. Zenich interjected, ". . . you've been a thorn in my side all these years." The dialogue continued with Zenich and Fava exchanging recriminations.[32]

Thereafter, Fava returned to his office and spoke with Biggs who had come with his wife to the bar for a drink. In substance, Fava told Biggs that he felt that he was being "setup" in connection with the termination of Mastriano. Biggs was a friend both of Fava and of Zenich. He took it upon himself to contact Zenich and went to the Coachman to converse with Zenich. Biggs communicated to Zenich that he had spoken with Fava concerning the conversation which Fava had had with Zenich. He asked what could be done to resolve the matter. In substance, Zenich expressed resentment over the fact that Biggs would approach him in a bar, during leisure hours, concerning the matter in question. Zenich stated that charges had already been filed, and there was nothing he could do about it. He expressed his opinion that the best thing Fava could do was to pay Mastriano off. He mentioned a figure of $3,000. Zenich recounted to Biggs the information which Mastriano had imparted to him concerning the various instances when Fava had allegedly sexually harassed Mastriano.[33]

IV. CONCLUSIONS

A. *Prefatory findings*

This cases arises in context of an effort on the part of Respondent's executive committee and of Bruno Fava, the newly designated manager, to resuscitate the floun-

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[29] The foregoing findings are based on a composite of the credited testimony of Bruno Fava, John Kelly Connell, and Brenda Riley. I have carefully considered the testimony of Deborah Mastriano and of Joaquin Razo as that testimony relates to the above incident. I reject that testimony. Razo was not a credible witness, and Mastriano's recounting of the episode impressed me as grossly inaccurate and carefully tailored to omit details which would redound adversely to her interest. At the same time, Mastriano's testimony contained embellishments which would place her actions in the best possible light and distort the conduct of Fava. I specifically reject Mastriano's testimony on direct examination to the effect that in the presence of Connell and Fava at the end of the bar she endeavored in a totally dispassionate and rational manner to acquaint Fava with the background of the charges made to his A and P account and that he precluded any explanation. Moreover, I specifically reject Mastriano's testimony to the effect that in terminating her Fava said, "Yes, I know you have already been to the union. You're through." To credit this testimony would require a conclusion that Fava, Connell, and Riley joined in a conspiracy to perjure themselves and concoct a tale destructive of Mastriano's interests and supportive of that of Fava. I reject this notion. Nothing in my observation of these three witnesses supports the thesis and much in the category of evidence and the observations of this factfinder is consistent with the conclusion, which I reach, that Mastriano conducted herself in the aberrant, agitated, and angry manner found above. Manifestly, as I observed Mastriano as she testified before me at the hearing, she is a person easily moved to emotion and the verge of tears. If there is present in this proceeding an intentional falsification of testimony to support vested interest, the tendency, if not propensity, resided with Mastriano.

[30] The foregoing is based on the credited testimony of John Kelly Connell and Bruno Fava. I specifically credit the testimony of Connell with respect to the remarks which Mastriano made to Fava in response to his statement signifying her termination.

[31] The foregoing is based on the credited testimony of Bruno Fava. I have considered the testimony of Deborah Mastriano to the effect that she actually entered Fava's office, conversed with him, and heard and observed him place a telephone call to his attorney. I interpret this testimony as a further example of embellishment calculated to place the conduct of Bruno Fava in the most unfavorable light while strengthening the thrust of the case being presented on her behalf.

[32] I credit that portion of the testimony of Bruno Fava and Ted Zenich, which is consistent with the above findings. I specifically reject the testimony of Zenich to the effect that Fava told him in specific terms that he had terminated Mastriano because she had charged drinks to his A and P tab. I credit Fava's testimony to the effect that he summarized for Zenich's benefit the events leading to Mastriano's termination.

[33] The foregoing is based primarily on the credited testimony of Ray Biggs. I have also considered the testimony of Ted Zenich and credit it to the extent that it is consistent with the above findings.

dering Santa Maria enterprise, and to achieve efficiency and cost-effective reorganization of the principal revenue-producing aspects of the operation. The case arises also against the backdrop of our ongoing, essentially arm's-length but generally harmonious relationship between Fava and the principal union officials, on the one hand, and of the Union and Respondent's owners, on the other. No employee or union-sponsored initiative to counter Fava's managerial prerogatives accompanied the transition of Fava from manager of the Vandenberg Inn, a union house, to the Holiday Inn, likewise unionized. Nothing in the background of either Bruno or Frank Fava had revealed a propensity on their part to oppose legitimate involvement of the Union in employment interests; and no evidence of record exists inferring antiunion hostility on the part of Respondent's executive committee, or ownership group. There is no history of unfair labor practices on the part of either Fava or the executive committee, and Fava's management experienoe at unionized enterprises had spanned many years. Explicit in the record is evidence that Bruno Fava expected efficiency and dedication to duty, and desired adherence to the chain-of-command principle, but not to the exclusion of the Union or the contractual and other legitimate visitation rights of union representatives. In his regard, I conclude that Fava's announced intention to limit the daily visits of the Union's business agent, McGuinness, establishes nothing more than a desire on his part to balance management interest in maintaining productivity and work-time discipline against the rights of employees to be collectively represented. Moreover, the evidence developed by the General Counsel revealing activities on the part of some supervisors and leadership personnel to test the depth of support for the Union among rank-and-file employees is insufficient to show antiunion propensities on Fava's part. Not only does the record suggest that this activity was a spontaneous excursion on the part of a segment of the departmental leadership personnel, but the General Counsel appears to have attached so little weight to the evidence that no allegation of unlawful conduct evolving from this activity was included in the complaint.[34]

For his part, Bruno Fava impressed me as a strong, confident manager possessed of firmly held notions of operating proprieties and employee work obligations. At the same time, Bruno Fava impressed me also, as I observed him testify at the hearing before me, as an individual of basic goodwill and candid openness. In tandem, so to speak, his uncle, Frank Fava, impressed me as an essentially genteel man of courtly nature and a deeply held sense of commitment to professional standards in the practice of the cooking and culinary craft. Upon my evaluation of Frank Fava I find him to have been a completely honest witness in terms of recounting to the best of his recollection the incidents to which he was a party, and I am convinced that his essential nature is such as to preclude the likelihood that he would have spoken in the profane manner (suggested by the testimony of Castaneda) or that he would act vindictively in personnel or union matters, as the testimony of Castaneda and Flores would imply.

The initial challenge by an employee through the Union to the "new broom" elements of Bruno Fava's management effort involved Paul Flores and evolved from his honestly held conviction that Bruno and Frank Fava had exploited him in their efforts to modify and improve the kitchen operation to serve their own personal interests and "track record," so to speak. A second challenge, that of the Union relating to the termination of Deborah Mastriano, involves more subtle undercurrents. From the totality of my observation of witnesses called during the 5 days of the instant hearing, I am convinced, subliminally as it were, that there lurks at the foundations of this case a smoldering resentment on the part of Deborah Mastriano relating to elements of her employment experience at the Vandenberg Inn under Bruno Fava and to the delimiting effects of Fava's management policies upon her previous prerogatives, prequisites, and freedoms as a bar manager and bartender at the Holiday Inn, once Fava assumed management of that enterprise. There exists, as well, as an integral element of this case, a well-disguised, carefully controlled dislike of Bruno Fava on the part of Ted Zenich, the Union's principal officer, deriving from their years of association as management-union adversaries. The threshold conclusion in an analysis of this consolidated matter relating to the termination of Deborah Mastriano, and one not lightly articulated, is that Mastriano carefully orchestrated her termination, building the constituent elements of her case through a process of rationalization, exaggeration, magnification, innuendo, and rumor-mongering so as to enmesh allies through a process of encapsulating hearsay. As I observed Mastriano testify before me at the hearing, it became manifest that she was an emotional woman easily moved to tears. I became convinced, upon careful, painstaking scrutiny of her at the hearing, that these traits had generic origins quite separate from the concurrence of her task of testifying concerning alleged sexual harassment of her by Bruno Fava. During her testimony I became convinced also that Mastriano feigned guilelessness, a characteristic belied by reason of her own not unsophisticated maturity; by her experience as a bartender and waitress in an industry involving the continuous and direct exposure of its personnel to influences, interplay, and effects of contemporary morals and mores; and by the calculated skill with which she inserted into her testimony a stream of consciousness embroidery of hearsay and augmentation.

B. *Interference, Restraint, and Coercion*

At the outset, I conclude, in agreement with the General Counsel, that in speaking to his employees in December, in the course of his first meeting with the employee group following his assumption of managership at the beleaguered Santa Maria enterprise of Respondent, Bruno Fava unlawfully inhibited employees in their right freely to consult with their collective-bargaining representative concerning terms and conditions of employment by instructing them, upon threat of jeopardizing their job, to follow a chain-of-command procedure and to consult first with supervision and management before contacting the Union. This limitation upon the exercise of Section 7 rights violates Section 8(a)(1) of the Act even though it did not exclude the Union entirely from the consultative process and doubtlessly was closely related to a perceived need to bring order out of a chaotic situation. See *JLG Industries, Inc.*, 243 NLRB 540 (1979); *Interstate Transport Security/ Division of PJR Enterprises, Inc.*, 240 NLRB 279, 278 (1979).

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[34] The conduct was not time-barred by Sec. 10(b) of the Act.

It is on the basis of this impermissible instruction, I conclude and find, that the General Counsel, relying on testimony of witnesses favorable to Flores and Mastriano, endeavored to depict Bruno Fava as an overbearing manager bent on willfully disregarding the representative rights of his employees and the prerogatives of the Union as their chosen collective-bargaining representative. The evidence, as I view it, presents a different focus. At the outset, on the facts as I have found them, I discern nothing impermissible in the conduct or statements of either Frank Fava or Bruno Fava, as they involve Richard Castaneda and/or Paul Flores. Contrary to the General Counsel, the statement forming the basis of the 8(a)(1) allegations of the complaint contained no threats, and no implication of adverse consequence to derive from any contact either Castaneda or Flores might make with the Union concerning their wages, hours, or terms and conditions of employment. The limitation imposed by Bruno Fava upon Flores' use of the telephone during the lunch hour rush was entirely lawful and devoid of coercive effect, within the meaning of Section 8(a)(1) of the Act.

C. *The Constructive Discharge of Paul Flores*

I conclude and find that Respondent constructively discharged Paul Flores by reducing his rate of pay in a manner and to the extent of causing him to proffer his resignation. In this connection I find that the reduction in his hourly rate of pay, disclosed to him on February 20, was the moving cause in Flores' decision to offer his resignation. Finally, I find that Bruno Fava personally intervened in the compensation process on or about February 5 in a manner leading to the reduction in Flores' wage rate to a level below $4.25, the rate at which Flores was initially compensated after being removed from salary. Thus, the evidence establishes that, upon reviewing the paychecks to be issued on February 5, Fava directed payroll personnel to compensate Flores at a rate below $4.25. Fava appears not to have been specific as to the lesser amount intended. Pertinent, however, is the fact that the check representing a rate of $3.60 per hour—a reduction of 73 cents per hour from Flores' previous salary rate cleared—payroll and was issued on February 20 without being countermanded by Fava. The assumption is thus indulged that the $3.60 rate was the one intended by Fava. Fava was a cost-conscious manager keeping a tight rein on wage levels. The inference to be drawn is that, having issued instructions to payroll concerning Flores' rate of pay, Fava scrutinized the February 20 paychecks, or at least Flores', and that he knew the amount being proffered Flores on February 20 but permitted it to issue. I conclude therefore that Fava intended Flores to be compensated at the wage rate of $3.60 contractually accorded fry cooks—an entry level classification. Pointedly, Bruno Fava did not accede to Flores' complaint concerning the extent of his wage reduction, but merely referred him to Frank Fava who, by inference at least, suggested that Flores' proper rate of pay was that paid a fry cook. In due course, Frank Fava relented to the degree of agreeing to effectuate a $3.75 per hour wage rate, a rate 17 percent below Flores' average hourly rate under salary. Flores was not acquiescent and he submitted his resignation, being unwilling to accept the burdens of the job at the substantially reduced rate of pay. Clearly, in my view, the cut in pay was the moving force in Flores' decision to submit his resignation. Despite Respondent's contention otherwise, the entire context of the record establishes to my satisfaction that the substantial reduction in pay was the factor which rendered the terms and conditions of his employment intolerable to Flores.

In conjunction with the foregoing, I further conclude and find that Bruno Fava caused the reduction in Flores' compensation below $4.25 because he knew that Flores had endeavored to contact the Union concerning his dispute over overtime compensation and he invoked his decision to place Flores on hourly wages as a cloak for his retributive reduction in Flores' compensation. The elements of a constructive discharge are thus present because the reduction in Flores' wage rate caused, and was intended to cause, a change in his condition of employment sufficient to force him to resign, and these changes were imposed because Flores had resorted to the Union. See *N.L.R.B.* v. *Holly Bra of California, Inc.*, 405 F.2d 870 (9th Cir. 1969), enfg. 164 NLRB 1112 (1967); *Crystal Princeton Refining Company*, 222 NLRB 1068 (1976). Respondent correctly contends that Bruno Fava had reached a decision to withdraw Flores' salary and compensate him on a hourly basis before he became aware that Flores was endeavoring to gain the interposition of the Union. Moreover, the evidence establishes that Fava chastised Flores for using the telephone during the lunch hour rush and not because he was contacting the Union. However, by reason of the telephone interlude, Fava became fully aware that Flores was resorting to the Union in pressing his overtime compensation claim. In the labor market that existed, and in light of Flores' experience as a cook and his demonstrated willingness to take instructions from Frank Fava in the culinary arts, there existed no discernible reason grounded in objective business considerations for Fava to have accomplished the substantial reduction in hourly compensation which resulted. Frank Fava had leveled no criticism against Flores and had not sought Flores' termination. Only Flores' resort to the Union gives rational explanation for the decision of Bruno Fava to reduce Flores' hourly rate of pay and to acquiesce in a reduction to the level accorded new, relatively unskilled cooks.

Upon the foregoing considerations I conclude and find that the evidence preponderates in favor of a finding that Paul Flores was constructively discharged and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

D. *The Termination of Deborah Mastriano*

I find that the General Counsel failed to prove by the preponderance of the credible evidence that Bruno Fava terminated Deborah Mastriano because she engaged in union or other protected concerted activities. Rather, I find that Mastriano was terminated for gross insubordination and that Fava acted spontaneously as a consequence of severe provocation provided by Mastriano's loud, repetitive verbal challenges in proximity of customers during business hours. I further find that Fava had not planned Mastriano's termination and that antiunion or legally impermissible motivation arising from Mastriano's involvement in protected concerted activity was nowhere present.

The General Counsel contends that Fava terminated Mastriano because she had complained to the Union on her own behalf, and in the interest of other cocktail waitresses, concerning the nature of the uniforms which they had been instructed to wear, and that these complaints caused Fava to contrive pretexts for justifying Mastriano's termination. I view the record differently and conclude that Fava's asserted anger at Mastriano over the uniform issue was a bogus issue contrived by Mastriano and given credence by Zenich in an effort to launch an assault upon Fava's management techniques and code of discipline which had served to intrude upon Mastriano's past prequisites as a bartender. The record nowhere supports the notion that in Fava's mind the disenchantment of the cocktail waitresses generally, and the complaints of Mastriano, specifically, with respect to the uniforms, had become a matter of cardinal importance sufficient to justify a showdown. Rather, separate from the carefully orchestrated testimony of Mastriano and Zenich, the record reveals that Fava first endeavored to accommodate Mastriano on the issue of modifying the uniform, later experienced transitory anger over the objections being lodged by Mastriano about the uniform, acquiesced in Mastriano's wearing of the modified uniform, and finally permitted her to cease wearing the uniform entirely. Absent in this case is a sufficient showing on the part of the General Counsel that Fava took any exceptional actions with respect to the uniform issue. He advised Dr. Ikola, the stockholder who had initially selected the uniforms, and then communicated to the cocktail waitresses that Dr. Ikola preferred the uniforms to be worn, if possible. Beyond this he responded in a dispassionate manner to union officials who solicited his response. This falls far short of the *cause celebre* scenario depicted by Mastriano and advanced in support of the complaint by the General Counsel. The purported cooling of Fava's attitude toward Mastriano incident to the uniform complaint has explanation having to do with the self-oriented recalcitrance of Mastriano toward the concept of a computer bar, her refusal to report during a weekend to assist in the installation of a segment of it, and Fava's identification of Mastriano as an employee engaged in gambling on the premises through the roll of dice. In any event, although the record warrants the conclusion that Fava reached a point of exasperation with Mastriano, causing him to welcome a decision on her part to find employment elsewhere, the record, in my view, falls short of establishing that Fava took overt action to bring her employment to an end. Rather, the totality of the evidence establishes that Fava was being very circumspect not to force the issue of Mastriano's continued tenure and may have been influenced in this respect by the fact that he had once before been charged with a violation of the Act in the effectuation of Paul Flores' resignation, and by the active ongoing interest being demonstrated in Mastriano's complaints by representatives of the Union.[35] The relationship in terms of time between the episode involving Flores and the events of November 28 is remote, and supplies no compelling nexus to the action taken with respect to Mastriano. I find on the record as a whole that, on November 28 through words and actions, Mastriano intentionally provoked Fava into terminating her and that Fava responded solely out of agitation and anger generated by Mastriano's conduct during the course of the exchange which took place at the end of the bar in the presence of Connell. I find no violation of the Act evolving from this conduct.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Holiday Inn of Santa Maria is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Culinary Alliance and Bartenders Union, Local No. 703, Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By instructing employees not to go to the Union concerning work related problems until after they had discussed the problem with their supervisors and management, and inferring that their jobs would be jeopardized if they did not do so, Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed them in Section 7 of the Act and engaged in conduct in violation of Section 8(a)(1) of the Act.

4. By substantially reducing the hourly wage rate of Paul Flores because he had consulted with the Union concerning a dispute over the amount of overtime compensation due him, Respondent constructively terminated Flores on March 2, 1979.

5. Respondent engaged in no other conduct violative of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent constructively discharged Paul Flores on March 2, 1979, I shall recommend that Respondent be ordered to offer Flores immediate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings which he may have had as a result of the discrimination against him. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

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[35] Moreover, if Fava had been guilty of a process of sexual harassment involving Mastriano it is doubtful that in the face of union interest in Mastriano's other complaints he would have nonetheless carefully planned her termination thus inviting her wrath and legal recourse.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[36]

The Respondent, Holiday Inn of Santa Maria, Santa Maria, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Instructing employees to refrain from contacting or consulting with the Union, or representatives thereof, with respect to problems or other matters relating to their terms and conditions of employment until after they have consulted with supervision or management, and inferring that their jobs would be in jeopardy if they did not do so.

(b) Constructively discharging employees.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer Paul Flores immediate and full reinstatement to his former position of employment or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay or other benefits he may have suffered by reason of the discrimination against him, in the manner described in the section of the Decision entitled, "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Santa Maria facility copies of the attached notice marked "Appendix."[37] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[36] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections hereto shall be deemed waived for all purposes.

[37] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Bramble's Graphic Center, Inc. *and* **Fred P. Rousseau. Case 7-CA-15118**

December 11, 1981

DECISION AND ORDER

By Chairman Van de Water and Members Jenkins and Hunter

On May 1, 1979, the National Labor Relations Board issued an Order[1] wherein it ordered Respondent to offer reinstatement to, and make whole, Fred Rousseau for loss of pay suffered by reason of Respondent's discrimination against him. On July 9, 1980, the United States Court of Appeals for the Sixth Circuit entered a judgment[2] summarily enforcing the Board's Order. A controversy having arisen over the amount of backpay due the discriminatee under the terms of the Board's Order, the Regional Director for Region 7, on October 29, 1980, issued a backpay specification and notice of hearing alleging the amount of backpay due. Respondent failed to file an answer to the specification.

On August 27, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 2, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent failed to file a response to the Notice To Show Cause and, accordingly, the allegations in the Motion for Summary Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.54 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides, in pertinent part, as follows:

> (a) The respondent shall, within 15 days from the service of the specification, if any, file an answer thereto . . . .
>
> * * * * *
>
> (c) If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. . . .

The backpay specification and notice of hearing, duly served on Respondent by certified mail on or about October 29, 1980, specifically states that, if an answer to the backpay specification is not filed within 15 days from the date of service thereof, "such allegations shall be deemed to be admitted to be true and Respondent shall be precluded from introducing any evidence controverting them." Further, by letter dated January 23, 1981, Respondent's attorney of record was notified that an answer to the backpay specification had not been filed, that the time for filing had been extended until February 5, 1981, and that summary judgment would be sought unless an answer was filed. Respondent has not filed an answer to the backpay specification or to the Notice To Show Cause and, in accordance with the rule set forth above, the allegations in the backpay specification are deemed to be admitted and are found to be true. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bramble's Graphic Center, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall make whole discriminatee Fred P. Rousseau by payment to him of $3,550.90, plus interest to be computed in the manner specified in *Florida Steel Corporation*, 231 NLRB 651 (1977),[3] until payment of all backpay due, less tax withholding required by Federal and state laws.

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[1] The Order is not included in the volumes of Board Decisions.

[2] *N.L.R.B.* v. *Bramble's Graphic Center, Inc.*, Case 80-1217.

[3] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

Weirton Steel, Division of National Steel Corporation *and* Independent Steelworkers Union. Case 6-CA-12955

December 11, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 12, 1981, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified and restated herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified and set out in full below, and hereby orders that the Respondent, Weirton Steel, Division of National Steel Corporation, Weirton, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith on the subject of its stock investment plan with Independent Steelworkers Union on behalf of employees in the following bargaining units:

> All office clerical, plant clerical and technical employees, including research technician-A, research technician-B, technician-A, technician-B, junior technician, shop technician-A, shop technician-B, storekeeper, junior draftsmen, stenographer, receptionist, typist, typist-temporary-research and development, office girl, senior research technician, senior shop technician, and file girl employed by National Steel Corporation's Research and Development Department at its Weirton, West Virginia, facility; excluding all other employees, employees currently represented by labor organizations, confidential employees, managerial employees, and guards, professional employees and supervisors as defined in the Act.
>
> All office clerical, plant clerical and technical employees, including Industrial Engineer technicians, juniors and stenographers employed

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[1] Respondent excepts to the Administrative Law Judge's ruling excluding an abstract of its payroll records, contending that the payroll records were voluminous and therefore the abstract should have been permitted under Fed. R. Evid. 1006, 28 U.S.C.A. We find no merit to this exception, noting that, at the hearing, Respondent offered neither to introduce the original payroll records into evidence, nor to demonstrate that these records could not conveniently be examined in the hearing room.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the "Background Facts" section of his Decision, the Administrative Law Judge incorrectly stated that employees could contribute as much as 10 percent of their gross pay to the stock plan. The record reveals that the plan allows them to contribute a maximum of only 7-1/2 percent. Additionally, the Administrative Law Judge referred to the Independent Steelworkers Union as the International Steelworkers Union. These inadvertent errors in the Administrative Law Judge's Decision do not affect his conclusions or our adoption thereof.

Respondent excepts to the Administrative Law Judge's finding that Respondent's spokesman McCreary refused even to talk about the possibility of continuing the stock plan for employees in the bargaining unit, contending that this finding is unsupported by the record. On several occasions, McCreary agreed to talk about the possibility of Respondent continuing the plan and provided the Union with purported reasons for its refusal to continue it. However, in light of the Administrative Law Judge's well-documented finding that Respondent's purpose in refusing to consider continuing the plan was to discourage its employees from participating in union activities, we agree with the Administrative Law Judge that Respondent did not bargain in good faith with respect to this issue.

[3] The General Counsel excepts to the Administrative Law Judge's failure to conclude that certain statements made by Respondent violated Sec. 8(a)(1) of the Act. The Administrative Law Judge found that on August 8, 1979, McCreary told union negotiators that they could have the stock plan if they forgot about the Union. We agree with the General Counsel that McCreary made this statement in order to dissuade employees from supporting the Union and thereby violated the Act. We shall amend the recommended Order accordingly.

The Administrative Law Judge recommended that Respondent pay $75,000 per month to the credit of eligible employees for the time period in which they were deprived of the stock plan, in order to compensate them for the loss of earnings suffered in consequence of Respondent's illegal conduct.

The Administrative Law Judge found that May 1979, during which Respondent paid $75,000 into the plan to match employee contributions, was a representative period for the purpose of determining Respondent's backpay liability. Review of the record indicates that this issue was not fully litigated at the hearing. Accordingly, we shall leave to compliance proceedings the determination of whether May 1979 was a representative period.

The Administrative Law Judge also recommended that Respondent compensate employees for dividends that would have been earned on National Steel stock purchased by employee and company contributions if Respondent had not unlawfully discontinued the plan. We agree that Respondent must compensate employees for dividends on stock that would have been purchased by Respondent's matching contributions. However, we will not require Respondent to compensate employees for dividends that would have been earned on *employee* purchases of National Steel stock since this would go beyond our requirement that employees be made whole for losses suffered as a result of Respondent's unlawful action. We shall modify the recommended Order accordingly.

[4] We modify the Administrative Law Judge's recommended Order to apply to "employees in the bargaining unit" rather than "salaried employees."

by the Weirton Steel Division of National Steel Corporation at its Weirton, West Virginia, and Steubenville, Ohio, facilities, and National Steel Corporation's Commercial Management Services Departments at its Weirton, West Virginia, facilities; excluding all other employees, all employees currently represented by labor organizations, Labor Relations stenographers and typists, confidential employees, managerial employees and guards, professional employees and supervisors as defined in the Act.

(b) Denying employees in the above-mentioned units the continued benefits of Respondent's stock investment plan for the purpose of restraining and coercing them, and other employees of National Steel Corporation, in their union activities.

(c) Telling its employees that they could continue to enjoy the stock investment plan if they forgot about the Union.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain in good faith with Independent Steelworkers Union, as agent of employees in the above-mentioned units, on the subject of Respondent's stock investment plan.

(b) Make whole all of the employees in the above-mentioned units for all economic benefits denied them as a result of its discontinuance of their participation in its stock investment plan for the period beginning September 1, 1979, until such time as Respondent complies with this remedial order, in the manner set forth in the Administrative Law Judge's Decision, as modified herein.

(c) Post at its Weirton, West Virginia, and Steubenville, Ohio, plants copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain with Independent Steelworkers Union as agent of the employees in the units described below, on the subject of our stock investment plan.

WE WILL NOT deprive the employees in the units described below of the benefits of our stock investment plan for purposes of restraining and coercing them in their freedom to engage in union activities or to seek representation by Independent Steelworkers Union.

WE WILL NOT tell employees that they could continue to enjoy our stock investment plan if they forgot about the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make whole the employees in the units described below for loss of economic benefits resulting from our discontinuing their participation in our stock investment plan.

WE WILL, upon request, bargain in good faith with Independent Steelworkers Union as the agent of employees in the units described below on the subject of our stock investment plan. The bargaining units are:

All office clerical, plant clerical and technical employees, including research technician-A, research technician-B, technician-A, technician-B, junior technician, shop technician-A, shop technician-B, storekeeper, junior draftsmen, stenographer, receptionist,

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

> typist, typist-temporary-research and development, office girl, senior research technician, senior shop technician, and file girl employed by National Steel Corporation's Research and Development Department at its Weirton, West Virginia, facility; excluding all other employees, employees currently represented by labor organizations, confidential employees, managerial employees, and guards, professional employees and supervisors as defined in the Act.
>
> All office clerical, plant clerical and technical employees, including Industrial Engineer technicians, juniors and stenographers employed by the Weirton Steel Division of National Steel Corporation at its Weirton, West Virginia, and Steubenville, Ohio, facilitites, and National Steel Corporation's Commercial Management Services Departments at its Weirton, West Virginia, facilities; excluding all other employees, all employees currently represented by labor organizations, Labor Relations stenographers and typists, confidential employees, managerial employees and guards, professional employes and supervisors as defined in the Act.

WEIRTON STEEL, DIVISION OF NATIONAL STEEL CORPORATION

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held on October 15 and 16, 1980, in Pittsburgh, Pennsylvania, on complaint of the General Counsel against Weirton Steel, Division of National Steel Corporation, herein called the Respondent or the Company. The complaint issued on January 31, 1980, upon a charge filed by Independent Steelworkers Union, herein called the Union, on November 23, 1979. The principal issue of the case is whether the Respondent in truth committed an unfair labor practice by refusing to bargain about, or to continue, an established stock investment plan for the benefit of its employees in order to coerce them in their freedom to engage in collective bargaining through the Union. Briefs were filed by the General Counsel and the Respondent.

Upon the entire record and from my observation of the witnesses I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Weirton Steel Division of National Steel Corporation is a Delaware corporation, engaged in the manufacture and nonretail sale of steel and steel products at its Weirton, West Virginia, and Steubenville, Ohio, locations. During a 12-month period ending November 1979, in the course of its business, it purchased and received at its Weirton location goods and materials valued in excess of $50,000 directly from out-of-state sources. I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Independent Steelworkers Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background Facts*

National Steel Corporation is a large company which produces steel. It operates through a number of subdivisions, one of them, called Weirton Steel, is immediately involved in this case. Generally speaking, the major group of employees working for the entire company fall into two classes: (1) hourly paid production and maintenance workers, who are engaged in the direct production process; and (2) salaried office and technical workers, sometimes called clericals. There are large groups of both categories employed in the many subdivisions of the parent company, located in different cities. The production and maintenance employees have for some years been represented by the Independent Steelworkers Union, under regular collective-bargaining contracts. Up to the time of the events which gave rise to this proceeding, none of the office workers or salaried employees had been represented by any union.

One of the distinctive benefits enjoyed by all the salaried employees as a condition of their employment is the right to participate in what is called the stock investment plan, a fringe benefit not accorded to the production and maintenance employees. The salaried employees can, if they choose, contribute a certain percentage of their pay to this plan for the purpose of purchasing stock in National Steel. They can contribute as much as 10 percent of their gross pay. In turn, the Company is obligated, still under the terms of the plan, to contribute an equal amount—called matching funds—to the credit of each participating employee. What stock, as a result, the individual then comes to own, is determined by adding his and the Company's matching contribution. However, the plan provides that in no event is the Company required to contribute more than 7-1/2 percent of the employee's pay, in the event the employee chooses to contribute up to 7-1/2 percent or more. There are also detailed provisions for permissible increase or reduction in an employee's contribution or participation, withdrawal or reentry into the plan, etc., but these matters are not germane to the issue to be decided here. The overall plan is administered by trustees, under the terms of a written arrangement, and they have the right, clearly stated, to suspend the Company's contributions altogether in the event, in their opinion, the Company's economic condition so requires.

In 1978 the salaried employees—office clericals, plant clericals, technical employees, etc.—at the two locations operated by the Company's Weirton Division—one at

Weirton, West Virginia, and one at Steubenville, Ohio--turned to the International Steelworkers Union for representation. In consequence a Board election took place in each of the two groups, as separate bargaining units, and on September 28, 1978, the Union was certified as bargaining agent in each unit. There followed a series of bargaining sessions, 33 of them, starting in January 1979 and ending at the end of August of that year. The Company was represented by one committee, with John McCreary, vice president of industrial relations, as chief spokesman, and an employee committee of nine persons speaking for the Union, with their lawyer, Robertson. On August 30, 1979, the parties signed a comprehensive collective-bargaining contract covering both units.

Beginning with its first reaction to the Union's initial list of demands, and holding firm to the very end of the negotiation sessions, the Respondent adamantly, and without qualification, held firm to a refusal to accede to the employees' request that they be permitted to continue their participation in the stock investment plan. The eventual agreement signed makes no reference to the plan; the understanding was that these people would no longer enjoy that particular employment benefit is clear. Thereafter, the Union filed a charge with the Board, saying that the Company committed an unfair labor practice by withholding that plan from these particular salaried employees and by refusing to bargain in good faith about it.

B. *The Theory of Illegality*

The complaint speaks of the Respondent's conduct with respect to this stock investment plan fringe benefit as violative of three separate prohibitions set out in the statute. One allegation is that, by telling the employees they would retain the benefit only on condition they rejected representation by the Union, the Respondent violated Section 8(a)(1). Another allegation is that by denying them that benefit, in the contract as signed, it discriminated against them in violation of Section 8(a)(3). And then the complaint alleges that, by its refusal to bargain about the plan at all as a possible condition of employment throughout the negotiation sessions, the Company violated Section 8(a)(5), refusal to bargain. In the light of the evidence received at the hearing, oral and documentary, I view these as but multiple paraphrasing of a single idea, and it is that the Company illegally coerced and restrained the employees in their right to engage in collective bargaining. In fact, the complaint also alleges, as indeed it must, that by each of the separately articulated unfair labor practices it also violated Section 8(a)(1).

I think that the essential theory of illegality charged to the Respondent, however phrased, is that National Steel passed a message to all its salaried employees—both those at the two locations involved in this case and all those working for it at its many other locations—that if any of them chose to go union—as none had previously done—they would pay a price, and that the Company would see to it that they paid that penalty, by losing the very substantial financial benefit of participation in the stock investment plan.

In denying the commission of any unfair labor practice, the Respondent's principal defense is that the Company is not obligated to yield to any demand of the Union, that in the give and take of the bargaining process it is free to pick and choose among the demands and counterdemands, and that all it did in this case was say no in response to the Union's demand for an economic benefit to the employees. There are other defense contentions. The Company also asserts that it did discuss this particular demand among those of the Union's that it did bargain in good faith, that it gave substantial *quid pro quo* in return for withholding the plan, that the employees were anyway free to do as they wished. It is also argued that the Union did not have to settle and sign the binding contract finally agreed to, and since it voluntarily accepted the complete terms of a comprehensive agreement, how can it now complain that there was any illegal coercion.

C. *The Evidence: Analysis*

The confusing use of words in the complaint tends to distort the real issue of the case and therefore calls for clarification at the outset. At one point, the complaint stated that on August 30 the Company "excluded" these employees from further enjoyment of the stock investment plan. This is another way of saying that the Company that day took the benefit away from them, like cutting their pay. At another point the complaint stated that on August 8 the Company "promised to return" that same benefit to the employees on the condition they rejected the Union. How could the Company, on August 8, promise to give back something it never took away until 3 weeks later? Besides, the idea, literally expressed, that the Company "disqualified" these employees from the plan is incorrect. It did not do it as a unilateral act; in fact, as will appear below, its spokesman told the union committee, before August 30, it was up to them, it was for the employees to decide whether they wished to continue enjoyment of that benefit. And in the end, when they voted to ratify the agreement reached by the two committees in the final negotiation sessions, the employees said, "Allright, if we have to we will do without the stock investment plan."

This erroneous language in the complaint in turn tends to lend a certain superficial persuasiveness to some of the defense assertions. By merely pointing to the Union agreeing, as in the end it did, to doing without the stock investment plan, the Respondent effectively destroys, on the face of things, the alleged "discrimination" under Section 8(a)(3) of the Act. And talking between the parties there were, hundreds and hundreds of pages as recorded by the stenographer who were present at 33 meetings. The company spokesman said no a number of times to the Union's demand on this point. The law clearly saying neither party need concede any economic demand, there results a seemingly correct picture. In the circumstances, I think it best to start by stating in very plain English what this case is actually about.

That this stock investment plan has always been a very substantive condition of employment of the salaried employees, and therefore a mandatory subject of collective bargaining, is so clear as to require little citation of authority. *Winn-Dixie Texas, Inc. d/b/a Foodway*, 234 NLRB 72 (1978). There were about 1,050 employees in the two bargaining units involved. For the month of April 1979 alone, 529 of the employees were contributing 7-1/2 percent of their pay into the fund, an average of $112 per man. This means the Company was paying out to their benefit, under the matching funds system, an equal amount. Even today $25 a week is a good part of a man's pay. There were 298 other employees contributing a lower percentage of their pay, and therefore receiving less cash for work from the Company. All of these employees lost this part of their pay when the union contract was signed. And the reason was because from first to last the company spokesman held firm to a fixed no, refusing time and time again to even consider the possibility of continuing the plan.

Why did the Respondent do that? This is the question in this case. It will not do for the Company now to say no employer is obligated to grant any economic demand by a union. Of course it does not have to concede employee benefits in the bargaining process. It can even insist to impasse upon reducing the established hourly wage rate. It can discharge any employee it does not like, as has been said, for a good reason, for a bad reason, or for no reason at all. But if it reduces the pay, if it rejects a demand out of hand, if it fires a man, all for the purpose of discouraging and, intentionally, putting a stop to union activities, it violates this statute in every instance. That is what this law is all about. This is why every violation of Section 8(a)(2), (3), (4), and (5) of the Act is also a violation of Section 8(a)(1). "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." No matter how it is accomplished, be it by threat, creation of an employer dominated group, discharge of a man, retaliation for testifying at a Labor Board hearing, or refusal to bargain in good faith, if the purpose of the activity is to coerce the employees so that they will agree to discontinue attempts at union representation in collective bargaining, the conduct is prohibited, and not permissible at all. Has such an illegal purpose been proved in this case? It matters not how the complaint be phrased, the question remains the same.[1]

A very comparable case is *The Kroger Co.*, 164 NLRB 362 (1967), enfd. 401 F.2d 682 (6th Cir. 1968), cert. denied 395 U.S. 904 (1969). There, a savings and profit-sharing plan was involved, and there too, although the employees involved had previously enjoyed the benefit of the plan while not represented by any union, the company refused to talk about it with their newly chosen union and refused to include it as a benefit in the contract eventually signed. The only difference between that case and this lies in the nature of the evidence proving the illegal purpose. Unlike here, the *Kroger* plan, as written, *in haec verba* excluded any and all union-represented employees. It read as follows:

> Notwithstanding the foregoing provisions, any employee who is covered by a limited group pension plan as herein defined shall cease to be eligible hereunder and, if a member of this Plan, shall be considered to have withdrawn therefrom on the date when such coverage commenced. The term "limited group pension plan" means a plan for the payment of pensions or other retirement benefits which (a) is limited in its coverage to a particular group of employees, and (b) *is established by or at the request of the covered employees or their authorized representatives.* [Emphasis supplied.]

But unlawful motive, or prohibited intent, is rarely proved by explicit and direct evidence. The question is comparable to a charge of hidden unlawful purpose in the obstensibly justified discharge of an individual employee. Therefore, no two cases are alike and none can be determinative precedent for the next; good faith "can have meaning only in its application to the particular facts of a particular case." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395 (1952). While it is true that the statute provides that neither party to the bargaining process need yield its position on any lawful proposal ". . . one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at the bargaining table, or . . . to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail." *N.L.R.B.* v. *Herman Sausage Co., Inc.*, 275 F.2d 229, 232 (5th Cir. 1960).

D. *The Evidence*

In the case at bar, the proof of illegal motive in what was ostensible bargaining is twofold. Part of it appears in the recorded transcripts of the regular negotiation sessions that took place, where the established committees and their principal spokesmen participated. The second part is oral testimony at the hearing concerning a meeting where no transcript record was made, held shortly before the final collective-bargaining agreement was signed. I find that, viewed in totality, the evidence does prove affirmatively both that the Respondent's spokesman, John McCreary, refused to talk about the possibility of continuing the investment plan for these salaried employees in any form, and that the Respondent's purpose behind such refusal was to discourage both these and all its other nonrepresented salaried employees from any steps towards union representation.

One further detail must be clarified before the evidence is listed. Among its many starting economic and other demands which the Union wrote out and which the Company studied before any discussions took place were several that would have given these salaried employees more, in the stock investment plan, than they were at the moment enjoying. It was proposed that they be able to change their individual participation twice instead of once each year; that the Company match their contributions up to 10 percent of their salary, instead of only as high as 7-1/2 percent; and that the employees be permitted to contribute more than 10 percent into the plan, but with no obligation on the part of the Company to give over 10 percent. The Company rejected all proposals about the plan offhand. In the session there was mention of the fact that some of the suggested improvements in the plan would cost the Company more money. As the early meetings continued, the Union gave up on these suggested improvements and came down to the level where it asked for no more than exactly what the plan had long provided and was being enjoyed by the employees at that moment. The "no" response held firm. With this, clear on the record, the question of the case reverts to its basic form. Why did the Company, even then, and to the very end, refuse to talk about it at all?

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[1] The General Counsel's reliance, in his brief, upon *N.L.R.B.* v. *Benne Katz, Alfred Tinkel, and Murray Katz, d/b/a Williamsburg Steel Products Company*, 369 U.S. 736 (1962), is misplaced. There the employer acted unilaterally, just gave the employees a raise during the union organizational campaign. The Court held this was coercive, an unfair labor practice, because of the very nature of the act. From this the General Counsel argues that the Company here should be found to have acted illegally "without regard to respondent's subjective state of mind." The logical continuance of this argument is that, when unorganized employees start bargaining through a union, all negotiations must be upward, they must always end up with all they previously had plus what the bargaining process adds to their old quantum of economic benefits. But the General Counsel was careful not to go that far, and correctly so, because the position misconceives this entire case.

Another argument was made by the company spokesman, at certain early meetings, that must be mentioned. The overall, companywide plan is administered by trustees, all pursuant to terms and provisions spelled out in writing and approved by the Internal Revenue Service. As stated above, the trustees have the power to discontinue the Company's matching funds if economic conditions make it advisable. In his constant repetition of the phrase that he would never agree to incorporate the plan in any form in "any bargaining unit," McCreary said there might be the danger that such a contractual obligation on the Company would make it impossible for the trustees to stop the contributions in the event of economic stress. He may have been right on that score. But again the union spokesmen removed that obstacle. The Union's final position was it wanted, or at least was asking the Company to consider the possibility of continuing, the plan in precisely the same form as it was in effect at the time, including any limitations on employee enjoyment as it stood. But still again the answer was "no," without further talk.

There is a significant difference between an employer telling his employees they will not get more if they go union, and telling them they will without doubt lose something they already have if they persist in such activities. An employer has a right to bargain hard, as the cases say, and when that happens and the greater number of as yet unorganized personnel learn that their fellow employees gained nothing by paying union dues, they may well be discouraged from themselves pursuing that course. But when the employer takes pains to assure that in any union contract the employees have to surrender a long enjoyed and established benefit—and reveals its purpose to be that all the unorganized employees understand that—it effectively weakens any thoughts in the larger group to attempt unionization at all. This is what the words "restrain or coerce" mean in the statute.

The written transcripts of all that was said during the 33 meetings between the two committees span over 1,800 pages; all were placed into evidence. The following are pertinent excerpts from those transcripts:

March 22

McCreary: As to your demands relative to a stock investment program, we do not propose to offer it to you. [This was McCreary's initial response to the Union's demands touching upon the stock investment plan.]

April 16

Mr. Bakich [for the Union]: The counterproposal on the stock plan—what is your answer to our counterproposal to the stock plan to have the same system the way it is set up now, that will bind you to no contract whatsoever due to money difficulties within the corporation? Within the corporation, you can stop the existing plan at Weirton Steel. What is your answer to that counterproposal, Mr. McCreary?

* * * * *

Mr. McCreary: The Company's response of 31 through 34 [the four union demands touching on the stock plan] is the same as it was prior to your counterproposal . . . "The demands are rejected."

April 27

Mr. Petrella [for the Union]: I have a couple of questions. One is the company position on the stock. Does it still remain the same?

Mr. McCreary: You may assume, Craig, that all company positions remain the same unless I advise you differently in the course of one of these meetings.

May 18

Mr. McCreary: We never really got to that subject because the position of the management of National Steel Corporation in respect to these negotiations is: (1) No stock investment plan, and (2) no offset or no parody kind of arrangement for the stock investment plan. So, we didn't talk about the possibilities of parody. The stress of the meeting a week ago Wednesday with Mr. Angevine had to do with the potentially unhappy affects of agreeing with the ISU salaried committee on stock investments, primarily, but also some of the other benefits matters which are in issue on the potential for organizing salaried employees at other divisions.

May 31

Mrs. Shawver [for the Union]: You stated that the company is willing to pay for the right to management to run the business and all earlier in your talk there. But are you not willing to talk about the two, the rates of pay and stock program. We can consider these two issues an impasse as far as you are concerned right now?

Mr. McCreary: I didn't say I wasn't willing to talk about it . . . Somebody down at the end of the table asked me specifically about the stock plan, and

I said I was willing to entertain union proposals. I am willing to entertain any union proposals, obviously, for alternatives to the stock plan. Whether or not I can do anything about them at this point, I can't say.

August 13

Mr. McCreary: With respect to the stock investment plan, the Union Demands 31 through 34, the result of the meeting on the 6th of August was to reaffirm the Company's response to this demand dated 3/15/79 . . . The Company will not agree to . . . the Company will, obviously, discuss what the Union wants to discuss, but the Company at this point is not going to agree to any alternate to the stock plan.

* * * * *

Mr. Robertson [the union lawyer]: What is the Company's reasoning in not granting the Union's demand for a plan—first of all, we asked for a stock plan, and then we revised it to indicate that we would accept the stock plan which gave the Company the sole right to terminate the plan at any time they saw fit for economic reasons, to terminate for the rest of the salaried employees of National Steel. What is the reason that that cannot be agreed to?

Mr. McCreary: The reasons are simply-fold. Number one, it is expensive. We are not particularly charged up about the prospect of spending the money, at least not at Weirton at the present time . . . More to the point, I suppose is the prospective effect of giving the stock plan in a collective bargaining negotiation to a one-certified labor organization and the anticipated effect that that would have on other similarly situated groups, both other salaried groups and other production and maintenance groups, both here at Weirton and other divisions. It is the original hole in the dike that we don't want to put in the dike.

Mr. Robertson: You are afraid your other salaried employees will organize?

Mr. McCreary: No. We are afraid our other salaried employees will organize, and we are also afraid our other hourly employees will demand the stock plan.

* * * * *

Mr. Shawver: If we are getting slapped across the fingers, then fine. Let's call a spade a spade and say, "If you guys organize, we are going to take the plan away from you."

Mr. McCreary: Or you can look at it from the company standpoint, and that is there are extraordinary costs and expenses associated with the negotiation and maintenance of the union for salaried non exempt employees which are attempting to recoup or offset by not giving you the stock plan. We are saying the same thing in perhaps slightly less words.

* * * * *

Mr. McCreary: It is an expensive proposition to have a union.

Mr. Robertson: If you did not have these costs, would you be willing to offer the stock?

Mr. McCreary: It depends on why I didn't have the costs, I suppose, David.

* * * * *

Mr. McCreary: It depends on a variety of circumstances. Obviously, if the Company's position is that the stock plan or the absence of the stock plan is an offset for the additional expenses involved in maintaining the relationship with the union, and the company is not required to maintain a relationship with the union, it would have to look at its position with respect to the stock plan.

* * * * *

Mr. Robertson: My question is: Do you intend to provide the stock to the salaried non exempt employees in this union even though it is not a matter of contract?

* * * * *

Mr. Robertson: Your position, John, I guess, is that from the company's viewpoint, they cannot agree to the stock plan because in future organizational campaigns, they wish to be able to cite the fact that the stock plan, historically, is available to unorganized salaried employees; is that correct?

Mr. McCreary: That is correct.Yes.

Mr. Robertson: If you go the way of Weirton salary, you, too, will be faced with the loss of the stock plan.

Mr. McCreary: The possibility of the loss of the stock plan. As I say, elsewhere, as here, it is a mandatory subject of bargaining.

Mr. Robertson: And its omission from this contract shall exists as a veiled threat to other salaried employees of National.

Mr. McCreary: Veiled threats are in the eyes of the beholder. It will exist as a fact which people can view and reach their own conclusion about.

August 14

Mr. Robertson: It is a question of whether you have X number of stewards, and you are creating other positions, and if so, are they all entitled to lost time or is that a liability of the Union?

Mr. McCreary: If you drop your demand to pay them for some or all of this process, you can pick anybody you want to.

Mrs. Shawver: If we do that can we get the stock program?

Mr. McCreary: No.

After a July 27 meeting, the employee members of the union committee, frustrated by the endless talking that was accomplishing little of substance, and fearful of possible decertification of the Union a month later, decided to talk with McCreary without their lawyer, and without the formality of transcript recording. At their request, seven of the nine members met with McCreary and several of his committee group, on the afternoon of August 8, in the regular conference room. All seven of the union men present there testified. From their pertinent testimony:

> *Joseph Shawver*: . . . we were concerned about the impasse, as far as the stock program was concerned, and we asked him about this program, if there was any way that we could get this into our contract, to bring it back to our people, this was the final stumbling block, that we felt, as far as going back to our people, we could take the contract back and have it ratified, so we brought this up, at which time we were told . . . Mr. McCreary told us again, that there would [be] no stock program, as far as the C and T [clerical and technical] people were concerned, Weirton Steel Company. At that time, he said that there would be no stock program, to take back to our people, and that he had given us a contract that was inferior, and one that we felt that we could not take back to our people and have ratified.
>
> * * * * *
>
> JUDGE RICCI: Did you say on direct examination that at that August 8th meeting, did you quote McCreary as saying that the reason why the company did not want to give the union that stock plan, was so the employees would refuse to ratify the contract?
>
> THE WITNESS: Yes, sir, that's what I said.
>
> *Edward Simmons*: . . . Mr. McCreary did all the talking, and he said that in no way we are ever going to get the stock plan, and he even talked about some alternative methods of making up a difference in that loss, and he said that we weren't going to make up any sort of a difference, or get the stock plan either . . . he indicated that if he gave us the stock plan, the rest of the National Steel would be organized . . . he made more or less a statement that I can't make any promises, you know that, but if the union would just sort of disappear, you would probably maintain all the benefits that you enjoy now, because the hourly ISU unit down there.
>
> * * * * *
>
> Q. During the course of negotiations, did any employer representative tell you, or any of the negotiating committee, as to why the employer was not willing to agree to this stock investment plan?
>
> A. If you mean by during negotiations, all the meetings that we attended, I think the only one was that one that you referred to, where our lawyer was not present, there were seven negotiators there, where he was afraid the rest of the salaried in the corporation would be organized, if they saw that we were able to organize and keep all of our benefits, and the stock plan too.
>
> * * * * *
>
> A. I think I also stated that, he [McCreary] said I can't make you any promises, but if the union was just going to happen to disappear, then you would probably go ahead and enjoy the same benefits that you have enjoyed before the organization of the union.
>
> *Robert Lewis*: The nature of the discussion was that if Mr. McCreary did not intend to offer stock plan to any bargaining unit employees.
>
> Q. Did he give any reason for this?
>
> A. Well, not at that meeting though, meetings in the past, to be comparative and stuff with other companies, they did not intend to offer the bargaining unit people the stock plan, because we had become unionized.
>
> * * * * *
>
> A. The statement that I can remember was if the Union would walk away, then as long as he was present, we could keep our stock.
>
> Q. And that occurred at the meeting you recall as being August 8th, 1979?
>
> A. Yes.
>
> *Adam Hudek*: . . . the only comments, I believe that I can remember is that, I think Mr. McCreary mentioned that he wanted the union to go away, and some of the other negotiators had questioned him as to what status the stock plan was, and exactly what they were driving at, we never accomplished, or what they personally were driving at, I did not have personal comments with Mr. McCreary at that meeting, but it was not in reference to the stock plan.
>
> * * * * *
>
> Well, he discussed the issue, I believe it was with one of the negotiators, and he said something to the effect that the stock plan, he could not offer it, but obviously we had it before, and more or less that we would keep it, you know, if we did not have a union.
>
> * * * * *
>
> Q. Now, at that meeting, did Mr. McCreary promise you, that if you ceased supporting the Union, decertified the union, or abandoned your participation in the union, you would receive the stock plan?

> A. . . . my memory on the meeting wasn't the greatest, and I believe that Mr. McCreary said that he wanted the union to go away, somehow, someway, and again, the words he said, I got the impression, he said if the union was gone, we had the stock plan before the union came, and with a shrug of the shoulder or something like that, we will keep it still if the union was gone, that was my impression of the talk, but the specifics, I can't recall.
>
> *Mc Creary*: I don't think there was any direct comment.

Against the foregoing there is the following testimony by McCreary:

> He started by describing the meeting as a "bitch session." Then there was a specific question asked to me by Mr. Shawver, and that question was in effect, "Why aren't you giving us the stock investment plan," and my response being, I told him, I've been telling you since this thing started, why you are not going to get the stock investment plan, and he said suppose the union was just to go away, what would happen then, and I said Joe, you know, I can't make you any promises, we are in a bargaining situation here, but I told you before, when we talked about this subject, that the employees' stock investment plan, in its present form, it is available to all salaried employees of the National Steel Corporation. The only thing that can affect that availability is the existence of a collective-bargaining agent, and then it becomes a mandatory subject of bargaining. If there were no collective-bargaining agent, I have no reason to believe that the employees, these employees will not be covered by that stock investment.

McCreary closed with denying having said, at the August 8 meeting, that his reason for refusing the stock investment plan was any fear that by granting it to these people other divisions of National Steel Company would be organized. He also denied having asked the men to decertify the Union. Beyond this, McCreary did not otherwise contradict the testimony of the union committeemen.

Although there were three other persons present at that meeting representing the Company, none of them testified concerning what was said on that day.

As stated above, I think the foregoing evidence proves affirmatively the reason why the Respondent refused to continue the investment plan for these people, or even to talk of any such possibility, was because, and only because, they had taken the first step towards unionization among all the Company's salaried personnel, wherever located. When McCreary talked, during the recorded meetings, about never permitting the plan to be covered by any "bargaining unit," about his fixed determination to give neither the stock plan nor any "off set" or "parody" in its place, he strongly indicated both his closed mind on the bargainable issue and his unlawful motivation. When Robertson, on August 13, asked him was this a "veiled threat" to the as yet unorganized salaried employees elsewhere, McCreary said the outsiders could decide that question for themselves when they looked at the ultimate facts, "reach their own conclusions." In the collective-bargaining process, especially one as long drawn out as this, an illegal motive, if in fact it exists, is rarely articulated in so many words. McCreary's lengthy discourses, appearing both in the minutes of the negotiation meetings and in his extended testimony at the hearing, show a master of words, and a talented skill at speaking indirectly and with obfuscation. But it is the total picture of the events that must be evaluated, not any single phrase or comment. His recorded words must also be taken with the fact—as to which there is no question—that management never varied an iota from its absolute refusal to yield in the slightest on the subject of the plan, indeed, even to talk about any possibility of compromising on the subject.

In giving their recollections of what was said at some of the recorded meetings, several employee-members of the union committee quoted McCreary in more explicit language. At one point Shawver said he heard the statement that the Company was refusing the plan because of "the fact that we had organized," because "these other sister divisions were watching, and if we got a contract and didn't lose anything, then they too, would follow unionization." But this man also admitted this was "probably off the record," "it came from the other side of the table," "I don't know specifically who said that." Hudeck, also of the committee, quoted McCreary as saying "they were worried about other corporations possibly unionizing, if we were given the stock plan as a union." This witness, too, added he did not remember "exact words," "I'm not sure if it was a direct statement," "somehow I came out with the feeling."

Given McCreary's oblique way of talking about this subject during the recorded meetings, it is understandable that some of the listeners would later recall the conversations as much in terms of what impressions were conveyed than in precisely what words were spoken. But because the discussions were recorded by a stenographer, fairness demands that only what was then written be considered now and not the ideas that witnesses think were intended. A more significant example of this is testimony, at the hearing, by the Union's lawyer, Robertson. He recalled McCreary saying that ". . . under a Domino theory, if the Independent Steelworkers Union walked out with the stock plan, that this could create serious organizational problems for them in other divisions . . . ." In fact, the transcripts do not show that McCreary ever spoke of a domino theory in so many words. But he did speak of intending to avoid any single "hole in the dike," "the anticipated effect that that [continuing the stock plan] would have on other similarly situated groups." With this spoken by McCreary, Robertson was not wrong in paraphrasing it as a "domino" basis for refusal.

We come to the unrecorded meeting of August 8. Disturbed by the substantive futility of the long bargaining sessions up to that point, primarily over the imminent loss of the stock investment plan, the employee committee wanted to make a last effort, without the formality of the lawyer or the stenographer, to prevail upon

McCreary to let them keep it. The essence of their testimony is that he made them understand that with a union they were not going to get it, but without a union they could keep it. It matters not who brought up the subject of removing the Union from the picture. I think it clear it was the employees who asked would the Company's position change if the Union were decertified, or otherwise removed from the picture. It was a logical thing for them to inquire about, for they had been listening to McCreary's oblique message that it was the presence of the Union which dictated loss of the plan to these people. I credit their testimony. McCreary's testimony about that meeting is not really in conflict with that of the employees. He said, "It [the plan] is available to all salaried employees . . . . The only thing that can affect that availability is the existence of a collective bargaining agent . . . . If there were no collective bargaining agent . . . ." I find, whatever words he used, that he did tell the union committeemen at the August 8 meeting that if they forgot the Union altogether they would continue to enjoy the benefits of the stock plan.

At the hearing, the Respondent asserted other reasons why it refused to permit these employees to continue the benefits of the stock plan. I find none of them convincing. One idea was that it costs the employer money to have a union represent its employees, paid time for union stewards being a major element. But when McCreary asked Robertson, on August 14, would the Union drop its demand that the Company "pay them [the stewards] for some or all of this process," the lawyer's response was to ask would the Company in that case give the employees the stock investment plan. McCreary's answer again was "no." Among other things which McCreary listed as "benefits" given to the Union as alternative to the stock investment plan were a grievance procedure, checkoff, and union security. It is perhaps best not to comment extensively on such arguments here. Whether McCreary realized it or not, what he was saying in effect is that if employees want to exercise their statutory rights to engage in union activity, they must expect to pay a monetary price at the hands of the Company. He was virtually conceding the merits of the complaint.

McCreary also spoke of having given these employees a raise in return for the stock plan. And it is a fact the contract, as signed on August 30, gave a retroactive cost-of-living raise back to May. The trouble with this defense is that the same cost-of-living raise was given, in May, to all the Respondent's salaried employees in all of its other subdivision plants, but at that time withheld from these salaried people. This means that in their eventual contract all they got was what had been withheld from them, and only from them, all these months. It was therefore not a benefit alternative to the stock investment plan they lost.

For the rest, there is very extended testimony about how the conditions of employment spelled out in the contract, eventually signed, compare with those of all the other unrepresented salaried employees. The contract consists of 100 printed pages, and the testimony seeking to explain its import, both that of the employee witnesses and of McCreary, is uncomprehensible detail and conclusionary words. A number of longtime employees explained how in the practical application of the new contract terms they were no better off than they were before. But their details were not clear, such as to support truly reliable findings. McCreary's lengthy statements as to how, over the long run, the new provisions do favor the employees, are equally devious and obscured. In the circumstances, I cannot say for a fact that the Respondent gave a monetary equivalent, or anything even approaching, the $75,000 a month which McCreary said the stock investment plan cost the Company for that one group among its many and various plants. There simply is no clear and definitive evidence of substantive advantage given the Weirton clericals and technicians which all the others do not also have.

Tied in with this *quid pro quo* contention defense is the further position that, anyway, the Company could not afford the cost of continuing the stock investment plan for these particular employees. McCreary did say this to the committee more than once; although it must be noted he never suggested in the continuing talk any different, diluted continuance of the plan that might have cost less. But most pertinent of all is the fact that it went right on giving the benefits of the plan to the much larger group of its salaried employees who remained outside any "bargaining unit."

All things considered, I find that by refusing to discuss any possibility of continuing the stock investment plan, and by that technique refusing to continue it to the benefit of these employees, for the sole purpose of discouraging union activity by them and by other employees of the Company, the Respondent violated Section 8(a)(1) and (5) of the Act. The essence of the Respondent's conduct having been to deprive the Weirton salaried employees of the stock investment plan, I also find that it thereby violated Section 8(a)(3) of the Act, calculated discrimination in employment as a coercive tactic to discourage union activity. This is not a *per se* finding of illegality, as in its brief the Respondent would characterize it. It is cited authority to the effect that an employer is not obligated either to grant a new, or to continue an old economic benefit, is therefore inapposite. It is the affirmative evidence of unlawful intent in its conduct that proves the unfair labor practice found in this case.

And finally, there remains the contention, as a matter of law, that by signing the contract without the stock investment plan, the employees, or their union, waived any right now to charge that any statutory rights of theirs had been violated. The defense is not supported by the record and I therefore find it without merit. See *Kroger Co., supra*, 164 NLRB at 374.

IV. THE REMEDY

The Respondent having refused to bargain in good faith on the subject of the stock investment plan for these salaried mmployees, it must be ordered now to bargain with their union, on request, as the statute commands. The unfair labor practice technique having been used to deprive the employees of a direct, monetary benefit, the Respondent must also be ordered to make them whole for what loss of earnings they suffered in consequence of the illegal conduct.

As always the remedial order must be aimed at restoring the status quo; it may neither be punitive nor an unwarranted windfall to the employees involved. The method appropriate in this case will be unusual, because the nature of the economic benefit of which the employees were illegally deprived is a variable under the stock investment plan. It is not comparable to simple calculation of backpay that would otherwise have been earned. In May 1979, 4 months before the effectuation of the unfair labor practice committed, over 500 employees were contributing 7-1/2 percent of their pay into the fund, and therefore receiving a like amount in matching funds paid them by the Company. But the system provided that they could change the amount—reduce it or discontinue it altogether. Two hundred or so others were contributing less, and about 200 more were, at that time, contributing, and therefore receiving nothing. But like the first group, these others too had the privilege of changing their amount, or entering the plan if they wished. Had the Respondent not taken this right away from them, how many would have reduced their contributing percentage, how many would have increased their input, how many would have entered the fund for the first time? There is absolutely no way of answering these questions.

In his brief, the General Counsel asks that the Company now be ordered to pay to the employees who in May 1979 were contributing the permissible maximum, a full 7-1/2 percent of their pay from August 30, when the union contract was signed, to the day the Respondent complies with this Order to cease and desist. He also asks, if I read him correctly, that as to those employees who were then contributing less, or nothing at all, the Company pay to their benefit "the maximum amount each employee could [would?] have contributed." The suggestion is founded upon pure speculation. To order the Company to pay the full 7-1/2 percent to persons who had as yet not decided to contribute anything would be more in the nature of punitive, rather than remedial action. And to order the Company to pay the full 7-1/2 percent to these employees who chanced, in May 1979, to be comtributing that much, means giving them something to which they may not be entitled, because they too might have changed their percentages depending upon economic conditions. Under such a procedure surely the man who was giving nothing, or very little, will say he would have gone up to 7-1/2 percent had he had the opportunity. And as surely the man who was giving 7-1/2 percent will assert he never would have lowered his amount. However the concept be viewed, it would be a guessing game; there simply is, and there never will be, any way of knowing how what did not happen would have happened.

In the circumstances, I think a fair overall make-whole formula will be as follows: A representative period shows on the record that for the month of May 1979 the Respondent contributed a total of $75,000 on behalf of all the employees in the two bargaining units to their credit in the stock investment plan fund. The record also shows—at least McCreary's statement to that effect stands uncontradicted—that in June 1980 the trustees of the fund suspended the Company's matching fund contributions for economic reasons, as the plan agreement provides. Whether the contributions have since been resumed was not shown. Beginning with the month of September 1979 and continuing for every month thereafter that the Company's contributions have been, or will be made, to other salaried employees, the Respondent must pay $75,000 for each month to the credit of these salaried employees. The payments shall be continued until such time as the Respondent complies with that part of this remedy which orders it to bargain with the Union on the subject in good faith. This rational restructuring of the past means that for each of the pertinent months in question $150,000 worth of company stock would have been purchased in the name of the employees. The Respondent must therefore also pay, as part of the make-whole remedy, a sum of money equal to what dividends such stock would have earned between the month involved and the date when it complies with the affirmative bargaining order. The total thus paid by the Company shall then be distributed, for each month involved, equally among all the employees who were working during that month and who were eligible to participate in the plan. It shall be a cash payment into their hands.

This does not mean the Respondent's duty to continue making these monthly payments becomes a contractual obligation. As argued by the Respondent, the Board is without authority to dictate any economic terms to be inserted into a collective-bargaining agreement, even where it has been found there was bad-faith bargaining, as here. In fact, the August 30 contract signed was for a 1-year period; whether it has been renewed this record does not show. But the Respondent must continue making the payments here ordered until such time as it does bargain in good faith. When that point has been reached is a question left to the compliance stage of the proceeding.

It is possible this formula places a liability on the Respondent in excess of what its burden might have been had it not committed the unfair labor practice found. But "the burden is upon the employer to establish facts which . . . would mitigate that liability [*N.L.R.B.* v. *Brown & Root, Inc., et al.*, 311 F.2d 447 (8th Cir. 1963)]," and there is no way a more reasonable formula could be evolved in this case. Concededly there is an element of uncertainty in this remedy. As precedent holds: ". . . the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty should be resolved." *United Aircraft Corporation*, 204 NLRB 1068 (1973). See also: *J. H. Rutter-Rex Manufacturing Company, Inc.*, 194 NLRB 19 (1971), and *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569 (5th Cir. 1966).

There is another side to this coin. Some of the employees involved, looking to the past, will feel they are getting less than their proper share. Others, no doubt, will receive more than they probably would have benefited in matching funds during the period following the unfair labor practice. It is in the nature of collective bargaining that employees act together, make common cause *vis-a-vis* their employer. Just as a union may contract to have some employees be paid a higher rate than others, even so, to achieve a workable remedy in a problematic case, the Board may balance conflicting interests among the employees in the interest of all as a total group. Compare: *International Association of Bridge, Structural & Ornamental Ironworkers, Local 373*, 232 NLRB 504 (1977).

And finally, the really coercive effect of the Respondent's unfair labor practice was in denying these employees the cash benefits of the plan, and not in its refusal to talk about it with their union. If the remedy be limited to talking about it all over again, even in good faith, the restraining force upon the employees' prounion resolve—the end object of the Respondent's purpose—will remain a fact of life. This means the Company will continue, as it has since 1979, to enjoy the fruits of its unfair labor practice. It is the Board's duty to avoid such a pointless ending to the entire proceeding, as was the case in the Sixth Circuit Court in the *Kroger* case, *supra*. Merely because a more nearly perfect restoration of the *status quo* would present "complex problems and multiple ramifications" is not reason enough for abandoning justice altogether.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. By refusing to bargain with the Union in good faith on the subject of its existing stock investment plan, the Respondent has violated and is violating Section 8(a)(5) of the Act.

2. By denying its Weirton Steel Division salaried employees the continued benefit of its stock investment plan for the purpose of restraining and coercing them, and other employees of National Steel Corporation, with respect to their union activities, the Respondent has violated and is violating Section 8(a)(3) of the Act.

3. By the foregoing conduct, the Respondent has violated and is violating Section 8(a)(1) of the Act.

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Teamsters Local Union No. 515 (Cavalier Corporation) *and* David E. Barber. Case 10-CB-3391

December 11, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 1, 1981, Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Teamsters Local Union No. 515, Chattanooga, Tennessee, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Causing or attempting to cause the Cavalier Corporation to unlawfully discriminate against David E. Barber by filing grievances to change his job assignments or duties because of his lack of membership in the Union."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT cause or attempt to cause Cavalier Corporation to unlawfully discriminate against David E. Barber by filing grievances to change his job assignments or duties because of his lack of membership in Teamsters Local Union No. 515.

WE WILL NOT maintain or process any grievance with regard to the job assignments and duties of David E. Barber which was filed because he resigned his membership in the Union.

WE WILL NOT in any like or related manner restrain or coerce employees of Cavalier Corporation in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL notify Cavalier Corporation that we have no objection to its employment of David E. Barber in the same classification with the same job duties he held prior to July 16, 1980.

WE WILL withdraw our grievance and process no further grievances with regard to the job duties and assignments of David E. Barber which were filed and maintained because he resigned his membership in the Union.

WE WILL make David E. Barber whole for any loss of earnings he may have suffered as a result of the unlawful discrimination against him, plus interest.

TEAMSTERS LOCAL UNION NO. 515

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear prepondernace of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We shall modify par. 1 (a) of the Administrative Law Judge's recommended Order to conform more closely to the violation found. We shall also substitute a new notice for that of the Administrative Law Judge, containing language which conforms to par. 2(b) of the Administrative Law Judge's recommended Order.

259 NLRB No. 94

DECISION

Statement of the Case

Hutton S. Brandon, Administrative Law Judge: This case was heard at Chattanooga, Tennessee, on June 23, 1981. The charge was filed on August 25, 1980,[1] by David E. Barber, an individual, hereinafter called Barber, and the complaint based on the charge was issued on October 6, alleging that Teamsters Local Union No. 515, hereinafter called the Union or Respondent, violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, hereinafter called the Act, by causing or attempting to cause Cavalier Corporation, Barber's employer, to change the job duties of Barber because he had resigned his membership in the Union. The issue presented is whether the Union's action in the filing of a grievance involving Barber's job duties and resolving that grievance to Barber's detriment was motivated by Barber's lack of membership in the Union and in order to encourage membership in the Union.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

Findings of Fact

I. JURISDICTION

The Cavalier Corporation, herein called the Company, is a Tennessee corporation with an office and place of business in Chattanooga, Tennessee, where it is engaged in the manufacture of bottle and can vending coolers. During the calendar year preceding issuance of the complaint herein, the Company sold and shipped from its Chattanooga plant goods valued in excess of $50,000 directly to customers located outside the State of Tennessee. The complaint alleges, the Union by its answer thereto admits, and I find and conclude that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Union admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. The complaint further alleges and the Union admits that the Union and the Company have been at the times material parties to a collective-bargaining agreement which was effective from September 1, 1979, to August 31, 1980.

III. THE ALLEGED UNFAIR LABOR PRACTICE

Barber, the General Counsel's only witness, was employed by the Company more than 11 years prior to the hearing herein. He worked as an inspector in a department usually containing in excess of 30 other inspectors, all of whom were included in the appropriate collective-bargaining unit represented by the Union and covered by the collective-bargaining agreement referred to above and the preceding initial 1-year agreement executed in January 1979, but effective from August 1978.

For several years Barber, in addition to his regular inspection duties, was called upon by the Company to perform additional inspection and repair duties at its warehouse. While the frequency of his assignment to the warehouse duties was not clearly established in the record, it is clear from Barber's testimony that as a result of his assignment to warehouse duties he received an average of 6 to 10 additional hours of overtime pay per month. Time records compiled by the Company, subpenaed by Respondent, and received in evidence,[2] covering an 18-month period beginning January 1, establish that Barber did receive more hours of work, including overtime work, than some more senior fellow inspectors but less than some others.

Barber did not initially join the Union when it became the collective-bargaining agent in 1978. He testified that in view of his reluctance to join the Union, he received pressure from a number of people, including union stewards. In this regard, he testified that union stewards Terry Powell and Terry Cole in September 1978 called him a "freeloader" and a "scab" and related that if a picket line was set up in front of the plant and if he tried to come across, he would be shot or his house would be burned.

In August 1979, according to Barber, Ed Guffey, the union representative responsible for servicing the collective-bargaining agreement with the Company, attempted to persuade Barber to join the Union and in so doing told Barber that if he did not join the Union, he would not remain at work at the Company. In the same conversation, Barber testified, Guffey aggressively inquired of Barber about a prior statement Barber had made to employee Douglas McRoy to the effect that if Guffey ever tried to stop Barber from crossing a picket line, Guffey would look "funny" with a Chevrolet bumper stuck in his posterior. While Barber did not deny having made the comment, he explained to Guffey that he had just been shooting a "bunch of bull."

Barber testified that he and his wife, who was also an employee of the Company, joined the Union in September 1979. Thereafter, Barber had his union dues checked off by the Company.[3] Barber subsequently decided that he did not want to remain a union member and called Guffey in May to ascertain how he could go about getting out. Barber testified he was unable to get any information from Guffey so he contacted an attorney. On May 14 he went to the union hall and filed a withdrawal. He was later told by employee Doug McRoy, who at this time was an alternate union steward, that the withdrawal was a waste of time and that Barber was still in the Union.[4] On June 24 and July 2 Barber sent the Union

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[1] All dates are in 1980 unless otherwise stated.

[2] Resp. Exh. 3.

[3] The Union's records reflect that the first dues deduction for Barber was on October 12, 1979. Resp. Exh. 3.

[4] The validity of the withdrawal is not clear from the record for while Guffey testified that Barber's withdrawal was effective from May 14 and no further dues were deducted, Guffey also testified that withdrawals were only applicable to situations where employees were on leaves of absence from employment or were terminated. Barber did not fit in either

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letters resigning from the Union and revoking his dues-checkoff authorization.[5]

Barber went on vacation in late June and returned to work on July 15.[6] On that day Georgeanne Finch, the union steward for Barber's department, asked him who he was going to "roll" and added that he was not going to do warehouse work anymore. Later that same week, Barber testified, he was told by the warehouse union steward, Dorothy Harris, that she had heard that someone else was coming to the warehouse in his place. Still later in the week, according to Barber, Barber asked his foreman, Chuck Lindsey, about the matter and Lindsey told him that a grievance had been filed regarding Barber's warehouse work.

It is undisputed that on July 16 Finch filed a grievance[7] contending that the transfer of Barber on that date to work in the warehouse necessitating the reassignment of someone else to Barber's regular work was a violation of the temporary transfer provision of article 16 of the collective-bargaining contract. As a remedy, the Union sought to have the senior inspector paid for the time that Barber worked at the warehouse. The grievance was resolved on August 5 with the Company agreeing to offer the warehouse work on a regular basis to the senior inspector who wanted it. Phyllis Jones, an inspector senior to Barber, thereafter was given the warehouse work until October when the Company, in a settlement of charges filed against it by Barber with the Board in Case 10-CA-16184, returned the warehouse work to Barber. Barber was still performing the warehouse work at the time of the hearing.

The General Counsel contends that the Union filed the grievance which adversely affected Barber's conditions of employment simply because Barber had resigned from the Union, and in so doing had violated Section 8(b)(1)(A) and (2) of the Act. In support of this contention the General Counsel relies upon the evidence of pressure put upon Barber to join the Union as outlined above, the timing of the filing of the grievance shortly after Barber had resigned from the Union and the fact that after his resignation from the General Counsel also relies on other testimony of Barber regarding comments made to him by union stewards following the filing of the grievance. Thus, Barber testified that after he had been removed from warehouse work alternate steward Doug McRoy told him that if he would be interested in getting back in the Union they would see what they could do about getting his job back at the warehouse for him. Still later, toward the end of August, according to Barber, union steward J. D. Newsome told Barber that Barber might not be paying union dues of $14 or $15 dollars, but "we're getting the amount anyway by knocking you out of going to the warehouse."

The Union's position is that the grievance filed which resulted in Barber's removal from warehouse work had nothing to do with his resignation from the Union, and, instead, was based upon a meritorious claim by various employees that the warehouse work should be awarded in accordance with the contract. More specifically, the Union argued that the warehouse job should have been made a full-time position and, absent making it a full-time position, the Company was violating the temporary transfer provision[8] of the collective-bargaining contract by transferring an inspector into the position sporadically while replacing that inspector on his regular job with another inspector.

To disprove the General Counsel's contentions regarding animus towards Barber because of his lack of union membership, the Union presented a number of witnesses. Terry Cole and Terry Powell both denied making any threats to Barber to cause him to join the Union. Moreover, according to the testimony of Guffey, neither Cole nor Powell was a union steward at the time in 1978 when Barber's testimony has it that they threatened him. Although Guffey admitted that he had talked to Barber in 1979 about joining the Union and had also discussed with Barber the threat concerning the Chevrolet bumper, he denied that he had ever told Barber that he would have to join the Union to work at the Company.

With respect to the filing of the grievance, McRoy testified for the Union that on a Friday while he was acting as steward in place of Georgeanne Finch who was on vacation in early July that a number of employees including inspectors Phyllis Jones, Calvin Dallas, and Gay Kegan complained to him about Barber's work at the warehouse and expressed concern why they could not go over and do the job too.[9] McRoy testified he related the complaint to Finch when she returned to work on the following Monday, July 14, and suggested she file a grievance on it. McRoy admitted that he was aware at the time the complaints were made to him about the warehouse job that Barber had said that he was going to get out of the Union, but denied that Barber's getting out

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category. Persons who had submitted withdrawal cards remained members of the Union but were relieved from any dues obligations. The fact that the Union honored the "withdrawal" may well have been a result of an administrative snafu in view of the terms of Barber's checkoff authorization. I therefore do not view Barber's early release from his checkoff obligation as evidence of either the Union's generosity or good will toward Barber. This view is further substantiated by Barber's uncontradicted testimony that McRoy told him the withdrawal was a waste of time and he was still in the Union.

[5] The applicable contractual provision on checkoff made checkoff authorizations irrevocable for 1 year or until the contract expired, whichever occurred sooner. G.C. Exh. 2. Barber explained that he sent two resignation and checkoff revocation letters to the Union because of some question of timeliness of the first letter. Apparently, the Union never made any contention that Barber's resignation and revocation was in any way untimely.

[6] While Barber testified he returned to work from vacation on Monday, July 21, the company time records reflect, and I find, he returned on Tuesday, July 15. Resp. Exh. 3.

[7] G.C. Exh. 3; Resp. Exh. 6.

[8] The provision referred to G.C. Exh. 2, art. 16, in pertinent part, as follows:

> 1. In the event it is necessary to temporarily transfer an employee within a department due to vacancies resulting from absenteeism, tardiness, leave of absence, etc., the department supervisor will determine which job or jobs can be discontinued or reduced in order to transfer the employees to fill the vacancies. Such employees will be removed in the reverse order of seniority and returned in the order of seniority. If more than one employee is to be transferred such employees will be given the opportunity to fill the available vacancies by seniority provided they can perform the job.

[9] The Company's time records listing the inspectors in the order of their employee or clock numbers, and thus in seniority order, reveal Jones and Kegan were above Barber in seniority while Dallas was below him.

of the Union had anything to do with his suggestion to Finch that a grievance be filed. Further, McRoy denied making the statement attributed to him by Barber to the effect that if Barber got back in the Union, they would see about getting his warehouse job back.

Finch testified that 2 months prior to the time the grievance was filed regarding warehouse work she had met with Bob Niswonger, the Company's vice president on a number of matters and the subject of the warehouse work came up. At that time, according to Finch, she argued that the warehouse job should be a permanent job and that it was violating the temporary transfer clause of the contract. Discussion on the subject was inconclusive and the matter was passed with Finch remarking that they would leave the situation like it was unless somebody complained. Finch testified that after she returned from vacation she got complaints from McRoy, Phyllis Jones, and Clara Moran, who was not an inspector, regarding the unfairness of Barber's warehouse work, and after unsuccessfully attempting to resolve the matter with Personnel Manager Brad Hillman and Foreman Lindsay went ahead with the written grievance. Finch conceded that she knew that Barber had gotten out of the Union but testified she pursued the grievance because "the people was on my back."

Finally, J. D. Newsome testified for the Union and admitted that he was a job steward for the Union during the period from July 1980 to March 15, 1981, but serviced a department other than Barber's. He denied that he had ever discussed with Barber his removal from the warehouse work. In addition, he denied that he had ever told Barber that while the Union was not getting union dues from Barber they were getting more than that by keeping him out of the warehouse job.

Discussion and Conclusions

A conclusion as to the Union's motivation in filing the grievance which adversely affected Barber is necessary to a determination of the existence of the violation of the Act alleged by the General Counsel. If the Union's motives were pure in the sense that the filing of the grievance was solely to enforce applicable provisions of the collective-bargaining agreement, then no violation has been established. It is well settled that the Board accommodates its enforcement of the Act to the right of persons to litigate their disputed claims in court rather than to condemn such action as an unfair labor practice. See *Clyde Taylor, d/b/a Clyde Taylor Company*, 127 NLRB 103 (1960). It goes without saying that a similar accommodation extends to the no lesser right of a union to enforce collective-bargaining agreements even though certain employees may be adversely affected by such action. However, the Board has held that where a union's processing of a grievance adversely affecting an employee or employees is prompted by an unlawful and discriminatory objective rather than by a genuine concern over the merit of the grievance or the integrity of the collective-bargaining agreement, its conduct falls within the proscriptions of Section 8(b)(1)(A) and (2) of the Act. *United Food and Commercial Workers International Union, District 227, AFL-CIO (The Kroger Co.)*, 247 NLRB 195 (1980).

A determination of the Union's motivation in the instant case must be based on facts established by the record, and such facts turn on which witnesses are to be believed. I found Barber to be a generally straightforward, candid, and generally accurate witness. However, his identification of Cole and Powell as being among those who tormented him in early 1979 regarding his lack of union membership is suspect because, contrary to his specific recollection at the hearing, his prehearing statement to the Board expresses some doubt as to the identity of those "union officials" who were harassing him. Nevertheless, he had named, with some uncertainty, Cole and Powell in his prehearing statement, and I am persuaded that his testimony, which was much more positive, was the product of genuine recollection rather than prevarication or contrived reconstruction. Moreover, I was unpersuaded by the denials of both Cole and Powell that they uttered the threats attributed to them by Barber. It is not at all unreasonable that they would urge Barber into union membership, nor is it unlikely that they might have referred to him as a "scab" or a "freeloader." Powell's denials that he ever had discussions with Barber about joining the Union were particularly hollow and unconvincing. And Cole's concession that he did talk to Barber about union membership lends no credence to his denial of any threats to Barber in view of his equivocal "not to my knowledge" response to the question of whether he had referred to Barber as a "scab."

Considering the foregoing and crediting Barber's testimony, I conclude that threats were made to Barber by Powell and Cole. The threats and comments of Powell and Cole clearly reveal that animosity towards Barber among the employee union members existed because of his lack of union membership.[10]

It is not disputed that Guffey attempted to persuade Barber to join the Union in 1979. It is also not disputed that Guffey confronted Barber about Barber's threat regarding the automobile bumper. It is clear that there was no love lost between the two men. However, I am unable to credit Barber's claim over Guffey's clear and specific denial that Guffey told Barber if he did not join the Union, he would not be working for the Company. Barber failed to include in his prehearing statement to the Board any reference to the alleged threat by Guffey, although he did refer to the confrontation with Guffey. There was no indication that Guffey's alleged threat was revealed by Barber to the Board prior to the hearing. Under these circumstances, and because Guffey's denial that he made such a remark was emphatic and convincing, and although Guffey may well have used persuasive arguments to insure Barber's joining the Union, I am not convinced that Barber's recollection of the alleged remark was reliable, and I credit Guffey over Barber in this instance.

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[10] I find it unnecessary to decide whether Cole and Powell were union stewards and agents of Respondent at the time of the threats made to Barber. It is sufficient that I conclude that animosity between them and Barber existed as a result of his lack of union membership, and such animosity would not likely be diminished at any subsequent time when they became stewards while Barber was not a union member.

Barber also failed to include in his prehearing statement to the Board the remark he attributed to Newsome to the effect that while Barber was not paying dues, the Union was getting even by knocking him out of going to the warehouse work. Nevertheless, Barber did subsequently prior to the hearing relate the matter to the Board attorney. Newsome, whose stewardship did not extend to Barber's work area, denied in his brief testimony that he had even talked to Barber about Barber's removal from the warehouse work. I am not convinced that Newsome's remark was the figment of Barber's imagination. Accordingly, and because on balance I found Barber a more believable witness than Newsome, I credit Barber on the matter.

I likewise credit Barber's testimony that alternate union steward McRoy told him that if Barber was interested in getting back in the Union, the Union would see what it could do to get his warehouse assignment back for him. McRoy generally was not impressive as a witness. Moreover, contrary to previous assertions made to Board investigators, McRoy conceded in his testimony he had at least once solicited Barber to join the Union. His testimony with respect to prior complaints by other employees about Barber's warehouse work and resolution of such complaints was confusing, contradictory, and unsubstantiated. Accordingly, and for other reasons cited below for not believing McRoy, I find that McRoy did make the statement attributed to him by Barber.

It is clear that Newsome was a steward and McRoy was an alternate steward during that period of time immediately surrounding the events on which the charge herein is based. Indeed, McRoy was the acting steward during the absence of Finch when the employee complaints regarding Barber's warehouse work were allegedly made. And, while Newsome was not the steward in Barber's area, he was acting within the scope of his stewardship authority in commenting upon the basis for the filing of a grievance, and any listening employee could reasonably believe that he was an authoritative source of information relative to grievance initiation and processing. The comments of Newsome and McRoy were directly related to the processing of the grievance which had been filed and which adversely affected Barber. Under the applicable collective-bargaining agreement, stewards had the authority to investigate and present grievances to management. They further were authorized conduits of union messages.[11] Thus, I conclude that in making the statements to Barber, Newsome and McRoy were acting within the scope of their authority and I conclude that their comments are imputable to Respondent, and Respondent is responsible therefor. See *International Brotherhood of Teamsters, Dallas General Drivers, Warehousemen and Helpers Local 745 (Transcon Lines)*, 240 NLRB 537 (1979); *International Brotherhood of Teamsters, General Drivers, Chauffeurs and Helpers Local Union No. 886 (Lee way Motor Freight, Inc.)*, 229 NLRB 832 (1977), enfd. without opinion, Docket No. 77-1629 (D.C. Cir. 1978).

The statements of Newsome and McRoy to Barber clearly revealed an ulterior motivation in the initiation and processing of the grievance affecting Barber. On the testimony of McRoy and Finch, Respondent would have me believe that the grievance on Barber's warehouse work was employee initiated and not instigated by the Union. Although Finch and McRoy support each other in certain respects, there was no employee corroboration on the point of the initiation of the grievance. Such employee corroboration would appear to be an important part of the Union's defense, and the failure to produce the named employee complainants suggests the absence of any such complainants. See *Local 138, International Union of Operating Engineers, AFL-CIO (Building Contractors' Association, Inc.)*, 233 NLRB 267 (1977). Such employee complainants would apparently be available to the Union since they were, according to McRoy, union members and supportive of the Union's position with respect to Barber. Moreover, it is undisputed that the grievance was not filed by an employee, but by Finch, the steward acting within the scope of her authority and, I find, like Newsome and McRoy, an agent of the Union.

I have already indicated my disbelief of McRoy. His testimony is rendered further incredible by records received in evidence as accurate company records of hours worked by the inspectors during the relevant period.[12] McRoy testified that inspectors Calvin Dallas, Gaye Kegan, and Phyllis Jones complained to him on Friday (July 11) about Barber's warehouse work while Finch was still on vacation, and he did not report the matter to Finch until her return on July 15. The company time records show, however, that the inspectors were all on vacation through July 14. It is thus incredible that Dallas, Kegan, and Jones came to McRoy during their vacation time to complain about Barber who was also on vacation at the time.

Finch was no more credible than McRoy in demeanor nor was the content of her testimony persuasive. Finch did not impress me as completely frank.[13] Moreover, her testimony was not consistent with McRoy's. Thus, in contradiction of McRoy's contention that the inspectors had always complained about Barber's overtime at the warehouse, Finch's testimony was that she had not heard of any complaints until July 14 even though she had been the steward in Barber's department for 2 years. Moreover, Finch's testimony was contradicted by other aspects of McRoy's testimony. McRoy contended that the issue of Barber's warehouse assignment had been in issue much earlier, but was resolved by then steward Powell working out an agreement that the job would be assigned on a rotating or seniority basis. Finch testified, however, that without any prior complaints she broached the subject of Barber's warehouse work to Bob Niswonger, the vice president of manufacturing, during a discussion with Niswonger on other problems about 2 months prior to filing the grievance regarding Barber. However, in that discussion Finch said she was merely complaining that the warehouse job should be made a permanent position and that Barber's use violated the temporary transfer clause. Since the discussion was inconclusive, Finch testified she was content to leave the matter as it was if there were no complaints, with the intention of subsequently negotiating the warehouse position into the next contract.

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[11] See G.C. Exh. 2, art. 5.

[12] Resp. Exh. 3.

[13] Finch's tendency to exaggerate is shown by her testimony, clearly rebutted by the company time records, that Barber's warehouse work gave him overtime every day.

I find Finch's unsupported testimony regarding the discussions with Niswonger incredible and improbable.[14] First, in the absence of a complaint, it is unlikely the subject would have been broached with Niswonger. Secondly, if Finch had considered Barber's warehouse work to constitute a clear and serious breach of the temporary transfer clause as the Union now claims, it is much more likely that she would have insisted on a remedy at that point and, in the absence of immediate remedial action, would have filed a grievance.

The timing of the filing of the grievance regarding Barber's job also strongly indicates, as urged by the General Counsel, that such action was discriminatorily motivated. Barber had been doing the work for a number of years without prior complaint from fellow inspectors. Indeed, it appears that the other inspectors were not qualified for the work since Jones, who replaced Barber in the warehouse work as a result of the Union's grievance, had to receive special training. Furthermore, the filing of the grievance followed within 1 week after the Union admittedly received Barber's letter revoking his membership and checkoff authorization on July 7[15] when complaints allegedly began to be made about Barber's warehouse assignment. And, although the complaints were claimed to be predicated on Barber's opportunity to make substantial overtime through his warehouse work, the company time records reflect that Barber had worked only 6-1/2 hours of overtime between May 1 and the date the grievance was filed.[16] This compares with 11-1/2 hours in April, 14 in March, none in February, and 2 in January. Thus, and assuming that all of Barber's overtime could be attributable to his warehouse assignment, it is clear there was no significant increase in his overtime work around the time of the filing of the grievance which would serve to attract attention and provoke discontent among his fellow inspectors who had tolerated Barber's assignment for so long before. In short, aside from Barber's withdrawal from the Union, which was admittedly known to Finch when the grievance was filed because "he told everybody," nothing had happened to trigger the employee complaints on which the grievance was based. Under these circumstances and considering the statements of McRoy and Newsome to Barber, and discrediting Finch's and McRoy's testimony to the contrary, I conclude that the grievance on Barber was not employee initiated and, on the contrary, was initiated by McRoy and Finch as union representatives.[17]

Finally, contrary to the Union's contention, the merit of the grievance on Barber's job is not so clearly meritorious insofar as it relates to the temporary transfer clause as to preclude the existence of discriminatory motivation on the Union's part in the filing and processing of the grievance. Of course, it is not necessary for the Union's defense that its interpretation of the temporary transfer clause be correct. It is only necessary that the Union not act unreasonably, arbitrarily, unfairly, or without legitimate purpose in taking its position on the contractual clause. *Wanzer Dairy Co.*, 154 NLRB 782, 793 (1965). The unreasonableness of the Union's interpretation of the provision would, however, tend to reflect ulterior and discriminatory motivation. Here, Barber had been doing the warehouse work for several years prior to the advent of the Union and the Union contract. He had continued to do it for three years following the advent of the Union and under the Union contracts. In view of this history, his customary and frequent assignment to the warehouse is more consistent with the existence of a permanent job category rather than a series of temporary transfers. Moreover, putting the job up for bid did not, insofar as this record shows, resolve the temporary transfer contention of the Union. Thus, Finch had argued that Barber's warehouse work had violated the temporary transfer clause since the Company did not leave Barber's regular position vacant at the times when he went to the warehouse and instead filled that position with another inspector. Yet, the record does not show any change in this procedure simply because someone more senior than Barber, in this case union member Jones, bid on and was subsequently assigned Barber's work. Presumably, someone else would have had to take Jones' regular work when she performed warehouse work. The record, therefore, shows no change which would appear to resolve the Union's complaint under the temporary transfer clause. Accordingly, I conclude the Union's reliance on the temporary transfer clause is not so reasonable as to escape the conclusion of the Union's unlawful motivation in processing the grievance that the record otherwise dictates. On the contrary, the failure to resolve the underlying concern relative to the temporary transfer clause while at the same time removing Barber indicates the Union's unlawful motivation.

Considering all the foregoing, and having credited the testimony of Barber over that of McRoy and Newsome, I conclude that the General Counsel has established a *prima facie* case of a violation of Section 8(b)(1)(A) and (2) of the Act by the Union in its filing of the grievance adversely affecting Barber. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). The General Counsel contends that the Union's action herein with respect to Barber was not predicated on mixed motives in any respect so that *Wright Line, supra*, is inapplicable. The Union, on the other hand, argued that even if the General Counsel established a *prima facie* case of a violation and that there was some unlawful motivation in its actions, the case is one of dual motivation and *Wright Line, supra*, requires further inquiry into whether the Union would have taken the same action against Barber notwithstanding the existence of discriminatory concerns. I have found the Union's actions here were pretextual, but, assuming that a dual motivation situation existed, i.e., discrimination and a legitimate concern over enforcing a contract clause, I am persuaded that the Union failed to demonstrate that it would have taken the same action against Barber even in the absence of Barber's resignation from the Union. Since I discredit that testimony of McRoy and Finch that the grievance was employee-instigated, and because the Union knew of the alleged contract violation for years but failed to grieve the matter until immediately after Barber, to the admitted knowledge of Finch and McRoy, had resigned from the Union, I conclude that the grievance would not have been filed had Barber not resigned. Accordingly, I conclude that the Union failed to rebut the General Counsel's *prima facie* case of a violation of Section 8(b)(1)(A) and (2).

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[14] Finch's testimony regarding the conversations with Niswonger was not contradicted. However, a trier of fact is not required to accept uncontradicted testimony as true if it contains improbabilities or there are reasonable grounds for otherwise concluding that it is false. *Operative Plasterers' & Cement Masons' International Association Local 394 (Burnham Brothers, Inc.)*, 207 NLRB 147 (1973). Moreover, as I have already related, on demeanor I did not find her altogether credible.

[15] The Union did not acknowledge receipt of Barber's first letter dated June 24.

[16] The records do not show whether Barber's overtime actually resulted from his warehouse assignments, but it is reasonable to infer from Barber's own admissions that he averaged 6 to 10 hours a month overtime at the warehouse and that such overtime was attributable to his warehouse work.

[17] I am cognizant of the fact that subsequent to having been awarded Barber's warehouse work and then removed from it as a result of a Board settlement with the Company, Jones filed a grievance and a charge with the Board against the Company. However, Jones' interest in the job shown after training for the position and occupying it does not establish the initial interest in it sufficient to initiate a grievance particularly where no previous interest was shown by Jones in the position for several years.

CONCLUSIONS OF LAW

1. Cavalier Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Teamsters Local Union No. 515, is a labor organization within the meaning of Section 2(5) of the Act.

3. By attempting to cause, and causing, Cavalier Corporation to change the job duties of its employee David E. Barber because of Barber's lack of membership in the Union, the Union has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(2) and 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Union has engaged in certain unfair labor practices, I shall recommend that the Union be ordered to cease and desist therefrom and take affirmative action designed to effectuate the purposes of the Act.

Since I have found that the Union attempted to cause, and caused, Cavalier Corporation to change the job duties of David Barber because of Barber's lack of membership in the Union and to this end filed a grievance discriminatorily seeking to adversely affect the job assignment of Barber because of his lack of membership in the Union, I find that in order to dissipate the effects of the Union's unfair labor practices, it will be necessary to order the Union to cease and desist from processing any grievance initiated or instigated by it seeking Barber's reassignment from the position he held prior to July 16, 1980.[18] Furthermore, it shall be recommended that the Union be ordered to withdraw its grievance regarding Barber's job assignment and duties as they existed prior to the filing of the grievance. It shall also be ordered that the Union notify Cavalier Corporation that it has no objection to the employment of Barber in the same position with the same assignments that he occupied prior to the filing of the July 16, 1980, grievance. Finally, I shall recommend that Respondent make Barber whole for any loss of earnings suffered by him by reason of the discrimination against him. The backpay obligation shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[19]

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[20]

The Respondent, Teamsters Local Union No. 515, Chattanooga, Tennessee, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause the Cavalier Corporation to change the job duties or assignments of employee David E. Barber because of his lack of membership in the Union.

(b) Maintaining or processing grievanances with regard to the job duties or assignments of employee David E. Barber which were filed and maintained because he resigned from membership in the Union.

(c) In any like or related manner restraining or coercing employees of Cavalier Corporation in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Notify Cavalier Corporation, in writing, that it has no objection to the utilization of David E. Barber in the same position with the same job duties that he possessed prior to July 16, 1980.

(b) Withdraw its grievance and process no further grievances with regard to the job assignment and duties of David E. Barber which were filed and maintained because he resigned his membership in Respondent.

(c) Make whole David E. Barber for any loss of earnings he may have suffered as a result of the unlawful discrimination against him in the manner set forth in the section above entitled "The Remedy."

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[18] This order shall be construed as being applicable to the processing of any presently existing grievance relative to Barber's job assignments and duties as they existed prior to July 16, 1980, including the grievance filed by Jones on October 20, 1980. (Resp. Exh. 8.) Jones' grievance resulted from the Union's initial grievance on Barber's job assignments and was clearly tainted by it. This order shall not be construed, however, as prohibiting the filing of any subsequent grievances on Barber's job assignment which are not discriminatorily initiated or instigated by the Union.

[19] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Post at its business office, meeting halls, or other places where it customarily posts notices copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representative of Respondent, shall, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Furnish the Regional Director for Region 10 signed copies of said notice for posting by Cavalier Corporation, if willing, in places where notices to its employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, shall, after being signed by an official representative of Respondent, be forthwith returned to the Regional Director for disposition by him.

(f) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Harvard Folding Box Co., Inc. *and* **Boston Local No. 600, Graphic Arts International Union, AFL-CIO-CLC.** Case 1-CA-17917

December 11, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on October 2, 1980, by Boston Local No. 600, Graphic Arts International Union, AFL-CIO, herein called the Union, and duly served on Harvard Folding Box Co., Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint and notice of hearing on November 17, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), (4), and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. On May 28, 1981, an amendment to the complaint issued, alleging additional violations of Section 8(a)(1), (3), and (5) of the Act. Copies of the charge and complaint and notice of hearing before an administrative law judge and amendment to the complaint were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 11, 1980, following a Board election in Case 1-RC-16868, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 25, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. It is further alleged that since on or about September 23, 1980, Respondent has failed and refused to supply information requested by the Union regarding the names, addresses, classifications, dates of hire, and wage rates of unit employees.[2] On December 24, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. On June 3, 1981, Respondent filed an answer to the amendment to the complaint admitting in part, and denying in part, the allegations in the amendment to the complaint.

On September 16, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 22, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent admits its refusal to bargain but challenges the Union's certification on the basis that the Board erred, first, in certifying the Union as the exclusive bargaining representative of Respondent's employees and, second, in failing to review an affidavit which was taken by the Regional Director during his investigation, but was not forwarded to the Board as a part of the record. Respondent further argues that granting of the General Counsel's motion will result in a duplication of effort because additional allegations in the complaint, not at issue in the General Counsel's motion, require a hearing and will also be subject to court review. In the Motion for Summary Judgment, counsel for the General Counsel alleges that Respondent seeks to relitigate issues previously considered in the underlying representation case, and, also, that no factual issues warranting a hearing are presented in this case concerning the issues which are the subject of his motion.

Our review of the record herein, including the record in Case 1-RC-16868, discloses, *inter alia*, that pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted among the employees of the stipulated unit on May 29, 1980, and that the tally of ballots furnished the parties after the election showed 52 votes cast for and 38 votes cast against the Union. There was one challenged ballot, an insufficient number to affect the results of the election. Respondent filed timely objections which alleged that a campaign leaflet distributed by the Union contained material misrepresentations concerning the wages paid to employees of a competitor. On July 3, 1980, the Regional Director issued his Report on Objections and Recommendations in which he recommended that the objections be overruled in their entirety and that the Board issue a certification of representative. In so doing, he found that the Petitioner's leaflet was an accurate recitation of a listing of wage rates paid under certain of the Petitioner's area contracts, and of the wages paid to employees in the Petitioner's bargaining unit at Lawrence Packing Corporation (one of the Employer's competitors). He further found that, even assuming a material misrepresentation was made, the Employer had sufficient time to reply. Respondent filed timely exceptions to the Regional Director's report reiterating the contentions set forth in its objections and arguing, *inter alia*, that the Petitioner's leaflet was an incomplete disclosure and a half-truth. On September 11, 1980, the Board issued a Decision and Certification of Representative adopting the Regional Director's findings and recommendations (not reported in volumes of Board Decisions).

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[1] Official notice is taken of the record in the representation proceeding, Case 1-RC-16868, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] The General Counsel moves for summary judgment solely on these allegations of the complaint. He moves that the remaining allegations in the complaint, as amended by the amendment to the complaint, be considered at the scheduled hearing before an administrative law judge. We find that the remaining allegations of violations of Sec. 8(a)(1), (3), (4), and (5) of the Act raise genuine issues of material fact. We therefore shall remand the issues raised by those allegations of the complaint to the Regional Director for hearing thereon.

259 NLRB No. 102

Respondent then submitted on September 29, 1980, a request for reconsideration of the Board's Decision and Certification of Representative. Its request was found to be untimely filed and was not considered. On October 8, 1980, Respondent again submitted a request for review seeking to overturn the ruling as to the untimeliness of its earlier request. On October 23, 1980, the Board reaffirmed its rejection of Respondent's request for reconsideration stating again that it had been filed in an untimely manner. On April 26, 1981, Respondent filed a "Motion To Reopen the Record and a Request for Oral Argument" alleging, *inter alia*, that prior to April 1, 1981, it was not aware that the affidavit of Respondent's president, Melvin Ross, taken by a Board agent during the investigation, had not been forwarded to the Board by the Regional Director as part of the record. It maintained that failure to consider the affidavit resulted in a denial of Respondent's due process. By telegraphic order of May 11, 1981, the Board denied Respondent's motion without prejudice to raising the issues of the contents of the record and the right to a hearing in the election objections proceeding in the unfair labor practice case.

In its answer to the complaint, as amended, Respondent admits that it refused to bargain collectively with the Union and that it refused to furnish the information requested by the Union, which Respondent concedes would be relevant and necessary for the Union's performance of its function as the exclusive bargaining representative of the unit employees if the Union were the lawful bargaining representative. Respondent denies that the Union is the exclusive representative of its employees and seeks to have the election results set aside based on the alleged misrepresentations that were the subject of the objections.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

The issues raised by Respondent in this proceeding concerning the merits of its exceptions to the Regional Director's Report on Objections were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.

Further, we find no merit to Respondent's contention that it was denied due process because Melvin Ross' affidavit was not transferred to the Board as part of the record. First, statements of witnesses which were before the Regional Director in his disposition of election objections and challenged ballots are not part of the record in a representation case as provided in Section 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. Indeed, such affidavits are expressly excluded from the definition of "documentary evidence" in the September 9, 1981, amendment to Section 102.69. (See Sec. 102.69(g)(1)(ii).) Second, Respondent has not been prejudiced by the Regional Director's failure to transfer the affidavit to the Board. The affidavit was attached to Respondent's "Motion To Reopen the Record" and to its "Opposition to Motion for Summary Judgment and Request for Transfer to the Board." Although such an attachment is normally part of the record only when it has been timely submitted to the Regional Director, we shall consider it part of this record in light of Respondent's assertion that it was unaware that the Regional Director had not forwarded the Ross affidavit. Accordingly, we have reviewed the affidavit and we find it raises no material issues of fact or law which warrant a reversal or modification of our previous Decision and Certification of Representative in Case 1-RC-16868. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant summary judgment with respect to the allegations of the complaint that Respondent refused to bargain with the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit and that Respondent refused to furnish certain information requested by the Union, relevant and necessary for the Union's performance of its function as the exclusive collective-bargaining representative.[4] We find, however, that genuine issues of material fact exist as to the remaining allegations of the complaint, as amended. We therefore remand those issues to the Regional Director for hearing before an administrative law judge as scheduled.

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[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Harvard Folding Box Co., Inc., a Massachusetts corporation, with an office and place of business at 71 Linden Street, West Lynn, Massachusetts, is engaged in the manufacture, sale, and distribution of folding boxes and related products. Annually in the course and conduct of its business, Respondent causes large quantities of cardboard and other materials to be purchased and transported from and through various States of the United States other than the Commonwealth of Massachusetts. Respondent also causes substantial quantities of folding boxes to be sold and transported from its plant to points outside the Commonwealth of Massachusetts. In addition Respondent annually sells and ships quantities of folding boxes valued in excess of $50,000 directly to points outside Massachusetts.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Boston Local No. 600, Graphic Arts International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Harvard Folding Box Co., Inc. at its plant located at 71 Linden Street, West Lynn, Massachusetts, including truckdrivers, but excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On May 29, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 1, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 11, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 16, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 25, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Commencing on or about September 23, 1980, and at all times thereafter, the Union, by letter, has requested Respondent to furnish the Union with names, addresses, classifications, dates of hire, and wage rates of all the employees in the bargaining unit. This information is necessary for and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the unit employees. Since on or about September 25, 1980, Respondent has failed and refused to furnish the Union with the information described above.

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[4] See pars. 12, 13, 14, 15, 16, 18, 19, and 20 of the complaint, as amended by the amendment to the complaint, and pars. 23 and 24 of the complaint, insofar as they relate to the above-noted paragraphs.

Accordingly, we find that Respondent has, since September 25, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Harvard Folding Box Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Boston Local No. 600, Graphic Arts International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Respondent at its plant located at 71 Linden Street, West Lynn, Massachusetts, including truckdrivers, but excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 11, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 25, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and by refusing to furnish the Union with the information it requested in its letter of September 23, 1980, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Harvard Folding Box Co., Inc., West Lynn, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Boston Local No. 600, Graphic Arts International Union, AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent at its plant located at 71 Linden Street, West Lynn, Massachusetts, including truckdrivers, but excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to supply the aforesaid labor organization with information necessary for collective bargaining, including the names, addresses, classifications, dates of hire, and wage rates of all the employees in the bargaining unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, supply the above-named labor organization with information necessary for collective bargaining, including the names, addresses, classifications, dates of hire, and wage rates of all the employees in the bargaining unit.

(c) Post at 71 Linden Street, West Lynn, Massachusetts, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 1 for the sole purpose of holding the scheduled hearing before an administrative law judge to resolve the issues raised by those allegations of the complaint upon which summary judgment has not been granted.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Boston Local No. 600, Graphic Arts International Union, AFL–CIO, CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to supply the above-named Union with information necessary for collective bargaining, including the names, addresses, classifications, dates of hire, and wage rates of all the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees employed by Harvard Folding Box Co., Inc. at its plant located at 71 Linden Street, West Lynn, Massachusetts, including truckdrivers, but excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, upon request, supply the above-named Union with information necessary for collective bargaining, including the names, addresses, classifications, dates of hire, and wage rates of all the employees in the bargaining unit.

HARVARD FOLDING BOX CO., INC.

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Walter Carpet Mills, Inc. *and* Building Material & Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Cases 21-CA-18257, 21-CA-18926, and 21-RC-16127

December 14, 1981

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 20, 1981, Administrative Law Judge Frederick C. Herzog issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Walter Carpet Mills, Inc., City of Industry, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election and held in Case 21-RC-16127 be, and it hereby is, set aside, and that said case be, and it hereby is, remanded to the Regional Director for Region 21 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's analysis and conclusions concerning the discharge of employee Ameliz Salazar and the Administrative Law Judge's conclusions concerning the speech given by Respondent's vice president, Donald Kuhn.

259 NLRB No. 96

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge: On October 3, 1979, Building Material and Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,[1] filed a petition in Case 20-RC-16127 seeking certification as the exclusive collective- bargaining representative of the production and maintenance employees of Walter Carpet Mills, Inc.,[2] located at City of Industry, California. Pursuant to a Stipulation for Certification Upon Consent Election an election was conducted on November 30, 1979. The results were that, of approximately 424 eligible voters, 188 cast votes for the Union and 209 cast votes against it, with the 10 challenged ballots being insufficient to affect the results of the election. The Union thereafter filed objections to the conduct of the election, but failed to present evidence in support of the allegations made in the objections. Accordingly, the Regional Director for Region 21 recommended that the Union's first four objections be overruled. The fifth, and last, objection was dealt with as follows.

On October 9, 1979, the Union filed a charge in Case 21-CA-18257 alleging the commission by the Company of unfair labor practices within the meaning of Section 8(a)(1) of the Act. A complaint was issued based hereon. Subsequently the Regional Director issued his report on the election objections, as mentioned earlier herein, and, noting that the findings of his investigation into the charge underlying the complaint in Case 21-CA-18257 demonstrated to him the sort of conduct alleged by the Union's fifth objection to the election, he concluded that the allegations made in Objection 5 could best be resolved in a hearing in conjunction with the complaint allegations of Case 21-CA-18257. Accordingly, he ordered the cases consolidated for hearing.

On April 10, 1980, the Union filed a second charge, in Case 21-CA-18926, against the Company, alleging that employee Amelia Salazar was discharged by the Company on April 9, 1980, because of her prior activities on behalf of the Union. The Regional Director subsequently issued a complaint based on this new charge, and consolidated its allegations for hearing with those of the cases previously mentioned.

These were heard by me at a hearing conducted in Los Angeles, California, on June 3, 4, 5, and 6, 1980. All parties were present and were afforded full opportunity to participate, to adduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record thus compiled, my observation of the witnesses and their demeanor, and my consideration of the arguments advanced in the post-trial briefs filed by the parties, I make the following:

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[1] Hereinafter referred to as the Union.

[2] Hereinafter referred to as the Company.

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The consolidated complaint alleges, and the Company's answer admits, that the Company is a California corporation engaged in the business of manufacturing carpet at its facility located in City of Industry, California. Further, it was alleged and admitted that the Company annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside California.

Based on the pleadings I find and conclude that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNION AS A LABOR ORGANIZATION

The consolidated complaint alleges, the answer admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE COMPANY'S SUPERVISORY HIERARCHY

The consolidated complaint alleges that the following named individuals occupied the positions set opposite their names, and, further that they are, and have been at all material times herein, supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act: Donald Kuhn, vice president of marketing and administration; Sandy Morales, personnel director at the New Braunfels, Texas, facility of Westpoint Pepperell, a parent corporation of Respondent; Derek Davis, director of employee relations for the carpet and rug division of Westpoint Pepperell, a parent corporation of Respondent; Jim Laney, industrial relations director; Homer Frausto, department head of tufting department; Joe Ruiz, supervisor, carpet repair and final inspection; George Dewsnap, chief industrial engineer; and Samuel P. Ortiz, supervisor, shipping department.

While the Company's answer initially denied certain of these allegations, the Company did ultimately admit that each person named above was a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act. Accordingly, I so find and conclude.

IV. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONABLE CONDUCT

A. *Background*

The Company, Walter Carpet Mills, Inc., was owned by Ludlow Corporation until its acquisition by Westpoint-Pepperell in August 1978. Since its acquisition it has apparently continued to operate essentially as it did previously, manufacturing carpet, but now as 1 of some 50 such facilities owned by Westpoint-Pepperell.

The record here reveals nothing to suggest that its labor relations history has been marked or typified by acrimony, unfair labor practices, or other illegal conduct. By all that appears, the organizational campaign undertaken by the Union herein may have been its first contact with a labor organization at the facility located in City of Industry, California.

It is clear, however, that the facts having direct bearing on this case began to unfold in late August and September 1979, when the alleged discriminatee, Amelia Salazar, and two fellow workers, Hilda Leonard and Elena Melendrez, contacted the Union. They then proceeded to enlist the support of other workers by means of personal conversations and solicitations and by distribution of cards and newsletters. All of this led to the election, the results of which are set forth above.

The election petition was filed on October 3, 1979, at 9:07 a.m. The election was conducted on November 30, 1979. Thus, the Union's objection that the Company engaged in a concerted campaign of harassment, coercion, intimidation, surveillance, and threats designed to impair the rights of the employees to exercise their right to vote in a free and fair election must be examined by me with a view toward determining, not only whether such conduct occurred, but also whether it occurred within the "critical period" preceding the election. The Board has long held that, absent exceptional circumstances not present in this case, the critical period is limited on the one end by the date that the petition was filed and on the other by the date of the election. *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961).[3] The "critical period" has been held to include the day on which the petition was filed, rather than running "from" that date. *Kenworth Trucks of Philadelphia, Inc.*, 229 NLRB 815, 822 (1977).

B. *The Issues*

Speaking generally, the allegations against the Company herein raise issues in only four categories:

(1) Whether or not the Company violated Section 8(a)(1) and interfered with the election by holding meetings of large groups of employees both before and after the filing of the petition (it was asserted that the Company created the impression among employees that their unionizing efforts would be made futile, promised them benefits and threatened employees with discipline).

(2) Whether or not the Company violated Section 8(a)(1) and interfered with the election by conducting a campaign of individual interviews with employees in which employees were led to believe their unionizing efforts would be made futile and in which employees were interrogated about their own and others' union activities.[4]

(3) Whether or not in various specific instances supervisors of the Company violated Section 8(a)(1) of the Act and/or engaged in objectionable conduct.

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[3] The Union's assertion that I should find that the Company's conduct was "aggregious" [sic] and that the critical period began sometime before the filing of the petition is unpersuasive, and its citation of *Lyon's Restaurants, a wholly-owned subsidiary of Consolidated Foods Company*, 234 NLRB 178 (1978), is inapposite, as that case dealt with a narrow exception to the *Ideal Electric* rule, having to do with a type of pre-petition conduct peculiar only to unions.

[4] At the hearing the General Counsel unsuccessfully sought to amend the complaint to allege that the Company also solicited grievances during these interviews. While the issue raised by such an allegation seems closely related to another complaint allegation, i.e., promising benefits, it must be borne in mind that the allegations having to do with promises of benefits rose out of a different factual setting, the large group meetings referred to in sec. IV,B(1), above.

(4) Whether or not the Company discriminated against Amelia Salazar when it discharged her from her job on April 4, 1980, of her having engaged in union, or other protected concerted activities.

C. *The Group Meetings*

The Company learned that an organizing campaign was underway no later than mid-September 1979, when union authorization cards were discovered in one of the Company's restrooms. Therefore, the Company's vice president and general manager of Walter Carpet Mills arranged to and did conduct a series of group meetings with employees. The employee complement of approximately 400 workers was split up into 6 to 8 groups, with roughly 60 to 70 employees in each group. Kuhn testified, at variance with his investigatory affidavit, that the meetings were begun on the night of October 1, 1979, and continued through the day of October 2, 1979, concluding before midnight. He was corroborated in this testimony by Morales, director of personnel at a company plant in Texas; Morales' testimony was similarly at variance with an affidavit he had provided to the General Counsel during the investigation.[5]

Based on an amalgam of the testimony concerning these meetings a general picture emerged, as follows. Kuhn was accompanied by Morales, Don Hartline, personnel director, and a Mr. Kelehear, director of personnel industrial relations for Westpoint-Pepperell's carpet and rug division. The meetings were begun, after employees were assembled by their supervisors, with Kelehear making introductory remarks. Then Kuhn read a prepared speech, with Morales interpreting for him as he went along. During his speech, Kuhn referred to two large pieces of cardboard, which displayed blown-up versions of union authorization cards, in both English and Spanish.

Kuhn's speech, as written, advised employees that he had learned the Union was trying to get union cards signed, that the Union was after their money, that employees had not needed to pay anyone previously to get fair treatment, that the Company was opposed to the Union coming into the plant, that employees need not join or pay dues to a union to keep their jobs, and that employees would get no special treatment for having joined the Union. He went on to stress that selecting a union by signing authorization cards might have greater consequences than employees realized because it might enable the Union to circumvent the process of a secret election. He told employees they could not rely on assurances that their cards would remain confidential, and illustrated his point by means of a story about employees being subpenaed to testify in a previous hearing despite earlier assurances against such disclosures. He urged employees to give "very serious thought to this matter" and not sign away their "job rights" in reliance on promises made by the Union. He followed by telling them of his belief that the Union would not accurately advise them of its dues, or its history of long and bitter strikes, or the fines it levied on its members. He then told the employees of a union campaign at another of Westpoint-Pepperell's plants, noting that many employees had lost their jobs after 4 years of negotiations led to a collective-bargaining agreement of no value to employees. Kuhn reiterated that the Union was interested in the employees only in an effort to get money from the employees. He urged employees to be careful about what they signed, and encouraged them to "discuss this matter freely with . . . supervisors." He closed by reminding them that the Union could not force the Company to agree to anything, and might call them out on strike, thereby causing all employees to have economic hardship. Kuhn closed by calling for employees to continue working directly with the Company, and telling employees that they could come to their supervisors, or anyone in management, to get straight answers to their questions.

Counsel for the General Counsel's witnesses recalled the speech essentially as outlined above, although with certain additions and variations. For example, Salazar and employee Silver recounted that they heard that employees *will* lose rights. Employee Alvarez heard that there *would* be strikes. Employee Gonzalez heard that the Union *could not* give employees anything and that Kuhn *would* try to resolve employees' problems without the intervention of a third party. And employees Leonard and Casillas heard that the Company *would* solve employees' problems if only it were given a chance. Moreover, Salazar heard a threat to discipline any union people found to be bothering employees, while Leonard recalled that it was stated that anyone taking union cards around for signatures, or going around from one department to another to talk, would be disciplined. And, finally, employee Monje heard Kuhn promise employees better benefits and salaries, if only given the opportunity.

As a result of such testimony I am urged to find that (a) employees were promised improved benefits, (b) employees were threatened with discipline, (c) employees were threatened with disclosure of their union sympathies, loss of their rights, strikes, and loss of work, and (d) in their entirety, the speeches conveyed to employees a sense of futility in their efforts to select a collective-bargaining representative. Counsel for the General Counsel failed to cite any case in her brief supporting these propositions, however. The Union's brief makes no mention of these matters.

I am unpersuaded that Kuhn or any other official of the Company actually made the types of threats or promises attributed to them by the General Counsel's witnesses. For while it is admitted that Kuhn, and his assistants, did say something more to the employees than is shown by the text of Kuhn's speech, it seems likely that such statements were insignificant and nothing more than perfunctory openings and closings to the various meetings, or that they were in response to isolated and uninvited questions. I am persuaded in this by the testimony of the Company's witnesses that the text of the speech was, in the main, closely adhered to. And, while the text does, indeed, contain ominous though oblique, references to such dire consequences as "loss of rights," "strikes," and "discipline," etc., as well as optimistic allusion to improvements in the future, it seems not to have crossed the line into violative threats or promises. That employees hearing such a speech might, as it appears to me they did, later recall a threat or a prediction in somewhat stronger terms than it was made is not surprising.[6] For, clearly, the speech was designed to evoke strong emotions among the employees, and to arrest their movement toward the Union. As such, the speech serves as evidence that the Company harbored strong sentiments against the Union.

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[5] Counsel for the General Counsel urges that these variances should lead me to discredit the testimony of Kuhn and Morales. She also urges me to credit the testimony of employees Casillas and Alvarez, who testified to having attended such a meeting as early as September 27 or 28, 1979. The point is not viewed by me as an important conflict, but I resolve it in favor of the version given by Kuhn and Morales, notwithstanding the variance between their testimony and their respective affidavits. There appears to be no reason why either would benefit from fabrication about the matter. And here, as in numerous other instances during the hearing, their testimony seemed to be more precise and accurate than that of the witnesses offered by counsel for the General Counsel. While I do not believe that either Casillas or Alvarez was fabricating while testifying, neither do I believe that either was capable of recounting a detailed actual scenario with accuracy.

But that is not the question at issue. For it has been long settled that Section 8(c) of the Act affords protection to an employer's expression of opinion concerning unions so long as the expression remains free of threat of reprisal or force or promise of benefit. Instead, since the Supreme Court's decision[7] in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Board has developed specific guidelines for distinguishing between protected speech and proscribed threats or promises of benefit. In making such distinctions the Board regularly cautions that it involves an examination of all the circumstances surrounding the employer's speech. The inquiry encompasses not only what the employer intended to imply, but also what its employees reasonably might have inferred from these remarks. Thus remarks, relatively innocuous in themselves, may be considered violative when considered in the totality of the employer's conduct.

Moreover, if the subject matter discussed by the employer is one peculiarly under his control (e.g., closing the plant, moving the plant, loss of wage increases, loss of benefits) the speech will be very carefully scrutinized by the Board. In election situations an employer may make such statements only if they are made on the basis of objective fact to convey his belief as to demonstrably probable consequences beyond his control. *Honeywell, Inc., Photographic Products Division*, 225 NLRB 617 (1976), quoting *Gissel, supra* at 618.

Here the allusion to strikes seems permissible. The speech did not depict strikes as inevitable, or within the control of the employer. Compare *Thomas Products Co. Division of Thomas Industries, Inc.*, 167 NLRB 732 (1967).

Nor was the possible loss of "job rights" presented as a factor within the control of the Company, any more than the disclosure of names relating to the signing of authorization cards in the event that litigation should ensue.

As to the threats to discipline employees for going around with union cards, or going from one department to another, I simply find the testimony of Salazar and Leonard lacking in credibility. No other witness was called to support their testimony of any such bald threats. I believe that the two leading adherents of the Union were perhaps so apprehensive concerning their exposure to reprisals as a result of their leadership that they imagined somewhat more than was actually said. Moreover, Leonard exhibited a high level of partisanship in her testimony, thereby detracting from her general credibility. And, as will be seen at a later point, Salazar's overall credibility was badly strained by her inconsistent testimony.

The allegation that benefits were promised in this speech must fail, since no words were spoken which might reasonably lead employees to believe that benefits would be conferred. Instead, the expression of hope that they could continue to work together (for their mutual benefit presumably) seems sufficiently ambiguous to prevent its being labeled as a promise, whether of benefit, or anything else.

In sum, I find and conclude that the evidence has failed to prove any of the allegations made in paragraph 7 of the complaint. I shall, therefore, dismiss these allegations.

D. *The Interviews*

When Westpoint-Pepperell acquired the Company from Ludlow in August 1978 it noted the need to establish its own policies there, this was accomplished in part by conducting numerous meetings and training sessions among the supervisory and management hierarchy at the Company. But also, so it claims, the Company made plans, as early as February or March, to conduct what it refers to as "in depth interviews" among the employees.

The Company's evidence was generally to the effect that its standard policy of some 11 years' standing calls for such interviews to be conducted on a routine basis at each of its facilities about once every year to year and a half. Its practice is to have such interviews carried out by management officials from another of its facilities. Thus, Davis explained, that though he did not even begin to work for Westpoint-Pepperell in Georgia until June, he learned thereafter that he was to conduct such interviews at the Company according to a plan set up months before. Moreover, despite the testimony of several employees that they were given no prior explanation or notice of the Company's plans, I credit Kuhn's testimony that such notices were placed on the Company's bulletin boards, in both English and Spanish, on September 20, a full week or more before the interviews began.

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[6] In this connection, it must be noted that most of these witnesses, like several of the Company's, exhibited a lack of fluency in the English language. Based upon my observations at the hearing I am convinced that much of what is disputed in this case is bottomed upon mere misunderstanding, rather than conscious fabrication or deceit on the part of witnesses. Nevertheless, I have evaluated the relative credibility of witnesses with this factor in mind, attempting to gauge the degree to which precision and accuracy seemed either possible or of importance to each witness, taking into account each witness' apparent language difficulties on fluency.

[7] The Court set out a distinction between lawful predictions and unlawful threats or promises as follows:

> [A]n employer, who has control over that relationship [with employees] and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "brinkmanship" when it becomes all to easy to "overstep and tumble [over] the brink" . . . . At the least he can avoid coercive speech simply by avoiding conscious overstatements he had reason to believe will mislead his employees. *Id.* at 620.

The interview format appears to have been fairly standardized. Over the course of a few days, beginning on September 27 and continuing through the forenoon of October 3, Davis and Morales each conducted about 70 individual interviews with employees. Each interview was conducted in private, with only the employee and the interviewer present. Generally the interviewer awaited the employee in an office near the plant's nursing station, and caused the desired employee[8] to be sent in to him. However, as the interviews progressed, some employees not scheduled for interviews heard about them and requested that they be interviewed; some, if not all, such requests were evidently honored, even though doing so meant that interviews continued past their scheduled ending.

Both Davis and Morales followed a format in which they introduced themselves to the employees, assured the employee that their conversation would be treated as confidential, talked with the employee in an effort to put him or her at ease, and then asked questions concerning the employee's feelings about the employee's job title, the employee's level of satisfaction with his job, and his level of satisfaction with his supervisor. The interview was generally closed by asking the employee if he had any questions.

Neither Davis nor Morales admitted that they asked employees anything about the Union. But since some of the interviews took place shortly following employees having heard Kuhn's speech, some were asked their feelings about the speech. And Morales routinely[9] told employees of the Company's "philosophy" about unions, i.e., it is the Company's policy to treat employees fairly and consistently so that they would feel no need of a union.

The General Counsel's witnesses tended generally to corroborate the testimony of Davis and Morales as to the basic mechanics of the interview process. However, a number of these witnesses testified to additional matter. Their testimony is discussed below.

1. Salazar, for instance, testified that Morales, in an interview of October 1, 1979, told her that he knew there were problems in the plant and that he wanted to know their nature. She also testified that he said he had heard rumors that a union was trying to come in. He went on to say that a union would not help her and would simply take her money.

Morales denied talking to Salazar about unions, except, as he had testified, about the Company's "philosophy." However, Salazar also testified apparently in connection with his assertions to her that the Union was merely after her money. Morales asked why she should give the money she made working for the Company to a union when she could keep it for herself. She went on to say that when she responded that the Company was not, in her opinion, going to give her "a dollar,"[10] he stated, "Well, changes will come, but they will come without a union."

As noted earlier, Morales generally denied talking to employees about the Union, but he admitted that he had no recollection of any conversation with Salazar about "a dollar." I find Morales' recollection to be superior to Salazar's, notwithstanding his inability to recall every point raised by her testimony. Indeed, I found that his unwillingness to claim that he was able to recall each detail of this conversation (or even some of the General Counsel's witnesses in general) enhanced his appearance as a truthful witness, making sincere attempts to refute charges he believed to be unfounded. However, he was unwilling to refute such charges by attempting to appear that he recalled more than he actually remembered. Accordingly, this allegation shall be dismissed.

2. Leonard also testified about her interview with Morales, which she recalled as having occurred in late September or early October 1979. Morales testified that he simply had no recollection of his talk with Leonard. However, Leonard's testimony was that Morales said he had been sent there from Texas to solve employee complaints because the Company was good and was out "looking to make [employees] happy." She said that he denounced the Union, claiming it was only interested in her money, and saying that she would be throwing her money away, as well as losing her freedom to speak directly to management regarding problems.[11] In response to his question she denied having any problems. Despite the fact that Leonard's testimony stands unrefuted in its specifics, I find Morales' general denial more persuasive than Leonard's testimony, which appeared tainted by extreme partisanship. Accordingly, I find this point to be unproven by either counsel for the General Counsel or the Union.

3. Employee Mendoza asked for and secured an interview with Morales on October 9, 1979, the day following the end of the interview program. Mendoza testified that he went to Morales for help in securing a transfer. He testified that in the interview "the union thing came up," and that Morales, who had come from Texas to help solve the problems employees had as a result of ill treatment by the Company, had been thinking of returning to Texas when the union problem came up, and so Morales had stayed on to "help [employees] about the transfer and all of that. He stated in essence that Morales asked his help in persuading anyone who had not yet signed an authorization card to give him time to solve the problem.

While Morales had no recollection of talking about the Union with Mendoza, he generally denied saying anything about the Union, aside from his standard message regarding the Company's "philosophy." Instead, so Morales claims, it was Mendoza who injected the Union into the conversation by volunteering that he was not in favor of the Union but felt bound to go along with the prounion sentiment of a friend.

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[8] Apparently interviews were conducted with about one-third of the employees at the plant. These employees' names were selected at random, months before, though the list thus compiled was checked and augmented with other names in an effort to assure that a reasonable sampling of employee opinion from every department would be obtained.

[9] Morales testified that he refrained from stating the Company's philosophy in instances where the employee volunteered the expression of sentiments similar thereto.

[10] Evidently she took Morales' words to mean that he was assuring her of a raise sometime in the future.

[11] Such statement constitutes objectionable conduct, if credited, and if shown to have occurred within the critical period. *Armstrong Cork Company*, 250 NLRB 1282 (1980).

I have considerable doubts about whether Morales and Mendoza ever truly understood one another's words. But I found Mendoza's testimony credible when he spoke of Morales' attempt to enlist his aid in preventing employees from signing authorization cards, and in holding out the implied, albeit vague, promise of a benefit (i.e., help of an unspecified nature in securing the transfer sought by Mendoza).

Thus, I find that Morales' conversation with Mendoza was both violative of Section 8(a)(1) of the Act, and, inasmuch as the conduct occurred within the critical period, also objectionable.

4. Jose Avila testified that, as he requested, he was interviewed by Morales in "early October." Among other things Avila claimed that Morales asked him if he had signed a union card and why he had done so. Avila went on to testify that Morales stated that he was there to resolve the employees' problems.

Morales testified that he did, in fact, interview Avila, but that all he did was listen while Avila blurted things out.

Avila showed a strong animosity towards the Company, apparently over having been fired. I was not persuaded that he testified accurately and have determined to credit the testimony of Morales. Accordingly, this matter stands unproven.

5. Maria Monje testified that she was interviewed on or about October 5, 1979, by Morales at her own request. She recited problems to Morales and, according to her, he responded by saying he would try to solve them. She also recalled that he asked her opinion of the Union.

Morales acknowledged that he interviewed Monje, but stated that he was unable to recall anything they said to one another.

I found Monje to be a truthful witness but, like others, her demeanor caused serious doubts as to her accuracy and precision. Nevertheless, despite my misgivings, I do not believe there is adequate reason to discredit her uncontroverted testimony. Accordingly, I find that Morales violated Section 8(a)(1) of the Act by interrogating her about her union sympathies, activities, and leanings, and impliedly promised to grant her benefits by remedying the problems she brought up regarding her salary and other matters. I also find that this conduct constituted a valid objection to the election.

6. Hector Gonzales testified about his interview with Morales on October 3, 1979. Gonzales recalled that, among other things, Morales asked him what he thought "about the problems with the Union."

Morales denied having asked the question attributed to him and insisted that he never mentioned the Union except in connection with his usual explanation of the Company's "philosophy." I credit Morales' recollection, as Gonzales impressed me as an angry and highly biased witness. As a consequence, I find that no violative or objectionable conduct has been proven regarding this incident.

7. Annie Alvarez testified that she was interviewed by Davis on or about October 3. She complained to him about the temperature in the plant and about her pay scale. She recalled him saying that he would "check it out." She also testified that he asked her what she had thought of the meeting (conducted by Kuhn), and what she thought about the Union. However, on cross-examination she admitted that she could not exactly recall just what Davis had asked her, or just what he had said he would do about the problems she had mentioned.

Davis admitted that he asked her how she liked Kuhn's speech, but denied any other comment or question about the Union, or his intentions regarding any remedy for Alvarez' complaints.

Based on the demonstrated uncertainty in Alvarez' testimony I have no hesitancy in crediting Davis' denials and finding that this matter stands unproven.

8. Carmen Silver testified that she was interviewed by Davis "a couple of days after this big meeting" (conducted by Kuhn). She recalled him asking her thoughts about the speech by Kuhn, and her response that it seemed unfair to talk about the Union without having a union representative present to answer the Company's claims. She recalled that he told her that if the Union came in everyone would have to belong to it.

According to Davis he merely asked Silver her thoughts about the speech as a sort of "icebreaker" in their conversation. He stated that Silver then went on and volunteered a great deal more.

I credit Davis' account, as Silver's demeanor demonstrated a strong bias against the Company.

Accordingly, this matter stands unproven.

9. In light of my findings above, I also find that the General Counsel's assertion that such interviews are violative of Section 8(a)(1) in their entirety cannot stand.[12] While the timing of these interviews seems suspiciously contrived, I also find that the evidence supports no more than two isolated violations. Certainly, there has been no proof of a pattern of illegal conduct when the evidence supports such a relatively small number of violations considering the large numbers of employees interviewed. It seems illogical to infer that the nature of the interviews was tainted by illegality when only 1 witness, from among roughly 190 employees interviewed, testified convincingly regarding these allegations, for it should be recalled that Silver's testimony was credited only because it was uncontroverted.

E. *The Various Specific Incidents*

1. It is alleged that Supervisor Ruiz created the impression of surveillance and interrogated Salazar.

Salazar testified that in early November 1979 she had a brief verbal encounter with Ruiz in the Company's parking lot. She testified that he told her then that everyone he met told him that she was working for the Union. She also recalled him going on to say that he was sure she would not be so dumb. She made no response.

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[12] I note further that no party has either argued or shown that the interviews were violative because of factors such as, for example, the location in which they were conducted, or because the questions asked by Davis about the employees' views of Kuhn's speech might have been a calculated ruse to compel employees to disclose their sentiments for or against the Union, or because of any seeming infirmity in the assurances of voluntary and confidential participation afforded employees who were interviewed.

Ruiz testified that he did not have any such conversation with Salazar. Instead, so Ruiz testified, he simply congratulated or sought to console her, shortly after the Union had lost the election, by commenting to her that she had tried her best.

I credit Salazar's testimony regarding this incident, as each of the two accounts shows that there was an encounter between them and that the Union was mentioned. It seems implausible that Ruiz would have uttered words so sympathetically as he testified.

Accordingly, I conclude that the Company created the impression of surveillance of Salazar's union activities, in violation of Section 8(a)(1) of the Act and that this was an instance of objectionable conduct to the election.[13] The allegation that Ruiz interrogated Salazar has not been proven and shall be dismissed.

2. It is alleged that George Dewsnap, the chief industrial engineer and a supervisor, telephoned Salazar at her home in early November and interrogated her about her union activities, sympathies, and membership.

Salazar testified that around November 10, 1979, while home on a leave of absence, she received a phone call from Dewsnap. According to Salazar, during this conversation between old friends, Dewsnap asked if he could ask a personal question, and upon receiving her assent, Dewsnap asked if she belonged to the Union. She recalled that she responded affirmatively and the conversation then turned back to personal matters, primarily concerning the state of health of Salazar's daughter.

Dewsnap denied that he had asked the question, though he did recall telephoning Salazar. He recalled that he called to let her know that, though she was gone from the plant for a while, she was not forgotten. He claimed that he understood the reason for her absence was related to Salazar's health, not that of Salazer's daughter. He also testified that he had once, a month or two prior thereto, attempted to tell Salazar his own feelings about unions, but that he had been abruptly cut off by her.

I credit Salazar's account of this incident. While I have doubts about the accuracy of her testimony in many other respects, those doubts do not go to her essential truthfulness. In so simple a factual scenario as this, involving a friend, it seems unlikely that her account would have been either inaccurate or unduly enlarged.

Accordingly, I find that by this conduct the Company violated Section 8(a)(1) of the Act and interfered with an employee's free choice in the then-upcoming election.

3. It is alleged that on or about November 9, 1979, Samuel Ortiz, a supervisor, threatened employees and promised benefits for keeping out the Union. The General Counsel's evidence was that in early November Salazar and Ortiz happened to be leaving the plant simultaneously and, as they walked across the parking lot, Ortiz began to tell her that the Union was no good, that the Company was a good one, and that she would get good benefits (such as increased medical benefits) if the Union were not brought in. Though Salazar expressed doubt about his accuracy, he pointed out that he knew these things to be true because he had been present in management meetings. Ortiz also told her that the Union was no good, and claimed that some of its people were involved in criminal activities. He told her to wait and see if the Company did not, in weeks to come, "almost beg" employees for another chance. He told her that things would be better if the Union were not brought in. And, finally, he told her that if she became a shop steward for the Union she would probably be beaten up.

Ortiz admitted that he talked to Salazar, but denied making any threats or implied promises, saying that he was friendly with Salazar and merely sought to respond to her complaints about the Company.

Ortiz, though apparently well motivated toward Salazar, was not credible. He demonstrated a high degree of bias against the Union. Accordingly, I credit Salazar's account of this incident and find that Ortiz committed the violations as alleged, and that such conduct also interfered with a voter's free choice in the upcoming election.

4. It is alleged that on January 18, 1980, Homer Frausto, a supervisor, threatened employees if they supported the Union.

Salazar's version of these facts was as follows:

On January 18, 1980, she was called to attend a company meeting. This meeting, with about 20 employees present, was conducted in the tufting department, with Dan Hartline presiding. He explained the Company's disciplinary policy to the assembled employees. At one point Salazar, in requesting clarification of a point, implied that the Company practiced favoritism.

Later that day she was called into the office of Frausto. Upon her arrival he complained that she had been making false accusations about management and he asked her if she had any proof. She responded negatively, implying at the hearing that he did so because of a desire to protect the sources of her information. He told her that her accusations were serious. She said that Hartline had misunderstood her, but added that if the Union had come in they would not have such problems. At that, so she testified, Frausto stated that he had do anything to keep the Union out.

Frausto, in his version of this conversation with Salazar, conceded that he had asked for whatever evidence she might have to support what he regarded as a serious attack upon the Company, and, apparently, his own integrity. However, he testified that as soon as she told him she could not support her allegations with evidence the conversation was soon ended without mention of the Union.

While I have no doubt that Salazar did, in fact, protest what she regarded as unfair treatment of employees, and that she and Frausto later had a discussion about it in which he asked her for the basis for her accusation, I do not credit her further testimony. I found Frausto to be a straightforward and earnest witness, whose testimony seemed to be careful, honest, and sincere. Additionally, it struck me as somewhat implausible that Salazar would have made her alleged comment to the head of her department about the need for a union over a month and a half after the election, with nothing to indicate that Frausto had ever been previously involved in any conversation which might logically lead into the remarks she claimed to have passed with him. And, finally, bearing in mind my previously noted dubiousness about the precision to be attributed to Salazar's recollection, I find myself reluctant to base a finding of a violation upon a remark which is, to say the least, somewhat ambiguous.

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[13] No finding is made herein with respect to Salazar's testimony that Ruiz talked to her on December 3, expressing surprise that she was present (in view of his expectation that she would be with her union friends). This matter is neither alleged nor argued by counsel for the General Counsel as an unfair labor practice. And, since it falls outside the critical period, it cannot serve as a basis for a finding of objectionable conduct.

This allegation is unproven and is dismissed.

F. *Salazar's Discharge*

1. Facts

Salazar began working for the Company on January 1, 1968. Aside from a couple of leaves of absence, each of which lasted about 3 months, she worked at the Company until April 4, 1980. On that date she was fired.

For some time preceding her discharge Salazar worked in the tufting department. During much of her career with the Company she had done "re-work," or mending, upon carpets which were manufactured with a flaw. During the time immediately preceding her discharge she had worked as an "Inspector/Mender" on machine no. 11, where her primary duty was to note any flawed material being turned out and to notify the machine operator to stop the machine. Her leadman was Alfrreo Nereo, her supervisor was Manuel Martinez, and the manager of the tufting department, including all three of its shifts, was Homer Frausto.

Salazar's work reputation was good and she had no history of problems with discipline, quality, or attendance until the time she began her activities on behalf of the Union, in August or September 1979. Indeed, during the hearing she repeatedly and adamantly testified that even up to the time of her discharge she had never been warned or disciplined.

As noted earlier in this Decision, Salazar, along with Hilda Leonard and Elena Melendrez,[14] contacted the Union in late August 1979. They sought the Union's help because Frausto told them they would no longer be allowed "clean-up time." The Union gave them a supply of authorization cards and literature. They began soliciting fellow employees to sign authorization cards and distributing the cards and literature throughout the employee complement. Salazar personally approached and solicited approximately 60 to 70 employees in efforts to persuade them to sign cards during September and October 1979. Generally she carried out her organizational activities in the Company's parking lot after her work shift concluded in mid-afternoon. Ultimately Salazar was designated by the Union to serve as an observer in the election of November 30, 1979.

Obviously, such activities could scarcely go forever unnoticed by the Company. So, the Company stipulated at the hearing that it was aware of her sympathies for the Union when she was designated as an election observer, a week or so before the election. While it seems more likely that the Company gained knowledge about Salazar's sympathies and activities considerably earlier than late November, it remains unclear whether such knowledge was gained at or before the time she began to have disciplinary problems.[15]

It cannot be said with certainty that the Company viewed Salazar as a prime adherent of the Union until early November 1979 when the incidents with Ruiz, Dewsnap, and Ortiz occurred.

In any event, the election campaign was conducted throughout October and November and the Union seemingly lost the election conducted at the end of November. Salazar, however, continued her regular work for the Company throughout the fall and winter of 1979 and the spring of 1980.

But, on April 1, 1980, a Tuesday, Selazar was assigned to work on machine no. 11 as an inspector/mender. The operator assigned to the machine was Jose Martinez. Such machines are approximately 15 feet across with 1,160 lines of material, called "ends," being fed down from creels situated on the two floors above. The material is woven into a carpet, complete with texture and pattern, as it feeds through the machine. As it feeds out of the machine on the side opposite where the operator normally stands the inspector/mender is supposed to be stationed on the catwalk and observe whether there are defects. If the inspector spots a defect the inspector notifies the operator, who stops the machinery.[16] On some machinery the inspector/mender must not only spot defects but must also mend them as they come out of the machine; toward this end a small, hand-held "gun" is used by the inspector/mender. But on machine no. 11 defects, or "mends" as they are called, were simply noted and the material was diverted to the rework frame where four employees were constantly stationed to attend to repairing defects. However, generally speaking, the longer the "mend" the less the chance there was of mending it so successfully that the carpet would not be downgraded and sold at a discount price, as a "second." The Company oonsidered any "mend" over 3 feet in length to be very long.

During the day on April 1, 1980, Salazar's leadman, Nereo, happened to pass by machine no. 11 and noticed that it was turning out defective carpet. He noticed, too, that Salazar was not at her appointed place[17] on the opposite side of the machine from the operator. So he stopped the machine and waited for her to return. He asked the operator about Salazar's whereabouts and was told that the operator had not known she was absent. Though he had just seen Salazar talking to another employee, he had not known then that she was not on an authorized break. When she came back about 5 minutes later, he told her of his observations. Then he reported the incident to Department Manager Frausto and Supervisor Martinez. Among the items he had noted, and which he reported, was that machine no. 11 had run some 60 to 70 feet of defective carpet before being stopped.

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[14] Melendrez was evidently discharged by the Company on or before Labor Day 1979. Though the point was not established, the record contains at least the hint that she was not thought to be a good enough worker to survive her probationary period. There is no evidence that her discharge was violative of the Act.

[15] Counsel for the Union failed to follow up her own questions and inquire of Leonard about the dates of certain incidents about which Leonard testified, evidently to demonstrate that supervisors and a forelady had knowledge of Leonard's, and perhaps Salazar's, union activities.

[16] When the machine is stopped in this fashion it leaves a mark on the carpet. Such "stop marks" are horizontally embedded in the carpet and are sometimes of such severity as to cause the material to be downgraded as a "second." Such marks are the sort of defect referred to by Leonard in her testimony to the effect that, after Salazar was fired, Hartline told a group of employees that machine no. 11 had been turning out defective carpet because of mechanical problems. However, such defects are not the sort which preceded Salazar's discipline, and ultimate discharge; those defects were vertical and were caused by tufts of material having been omitted or skipped.

On the next day, April 2, a Wednesday, having checked into the matter sufficiently to be satisfied that he knew what had happened, Martinez spoke to Salazar and Jose Martinez, the operator. He verbally warned them to use care, so as not to cause "seconds" produced. But no disciplinary, or even counseling, action was taken against either employee.

And that is apparently how matters would have remained had there not been another incident on Thursday, April 3. This time, however, Martinez saw for himself that Salazar was again absent from her assigned post, which again happened to be as inspector/mender on machine no. 11. And, he saw that she was talking to other employees. As he testified, "She knew, because she saw me and right away she saw me, she run away." And "I told Mr. Frausto, Homer, it is too much; she don't want to stop doing that." Accordingly, he decided to recommend that a written warning be issued to her and that she be discharged. He did so and turned the matter over to Frausto, who agreed and, in turn, submitted the issue to Dan Hartline, the personnel director and the official responsible for authorizing personnel actions such as discharges.

Thus, on Good Friday, April 4, 1980, Hartline sent for Salazar and called her into his office, with Frausto and Martinez present. He testified that he reviewed her record with her, including the fact that this incident constituted her third warning. And, so the Company contends, its policy was that any employee receiving a third warning in any 12-month period was to be automatically terminated. As a consequence, Hartline testified, he had no alternative but to discharge Salazar.[18] He did so, and issued her final paychecks to her. Salazar, although refusing to sign any of the documents proffered her by Hartline, claimed that the accusations against her were untrue, but to no avail.

The essence of the case of the counsel for the General Counsel appears to rely heavily on the leadership role of Salazar in the organizational campaign during the fall of 1979, and the suspicious timing of warnings which the Company claims were given Salazar near the time of the campaign's outset. Additionally, the fact of the prior existence of a formal disciplinary system at the Company is called into question, as well as whether Salazar was ever afforded any notice of her jeopardy thereunder. And, finally, the General Counsel contends that the evidence demonstrates harsh, disparate treatment toward Salazar, with inadequate and unreliable documentation of the reasons underlying the seemingly sudden change in the Company's view of Salazar's worth as an employee.

2. Discussion and conclusions

Neither the leadership role of Salazar in the organizational campaign, nor the suspicious timing of disciplinary actions taken against her at that time can be seriously contested.

But the remainder of the counsel for the General Counsel's contentions cannot withstand close scrutiny.

The existence of the Company's policies regarding employee discipline is not, in my view, successfully attacked by the testimony of Salazar, and other witnesses, that they had no knowledge of such policies before their explanation by Hartline at a meeting called for that purpose on January 18, 1980. For, as demonstrated by the previously noted failure of communication regarding the notices of the Company's intent to conduct individual interviews, the fact that certain employees may testify, with evident veracity, as to their complete ignorance about a particular policy does not necessarily establish the previous nonexistence of the policy. For it ignores the plausible, and credited, testimony of Hartline that following the Company's acquisition by Westpoint-Pepperell, each policy required discussion and promulgation among the Company's supervisory personnel, that a series of meetings was held toward that end, and that the Company's policies on discipline were explained or reinforced at small group meetings of employees, as questions arose, as well as in the larger employee meetings during the week of January 18, 1980. And nowhere is there direct evidence that the meetings during the week of January 18, 1980, were called to announce new policy, as opposed to an ongoing program of explaining or reinforcing all policies, whether new or old. To the contrary is Hartline's credited testimony. Further, as shown elsewhere, the testimony of Salazar that she had previously known of no such disciplinary system is demonstrably unreliable, for it became clear during her cross-examination in the General Counsel's case on rebuttal that she must have had at least rudimentary understanding of the very existence of the Company's disciplinary system, for she admittedly had been its subject more than once, her previous denials notwithstanding.

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[17] The operator is capable of running the machine alone, at least for relatively short periods of time, by utilizing a remote-control switch to stop the machine. However, he would not resort to this if the inspector left the area without first telling him that she was leaving, since, due to the intervention of the carpet and the machine, he would not be able to observe that the inspector was absent.

In this case Jose Martinez claimed not to have known that Salazar was going to leave on April 1, thereby accounting for his failure to come around to the other side of the machine and operate it with the remote-control switch pending her return. As a consequence, he had no way of observing the flaw in the carpet as it was produced, since the defect was visible, not from the operator's normal position, but from the inspector's catwalk on the opposite side of the machine.

Salazar acknowledged that she was aware of a company policy requiring that an inspector first notify an operator before leaving the assigned post for a break, or to go to the restroom. She also acknowledged her understanding of the purpose behind such policy, i.e., to allow the operator to be on notice that he would be required to go to the opposite side of the machine and operate it by means of the remote switch while doing double duty as an inspector during the inspector's absence.

[18] Another incident on April 3 and 4 clearly infuriated Martinez against Salazar. This had to do with his apprehension that she was undermining explanations he had made to employees about working only 4 hours on Good Friday, and being paid for only 4 hours. However, I have concluded that Salazar's fate was already sealed by the time this incident occurred, and that it therefore played no part in her discharge.

The Company's evidence was to the effect that Salazar was the recipient of a "counseling report"[19] for having left her work station without permission and having interfered with the work of others on September 4, 1979. Then, on September 24, 1979, she received a written warning for having left her work station and interfered with other employees' work by stopping to talk with employees instead of returning promptly from a permissible break. And, finally, on October 1, 1979, Salazar received a second "warning notice," for having punched another employee's timecard, in violation of company policy; of particular interest in the context of this case is the language on the face of the "warning notice" to the effect that Salazar was given explicit warning of the jeopardy she faced; i.e., that a third warning would require her discharge.

The General Counsel's attacks upon the validity of these documents are not persuasive.

The suspicions raised by the timing of the warnings of September 24 and October 1, 1979, are diluted by the fact that Salazar's next warning was not issued for over 6 months after the issuance of the second warning. It seems illogical to infer on the basis of such timing that the Company made hasty efforts to grease the skids beneath Salazar's employment and yet, without apparent reason, failed to play its trump card, a third warning, until the passage of over 6 months. For this theory flies in the teeth of the contention that the Company harbored animus toward her activities throughout October and November, 2 crucial months of the election campaign, but failed to find a pretext to be rid of her influence.

Nor do I believe that warrant exists for a conclusion that the warnings issued to Salazar are so lacking in good cause, or are so tainted by evidence of disparate application, as to bespeak discriminatory motivation hidden by pretext. For it is clear that "[t]he Act . . . recognizes the employer's right to terminate employment for normal reasons." *N.L.R.B.* v. *Waterman Steamship Corporation*, 309 U.S. 206, 218–219 (1940). As we are frequently reminded, employers may discharge employees for good cause, bad cause, or no cause at all. And "Board law does not permit a trier of fact to substitute his own subjective impression of what he would have done were he in [the employer's] position." *Grand Auto, Inc., d/b/a Super Tire Stores*, 236 NLRB 877 (1978). Even "[w]hile the discipline may seem extreme, it does not follow that the ascribed reason for the discharges is pretextual." *J. Ray McDermott & Co., Inc.*, 233 NLRB 946, 952 (1977). In short, unless unlawful motivation is shown, the Board cannot substitute its judgment for that of an employer as to the grounds for punishment, or the type of punishment, unless the punishment administered is so harsh as to itself bespeak a discriminatory motivation. As stated above, I do not believe that to be the case here.

For Salazar was ultimately compelled to concede in her testimony that she did, contrary to her earlier repeated and vehement denials, receive notice regarding the counseling of September 4, 1979, the warning of September 24, 1979, and the warning of October 1, 1979. While she disputed the conclusion drawn by the Company regarding the September 4 incident, she ultimately admitted, "There was an incident discussed." And, regarding the September 24 warning she finally admitted "Yes, I did [have a conversation with Frausto and Martinez], "and she went on, "There was an incident." And, with respect to the October 1 matter, she eventually conceded, "Some of the incidents were discussed." In fact, regarding still another incident which occurred on February 9, 1980, she stated, "Manuel did mention something about being more careful." And, if more is needed to establish that she did have notice of the Company's warnings to her (and, therefore, of its disciplinary policy's existence), it seems that had she in fact been ignorant of the notices outstanding against her record she would have protested the evident inaccuracy of Hartline's statement to her in the termination interview, that she had three warnings in her file. She did not. Instead, she but unpersuasively stated that she failed in this respect because she was upset.

Contrary to my findings regarding Salazar's testimony, I found that Frausto and Martinez, the Company's key witnesses regarding Salazar's discharge, were quite credible. While each was shown to have erred in his testimony in minor ways, this failed to detract from the overall favorable impressions they made. That is not to say that Martinez did not show unmistakable signs of being a harsh and judgmental supervisor. But I am unable to conclude that he was untruthful based on my assessment of his demeanor and testimony. To the contrary, even if harsh, Martinez was shown to be a man determined to do what he thought to be right.

And, finally, the counsel for the General Counsel's own evidence tended to disprove the critical element of disparate treatment. For Hector Gonzales testified that he, like Salazar, received warnings, without notice, for leaving his post and interfering with the work of other employees.

For all the reasons mentioned above I find and conclude that the General Counsel has not proven a *prima facie* case based on substantial and credible evidence. I shall, accordingly, dismiss this allegation of the complaint.

G. *The Objection*

By soliciting an employee's aid in preventing other employees from signing union authorization cards, by impliedly promising benefits to employees, by interrogating employees concerning their union sympathies, activities, and leanings, by creating the impression that employees' union activities were being kept under surveillance, and by threatening employees with physical harm, all of which occurred within the critical period, the Company engaged in conduct sufficient to warrant overturning the election and requiring that it be rerun. In this regard I specifically reject the Company's argument that whatever conduct was objectionable here was isolated and/or *de minimis*. Compare *Robert King d/b/a Regency at the Rodeway Inn*, 255 NLRB 961 (1981), and *Caron International, Inc.*, 246 NLRB 1120 (1979), and cases cited therein.

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[19] "Counseling reports" were placed in an employee's file, but did not serve to trigger a penalty, unlike "warning reports," which caused automatic discharge upon the accumulation of three in a 12-month period.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the company, set forth in section III, above, occurring in connection with the operation of the Company described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commence.

V. THE REMEDY

Having found that the Company has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company violated Section 8(a)(1) of the Act by soliciting the aid of employees in preventing other employees from signing union authorization cards, by impliedly promising benefits to employees, by interrogating employees concerning union sympathies, activities, or leanings, by creating the impression that employees' union activities were being kept under surveillance, and by threatening employees with physical harm.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except as is set forth above, the General Counsel has not established by a preponderance of the credible evidence that the Company has violated the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[20]

The Respondent, Walter Carpet Mills, Inc., City of Industry, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Soliciting the aid of employees in preventing other employees from signing union authorization cards.

(b) Impliedly promising benefits to employees in order to induce them not to support a union.

(c) Interrogating employees concerning their own or others' union activitles, leanings, or sympathies.

(d) Creating the impression that employees' union activities are being kept under surveillance.

(e) Threatening employees with physical harm for engaging in union activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights under the Act.

2. Take the following affirmative action:

(a) Post at the City of Industry, California, plant of Walter Carpet Mills, Inc., copies of the notice attached and marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material. The notices shall be posted in both English and Spanish, as translated by the Regional Director for Region 21, or his agents.

(b) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the election of November 30, 1979, be set aside and a new election directed.

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[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Halo Lighting Division of McGraw Edison Company *and* Independent Radionic Workers of America, affiliated with National Federation of Independent Unions of America and International Brotherhood of Electrical workers, Local 134, AFL–CIO, Party in Interest. Cases 13–CA–18948 and 13–CA–19105[1]

December 15, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On January 30, 1981, Administrative Law Judge Abraham Frank issued the attached Decision in this proceeding. Thereafter, the General Counsel, Respondent, and the International Brotherhood of Electrical Workers, Local 134, AFL–CIO (hereafter IBEW), filed exceptions and supporting briefs, and the General Counsel, Respondent, and the IBEW filed briefs in response to opposing parties' exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The General Counsel excepted to the failure of the Administrative Law Judge to find that statements made by Respondent's president, Thompson, and several of Respondent's supervisors, to various employees, that if the IBEW, the incumbent Union, lost the impending election installation electricians represented by that Union would refuse to install Respondent's products which would cause a loss of sales for Respondent and a resultant loss of work for the employees. We find merit in this exception.

Respondent is a manufacturer of lighting fixtures which it sells to distributors and contractors mainly for installation in commercial buildings. It began operations in 1955 and, since shortly thereafter, has been party to collective-bargaining contracts with the IBEW covering its production and maintenance employees. In 1979,[3] a number of Respondent's employees including IBEW stewards became dissatisfied with IBEW's representation, and contacted the Independent Radionic Workers of America (hereafter IRWA), and, on June 8, an election petition was filed.

Throughout the vigorously run campaign, Respondent supported the reelection of the IBEW through a series of written communications to the employees and a preelection speech by Thompson. It stressed its concern over the possible loss of the use of the IBEW label on its product, and predicted a refusal by electrical installers represented by the IBEW to handle the product, which in turn would result in the loss of sales and the loss of a great number of jobs. Although the General Counsel did not allege that the written communications and Thompson's speech were violative of the Act, it did allege that the same message conveyed by Thompson and several supervisors in conversations with employees threatened employees with loss of jobs in violation of Section 8(a)(1).

The Administrative Law Judge dismissed the 8(a)(1) allegations concerning these statements by Thompson and the supervisors, although he did find that predictions as to the loss of specific numbers of such jobs were unlawful. Relying on the doctrine enunciated in the Supreme Court's decision in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), that a company may predict the precise effect unionism will have on it if the prediction is based on objective fact "to convey an employer's belief as to demonstrable probable consequences" beyond the employer's control, the Administrative Law Judge concluded that the evidence presented by the Employer in support of its belief that the loss of the IBEW label would have such a detrimental effect on its business was substantial, and unrebutted by any evidence presented by the General Counsel that such an effect would not result.

The evidence presented by the Employer in support of its predictions included an incident which occurred in Missouri in 1956 when electricians refused to install Respondent's incandescent lighting because it did not have the IBEW label, an incident which caused Respondent to seek out the IBEW and initiate its contractual relationship with that Union; testimony that Respondent's major competitors all have the use of the IBEW label; that 90 percent of Respondent's sales are in the United States and that 95 percent of its sales are to distributors or contractors for use in large commercial construction; that on occasion Respondent's product has gone out without the label, resulting in its sending the labels to follow the product, or confirming that it was still affiliated with the IBEW; that Respondent's eastern regional sales manager, in sales presentations, lets the customers know that Respondent is an IBEW company, and that in his past experience as a journeyman electrician he looked for the IBEW label on products, and he did not recall seeing other union labels on electrical products; and testimony of the business representative of the IBEW that it was normal for journeymen electricians to check to see if an electrical fixture bore the label of an AFL-CIO affiliate and, if not, to call the union hall to see if the manufacturer was a union company. The company would then be notified to send the labels to the jobsite.

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[1] By telegraphic order dated October 23, 1981, the General Counsel's motion to sever Case 13–RC–15139 was granted and that case was remanded to Region 13 for further processing.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the General Counsel that the notice to employees should be posted in both English and Spanish at Respondent's facility, and we shall order such posting.

[3] All events occurred in 1979.

259 NLRB No. 86

Noting the failure of the General Counsel to refute the foregoing testimony or to present evidence that journeymen electricians would be willing to install fixtures without the IBEW label, or that any of Respondent's competitors used a label other than that of the IBEW, the Administrative Law Judge found Respondent's evidence sufficient to support its belief on which it based its predictions.

Contrary to the conclusions reached by the Administrative Law Judge, we do not beleive that Respondent's evidence constitutes objective fact supporting the belief that the election of IRWA rather than the IBEW by the employees would bring about the dire consequences predicted by Respondent, i.e., the loss of the employees' jobs.

The only direct evidence relating to the refusal of electricians to install Respondent's product concerns an incident which took place in Missouri 25 years ago, an event we find too remote in time to support Respondent's stated belief. We realize, however, that Respondent has since that time had a bargaining relationship with the IBEW. The remainder of Respondent's evidence on this issue may indicate Respondent's belief in the advantages of having a contractual relationship with the IBEW; the loyalty of IBEW members to their Union and their concern for the protection of the organizational gains made by it; and the success the IBEW has had in organizing the electrical industry, but it does not show that journeymen electricians as a group will refuse to install the product of a company which does not have a contractual relationship with the IBEW, or that the IBEW would act contrary to the Act by inducing its members to refrain from handling the products of such a company. Thus, we find that Respondent's evidence does not demonstrate an objective basis to support Respondent's predictions that the loss of the IBEW label will cause IBEW installers not to handle its product, cause a substantial loss of business, or result in a substantial loss of jobs.

These unsupported predictions made by Respondent were serious in nature in that they posed a threat to the very livelihood of the employees. In such circumstances, an employer who wishes to predict such consequences based on the outcome of a Board election must use care to assure that its predictions are based on objective fact concerning matters beyond its control, and will not convey the impression that it will take steps on its own to adversely affect the employment status of its employees. We find here that the Employer failed to use such care in that its prediction had no sufficient basis in fact. Further, in the context of other preelection conduct engaged in by Respondent in violation of Section 8(a)(1), including, *inter alia*, threats of discharge, loss of benefits, plant relocation, reduced wages, and threats to report employees to the Immigration Service if they supported the IRWA rather than the IBEW, we find that Respondent made its predictions relating to job loss in a conscious effort to further instill fear in its employees. This infringed upon the employees' rights to freely engage in Section 7 activities protected by the Act. We therefore find that the statements made by Thompson and Supervisors Lizordi, Monaco, Hueuink, Orabutt, Baez, Saez, and Jeffress concerning the refusal of installers to handle Respondent's product, which would result in a loss of business and loss of jobs, violated Section 8(a)(1) of the Act.

We find merit also in the General Counsel's exception to the failure of the Administrative Law Judge to find that Respondent violated Section 8(a)(1) by focusing the blame for the cancellation of the company picnic on the IRWA.

The Company had planned its second annual fiesta day, a picnic expected to attract about 700 employees, for July 7. During the last week of June, Supervisor Hueuink began receiving reports that there might be violence at the picnic between the IRWA and IBEW supporters, instigated by some of the internal organizers for IRWA. Respondent decided to cancel the picnic in light of these reports and, on July 5, it issued a memo announcing the cancellation of the picnic containing the following language:

> Information has come to our attention that the organizers for the Independent Radionic Workers of America (IRWA), the independent union that is attempting to become the bargaining agent for our plant production employees, although not invited to our picnic,

> have made known their intentions to appear there. Recent incidents related to their organizational activities have created increased tensions and aroused feelings among our employees. We believe the picnic would be used by them as a forum to pursue further organizational activities, and if that happens, it would only interfere with the purpose of our picnic. Since adequate security to deal with such a condition is not available, we believe it is in everyone's best interest to avoid such an incident; and, as a precaution, we are cancelling the picnic.

The Administrative Law Judge found that although Respondent's information concerning nonemployee organizers' plans to attend the picnic may not have been accurate, Respondent did have legitimate concern based on the reports of possible violence to cause it to cancel the picnic, and that its purpose was not to interfere with the rights of its employees. He therefore found no violation of the Act.

We agree that based on the reports of possible violence Respondent was justified in canceling the picnic. However, the memo announcing the cancellation unjustifiably placed the blame for the cancellation on the IRWA, particularly the nonemployee organizers of that Union. The evidence shows that Respondent had no cause to believe that these organizers had planned to attend the picnic. Rather it shows that the information received by Respondent pertained only to the possibility of employee organizers causing confrontations, not to persons "not invited to our picnic," as stated by Respondent in its memo. Although Respondent may have feared a confrontation between supporters of the two Unions at the picnic, it is clear from the memo that Respondent used its announcement to place the blame for this loss of a benefit on the Union it opposed in the election without any basis in fact. This we find interfered with the employees' Section 7 rights, and violated Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Halo Lighting Division of McGraw Edison Company, Elk Grove Village, Illinois, its officers, agents, sucessors, and assigns, shall:

1. Cease and desist from:

(a) Promising employees benefits and wage increases if they vote for International Brotherhood of Electrical Workers, Local 134, AFL-CIO, in a Board-conducted election.

(b) Promising employees better jobs if they support the above-named labor organization in a Board-conducted election.

(c) Threatening to lay off half the employees and half the supervisors, and reduce salaries to $2.90 if Respondent loses the use of the IBEW label, thereby unlawfully restraining and coercing employees to vote for the above-named Union in a Board-conducted election.

(d) Threatening to lay off employees and reduce salaries if the employees try to put in a new union, thereby unlawfully restraining and coercing employees to vote for the above-named labor organization in a Board-conducted election.

(e) Threatening to move Respondent's plant to another location if the employees do not vote for the above-named labor organization in a Board-conducted election.

(f) Threatening that employees would have to start with minimum wages or at the bottom of Federal rates if the employees do not vote for the above-named labor organization in a Board-conducted election.

(g) Soliciting employee grievances to induce employees to vote for the above-named labor organization in a Board-conducted election.

(h) Threatening to call the Immigration Service if the employees vote for Independent Radionic Workers of America, affiliated with National Federation of Independent Unions of America, in a Board-conducted election.

(i) Threatening to discharge or otherwise discriminate against employees because of their support for the above-named Independent Radionic Workers of America.

(j) Informing employees that the loss of the IBEW label would result in the loss of business for Respondent because IBEW electricians on construction sites would not install Respondent's products, with a consequent loss of jobs for Respondent's employees.

(k) Informing employees that the company picnic was canceled because of the intention of nonemployee organizers for the Independent Radionic Workers of America to attend, thus causing a security problem.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its plant in Elk Grove, Illinois, copies of the attached notice marked "Appendix" printed both in English and Spanish.[4] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

It is further ordered that the complaint be dismissed insofar as it alleges violations of the National Labor Relations Act not found herein.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not promise our employees benefits and wage increases if they vote for International Brotherhood of Electrical Workers, Local 134, AFL–CIO, in a Board-conducted election.

We will not promise our employees better jobs if they support the above-named labor organization in a Board-conducted election.

We will not threaten to lay off half of our employees and half of our supervisors and reduce salaries to $2.90 if our Company loses the right to use the IBEW label.

We will not threaten to lay off employees and reduce salaries if our employees try to put in a new union.

We will not threaten to move our plant to another location if our employees do not vote for the above-named labor organization in a Board-conducted election.

We will not threaten that our employees will have to start with minimum wages or at the bottom of Federal rates if they do not vote for the above-named labor organization in a Board-conducted election.

We will not solicit grievances from our employees to induce them to vote for the above-named labor organization in a Board-conducted election.

We will not threaten to call the Immigration Service if our employees vote for Independent Radionic Workers of America, affiliated with the National Federation of Independent Unions of America, in a Board-conducted election.

We will not inform employees that the loss of the IBEW label would result in the loss of business for us because electricians on construction sites would not install our products, with a consequent loss of jobs for our employees.

We will not inform employees that the Company picnic was canceled because of the intention of nonemployee organizers for the Independent Radionic Workers of America to attend, thus causing a security problem.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

Halo Lighting Division of
McGraw Edison Company

DECISION

Statement of the Case

Abraham Frank, Administrative Law Judge: The original charge in this consolidated case was filed on July 24, 1979.[1] A second charge was filed on September 12. The consolidated complaint, alleging violations of Section 8(a)(1) and (2) of the National Labor Relations Act, as amended, herein called the Act, issued on September 26. The hearing was held on various dates between March 4 and 21, 1980, inclusive, in Chicago, Illinois. All briefs filed have been considered.[2]

At issue in this case are questions whether Respondent engaged in various acts of interference, restraint, and coercion and unlawful assistance to the incumbent union during the course of an organizational campaign conducted by the Charging Party prior to a Board election on August 29. Also involved are the Petitioner's objections to the conduct of the election.

Findings of Fact and Conclusions of Law

I. PRELIMINARY FINDINGS AND CONCLUSIONS

The Respondent, Halo Lighting Division of McGraw Edison Company, is engaged in the manufacture and distribution of lighting fixtures and related products at its plant in Elk Grove Village, Illinois, the only facility involved in this proceeding. During the last fiscal or calendar year Respondent manufactured, sold, and shipped finished products valued in excess of $50,000 directly to customers located in States other than the State of Illinois.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates hereafter are in 1979 unless otherwise indicated.

[2] The joint motion of the parties to correct the exhibits and the General Counsel's motion to correct the transcript are granted.

I find that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Independent Radionic Workers of America, affiliated with National Federation of Independent Unions of America, hereinafter the IRWA, and International Brotherhood of Electrical Workers, Local 134, AFL-CIO, hereinafter the IBEW, are labor organizations within the meaning of Section 2(5) of the Act.

II. PREFACE

Halo, a then small manufacturing plant, was founded in 1955 and operated out of a single facility on North Orchard Street in Chicago, Illinois. Dan T. Thomson, president of the commercial products group of McGraw Edison Company and president of Halo Lighting Division of McGraw Edison Company at times material herein, was one of the original three employees. Then, as now, the Company manufactured incandescent lighting fixtures, at that time its only product line.

Halo began operations as an unorganized plant. Its first major commercial sale for incandescent fixtures was made to the Harry S. Truman Memorial Library in Independence, Missouri. After the fixtures arrived at the jobsite, the Company was informed that the contractor and the electricians on the job were refusing to install the fixtures because they did not bear the IBEW label. The Company sought counsel, contacted the IBEW, and shortly thereafter its employees were represented by that Union. Since then Respondent, as a member of the Chicago Lighting Equipment Manufacturing Association, has had a continuous bargaining relationship with the IBEW covering its production and maintenance employees under a series of contracts, the last of which terminated on August 31.

Sometime in 1979 a number of Respondent's employees, including most, if not all of the IBEW stewards, particularly the chief steward, Jesus Gonzalez, became dissatisfied with the representatives assigned by the IBEW to serve the employees at the Halo plant. Gonzalez and other employees contacted the IRWA with the view of establishing that Union as their collective-bargaining representative in place of the IBEW. On June 8 the IRWA filed its petition in this case. Thereafter, Ed Lane and Elizer Medina, the then representatives for the IBEW, were replaced by Joe Kingsley and Roy L. Cortes. Cortes, a business representative of Local 1031, IBEW, was assigned to Local 134 for work at the Halo plant during the 3-month period prior to the election of August 29. A large proportion of Respondent's employees are of Hispanic origin and fluent only in Spanish. Cortes speaks English and Spanish and communicated with all employees in either language.

From June 5, the date the IRWA began its campaign, until August 29, the date of the Board election, Respondent and both Unions campaigned vigorously. Respondent supported the reelection of the IBEW by means of, *inter alia*, a series of written communications to its employees and a final speech by Thomson on August 23 to the employees. Respondent stressed particularly its concern that the loss of the IBEW label on its lighting fixtures would result in a loss of business and a loss of a great number of jobs.[3]

On July 19 Thomson wrote the employees that bargaining would start from the beginning with a new union and the employees could lose the wages and benefits they now had if they elected the IRWA. On July 25 Thomson pointed out to the employees that the IRWA was losing money and that the employees the IRWA represented at Zenith had lost about 12,500 jobs since 1968; that representation of the employees by the IRWA at Halo could cause the Company to lose business and many of the employees lose their jobs. On July 31 Thomson pointed out to the employees that Respondent had expanded from 200 employees in 1968 to 1,100 employees in 1979 and asked the employees to compare Halo's growth to the IRWA's decline and jobs lost at Zenith. On August 2 Thomson responded to an IRWA bulletin of August 1, stating that it was not true that the IRWA represented journeymen electricians and repeated Respondent's opinion that the loss of the IBEW label could drastically reduce the number of fixtures sold, which could mean a significant loss in sales, resulting in a loss of jobs for many employees at Halo.

On August 10 Thomson again called for support of the IBEW. He stated that the IRWA was not a recognized electrical union and their label did not mean anything to Halo's customers, that thousands of IRWA members had lost their jobs. In an August 20 memo Thomson informed the employees that a group of Northwest Airlines employees had switched from an AFL-CIO union to an independent union and then stated that it took the new union a year and a half to negotiate the first contract, that the pay increase, although retroactive, was not received by the employees for 20 months, and that the new contract left the employees behind the pay and benefits given by other airlines. The memo concluded with the question, "Could these things happen here?"

On August 22 Thomson again challenged the truth of statements made by the IRWA, asserting that the IRWA had lost benefits for its members in the first contract negotiated after the sale of Zenith's hearing aid division, setting out specific lost benefits with an attached chart. In a final memo on August 28 Thomson reminded the employees that the then-current contract with the IBEW would expire on August 31 and that the employees' failure to choose the IBEW in the election of August 29 would mean that the Company would lose the right to display the IBEW label on its fixtures, a result that "could hurt both of us."

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[3] In a letter dated July 6 Thomson wrote:

> We think it is important that you know how your Company feels about the decision you will be making and how it could affect your future. It is our sincere believe [sic] that it would be a serious mistake for our employees to vote for a change in their bargaining representative because if they do, it would mean that we could no longer affix the IBEW label to our products. Our present relationship with the IBEW, as your exclusive bargaining agent, enables us to place their union label on all the products we manufacture and it is especially important to the sale of Halo, Lite-Trend, and Power Trac assembly fixtures. IBEW electricians have, in some instances, refused to install "non-IBEW labelled fixtures." We are convinced if we lost the IBEW label it could affect a substantial part of our business and cause the loss of a great number of jobs.

On August 23 Thomson made a speech to the assembled employees. During the course of the speech Thomson said, *inter alia*, that outsiders were attempting to tear them apart and "at times I felt as though they just might be trying to force us to temporarily close the plant"; that, "if the IBEW label is lost, we all could lose"; that the IRWA had falsely stated that the IBEW journeymen electricians would not refuse to install the Company's fixtures if the IBEW lost the election; that the Company's competitors would like to see the IRWA win and the Company to lose the IBEW label, business, and jobs; that thousands of IRWA members at Zenith had lost their jobs in the past few years; and that Thomson did not want to see that happen at Halo.

The complaint does not allege that any of the above written communications or the August 23 speech is unlawful and the General Counsel so stated on the record. Nevertheless, the General Counsel takes the position that alleged unlawful statements orally made by supervisors and found to accord "exactly" to "Respondent's script" are unlawful.

Normally, the failure of the General Counsel to allege known conduct of Respondent within the 10(b) period as unlawful would preclude me from ruling on the legality of such conduct. The General Counsel's insistence, however, on litigating the legality of oral statements "exactly" the same as the written statements puts such statements, whether written or oral, in issue. An unlawful threat is unlawful whether written or spoken. Although awkwardly presented, the issue of Respondent's right under Section 8(c) of the Act to refer to the possible loss of the IBEW label and the consequent loss of business and jobs was fully litigated in this case.

The propriety of the Respondent's campaign literature is raised by the IRWA as an objection to the conduct of the election. However, the IRWA rested its case on the basis of the General Counsel's *prima facie* case of unfair labor practices. No evidence was offered challenging the accuracy of the facts and figures contained in Respondent's letters and communications to its employees.

III. THE FACTS

A. *Interference, Restraint, and Coercion*

1. Statements by supervisors

a. *By Supervisor Tony Lizardi*

Lizardi, a man of many talents, was, like many of Respondent's employees, of Puerto Rican origin. He was employed by Respondent as a supervisor in the shipping department during the campaign period from June to September. At the time of the hearing he was employed by the Department of Defense in the Defense Logistics Agency. Prior thereto he had been for a number of years a professor at the University of Puerto Rico, teaching labor law, labor history, accounting, finance, and business planning. In his varied occupations Lizardi had also managed a warehouse and had participated as part of management in dual union organizational campaigns.

Lizardi is fluent in English and Spanish. A loquacious and colorful individual, Lizardi undertook to educate Respondent's employees, some of whom spoke only Spanish, in the intricacies of labor law, including policies of the National Labor Relations Board, textbook references to the AFL-CIO Industrial Union Department, and the necessity for good-faith negotiations in collective bargaining. In his many conversations with individuals and groups of employees, Lizardi stressed particularly the necessity to retain the IBEW label and the possibility of extended negotiations if a new contract had to be negotiated with a new union. So erudite and forceful were Lizardi's arguments that several employees would shout when they saw Lizardi approaching, "Hey, don't talk to Tony. He's going to make you dizzy, he's going to make you dizzy." At times Lizardi would drive home his point with an understandable metaphor. Speaking of the negotiating process, he explained it was like trying to convince a girl. "If you've gone out with her once and you nail her down there, you know the second time around it's going to be easier than the first time. You had to work real hard at it, didn't you?"

According to Lizardi and contrary to the testimony of witnesses for the General Counsel, he made no threats or promises to the employees to induce them to vote for the IBEW rather than the IRWA. He told them there was no way the salary matter could be touched before a Board election. When the employees argued they did not need the IBEW label he told them, "[I]f the lamps do not go out on the truck, because they do not order, the clients do not order, there is no need to do any one of them. If there is no need to need any lamps, there is no need for people to build lamps. And this would affect us all including me." In explaining Respondent's letter of August 20, relating to the strike at Northwest Airlines, Lizardi pointed out that in that case the Teamsters, a newly elected union, did not even manage to get the same benefits that the industry had or that the employees had under a different union. If the employees elected a new union at Halo, "negotiations could carry on for God knows how long" since all the contract language would have to be negotiated anew. When an employee asked, "Well, why do they want to give us the minimum wage?" Lizardi responded, "Well, it's up to the negotiators, you know, to determine whether they would accept that or not, but after a long negotiation, necessarily they can offer you whatever they think they can afford, whether that's included or not."

Five witnesses for the General Counsel, three of whom had been discharged by Respondent between August 31 and October 5 and all of whom were no longer employed by Respondent, testified that Lizardi made more specific and forceful arguments on behalf of the IBEW:

(1) *Santiago (Chago) Cabrera* began working for Respondent in 1970 and was discharged on August 31. Lizardi was Cabrera's supervisor in the shipping department. During the months of June, July, and August Cabrera, a strong and vocal supporter of the IRWA, spoke to Lizardi about the unions two or three times a day.

Cabrera testified that in mid-August Lizardi called Cabrera into Lizardi's office and told Cabrera that if he kept quiet and kept calm and helped to calm down the other employees Lizardi would get Cabrera more money and more benefits. On this and other occasions Lizardi asked Cabrera if he belonged to the new (IRWA) or old (IBEW) union. Cabrera replied that he was 100 percent for the new union. Lizardi also said that if the IRWA won the election the employees would go back to making $2.90 per hour. Cabrera told Lizardi that Cabrera would continue talking for the IRWA. Following his conversation with Lizardi, Cabrera told other employees that Lizardi had offered Cabrera money to keep quiet and calm the other employees down. Cabrera told the employees he was 100 percent for the IRWA.

Cabrera testified that in other conversations with Lizardi during this period, at times when they were alone and at times in the presence of other employees, Lizardi said that if the IRWA came into the plant the Respondent would pay the employees $2.90 per hour, and that they would lay off half the employees and maybe even lay off half the supervisors.

Cabrera also testified that he and Lizardi had lunch on one occasion, that they were late returning to work, and that Lizardi took care of Cabrera's card for punching in purposes. During the luncheon Lizardi told Cabrera that if the employees continued to try to put in a new union the same thing would happen at Halo that happened in other companies where the employees put in a new union, it ended with employees laid off and salaries reduced.

Cabrera testified further that every time Lizardi talked about the Union Lizardi would say if the employees did not vote for the IBEW Respondent could move the Company to California or any place because McGraw Edison was a big company and had a lot of money.

Cabrera testified, with respect to the IBEW label, that Lizardi would start his conversations with the statement that if the IRWA came in the Company would lose the use of the IBEW seal, and that they would have to lay off half the employees, lay off some of the supervisors, and reduce the salaries to $2.90.

(2) *William Velasquez*, employed by Respondent in the shipping department in 1974, was discharged on September 12. He testified that he and about 20 other employees met with Lizardi during working time on or about July 30. Lizardi told the employees that they should vote for the old union (IBEW) and he would take care of everything for them; he would go to personnel and try to get the employees a raise of 25 cents per hour.

Velasquez testified that during the period from July to August he spoke to Lizardi on two other occasions, once in the company of other employees and once alone. In these conversations Lizardi spoke of a strike at an airplane factory where another union entered and the employees lost a lot of money. Lizardi said that the same thing would happen at Halo if another union came in—a lot of jobs would be lost. Lazardi spoke of the IBEW labels, that without the labels the electricians would not install the Company's products and the employees would lose jobs if the IRWA came into the Company. Lazardi also said that the employees' salaries would be lower.

(3) *Dionisio Perez*, employed by Respondent in February 1976, in the shipping department, was discharged on October 5. He testified that Lizardi spoke to Perez and other employees before working time every day for about an hour during the period from July to August. Lizardi told Perez that if the employees did not vote for the IBEW there would be loss of work, loss of production; the employees would lose benefits; they would have to start with a new contract and minimum wages.

Perez testified that Lizardi compared the employees working at Zenith represented by the IRWA with those represented by the IBEW and said that the former earned less than the latter, Lizardi said that if the employees voted for the IBEW they could get a good contract; if they did not vote for the IBEW the plant could move to another location.

Perez testified further that Lizardi told the employees who gathered around him that he could talk to Thomson to set up a meeting with them and whatever they needed, if they needed an increase, they could talk to Thomson.

Perez also testified that a few days before the election Lizardi said that if the IBEW lost the election the Company would not have the label and, as a result, there would be a loss of production and a lot of layoffs.

(4) *Pedro Fortis*, who was employed by Respondent as an order filler in the shipping department from August 29, 1978, to November 28, testified that he had four or five conversations with Lizardi during the period from June to August.

Fortis testified that in his first conversation with Lizardi in June the latter said that if the IBEW lost there would be a lot of people who would be laid off and the Company would move the factory to another place.

Fortis also testified that Lizardi said that if the employees supported the IBEW and the IBEW won the election Lizardi would take the employees out to eat and they could drink what they wanted. If the IRWA won the election the Company would pay the employees $2.90 per hour instead of the $5.17 an hour the employees were making and the employees would not have any kind of benefits.

Fortis testified further that all of his conversations with Lizardi, including a conversation a week before the election, were almost to the same effect.

In one of the above conversations Lizardi said that if he could legally find out who voted in favor of the old union (IBEW) he would try to get the employees a 25-cent-per-hour increase.

During some of the conversations employees would ask Lizardi why the label was so important. Lizardi explained that if the IBEW lost the election the Company would not be able to use its label and therefore it would lay off employees and move the factory.

(5) *Francisco Lopez* was employed by Respondent in the shipping department as an order filler under the supervision of Angel Santiago from August 29, 1978, to August 24, 1979.

Lopez testified that he and six or seven other employees met with Lizardi in the shipping section of the Lite Trend area in mid-August. Lizardi was carrying some handbills and asked the employees if they had received them. Lopez asked what Lizardi thought was the best thing for the employees to do. Lizardi said, "Stay with the one you have, because voting for a new union is like throwing your salaries away and no benefits." Lopez asked Lizardi what he meant. Lizardi said, "If the IRWA wins we will have to negotiate, start from the bottom on the federal rates and then we would have to start from new benefits."

Lopez testified further that in early August he and two other employees were in the cafeteria during their breaktime. Lizardi approached them and said, "You look like smart guys. You speak English, write English and understand English. You could have a better job if you stick with us." Lopez said nothing.

In resolving credibility as to these witnesses I have taken into consideration the probability that the witnesses for the General Counsel may have misunderstood or misinterpreted much of what Lizardi read to them from technical books or told them about negotiation from "Day One" or the need for the IBEW label to sell Respondent's products. It is understandable that some of them would get dizzy listening to him or react angrily by calling him a liar. As Lizardi conceded, the employees with whom he was dealing were highly emotional, impatient people. They were poorly or not at all educated in a formal sense. Certainly, at some point Lizardi, himself highly articulate and knowledgeable, must have realized that he could not accomplish his objective of persuading them to vote for the IBEW by showing them technical treatises and talking about good-faith collective bargaining. It may well be that Lizardi did not make all of the statements in *haec verba* attributed to him by the General Counsel's witnesses, several of whom were not impressive.[4] But I cannot believe he made none of them. Lizardi's own testimony as to what he told them is too bland (except for metaphors), too pat, and too general to be convincing. It has none of the sharp sting and directness that might be expected from an outspoken, direct, and passionate individual, such as Lizardi. It was, after all, his assigned job to persuade these simple, but very stubborn employees that they had no real choice but to vote for the IBEW. The hard points of impact and persuasion found in Respondent's written material are mirrored in some of the testimony of the General Counsel's witnesses, but with added force. In the absence of a more specific and believable version of what Lizardi, in fact, may have told the employees in his vigorous and persistent compaign to insure victory for the IBEW, I credit the testimony of witnesses for the General Counsel over Lizardi.

b. *By Supervisor Vince Monaco*

Luz Velasquez, who was employed by Respondent from September 26, 1975, to August 20, 1979, testified that on a day in July she was translating into Spanish for a fellow employee a campaign letter about the IBEW label. Monaco interrupted her conversation and said, "I don't want to brainwash you, but this is what the paper says, we could lose our job." Monaco explained that the IBEW journeymen electricians would not install a part that did not have their union label on it; that the Company would not be able to sell the fixtures; that the employees could lose their jobs; and that he might lose his job too.

While Velasquez' testimony was somewhat inconsistent, including statements made in her affidavit, I am satisfied that the above testimony accurately reflects her conversation with Monaco and it is credited. Monaco did not testify.

c. *By Supervisor Daniel Hueuink*

Dionisio Perez, whose testimony is discussed above, also testified that in late July or early August he and other employees had a conversation with Hueuink, then a division of employee relations manager, in the shipping department. Perez asked Hueuink why they should keep the IBEW label; if the IRWA won the election they could use the label of that Union. Hueuink responded that he did not want that to happen because if the IBEW lost the election the electricians would not want to install the lamps; if that happened there would be layoffs, they would lose benefits, and they would get a new contract at a minimum salary. On cross-examination Perez denied that Hueuink had said anything about company sales if the lighting fixtures were not installed or that there was a discussion of contracts. However, Perez conceded that Hueink said the Company would sit down and negotiate a new contract if the IRWA won the election, but that they had to start with new benefits.

Hueuink testified that on the above occasion, at Lizardi's request, Hueuink spoke to the employees about the IBEW label. Hueuink told the employees that without the IBEW label the IBEW electricians on the construction site would probably not install the fixtures and thus the Company could have a loss of sales. Hueuink indicated that a reduction in sales could reduce employment. Hueuink also told the employees that if the IRWA won the election wages and benefits would have to be negotiated.

Hueuink testified in a clear and straightforward manner. I credit him over Perez as to this conversation.

d. *By Supervisor Castor Colon*

Pedro Fortis, whose testimony is discussed above, also testified that he spoke to Colon, a supervisor in the shipping department, about the Union three or four times in August. Colon said if the IRWA won the election there was a good probability that many of the employees would lose their jobs and there was a possibility that the factory would move to another location. On several occasions during this period Colon would give the employees a company letter saying, "Here is a paper from the Company" and explain to those who did not understand English what it said.

William Velasquez, whose testimony is discussed above, also testified that he spoke to Colon on one occasion in early August in the presence of other employees. Colon said that the labels could not be changed; that if they changed, the electricians would not be able to install the lamps in any part of the State; that if the IRWA won the election many of the employees would lose their jobs; that salaries would be lowered and there would be a lot of layoffs; the Company would be obliged to move the plant to another location.

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[4] See below in sec. 1(d) findings with respect to William Velasquez.

While Colon conceded that he had distributed company literature to the employees and that he spoke to Velasquez twice a week during the period prior to the election about softball, Colon denied that he ever discussed the Union or that he had made the statements attributed to him.

Velasquez' affidavit to the Board does not mention his conversation with Colon and at the hearing Velasquez' testimony as to whether he had discussed his testimony with the General Counsel in preparation for the hearing was evasive and contradictory.

Colon, however, was a most unimpressive witness. I cannot believe in this hotly contested campaign that he never discussed the desirability of voting for the IBEW rather than the IRWA with employees under his immediate supervision and with whom he was in daily contact. Velasquez' testimony corroborates that of Fortis. I credit Velasquez and Fortis over Colon.

e. *By Traffic Manager Charles Orabutt*

Pedro Fortis also testified that on several occasions 2 or 3 weeks before the election Orabutt told Fortis and other employees that if the IRWA won the election the majority of the employees would be laid off and would lose their jobs and the label was very important for the Company to be able to sell the lamps. Orabutt spoke in English, which was translated for Fortis into Spanish. However, Fortis, who has a limited ability to understand English, testified that he was able to understand what Orabutt said in English.

Orabutt testified that in mid-August he was asked by Frank Lopez in the presence of Fortis and other employees why the Company's products could not use the IRWA label instead of the IBEW label. Orabutt told the employees that the IRWA label was not the type of label that could be recognized in the electrical industry; if the IBEW label were not on the product it could be a problem if the electricians did not install it; the loss of the IBEW label would mean a loss of sales for the Company; it would mean the loss of jobs because of the loss of business; there would be layoffs throughout the Company.

I find no serious questions of credibility in the testimony of these two witnesses. Fortis' knowledge of English is quite limited and he may well have understood Orabutt to have made the statements attributed to him. However, I am satisfied that Orabutt's version of what he, in fact, told the employees on the above occasion is more accurate and I credit Orabutt to the extent his testimony varies from that of Fortis.

f. *By Supervisor Gomer Baez*

Jesus Gonazlez, who was employed as a setup man from October 3, 1977, to September 1979, testified that on or about August 22 he overheard a conversation between Baez and an employee, whom Gonzalez, himself a native of Puerto Rico, believed to be of Mexican origin. Baez told the employee that if the IRWA won the election the Company would call the Immigration Service and a lot of people who were here without legal right would get into trouble. Gonzalez stepped back and said, "Gomer, what are you saying?" Baez replied in Spanish, "You better keep going, you are hot."

Angela Sanchez, who was employed by Respondent for 3 years prior to and at the time of the election, submitted a pretrial affidavit to the General Counsel. Sanchez was not employed at the time of the hearing and her address was unknown. The General Counsel sought to subpena Sanchez at her last known address. The subpena was returned unclaimed. In these circumstances her affidavit was offered and received in evidence.

Sanchez stated in her affidavit that 2 or 3 weeks before the election Baez told Sanchez that Baez knew she was for the new Union and that she was running the risk of being fired. Baez said if the IBEW won Sanchez would be fired and that she was the first one on the list. Baez also said that he would see Sanchez in line waiting for compensation with a cup of coffee and a doughnut in her hand. A day before the election Sanchez reported to Foreman Ivan Saez what Baez had said about Sanchez risking her job. Saez said that Baez had no authority to say that to her. Saez did not testify.

Sanchez stated further that about 2 or 3 weeks before the election Baez and Saez came to the production line and stopped work to talk to about 15 employees. Baez said that if the new Union (IRWA) won the Company would lose the old Union's (IBEW) label and electricians would not install Halo lamps; the Company's merchandise would not get out because when the electricians saw the merchandise did not have the label they would send it back and the employees would be laid off. Saez said that the label was very important and that losing the label would mean losing the merchandise.

Baez denied making the statements attributed to him by Gonzalez and denied telling Sanchez she was running the risk of being fired or that he would see her in line waiting for compensation. Baez testified that he handed out literature to the employees once or twice a day and sometimes more during the preelection period. He talked to the employees about the label and other kinds of problems, but denied ever saying that the employees would be better off with the old union.

Baez was in daily contact with the employees in handing out literature and answering questions. His testimony as to what he actually told the employees is vague and his contention that he never said that the employees would be better off with the old Union (IBEW) is, at least, evasive. Gonzalez' testimony of a veiled threat of discharge is consistent with Sanchez' testimony of an actual threat of discharge. I credit Gonzalez and Sanchez over Baez.

g. *By Director of Distribution Joe Jeffress*

Santiago Cabrera, whose testimony is discussed above, testified that during the last 2 weeks in July he was called to a meeting in Jeffress' office along with Zoilo Rodriguez and Francisco Lopez. Jeffress spoke in English. Cabrera's ability to understand English is limited. At the hearing most of his testimony was given through an interpreter. Cabrera testified that he understood some of what Jeffress said and Lopez translated other portions. According to Cabrera, Jeffress asked the employees if more money or more benefits were the main thing the employees wanted. Cabrera said, "Yes, it is, more money, more benefits, more something, you know." Jeffress said he would try; he would go to Thomson and maybe Thomson could find something for everybody. Jeffress said the Company could move to some place and lay off the foremen. If the new Union won the election the Company would lay off half the people, maybe 200 to 300 people and the foremen too. On several other occasions Jeffress told Cabrera the employees would lose a lot of benefits if the new Union came in; the new Union was small and could not support a company the size of Halo.

Lopez testified that he recalled the meeting in Jeffress' office with Cabrera and Rodriquez, but did not recall what was said. Rodriguez did not testify.

Jeffress testified that he was informed by Lizardi that several employees wanted to talk to Jeffress privately about working conditions. Jeffress met with the above employees in his office about a month or a month and a half before the election. Lopez told Jeffress that the employees thought things were getting out of hand and all that the employees wanted was to correct some working conditions. Jeffress told the employees he could not make any promises and could not discuss the matter, but asked what some of the working conditions were. The employees said they wanted to talk to Thomson. Jeffress asked for the names of people who were concerned and what they wanted to talk about and he would see what could be done. Jeffress denied making the statements attributed to him by Cabrera. Thereafter, Lizardi gave Jeffress a list of names of employees. Jeffress gave the list to his boss, Greg Hege, vice president of operations. Subsequently, Hege told Jeffress that they could not have a meeting with the employees because they would be violating the law. Jeffress communicated this information to Lopez.

Jeffress also testified that he had a lengthy meeting with Lopez during this period and showed Lopez the IBEW label on a housing item. Jeffress pointed out to Lopez that a tradesman would not install the product if it did not have the label and that meant the Company would not sell its product. About this time Jeffress also had a discussion with Lopez about contract negotiations. Jeffress told Lopez that if the IRWA won the election they would have to start from the first page and the first letter; that with the IBEW the employees had a contract that had been developed over 20 years.

Jeffress testified in a frank and open manner, freely admitting he had discussed with Lopez the IBEW label and the advantage to the employees in contract negotiations if they voted for the IBEW rather than the IRWA. Lopez, on the other hand, had nothing to say about his conversations with Jeffress even though Lopez had translated a portion of Jeffress' remarks to Cabrera at the meeting in Jeffress' office. Nor was Lopez called on rebuttal to contradict Jeffress' testimony that Lopez was told by Jeffress that a meeting with Thomson could not be arranged because it would be unlawful. Cabrera's knowledge of English is poor and it may well be he misunderstood or misinterpreted Jeffress' remarks. In any event, in view of Jeffress' believable testimony and the failure of Lopez to confirm Cabrera's testimony or to contradict the testimony of Jeffress, I credit Jeffress over Cabrera as to the above conversation in Jeffress' office.

h. *By President Dan T. Thomson*

Concepcion Ocampo, who had been employed by Respondent for 6 years at the time of the hearing, testified that on a day in the early part of August she and about 20 other employees met with Thomson at the production line. Ocampo told Thomson the employees were confused by all the papers that had been passed out to them about the label and asked him to explain the situation to them. Thomson said the label used by the Company was recognized by the Electrical Workers Union and if the product did not bear that label they would refuse to install it. The employees asked why that was so since there were many other factories that were making lamps and did not use the label and still had sales. Thomson said there was no way that they could prove that and because of the label Halo was No. 1 in selling lamps. Thomson distinguished the situation where a lamp was sold in a store from the installation of a lamp at a construction site. Thomson said the electricians belonged to the same union and in refusing to install the products Halo would have less orders, less sales, and less work.

Ocampo also testified that prior to the election Thomson made a speech to the employees in the cafeteria; that he spoke about the label; that he read from a piece of paper; and that he said almost the same thing he had said to the employees on the production line in the above meeting.

Jesus Gonzalez: As indicated above, Gonzalez, despite his position as chief steward for the IBEW, was an original and consistent advocate of the IRWA. Gonzalez testified that Hueuink arranged a meeting between Gonzalez and Thomson on June 18 in Thomson's office. Thomson asked Gonzalez if Gonzalez knew what he was doing in bringing the new Union into the plant. Gonzalez said that he had not brought the Union in, but it could happen. Thomson told Gonzalez that if the Company lost the IBEW it would lose the label and that meant at least one-third of the employees would be laid off. Thomson asked Gonzalez to support the IBEW, to make the right decision. As Gonzalez was leaving, Thomson said, "Don't answer me today; answer me Monday." Gonzalez said, "O.K. I want an appointment with you Monday and I'll answer you Monday." In Gonzalez' meeting with Thomson on June 25 Thomson made substantially the same statements with respect to the loss of the label, the resultant loss of business, and the loss of jobs that Thomson stated in his speech to the employees a few days before the election. The conversation of June 18 was somewhat different in that Thomson repeated in a positive way that there would be a loss of jobs if the Company lost the right to use the IBEW label.

Thomson confirmed Gonzalez' direct testimony that they met on two occasions. Thomson, however, placed the first meeting on June 25 and the second between June 25 and July 6. According to Thomson, the meeting was suggested by Vice President of Manufacturing Bob Rieger and arranged through Gonzalez' line foreman. The meeting was initiated as a result of a request by Gonzalez that he be allowed more time during work to fulfill his responsibilities as shop steward. Thomson testified that the first meeting with Gonzalez was concerned only with this issue and that Gonzalez was granted half an hour in the morning and a half hour in the afternoon to attend to his stewardship duties. Thomson denied that there was any discussion of the IBEW label at this meeting. Thomson testified that the second meeting with Gonzalez occurred at Thomson's request and was due to Gonzalez' failure to adhere to the time limitation. During this meeting Gonzalez asked Thomson if what Gonzalez had been hearing about the IBEW label was actually the fact. Thomson did not recall how he responded, but thought he probably used the Truman Library situation as an example of the problem the Company would face without the IBEW label.

The record shows that Thomson drafted and distributed to subordinates a memo, dated June 26, referring to a meeting with Gonzalez on June 25 and authorizing a half hour in the morning and a half hour in the afternoon to permit Gonzalez to discuss employee problems relating to the interpretation of the contract.

The original notice of representation hearing issued on June 15 for a hearing on June 25, thereafter rescheduled to July 5, at which time the stipulation for an election was entered into.

On rebuttal Gonzalez testified that it was during a third meeting with Thomson that the question of additional time to perform his duties was discussed.

Although there is a great disparity between the economic and social positions of Gonzalez and Thomson, both men are men of high caliber. Both had much to lose or gain in the outcome of this proceeding and both testified with a certain wariness and, I am satisfied, without complete candor. On the one hand, Thomson was aware that Gonzalez was spearheading the drive for the IRWA. As the General Counsel points out, Thomson had never previously met with Gonzalez in a private interview. The issue of granting Gonzalez extra time to attend to his stewardship duties could easily have been arranged without the personal attention of the president of the Company. Moreover, the timing of Thomson's meeting with Gonzalez was at the outset of the IRWA's campaign, a few days before a scheduled Board hearing. On the other hand, Gonzalez did not mention during his direct and cross-examination that he and Thomson had discussed extra time for Gonzalez to attend to his stewardship duties. Only on rebuttal, following the introduction of the memo dated June 26, did Gonzalez concede that he and Thomson had discussed this topic. Gonzalez testified for the first time that there had been a third meeting, although he had previously testified that he had met with Thomson twice, on June 18 and 25.

The testimony of neither of the above witnesses can be credited in its entirety. I find that the two men met only on June 18 and June 25 and that the ostensible purpose of the meetings was the issue of time off for Gonzalez to attend to stewardship duties. I find Further that the issue of the IBEW label was discussed at both meetings and that Gonzalez' version of what Thomson said is believable and substantially accurate, except that I do not credit Gonzalez to the extent he testified that Thomson said that one-third of the employees would be laid off if the Company lost the IBEW label. Such a specific prediction would be inconsistent with all other written and oral statements by Thomson on this subject to employees generally and to Ocampo in particular.

2. Surveillance of union activity

As indicated above, IRWA organizational activity began on June 5. On that date James Weil, union director of the IRWA, Rick Bugajsky, Frank Woljak, and Tony Meccia, other IRWA representatives, arrived at the Halo parking lot at or about 6 a.m. Shortly thereafter Hueuink, Schrader, and several other supervisors arrived. Hueuink accosted the IRWA organizers and ordered them off the property. Thereafter, Weil and his coworkers passed out authorization cards on the easement of the driveway leading to the company parking lot. Schrader and other company supervisors were also on the parking lot between 6 and 7 a.m. on June 6, 7, and 8. Beginning on June 5 IBEW stewards Gonzalez, Ivan Cruz, Carmel Galarza, Ronald Loyo, and Tony Bea were engaged in soliciting employees to sign authorization cards for the IRWA. The supervisors noted this activity and overheard some of the conversations.

Hueuink and Schrader had received information on June 4 that there might be violence on June 5 in connection with the IRWA's organizational campaign. Schrader notified the police department on June 4 that the Company anticipated some difficulty on June 5 and requested their assistance. Between June 5 and 8 an estimated 100 to 500 employees milled about the parking lot in the early morning hours. There was considerable commotion, yelling, and screaming. On June 6 two employees, Frank Lopez and Pedro Reyes, engaged in some form of altercation, which was resolved by a police officer. Schrader made a note of this incident, but otherwise took no notes and did not record the names of employees signing or refusing to sign cards.[5]

3. Cancellation of Company's picnic

On May 2 Respondent issued a circular, announcing that the second annual Halo fiesta day would be held on

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[5] On June 5 Gonzalez, Bea, and Galarza were suspended. Gonzalez filed an unfair labor practice charge with respect to these suspensions. The parties stipulated that the charge was dismissed by the Regional Director on the ground that any possible violation of the Act had been remedied. In these circumstances, contrary to the General Counsel, no inference can be drawn from these suspensions that Respondent's conduct served to highlight the danger to employees of passing out IRWA literature on company property. Employees do not have an absolute right to distribute literature at all times and in all places on company property. The Regional Director was satisfied to dismiss the charge without resolving the legality of Respondent's conduct. The General Counsel cannot have it both ways. So far as this case is concerned, the employees' reaction to the above suspensions is immaterial and irrelevant.

Saturday, July 7, for all internal personnel. The picnic, scheduled to last from 10 a.m. to 6 p.m., provided for various forms of entertainment, including swimming, tennis, softball, children's games, dancing, refreshments, and prizes. For the next several months additional bulletins were issued in English and Spanish requesting employees to sign up for the picnic and the various games. Respondent had purchased prizes to be distributed to the employees and their families. It was anticipated that about 700 employees would attend the picnic.

During the last week of June Hueuink began receiving reports of possible problems, including violence, that might occur at the picnic. Pedro Reyes, a member of the organizing committee, told Hueuink that Reyes had been questioned by employees about the use of knives and guns at the picnic; that he had heard that the IRWA advocates were going to attend and show everybody who was boss. Unfer, a nurse, warned Hueuink that there might be violence at the picnic, suggesting that the IRWA in-plant organizers Cabrera, Rodriguez, Gonzales, and Pedro Sanchez planned to attend and cause "trouble."

By memo dated July 5 Respondent canceled the picnic. Thomson explained the reason for the cancellation as follows:

> Information has come to our attention that the organizers for the Independent Radionic Workers of America (IRWA), the independent union that is attempting to become the bargaining agent for our plant production employees, although not invited to our picnic, have made known their intentions to appear there. Recent incidents related to their organizational activities have created increased tensions and aroused feelings among our employees. We believe the picnic would be used by them as a forum to pursue further organizational activities, and if that happens, it would only interfere with the purpose of our picnic. Since adequate security to deal with such a condition is not available, we believe it is in everyone's best interest to avoid such an incident; and, as a precaution, we are cancelling the picnic.

Weil testified that at an IRWA meeting on June 20 the officials of that union decided that IRWA organizers would not attend the picnic. During the 2-week period prior to the date of the scheduled picnic Weil informed Respondent's employees in English during the course of his handbilling activities in front of the Halo plant that IRWA organizers would not attend the picnic. Other IRWA representatives also made the same statement. However, the IRWA did not so inform the employees in its handbills or other publications. Nor did officials of Respondent contact the IRWA to determine whether or not IRWA organizers planned to be present at the picnic. The decision of the IRWA with respect to this matter was due, in part, to a concern that there might be a confrontation among competing groups at the picnic.

B. *Assistance to IBEW*

1. Disparate treatment of IRWA non-employee organizers with respect to campaigning on Respondent's plant premises

Respondent's contract with the IBEW in effect during times material herein provides that representatives of the IBEW "shall have access to the factory premises of the Employer at any time during working hours for the purpose of investigating and adjusting matters covered by or arising under this Agreement." Pursuant to the above provision Cortes and Kingsley requested and were granted permission by Hueuink or Schrader during the preelection period to enter the plant premises either together or individually two or three times a week. As was customary, they met in Respondent's conference room to discuss grievances, complaints, and other union business and to confer with the IBEW stewards, grievants and, if necessary, company officials or supervisors. Usually, grievances were filed verbally and were reduced to writing only if they could not be resolved at the supervisory level. During the period from June 6 to July 17 at least 10 written grievances were filed. Hueuink conceded that Cortes and Kingsley were also granted permission to go into the plant and investigate grievances of employees on the line. Both Hueuink and Schrader testified that they would break up unauthorized meetings between the IBEW representatives and the employees.

Several witnesses for the General Counsel testified that they observed Cortes talking to employees and urging support for the IBEW. Supervisors in the vicinity did not interfere with Cortes' conduct.

The record is clear that Respondent did not permit IRWA nonemployee organizers to distribute campaign material on plant premises or to solicit support for the IRWA.

2. Disparate treatment of IRWA employee organizers with respect to campaigning on Respondent's plant premises

As indicated above, the IRWA campaign was initiated by the IBEW stewards. During the early days of the IRWA's organizing drive most of the IBEW stewards actively solicited IRWA authorization cards from Respondent's employees and passed out IRWA literature on the parking lot and in the Company's cafeteria. Curiously, as the campaign progressed, literature for both the IBEW and the IRWA was distributed by some stewards, apparently without discrimination. In August toward the end of the campaign the stewards' sentiment shifted to the IBEW. However, stewards Gonzalez, Ivan Cruz, Ronald Loyo, and Lydia Santiago continued to pass out material for the IRWA on plant premises without interference by Respondent's officials.[6]

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[6] In making this finding I place no reliance on a document dated July 26 and signed by all IBEW stewards repudiating their support for the IRWA and urging support for the IBEW. Kingsley informed the stewards that they could not remain IBEW stewards unless they signed the document. Nevertheless, Gonzalez remained a supporter of the IRWA and Santiago, his close friend, continued her support for the IRWA until a few days before the election.

Literature for both Unions was passed along the assembly lines without interference from Respondent. Baez testified that Santiago passed out IBEW handbills on Baez' assembly line with his permission. According to Baez, his supervisor, Art Kavanaugh, directed that the steward be permitted to pass out any campaign literature that came into the plant without differentiating between the IRWA and the IBEW.

Literature for both Unions was regularly posted on Respondent's bulletin boards except for a single bulletin board that was glass-enclosed and locked.[7] Hueuink and his assistant would tour the plant nightly and remove the literature of both Unions from the bulletin boards. Respondent has about 450 "towveyor" carts that move throughout the plant. During the election campaign signs in English and Spanish appeared in chalk on the carts, advocating that employees vote for the IBEW or the IRWA. Respondent's supervisors would attempt to remove the signs in the evenings.

Buttons for both Unions were worn by the employees without interference from Respondent's officials.

A few days before the election banners were hung from the ceiling advocating, respectively, that employees vote for the IBEW or the IRWA. Hueuink ordered both banners removed.

3. Rejection of the IRWA's request on behalf of IRWA employee organizers

On August 23 Weil, accompanied by IRWA Representatives Frank Woljak, Rick Bugajsky, and Tony Meccia met with Hueuink and Schrader in the latter's office.

The testimony as to what occurred is conflicting.

Weil, corroborated by Bugajsky, testified that they asked Schrader four questions: (1) Whether IRWA nonemployee representatives could pass out literature in the parking lot; (2) whether Halo employees could pass out IRWA literature in the parking lot; (3) whether IRWA nonemployee organizers could pass out IRWA literature in nonworking areas on nonworking time; and (4) whether IRWA employee supporters could pass out IRWA literature in nonworking areas on nonworking time. Schrader replied affirmatively to question (2) and negatively to all other questions.

Hueuink and Schrader denied that they had refused permission for IRWA employee supporters to pass out IRWA literature on nonworking time in nonworking areas.

I credit Hueuink and Schrader. The record is clear that IRWA employee supporters in fact passed out IRWA literature in the parking lot and in the cafeteria during the entire preelection period without interference by Respondent. Certainly, at least since the incident involving the suspensions of Gonzalez and other IRWA supporters, Hueuink and Schrader were well aware of employee rights to distribute campaign literature in nonworking areas on nonworking time. It makes no sense that they would inconsistently grant such permission to IRWA employee supporters with respect to the parking lot, a nonworking area, while denying permission to campaign in other nonworking areas or on nonworking time.

IV. ANALYSIS AND FINAL CONCLUSIONS OF LAW

A. *Conduct Violative of Section 8(a)(1)*

I find that Respondent violated Section 8(a)(1) of the Act in the following respects:

(1) Supervisor Tony Lizardi's promise of benefit to Santiago Cabrera in mid-August that if Cabrera kept quiet and kept calm and helped to calm down the other employees Lizardi would get Cabrera more money and more benefits in the context of Cabrera's open advocacy of the IRWA and Respondent's opposition to that Union.

(2) Lizardi's threat to Cabrera in mid-August that if the IRWA won the election the employees would go back to making $2.90 per hour.

(3) Lizardi's threat to Cabrera during the preelection period that Respondent would lay off half the employees and maybe even half the supervisors if the IRWA came into the plant.

(4) Lizardi's threat to Cabrera during the preelection period that if the employees continued to try to put in a new union it would end with employees laid off and salaries reduced.

(5) Lizardi's threat to Cabrera during the preelection period that if the employees did not vote for the IBEW Respondent could move the Company to California or any place because McGraw Edison was a big company and had a lot of money.

(6) Lizardi's threat to Cabrera during the preelection period that if Respondent lost the use of the IBEW label the Company would have to lay off half the employees, lay off some of the supervisors, and reduce salaries to $2.90.

(7) Lizardi's promise of benefit to William Velasquez and other employees on or about July 20 to the effect that Lizardi would go to personnel and try to get the employees a raise of 25 cents per hour if they voted for the IBEW.

(8) Lizardi's threat to Velasquez that the employees' salaries would be lower if a new union came into Halo.

(9) Lizardi's threat to Dionisio Perez and other employees during the preelection period that if the employees did not vote for the IBEW the employees would lose benefits and would have to start with minimum wages.

(10) Lizardi's threat to Perez and other employees during the preelection period that the plant could move to another location if the employees did not vote for the IBEW.

(11) Lizardi's solicitation of employee grievances during the preelection period by informing Perez and other employees that Lizardi could set up a meeting with Thomson for them and they could talk to Thomson about whatever they needed, including an increase.

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[7] I do not credit the testimony of James Weil that he saw a handbill for the IBEW posted inside the glass-enclosed bulletin board on the day of the election. Having credited Hueuink that he regularly removed literature for both Unions from the bulletin boards, it is most unlikely that he would permit the posting of campaign literature for the IBEW on a bulletin board under the complete control of Respondent on the day of the election.

(12) Lizardi's threat to Pedro Fortis in June that if the IBEW lost the election the Company would move the factory to another place.

(13) Lizardi's promise of benefit to Fortis during the preelection period that if the employees supported the IBEW and the IBEW won the election Lizardi would take the employees out to eat and they could drink what they wanted.

(14) Lizardi's threat to Fortis during the preelection period that if the IRWA won the election the Company would pay the employees $2.90 per hour instead of the $5.17 they were making and the employees would not have any kind of benefits.

(15) Lizardi's promise of benefit to Fortis that if Lizardi could legally find out who voted in favor of the IBEW Lizardi would try to get the employees a 25-cent-per-hour increase.

(16) Lizardi's threat to Fortis during the preelection period that if the IBEW lost the election the Company would not be able to use the label and therefore they would move the factory.

(17) Lizardi's threat to Francisco Lopez and other employees in mid-August to stay with the Union the employees had because voting for a new union was like throwing away salaries and no benefits; that if the IRWA won the election that the Company would have to start from the bottom on the Federal rates and from new benefits.

(18) Lizardi's promise of benefit to Lopez and other employes in early August that they could have a better job if they would "stick with us" in the context of Respondent's active campaign on behalf of the IBEW.

(19) Supervisor Castor Colon's threat to Pedro Fortis in August that if the IRWA won the election there was a possibility that the factory would move to another location.

(20) Colon's threat to William Velasquez and other employees in early August that if the IRWA won the election salaries would be lowered and the Company would be obliged to move the plant to another location.

(21) Supervisor Gomer Baez' threat on or about August 22 to an unidentified employee, overheard by Jesus Gonzalez, that if the IRWA won the election the Company would call the Immigration Service and a lot of people who had no legal rights would get into trouble.

(22) Baez' threat to Gonzalez on the same occasion, when Gonzalez objected to Baez' comment, that Gonzalez had better keep going, that he was "hot," thereby implying that Gonzalez was risking discharge or other adverse action by Respondent because of Gonzalez' concern on behalf of the employee and the IRWA.

(23) Baez' threat to Angela Sanchez 2 or 3 weeks before the election that Baez knew Sanchez was for the new Union (IRWA) and she was running the risk of being fired; that if the IBEW won the election Sanchez would be the first one to be fired.

The unfair labor practices found above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

B. *Conduct Not Violative of Section 8(a)(1)*

I find that Respondent did not violate Section 8(a)(1) in the following respects:

(1) President Thomson's prediction to employee Concepcion Ocampo and other employees in the early part of August that the label used by the Company was recognized by the Electrical Workers Union and if the product did not bear that label they would refuse to install it and in refusing to install the products Halo would have less orders, less sales, and less work; President Thomson's similar statements to Jesus Gonzalez in their meetings on June 18 and 25.[8]

I have given long and serious consideration to the above issue, recognizing, as I do, the enormous advantage to the IBEW and the serious detriment to the IRWA if Respondent may lawfully inform its employees immediately prior to a Board election that a vote for the IRWA rather than the IBEW is, in effect, a vote to lose jobs, possibly their own. But the question presented to me in this case is not the impact on the employees of Respondent's repeated warnings that the loss of the IBEW label would have an adverse effect on the Company and its employees. The legality of an employer's preelection statements rests rather on the truth or falsity of such statements and the power of the employer to influence or affect the consequences it predicts. The Supreme Court has held that an employer is free to communicate to its employees his views about unionism and particular unions. He may predict the precise effect unionism will have on its company provided its prediction is based on objective fact "as to demonstrably probable consequences beyond his control." *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969). The prediction falls into the category of an unlawful threat if there is any suggestion or implication that the Employer "may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him." *Ibid.*

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[8] Falling into the same category of statements not violative of Sec. 8(a)(1) are statements made by Lizardi to Velasquez and Perez and admittedly made by Lizardi to employees generally during the preelection period when he explained to them the importance of the IBEW label in selling the Company's products and retaining jobs for the employees. Also included is the explanation of Supervisor Vince Monaco to Luz Velasquez in July of a handbill relating to the importance of the IBEW label to the Company and its employees; the prediction of Supervisor Daniel Hueuink to Dionisio Perez and other employees in late July or early August with respect to the loss of the IBEW label, the loss in sales and the loss in employment; the prediction of Traffic Manager Charles Orabutt in mid-August made to Lopez, Fortis, and other employees that if the IBEW label were not on the product it could be a problem if the electricians did not install it, that the loss of the IBEW label would mean a loss of sales for the Company, a loss of jobs because of the loss of business, and there would be layoffs throughout the Company; Supervisors Baez' and Saez' prediction to Angela Sanchez about 2 or 3 weeks before the election that electricians would not install the Company's products if they did not bear the IBEW label with a result that the merchandise would be sent back and employees would be laid off; Director of Distribution Joe Jeffress' explanation to Lopez during the preelection period that the tradesmen would not install the Company's products if they did not have the IBEW label.

Not included, however, as found above, are statements that the loss of the IBEW label would result in half the employees or half the supervisors being laid off. While the loss of business and the loss of jobs, for reasons stated below, was a probable consequence beyond the Employer's control resulting from the loss of the IBEW label, the record will not support such a finding with respect to a specific number of jobs.

In the instant case Respondent introduced substantial evidence in support of its position that the right to stamp its products with the IBEW label was an important, if not the most important, factor in the rise of Halo from a small three-man facility to the largest manufacturer in the world of incandescent recessed lighting.

Thomson testified that the Company's first major sale of incandescent lighting fixtures was made in 1956 for the Truman Library in Independence, Missouri. On that occasion the electricans on the jobsite were unwilling to install the lamps because they did not bear the IBEW label. As a result of that experience, the Company sought out the IBEW, the employees of the Company became members of that Union, and a contractual relationship between the IBEW and Respondent has continued from that time until August 31.

Respondent's major competitors all have the use of the IBEW label. These include: Lightolier in Jersey City, New Jersey; Progress Lighting in Philadephia, Pennsylvania; Gotham in the vicinity of Cleveland, Ohio; Omega in Long Island, New York; and Thomas Industries in Kentucky.

Ninety percent of Respondent's sales of lighting fixtures are made in the United States. Ninety-five percent of Respondent's products are sold to distributors or contractors for use in large commercial construction projects such as auditoriums, commercial offices, and shopping centers.

On occasion when Respondent's products were sent to the field without the IBEW label, company officials were reminded that the label was missing. On those occasions Respondent was required either to send IBEW labels to the field for those products or to confirm that Respondent was still affiliated with the IBEW.

Patrick Quinn, eastern regional sales manager for Respondent, testified that in sales presentations he would let the customer know at the outset that the Company was an IBEW Company. During his prior experience as a journeyman electrician on a construction site it was Quinn's custom and that of other electricians to check to see that the electrical product bore the IBEW label, commonly referred to as the "bug." During Quinn's experience in lighting installations Quinn had never come across a union label on an electrical product other than the IBEW label.

Joseph Duffy, business representative of the IBEW, testified that in his experience as a journeyman electrician on a construction site it was normal for the union steward to check whether the fixtures bore the label of a union affiliated with the AFL–CIO. If the fixtures did not show such a label the steward on the job would call the IBEW office to determine whether the manufacturer was a union company. Once that was established the company would be notified to send their labels to the jobsite to be affixed to the fixtures.[9]

While the General Counsel challenges the conclusions to be drawn from the above testimony, he introduced no evidence to refute the accuracy of such testimony. No witness for the General Counsel testified that journeymen electricians on commercial jobsites would be willing to install electrical fixtures that did not bear the IBEW label. No evidence was introduced to show that a single major competitor of Respondent used a label other than that of the IBEW. In these circumstances the General Counsel's contention that Respondent's expressed concern over the possible loss of the IBEW label amounts to "unfounded speculation" is, to say the least, without merit.

As indicated above, I have reached my conclusion on this issue after serious consideration and on the basis of the evidence presented. Nevertheless, I must say that the General Counsel's bifurcation of the evidence by failing to allege that Respondent's letters and memos to its employees, signed by Thomson himself and Thomson's speech of August 23, specifically referring to the loss of business and the loss of jobs as a result of the loss of the IBEW label are unlawful, has given me pause. Despite the vigor of the General Counsel's argument in his brief, his failure to include in the complaint conduct in written form otherwise alleged to be unlawful in spoken form raises considerable doubt as to his own conviction in this matter.

(2) The conversation of Director of Distribution Joe Jeffress with Santiago Cabrera in the former's office during the last 2 weeks of July, the testimony of Cabrera as to this conversation having been discredited.

(3) Surveillance of union activity: The evidence adduced by the General Counsel is that supervisors of Respondent were present on Respondent's parking lot on June 5, 6, 7, and 8 at times when nonemployee and employee organizers for the IRWA were engaged in soliciting authorization cards from Respondent's employees. No evidence was adduced that Respondent's supervisors noted the names of employees signing cards for the IRWA or that pictures of card signing activity were taken. The evidence is that notes were not taken. Respondent was informed that organizational activity would occur on its parking lot on June 5 and had reason to believe that there was a possibility of violence. In fact, an altercation did occur on one of the above dates requiring the presence of a police officer. Respondent has a right to police anticipated violence on its property and a right to eject nonemployee union organizers from its parking lot. *N.L.R.B.* v. *The Babcock & Wilcox Company*, 351 U.S. 105 (1965). In these circumstances the mere presence of Respondent's supervisors on its parking lot on June 5, 6, 7, and 8 did not constitute unlawful surveillance of union activity.

(4) Cancellation of the company picnic: The evidence does not establish that Respondent's purpose in canceling the picnic scheduled for July or its effect was to interfere with, restrain, and coerce its employees unlawfully in the exercise of their Section 7 rights. For 2 months, including the month of June when the IRWA pursued its organizational drive, Respondent made plans for an elaborate picnic to be enjoyed by the entire complement of plant

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[9] Sec. 8(b)(4) of the Act forbids union activity of a secondary nature with respect to the refusal of employees to handle nonunion products. As a union agent, Duffy's testimony was somewhat circumspect in response to questions relating to the practice of IBEW electricians in refusing to install products that did not bear an acceptable union label.

employees and their families. It was only upon information volunteered by employees that the picnic might degenerate into conflict between opposing groups of employees that Respondent made the decision at the last minute to cancel the picnic. Lizardi testified as to the emotional temperament of many of Respondent's employees. Their feelings for and against the IRWA ran deep. There was talk of knives and guns. In this context it was understandable that employees would be reluctant to subject their families or themselves to an uncomfortable and possibly violent confrontation between IRWA and IBEW supporters. Indeed, officials of the IRWA decided on June 20 that they would not attend the picnic because of their own concern that such a confrontation might occur.

While Respondent's information that IRWA nonemployee organizers planned to attend the picnic may have been inaccurate, I am satisfied that the question was sufficiently muddy and Respondent's concern sufficiently legitimate to rebut the General Counsel's allegation that the cancellation of the picnic violated Section 8(a)(1).

C. *Conduct Not Violative of Section 8(a)(1) and (2)*

I find that Respondent did not violate Section 8(a)(1) and (2) of the Act in the following respects:

(1) Disparate treatment of IRWA nonemployee organizers with respect to campaigning on plant premises: admittedly, IBEW Officials Cortes and Kingsley were permitted to enter plant premises and investigate grievance problems in the plant proper while IRWA officials were denied access to the plant. It is, however, too well established to require citation of cases that an incumbent union with a contractual right may lawfully exercise that right despite the denial of the same right to an outside union with no representative status. During an election campaign where, as here, there are hundreds of employees it is difficult, if not impossible, to guarantee that the incumbent union will adhere strictly to the terms of the contract and refrain from campaigning on its own behalf. The record shows that Hueuink and Schrader made reasonable efforts to restrict the IBEW officials' contact with employees to legitimate investigation of grievances and conferences with stewards. As a practical matter, this is the most that can be expected of an employer caught in this situation. Inevitably, there were occasions, particularly involving Cortes, who spoke Spanish fluently, when employees would raise questions about various pieces of literature and Cortes would respond. In the balance to be struck between lawful and unlawful assistance such incidents do not rise to the level of unlawful conduct on the part of Respondent in the context of affirmative attempts by Respondent's officials to restrict such activities and the absence of evidence of a policy to permit campaigning by the IBEW while denying such permission to the IRWA.

(2) Disparate treatment of IRWA employee organizers with respect to distribution of literature and posting of campaign materials on Respondent's plant premises: The credited testimony is insufficient to warrant the conclusion that Respondent permitted sympathizers for the IBEW to distribute literature in nonwork areas of the plant on nonwork time and to post campaign materials inside Respondent's plant while denying similar rights to sympathizers of the IRWA.

D. *Objections to the Conduct of the Election*

Included in the IRWA's objections are the following: (1) that the Employer utilized its plant bulletin boards to display IBEW handbills, letters, and other IBEW papers; (2) that the employer and the IBEW representatives met collectively and individually with captive groups of employees in the plant during working hours; and (3) that the Employer distributed letters, pamphlets, and other literature to the employees threatening loss of jobs and other benefits if they were no longer represented by the IBEW.

I find no merit in these objections. For reasons stated above, the allegations of employer favoritism to the IBEW over the IRWA have not been established. Nor does an employer engage in objectionable conduct by meeting with employees for campaign purposes on working time. No evidence was introduced to refute the accuracy of the facts and figures published in Respondent's letters and pamphlets. I have found above that Respondent's oral predictions of a loss of business and loss of jobs as a consequence of the loss of the IBEW label are not violative of Section 8(a)(1). Applying the standard applicable to objections to the conduct of an election, I find such oral and written predictions protected by Section 8(c) and inadequate as a basis for setting the election aside. These objections are dismissed.

Contrary to Respondent, however, the IRWA's objections are broad enough to encompass conduct found above to constitute violations of Section 8(a)(1) and the objections are sustained on the basis of those findings. The IRWA filed its objections "for the reason that on August 29, 1979 and prior thereto, the Employer unduly influenced and coerced employees in the exercise of their rights to a free and independent choice of bargaining representative," including in its objections the above specific objections.

Respondent was on notice at the hearing that the IRWA rested its case on the evidence adduced by the General Counsel with respect to conduct alleged to be unfair labor practices and now, in part, so found. The mere fact that these unfair labor practices were not specifically alleged in the IRWA's timely objections is insufficient to disregard serious objectionable conduct within the critical preelection period that unduly influenced the employees in their choice of a bargaining representative. *Decoto Aircraft Inc.*, 209 NLRB 1034 (1974), 512 F.2d 758 (9th Cir. 1975), cert. denied 423 U.S. 836.

I shall recommend that the election held on August 29 be set aside and that the Regional Director for Region 13 conduct a new election in accordance with the Board's established Rules and Regulations.

[Recommended Order omitted from publication.]

The Buckley School *and* California Federation of Teachers, American Federation of Teachers, AFL-CIO. Case 31-CA-11114

December 15, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on May 8, 1981, by California Federation of Teachers, American Federation of Teachers, AFL-CIO, herein called the Union, and duly served on The Buckley School, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on June 9, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on February 23, 1981, following a Board election in Case 31-RC-4692, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about March 9, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On June 19, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On August 27, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 2, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in response to the Notice To Show Cause, Respondent admits that it refused and continues to refuse to recognize the Union as the exclusive bargaining representative of its employees. While it denies that the Union requested bargaining or that it refused to bargain, it does not challenge the authenticity of the Union's March 4, 1981, letter requesting bargaining and its March 9, 1981, letter refusing the request. (Both letters are attached as exhibits to the General Counsel's motion.) In defense of its conduct, Respondent contests the validity of the certification issued by the National Labor Relations Board. Specifically, Respondent asserts that it was improperly denied a hearing on its objections to the conduct of the election in that it had raised substantial and material issues of fact. The General Counsel asserts that Respondent improperly seeks to relitigate issues which were raised and decided in the representation case. We agree with the General Counsel.

A review of the record, including the record in Case 31-RC-4692, reveals that, following a hearing on the Union's petition, the Regional Director issued a Decision and Direction of Election on October 15, 1980. Respondent thereafter filed a timely request for review and supporting brief with the Board. On November 11, 1980, the Board issued an order finding that substantial issues had been raised concerning the managerial status of three individuals which could best be resolved through the challenged ballot procedure, and in all other respects denying Respondent's request for review because it raised no substantial issues warranting review. An election was held on November 13, 1980, in which 33 ballots were cast for, and 30 against, the Union, with 3 challenged ballots. Respondent subsequently filed objections to conduct affecting the results of the election and a statement of position concerning the three challenged ballots. Respondent also requested that a hearing be held for the presentation of evidence and argument. The Regional Director gave both parties reasonable notice and opportunity to present all relevant evidence, and conducted a full investigation of all objections and challenges. Thereafter, on February 23, 1981, the Regional Director issued a Supplemental Decision and Certification of Representa-

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[1] Official notice is taken of the record in the representation proceeding, Case 31-RC-4692, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

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tive, in which he sustained the challenge to one voter's ballot, and concluded that Respondent's objections failed to raise substantial or material issues which would warrant setting aside the election, thereby by implication also concluding that a hearing was not warranted. Respondent's request for review of the Supplemental Decision and Certification of Representative and request for oral argument was denied by the Board on June 17, 1981.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a California corporation engaged in the operation of a private school with its principal place of business in Sherman Oaks, California. Within the 12 months preceding the Decision and Direction of Election, Respondent derived gross revenues in excess of $1 million. It annually purchases goods and services valued in excess of $5,000 directly from suppliers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

California Federation of Teachers, American Federation of Teachers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All faculty members employed by the Employer at its location at 3900 Stansbury Avenue, Sherman Oaks, California, excluding office clerical employees, janitorial employees, bus drivers, and supervisors as defined in the Act.

2. The certification

On November 13, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on February 23, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about March 4, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit.

Commencing on or about March 9, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

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[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c). In its response to the Notice To Show Cause, Respondent also argues, for the first time, that the Regional Director improperly considered and relied upon evidence that Respondent had not seen in the earlier representation case. Respondent's failure to timely raise this issue in the representation proceeding constitutes a waiver precluding it from raising this issue as a defense to its refusal to bargain with the Union. See *Fall River Savings Bank*, 250 NLRB 935, 936, fn. 12 (1980), enfd. 649 F.2d 50, 57–61 (1st Cir. 1981); *St. Anthony Hospital Systems*, 252 NLRB 50 (1980), enforcement denied on other grounds 655 F.2d 1028 (10th Cir. 1981).

Further, in the representation case Respondent did not seek review with respect to the Regional Director's sustaining of the challenge to the ballot of Wendy Jane Lawson. The remaining ballots were then not determinative. As to the objections, the facts were either essentially undisputed, or the Regional Director accepted as true the evidence submitted by Respondent, apparently investigating only to ascertain whether the objections were otherwise supported. Finally, Respondent submitted its evidence in support of its objections as exhibits to its request for review, and the Board concluded that they were insufficient to warrant granting review with respect to the Regional Director's determination that the Union should be certified without the holding of a hearing. *Rexco D.S., Inc., and/or White Cross Stores, Inc., No. 14* v. *N.L.R.B.*, 653 F.2d 264 (6th Cir. 1981).

Accordingly, we find that Respondent has, since March 9, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Buckley School is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. California Federation of Teachers, American Federation of Teachers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All faculty members employed by Respondent at its location at 3900 Stansbury Avenue, Sherman Oaks, California, excluding office clerical employees, janitorial employees, bus drivers, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 23, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 9, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Buckley School, Sherman Oaks, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with California Federation of Teachers, American Federation of Teachers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All faculty members employed by the Employer at its location at 3900 Stansbury Avenue, Sherman Oaks, California, excluding office clerical employees, janitorial employees, bus drivers, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at The Buckley School, 3900 Stansbury Avenue, Sherman Oaks, California, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with California Federation of Teachers, American Federation of Teachers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All faculty members employed by the Employer at its location at 3900 Stansbury Avenue, Sherman Oaks, California, excluding office clerical employees, janitorial employees, bus drivers, and supervisors as defined in the Act.

THE BUCKLEY SCHOOL

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Galesburg Construction Company, Inc. *and* **John E. Knowles. Case 14-CA-15145**

December 15, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND ZIMMERMAN

Upon a charge filed on June 24, 1981,[1] by John E. Knowles, and duly served on Galesburg Construction Company, Inc., herein called Respondent, the General Counsel for the National Labor Relations Board, by the Regional Director for Region 14, issued a complaint on August 6 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent did not file a timely answer to the complaint.

On September 14, counsel for the General Counsel filed directly with the Board in Washington, D.C., a Motion for Summary Judgment, with appendixes attached. Subsequently, on September 17, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On the same date, Respondent filed an answer to the complaint. Thereafter, on September 28, the General Counsel filed a motion to strike the answer as untimely filed. On October 5, Respondent filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion To Strike Answer As Untimely Filed and Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing issued on August 6, and served on Respondent by registered mail, return receipt dated August 8, specifically states that, unless an answer to the complaint is filed within 10 days from the service therof "all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board." Further, according to the Motion for Summary Judgment, counsel for the General Counsel informed Respondent by letter dated August 26 that, if Respondent did not file an answer by September 2, summary judgment would be sought. Respondent did not file an answer to the complaint until September 17. The General Counsel thereupon filed a motion to strike the answer as untimely filed.

Respondent's response to the Notice To Show Cause argues that the General Counsel's Motion for Summary Judgment should not be granted. Respondent states that on or about July 13 an attorney for the Board, Gail Barder, questioned Respondent's president, Patrick H. Thomas, about the issues involved in this case. Respondent contends that, at the conclusion of the meeting, Thomas asked Barder if there was anything else he would have to do or answer in connection with this case, and Barder replied that there was not. Respondent alleges that Thomas was unavailable during most of August because he was out of his office on business, and that, relying on Barder's representation to him, he did not inform his office staff to advise him of any communication from the National Labor Relations Board. Respondent maintains that Thomas did not learn of the complaint until September 8, and that Thomas then immediately sought to retain counsel.

We do not think that Respondent's submissions constitute good cause, within the meaning of Section 102.20 of the Board's Rules and Regulations for failure to file a timely answer. Respondent's reliance upon Barder's alleged assertion is wholly misplaced. Assuming *arguendo* that the alleged representation was in fact made, Respondent, as noted above, had been duly served with the complaint and notice of hearing which clearly stated that Respondent must file an answer, and was also notified by letter dated August 26 that it must file an answer by September.

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[1] All dates herein are in 1981.

2. In these circumstances, we find that Respondent had been put on notice that it was required to file an answer.[2] In addition, the fact that Thomas was not in his office for most of August does not relieve Respondent of its obligation to answer the complaint.[3]

Accordingly, we grant the motion to strike the answer as untimely filed. We similarly find that Respondent has offered no valid reason why the Motion for Summary Judgment should not be granted, and, under the rule set forth above, the allegations of the complaint are deemed admitted and are found to be true, and we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. THE BUSINESS OF RESPONDENT

Galesburg Construction Company, Inc., a Delaware corporation with an office and place of business at 147 South Cherry, Galesburg, Illinois, is engaged as a general contractor in the building and construction industry. Respondent's jobsites at J. C. Penney and Blessing Hospital, Quincy, Illinois, are the only jobsites involved in this proceeding. During the 12-month period ending July 31, Respondent performed services valued in excess of $50,000 for various enterprises located outside the State of Illinois.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE UNFAIR LABOR PRACTICES

On or about June 18, Respondent told an employee that he was being laid off because he had engaged in union activities. On or about June 19, Respondent told an employee that he would not be hired on Respondent's projects in Quincy, Illinois, because of his union activities. We find that, by such conduct, Respondent violated Section 8(a)(1) of the Act.

Since on or about June 18, and continuing to date, Respondent has refused to hire employee John E. Knowles because he joined, supported, or assisted a union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection. We find that, by such conduct, Respondent has violated Section 8(a)(3) and (1) of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall offer employee John E. Knowles immediate and full employment in the position for which he applied, or, if that job no longer exists, a substantially equivalent position, without prejudice to his seniority or other rights and privileges. Respondent shall also make Knowles whole for any loss of earnings suffered by reason of its unlawful refusal to hire him. Backpay shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Galesburg Construction Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By telling an employee that he was being laid off because he had engaged in union activities, and by telling an employee that he would not be hired because of his union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By refusing to hire John E. Knowles because of his union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

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[2] *Clean and Shine*, 255 NLRB 1144 (1981). See *Capitol Temptrol Corporation*, 243 NLRB 575, 589, fn. 59 (1979).

[3] *Ancorp National Services, Inc., Casco Division*, 202 NLRB 513 enfd. in an unpublished opinion 87 LRRM 3274 (lst Cir. 1973).

[4] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Galesburg Construction Company, Inc., Quincy, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that they will be laid off because of their union activities.

(b) Telling employees that they will not be hired because of their union activities.

(c) Refusing to hire applicants or otherwise discriminating against employees because of their union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer John E. Knowles immediate and full employment in the position for which he applied or, if that job no longer exists, in a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make John E. Knowles whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him, as provided in the section of this Decision and Order entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at at its Galesburg, Illinois, facility copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT tell employees that they will be laid off because of their union activities.

WE WILL NOT tell employees that they will not be hired because of their union activities.

WE WILL NOT refuse to hire applicants or otherwise discriminate against employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer John E. Knowles immediate and full employment in the position for which he applied or, if that job no longer exists, in a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make John E. Knowles whole, with interest, for any loss of earnings he may have suffered by reason of the discrimination practiced against him.

GALESBURG CONSTRUCTION COMPANY, INC.

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

King Trucking Company *and* **James Morgan** *and* **Ernest Centers.** Cases 9-CA-15335 and 9-CA-15462

December 16, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On May 11, 1981, Administrative Law Judge James P. Timony issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, King Trucking Company, Burlington, Kentucky, shall take the action set forth in said recommended Order, as so modified:

1. Substitute the following paragraph for paragraphs 1(a) and (b):

"(a) Discharging or otherwise discouraging employees for their support of Truckdrivers, Chauffeurs and Helpers, Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discriminating against them for engaging in protected union activity."

2. Insert the following as new paragraph 1(b):

"(b) Assaulting employees in violation of Section 8(a)(1) of the Act because they have engaged in union activity."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

We will not discharge or otherwise discourage employees for their support of Truckdrivers, Chauffeurs and Helpers, Local Union No. 100, an affiliate of the International Broth-

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[1] Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge's findings that James Morgan was not discharged. In so doing we disavow the Administrative Law Judge's conclusion that Morgan was not an employee of Respondent. Morgan was a part-time employee who had worked for Respondent in the past. The established practice was for Morgan, because of a communication problem, to contact Respondent when he needed work. On March 26 Morgan contacted Respondent and was assigned a route.

While fueling his truck at the truck stop, he met the other drivers who were discussing the Swigert incident, and decided to return to the company yard with them to discuss the matter with Respondent's president, King. This meeting lasted several hours and at its conclusion the drivers decided it was too late to begin their routes. When Morgan informed King that he was not going out on his route, King requested the truck keys. Morgan asked if he was going to be fired and King replied, "no." Morgan never contacted King after March 26. For that reason the Administrative Law Judge found that Morgan was not discharged but rather voluntarily discontinued the established employment arrangement. We agree.

[2] We adopt the Administrative Law Judge's finding based on credibility that Respondent by Meade King did not threaten plant closure when he talked to Otis Mefford during the organizational campaign. We therefore find it unnecessary to decide Meade King's status with Respondent.

Under the section entitled "Discussion" the Administrative Law Judge apparently buttressed his finding that Respondent was hostile to the Union with an incident which took place between Combs and driver Jim Hudson. Although we adopt the Administrative Law Judge's finding that Combs discharged Swigert for antiunion purposes, we disavow any inference drawn from the incident in which Combs excluded Hudson from the "shop."

[3] The complaint alleged that Respondent, by Supervisor Combs, violated Sec. 8(a)(1) of the Act by assaulting employee Swigert during an unlawful discharge. Although the Administrative Law Judge found that Swigert was assaulted, he failed to make a finding as to whether such conduct violated Sec. 8(a)(1) of the Act. The General Counsel excepts to this omission. We find that Combs' assault of Swigert, in the context of and related to his unlawful discharge and because of his union activity, violated Sec. 8(a)(1) of the Act and we shall amend the Administrative Law Judge's recommended Order and notice accordingly.

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erhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discriminating against them for engaging in protected union activity.

WE WILL NOT assault employees because they engage in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer John Swigert immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of pay he suffered as a result of the discrimination practiced against him, plus interest.

KING TRUCKING COMPANY

DECISION

STATEMENT OF THE CASE

JAMES P. TIMONY, Administrative Law Judge: These consolidated cases were heard in Cincinnati, Ohio, on February 19 and 20, 1981, upon the complaint of the General Counsel issued June 26, 1980, based upon the charge filed on May 16, 1980, by James Morgan and the amended consolidated complaint issued July 23, 1980, based upon the charge filed by Ernest Centers on June 17, 1980.

The complaints allege that King Trucking Company unlawfully discharged three employees, John Swigert, James Morgan, and Ernest Centers; coercively interrogated and threatened employee Ernest Centers; promised employees additional benefits if they would forego support of the union; withdrew company credit cards from employees because of their participation in the union organizing campaign; and that Respondent's agent/supervisor, Tom Combs, assaulted an employee because of that employee's support of the union. At the hearing, another allegation added is that Meade King coercively threatened employees with plant closure if the union was selected as the employees' collective-bargaining representative.

Respondent, in the answer, admits jurisdiction but denies the commission of any unfair labor practices. Respondent contends that the three named employees voluntarily quit their jobs and denies that Tom Combs was a supervisor under the law.

Upon consideration of the whole record, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

King Trucking Company is a partnership, with an office and place of business in Burlington, Kentucky, engaged in the operation of a trucking service, providing services valued in excess of $50,000. The company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE EVENTS

King Trucking Company transports coal and sand. Gary King, president of the Company, owns 70 percent of the stock, and his father, Meade King, owns the rest.[1] They own 10 Mack trucks and employ 10 drivers.[2] The Company transports coal exclusively for Madison Coal Company which contracts to buy coal directly from coal mines and then, each morning, directs King where the coal is to be picked up.

Drivers come in about 8 a.m., receive their assignments, go to the sand pits, load, and go to Lexington or London, Kentucky. They unload the sand and go to the coal fields east of Lexington to load coal. They drive to the Madison Coal Company in Cincinnati, dump the coal, and return as late as 10:30 p.m. to the King Trucking Company.

The drivers are paid 25 percent of the gross revenue received by King for each haul of sand and coal. On some days Madison Coal Company has not contracted for enough coal to fill all of the trucks. King then allocates the hauling of coal to the drivers by seniority. On some days the drivers haul only sand and come back empty.

In February 1980, a union[3] started an organizing campaign at the King Trucking Company. The drivers signed union authorization cards, and the union filed a representation petition on February 26, 1980. The parties entered into a Stipulation for Certification Upon Consent Election which was approved by the Regional Director of Region 9 of the National Labor Relations Board on April 18, 1980. The results of the election were five votes for the union; no votes against the union; and six challenged ballots. The Regional Office resolved three of these six challenges, finding that their ballots should not be counted. Since the remaining three challenged ballots would not affect the outcome of the election, the union was certified as the exclusive bargaining representative of the truck drivers on May 27, 1980.

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[1] Meade King is not in the management of the Company.

[2] King also leases about 30 trucks from owner-operators and, acting as a broker, leases the trucks to Madison Coal Company.

[3] Truck Drivers, Chauffeurs and Helpers, Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

A. *Tom Combs' Assault*

The most dramatic incident in this case involves a fracas between Tom Combs and John Swigert on March 24, 1980.

Tom Combs had leased a truck to King and had worked part-time as a mechanic for the Company for several years. In January 1980, King had just purchased five new Mack trucks, at $75,000 each, and hired Combs as a full-time mechanic. In March 1980, the trucks were breaking down due to the drivers' failure to perform routine maintenance and because the trucks were being driven overloaded over rough roads. Gary King told the drivers that he had authorized Tom Combs to report any further instances of breakdown due to driver negligence, and King said he would discharge the driver. Combs apparently was the only employee in the office after the trucks had gone on their daily journey, and he answered the telephone in the office in Gary King's absence and took messages. He recommended two drivers who were employed by the Company. Gary King admitted on the witness stand that Tom Combs was in charge when he was away. In fact, King told several of the drivers that Combs was "road boss" and that Combs could fire them if they mistreated the equipment.[4]

About 10:30 p.m. on March 24, 1980, the drivers were returning to the yard at King Trucking Company. John Swigert, a driver for King for about 2 years, helped another driver back his truck into the yard. Swigert then approached a group of other drivers, joshing how he was going to have to conduct lessons in driving. At the same time, Tom Combs approached the group to find the root of the hostility recently shown to him by some of the drivers. He asked one of the group, John Keeler, whom Combs had considered to be his friend, why the drivers had not been talking to him. Combs said that if it was related to Gary King giving him the authority to report abused equipment, he assured them that he would confront the driver with the facts before taking him into the office and reporting the matter to King. At that point Swigert joined the group and asserted that Combs would not take him into the office. This lead to an escalation of heated threats. Combs testified that Swigert said that he did not like working for Gary King and that when he left he was going to make sure King was out of business. Combs said that he then called Gary King on the telephone and recommended to King that Swigert be discharged because he felt that Swigert was threatening the livelihood of all of the drivers. Swigert, however, gave a different version of what happened.[5] He testified that the following dialogue occurred:

> I said, "Are you firing me?" I said, "Am I fired." He said, "Yeah, if I say you're fired, you're fired, buddy." I said, "Well, why are you firing me?" And he said, "Well, you and the God damned Union are going to break this trucking company." And I said, "I don't have any more to do with the Union than anybody else around here, Mister." And he said, "Well, you're fired." And I said, "Well, if I'm fired, pay me so I can go on home." He said, "I'll do just that."

Combs then went into the office to call Gary King. He dialed the telephone. He picked up a tire hammer and hit it on a bench while he talked on the phone. After he hung up the telephone he came back toward Swigert and said, "You come in in the morning and get your money. It will be here." Swigert testified that Combs then threw the tire hammer underneath a truck and hit the wall with a terrible "rippet." Arguing resumed and with both screaming imprecations Combs reaffirmed his point of view by jabbing his finger into Swigert's chest. Swigert finally pushed Combs hard with a blow similar to a straight arm in football, mashing Combs' mouth. Swigert left to go to his car. Combs followed him into the dark yard and Swigert testified at the hearing as to what next occurred:

> And I saw a shadow and I threw up my hand and a shovel come across my arm and nearly broke my arm and stuck in my head. And I went down in the rocks and he hit me again, flatways, right about the ear with the shovel. And then he hit me in the back. I was down in the yard bleeding and getting fainty. And I hollered for help and nobody come. And my car was sitting there running with the door open. And I crawled in it. Someway I got up to Burns' Truck Stop and somebody called the Law and the ambulance. The blue lights was everywhere in the—and they took me to the hospital.

Two days later, when word of the altercation had spread, the drivers met at a truck stop for coffee before proceeding to pick up their load. Driver Ernest Centers called Gary King and wanted him to come to the truck stop to talk about it. King declined and said that they would discuss it on the following day. Instead, however, the drivers returned to the company yard. As Centers was getting his equipment out of the truck, Gary King saw a baseball bat in the cab of the truck. He grabbed it and ran to the office to call the police.

B. *Promising Benefits To Forego the Union*

After the police arrived at the company yard, they advised the drivers to go home. First, however, Gary King invited the drivers into his office individually to discuss the affair. Later, he addressed a group of drivers in the yard again asking about their grievances. They told him that they were afraid of Tom Combs, and that they wanted health insurance and "show-up" pay (a $10 payment to each driver for appearing at the company yard on days when King had nothing to haul). King had received legal advice and told the drivers that, because of the union organizational campaign, he could not make any promises but he implied that the demands were reasonable. He told the drivers that he could not discharge

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[4] Ernest Centers' testimony on this point was corroborated by drivers Otis Mefford and Ritchie Smeal, neither of whom is now employed by King and therefore they are without bias. Respondent did not call other employees who were present during this conversation.

[5] I find from my observation of the witnesses that Swigert's testimony as to the reason he was fired is more accurate. Combs appeared to be a combative individual and was not a trustworthy witness. He appeared to be willing to give whatever testimony might help the Company's cause, whereas Swigert appeared to be a relatively sincere witness.

Combs because of the union campaign but that Combs had no power to fire Swigert and that Swigert was not fired. King also said that he would see that Combs would not hit anybody else, and the drivers said that was what they wanted and they left and returned the next day for work.[6]

C. *Discharge of Swigert, Centers, and Morgan*

The day after the altercation, Gary King tried to find out what had happened. He asked the other three drivers who had been there, but they had not seen much because the yard was dark and they had not heard much of the dialogue between Combs and Swigert. King tried to call Swigert on the telephone, but he got Mrs. Swigert and she said she did not know what had happened. King told driver Jim Hudson, who was Swigert's friend, to see Swigert and tell him he was not fired. Swigert did return to vote in the union election at the request of the union organizer but did not return to work as a driver because he felt that he had been fired and his lawyer told him to stay away from King Trucking Company.

Ernest Centers continued to drive for King for several weeks after the incident involving the baseball bat. Centers received several fines for driving overloaded trucks in early 1980 and claims that King required him to continue to drive overloaded, and that he therefore had to leave the Company.

King had a policy that drivers should not drive the trucks overloaded because it is illegal and can damage the springs and other parts of the truck. Scales are located at the tipple of the coal mine where the trucks are loaded, but, since they are paid on a percentage of the weight of the load carried, some drivers did drive overloaded and King formerly had paid the commission even on loads exceeding the legal limit. After he bought the new trucks, however, King told the drivers that he would pay the commission only up to the legal amount. This policy was posted on the bulletin board in the office.

About May 1, 1980, King's orders to transport coal dropped off drastically.[7] Gary King told Centers that, although there would be no coal to haul for a while, he could haul sand. Centers said that he could not make a living that way. Centers claims that he called Gary King on the night of May 15, 1980, asking for work and that King told him he would have to haul sand overweight and that he refused and that the next day he went and applied for workmen's compensation, stating that he had been discharged for failure to carry more than the legal weight. An unemployment insurance examiner for the State of Kentucky, Stephen Schultz, testified that he asked Gary King whether this was true and that King replied that Centers could come back to work under the same conditions as he worked before. Since I find that King had a policy against driving overweight, this offer meant, in effect, that Centers had not been discharged. Centers later saw driver Jim Hudson at a truck stop and admitted to him, "I'm kind of in a way sorry I quit."[8]

James Morgan was one of three substitute dirivers who had worked for King Trucking when regular drivers were unavailable. Since Morgan did not have a telephone at his home, his practice was to call King when he wanted work. Morgan had worked for King on 2 previous days, on March 14 and 23, and he asked Gary King to work on March 26, 1980, the day of the baseball bat incident. Morgan had not filled out an application and had not been hired as one of King's full-time drivers. When he returned from the truck stop with the other drivers to protest the altercation, he was invited into the office and Gary King asked him why he had returned to the yard. Morgan said he wanted something done about Combs. King told him to turn over the key to the truck. Morgan asked if he was fired and King said, "No." He left the yard and did not return.

D. *Coercive Interrogation of Ernest Centers*

Ernest Centers testified that at 9 a.m. on March 4, 1980, he was fixing a flat tire in the shop when Gary King came up to him and asked him what he knew about the Union, and Centers replied that if King wanted to know anything about the Union he should get everybody together. Centers alleged that King said that he would find out who started it and fire them and if he could not find out who it was he would fire everybody. Gary King denied making this statement.

Based on their demeanor and their whole testimony I find that Gary King's denial of this allegation is more credible. The evidence shows that King was receiving competent legal advice—which he followed—not to mention the Union to the employees.[9] Further, other drivers testified that King had not interfered with their rights to vote in the Union.

E. *Withdrawal of Credit Cards*

King Trucking Company provided a credit card kept in each truck so that the driver could use it to pay the tolls on the highway. During the spring of 1980, Gary King noted that his bill for tolls had increased $200 in 1 month and that the receipts showed that unauthorized automobiles and trucks were being checked through the toll booth on the credit cards. He therefore removed the credit cards from the trucks for 2 months and gave the drivers cash for the tolls. There is no evidence that the credit cards were intended as a prequisite, nor that the temporary discontinuance had anything to do with the Union.

F. *Meade King's Threat*

During the testimony of driver Otis Mefford, he stated that Meade King said that there would not be a union at the Company and that "he would close it down and go back to Tennessee." This statement responded to a leading question, and was unadorned by details as to where and when it occurred as well as any information about any other witnesses who heard the statement.[10] The allegation was not in the complaint and Respondent was not prepared to defend against it and had no duty to probe for further detail. Furthermore, while Meade King is a stockholder in King Trucking Company, there is no record proof that he has any management function, nor that he had the power to close down the Company.

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[6] Otis Mefford generally corroborated Gary King's testimony as to what was said on this occasion.

[7] The president of the coal company, James Hatfield, testified credibly about this decrease.

[8] This testimony was technically hearsay elicited through driver Jim Hudson. Ernest Centers was in the courtroom, however, and heard the testimony and later testified on rebuttal and denied the statement. By their demeanor, I believe Hudson to be the more credible witness.

[9] Otis Mefford and Jim Hudson—both believable witnesses—corroborated King's testimony in this regard, directly contradicting Ernest Centers.

III. CONCLUSIONS

1. Ernest Centers, a claimant in this proceeding, was not coercively interrogated concerning his union sympathies by Gary King, president of Respondent, on March 4, 1981. In addition, Centers was not coercively interrogated by Gary King concerning which employee initiated the union campaign.

2. Respondent, through Gary King, did not on March 4, 1980, threaten to discharge the employee who began the union campaign. Furthermore, Gary King did not threaten to fire all the employees if he could not find the particular employee who began the union campaign.

3. Respondent employed Tom Combs as a full-time mechanic in January 1980. Combs' duties included repairing Respondent's equipment, recommending prospective drivers for employment, reporting to Gary King any abuse of the equipment, discharging employees for such abuse, and answering the phone and being in charge when Gary King was not on Respondent's premises.

4. Tom Combs was a supervisor for King Trucking Company.

5. Respondent discharged its employee, James Swigert, on March 24, 1980, for union activity.

6. Respondent, through Gary King, did not promise additional insurance and showup pay to its employees on March 26, 1980, and did not threaten the employees that the Union would never represent them. On March 26, 1980, Gary King told a group of employees that he could not discuss the Union with them nor offer them additional benefits because of the union election.

7. Respondent did not discharge James Morgan, a claimant herein, but Morgan voluntarily terminated the arrangement he had with Respondent. James Morgan was not a full-time employee with Respondent, but only a "fill-in" who would temporarily drive when another driver could not work. Morgan only drove for Respondent on 3 days, never filled out an employment application, and was not an employee of Respondent.

8. Respondent did not discharge Ernest Centers, but Centers voluntarily terminated his employment with Respondent. When Centers asked Gary King if he could return to his employment, King said he could under the previous conditions but King did not say that Centers had to haul illegal overweight loads of sand and coal as a condition of reemployment.

9. Meade King did not threaten to close down the shop if the employees formed a union.

Discussion

In deciding whether Respondent unlawfully discharged John Swigert, there are three issues: (1) whether Tom Combs was Respondent's supervisor,[11] (2) whether Swigert was discharged or quit, and (3) what was the motivation for the discharge.

The National Labor Relations Act defines the term "supervisor," 29 U.S.C. §152, as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The fact that Combs was authorized to discharge employees, without more, is sufficient to show that he was a supervisor within the meaning of the Act: ". . . [T]he possession of any one of the authorities listed [in that section] places the employee vested with this authority in the supervisory class. *Ohio Power Company* v. *N.L.R.B.*, 176 F.2d 385, 387 (6th Cir. 1949). Since Tom Combs was authorized to discharge employees, he was a supervisor under the Act.

Furthermore, even Gary King testified, in effect, that Combs was authorized with the power effectively to recommend the discharge of an employee; Combs is, therefore, a supervisor within the meaning of the Section. *Elliott-Williams Co. Inc.*, 143 NLRB 811, 816 (1963), enfd. 345 F.2d 460 (7th Cir. 1965).[12] And, two disinterested witnesses, Otis Mefford and Ritchie Smeal, testified that, after the drivers complained to King about Tom Combs hitting John Swigert with a shovel, King said that, although he could not discharge Combs because of the union campaign, he would see that Combs was no longer a "foreman" or a "boss," thus implying that Combs had in fact been a supervisor when he discharged Swigert.

Tom Combs appears to have an irascible nature. His dominant motive for discharging Swigert, however, was Combs' prejudice against the Union, expressed in his response to Swigert's question why he was being fired. This animus was also indicated by his treatment of Jim Hudson, a leader of the union movement. One night 2 weeks after Swigert was discharged, Hudson was parking his truck in the company lot when the rear end of the truck caught fire. He ran into the shop for a hose to put out the fire and Combs began to curse him, and, pointing his finger at Hudson, told him, "You ain't allowed in the shop." Combs told driver Richie Smeal, "I've got nothing to say to you, Richie. I'm talking to him." Richie Smeal was one of two drivers working for King who did not participate in organizing the Union.

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[10] Although Otis Mefford was a trustworthy witness, I am not required to find as a fact everything he said. *Edwards Transportation Company*, 187 NLRB 3 (1970), enfd. *per curium* 437 F.2d 502 (5th Cir. 1971).

[11] Since I find that Combs was a supervisor, there is no need to decide whether Combs acted as Respondent's agent.

[12] Respondent's argument that Combs could not be a supervisor because he was allowed to vote in the union election is without merit. *N.L.R.B.* v. *Elliott-Williams Co., Inc.*, 345 F.2d 460, 463.

When Respondent's employee Tom Combs, acting as a supervisor, told John Swigert that he was discharged,[13] and a motivating factor in that act was Union activity protected by the Act, the burden shifted to Respondent to show that the discharge would have occurred even in the absence of the protected activity. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). Respondent offered no reason to justify Swigert's discharge.

Respondent, in fact, denies that Swigert was discharged. The point having been emphasized with shovel blows, I believe that Swigert acted reasonably in thinking that he had been discharged[14] and that Respondent had a duty clearly to demonstrate to Swigert that he had not been discharged. Gary King's inconclusive call to Mrs. Swigert to find out what had happened, and his use of Jim Hudson as an emissary, did not, in my opinion, fulfill this obligation. King saw Swigert at the election on April 28, 1980, and could have made clear his intent at that time. He testified that he saw Swigert on his lot at the union election but said nothing. That is not in my estimation a good-faith repudiation of Combs' reprehensible conduct or adequate reassurance that Swigert's job was still available.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by Tom Combs, violated Section 8(a)(1) and (3) of the Act by unlawfully discharging employee John Swigert as a result of his activity on behalf of the Union.

4. Except as found above, Respondent has not engaged in other unfair labor practies as alleged.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find it necessary that it cease and desist therefrom and from any like or related conduct, and to post an appropriate notice, attached hereto as an Appendix.

Moreover, Respondent should make whole employee John Swigert for any loss of pay as a result of the discrimination against him, and offer him immediate and full reinstatement to his former position of employment or, if that position no longer exists, to substantially equivalent employment, without prejudice to his seniority or other rights or privileges previously enjoyed. Said backpay is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (962)

Upon the foregoing findings of fact, conclusions of law, and the entire record, I hereby issue—pursuant to Section 10(c) of the Act—the following recommended order.

ORDER[15]

The Respondent, King Trucking Company, Burlington, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they have engaged in protected concerted activity.

(b) Discouraging membership in the Union, or any other labor organization of its employees, by discriminating against them for engaging in protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which will effect the policies of the Act:

(a) Offer John Swigert reinstatement to his former position and make him whole in the manner set forth in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post in its office and provide each of its driver employees with a copy of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days therefter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the effective date of this Order, what steps Respondent has taken to comply herewith.

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[13] Jim Hudson, a driver presently employed by King and generally a believable witness, testified that Combs told Swigert: "You're fired. Get off the damn lot. You're fired."

[14] Swigert testified that he applied for unemployment compensation on the basis of having been fired.

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[16] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Kyle & Stephen, Inc. *and* Jerry Mason. Case 15-CA-7501

December 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 27, 1980, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found, and we agree, that Respondent, through its supervisor, Jarratt, did not threaten its employees in violation of Section 8(a)(1) of the Act. The Administrative Law Judge also found, and we agree, that Respondent, through its part owner, Harvey J. Hall, did not interrogate its employees in violation of Section 8(a)(1) of the Act.

The General Counsel excepts to the Administrative Law Judge's failure to find that Respondent violated Section 8(a)(1) of the Act by discharging employees Mason and Campbell for engaging in protected concerted activity. The General Counsel also excepts to the Administrative Law Judge's failure to find that Respondent, by Jarratt and its attorney, Harvey Lee Hall, violated Section 8(a)(1) of the Act by interrogating employees Mason and Campbell about their protected concerted activities. For the reasons set forth below, we find merit in the General Counsel's exceptions.

Respondent is a general contractor in Baton Rouge, Louisiana. None of its employees is represented by any labor organization. State law, however, requires that contractors pay their employees "union scale" whenever the contractor is engaged in work for the State. Respondent, in the past, had been ordered to make restitution to employees for failure to pay them the proper wage on state construction jobs.

Respondent had a contract with the State to do construction work at Louisiana State University (LSU). Two of Respondent's employees, Mason and Campbell, felt they were not being paid the correct wage rate for their work. Mason, on behalf of himself and Campbell, filed a complaint with the State Department of Labor. (Both Mason and Campbell had received restitution for Respondent's substandard wage payments in the past, although there is no evidence that either of them instigated the prior complaint.)

Mason's complaint was that he was a carpenter and as such was entitled to $12.45 per hour rather than the $10 per hour he was being paid by Respondent for his work on the LSU job. Campbell, Mason's helper, joined in the complaint.

On November 28, 1979, Doughty, an investigator for the State Department of Labor, came to the LSU site to interview Mason and Campbell regarding their complaint. After introducing himself to Jarratt, Respondent's supervisor, Doughty spoke with Mason and Campbell. After Doughty left, Jarratt approached Mason and Campbell and asked them what they had told Doughty. They said that they told Doughty their names, job classification, and wage rate. Jarratt told them they would not accomplish anything by their actions. In the early afternoon, Jarratt and Hall, a co-owner of the Company, initiated another discussion with Mason and Campbell.

The discussion primarily concerned Mason's wage rate. Mason contends that he was a carpenter and should, therefore, be paid $12.45 per hour, "union scale" for carpenters. Hall responded that, although Mason was indeed a carpenter, he spent about 40 percent of his time engaged in noncarpentry work. Therefore, Hall computed Mason's pay by averaging the rate paid to carpenters ($12.45 per hour) with the rate paid to laborers ($7.80 per hour). Hall concluded, based on this for-

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[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Additionally, the General Counsel asserts that the Administrative Law Judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

The Administrative Law Judge, in fn. 3 of his Decision, discredited the testimony of employee Jerry Mason that Respondent's part owner, Harvey J. Hall, told Mason that he (Mason) would no longer have a job with the Company if he kept "complaining to the Board," based, in part, on the finding that Mason's testimony was uncorroborated by that of employee Harold Campbell. The General Counsel excepted to this finding and we find merit in his exception. Mason's testimony on this matter was corroborated by Campbell who testified that Hall stated, "If you don't quit complaining to the Labor Board, you no longer have a job here." However, since the Administrative Law Judge relied upon other factors in crediting Hall's denial of any statement along these lines over Mason's contradictory testimony, including relative demeanor, and found that Hall for the same reasons should be credited over Campbell, we do not rely on Mason's and Campbell's testimony on this matter in resolving the issue of their alleged unlawful discharge.

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mula, that Mason should be paid $10 per hour. Hall continued:

> And Mason protested that he was a carpenter. And I don't recall how many times we went back and forth between, "but this morning you were finishing concrete." "I'm a carpenter." "Yesterday you were putting up a fence," "I'm a carpenter." And finally, when I decided that I wasn't getting anyplace, I said to Mason, "I don't have a job for a man who is just a carpenter, and that wasn't the basis on which you were hired. I don't have a job for you."
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> He said that was the only basis on which he was willing to work.
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> And I don't recall whether I said, "Well, you are fired," or he said, "Well, I quit," or whether we just turned our backs on each other and just left. I don't remember.

Hall told Campbell (Mason's helper) that there would be no work for him now that Mason was not working. Regarding Campbell's termination, Hall testified, "I suppose that is firing him, yes. I guess that would be a correct way to say it."

The Administrative Law Judge found, and we agree, that Mason and Campbell were engaged in protected concerted activity in pursuing their wage claim under state law. The Administrative Law Judge further found, and we agree, that "employees may present a wage claim to an employer, and the employer may not discharge them for this reason." The Administrative Law Judge concluded, however, that Mason and Campbell were not fired for engaging in these activities. The Administrative Law Judge also found it unnecessary to decide whether Mason and Campbell were fired or quit.[2] Rather, the Administrative Law Judge concluded that Mason was "separated" from his employment because he would not work for less than $12.45 an hour and Campbell was "separated" because, without Mason, there was no work for Campbell.[3]

The discussion between Mason, Campbell, and co-owner Hall was initiated by Hall. Neither Mason nor Campbell affirmatively approached Hall to insist that they be paid a particular wage. Hall sought out Mason and Campbell to explain to them how he arrived at their wage rates. When Hall realized that Mason and Campbell still disagreed with him on the proper wage rate, Hall discharged Mason because, "I don't have a job for a man who is just a carpenter, and that wasn't the basis on which you were hired. I don't have a job for you." Hall admittedly discharged Campbell because he had discharged Mason.

In other words, Hall discharged Mason and Campbell for maintaining the position that was the basis of their complaint to the State Department of Labor, i.e., that they were carpenters and, therefore, should be paid as such. Contrary to the Administrative Law Judge, neither Mason nor Campbell *refused* to do any work unless it was carpentry work. Rather, in response to Hall's questioning, they simply maintained that, regardless of the exact work they were doing at any given moment, they were carpenters by trade and should, therefore, be paid carpenter's wages.[4]

Based on the foregoing, we find that Hall discharged Mason and Campbell for pursuing a wage claim under state law and concertedly adhering to their claim before him. Accordingly, we find that Respondent unlawfully discharged Mason and Campbell in violation of Section 8(a)(1) of the Act.

The Administrative Law Judge dismissed the complaint allegations that Respondent, through Jarratt, violated Section 8(a)(1) of the Act by interrogating and threatening Mason and Campbell regarding their protected concerted activities. Specifically, with respect to the alleged unlawful interrogation, the Administrative Law Judge found Jarratt, a job superintendent, is at best a low-level supervisor in substantially the same level as Mason, that his question was no more than an innocent inquiry among individuals who work together, and that it did not, therefore, rise to the level of unlawful interrogation, citing *Pepsi-Cola Bottling Co. of Los Angeles.*[5] As indicated above, Supervisor Jarrett was not only present, but was introduced to State Department of Labor investigator Doughty when the latter came on the jobsite to interview Mason and Campbell. Not long after the interview, Jarratt asked Mason and Campbell together what they had told Doughty and then remarked, in effect, that they were not going to accomplish anything by their actions. While we agree with the Administrative Law Judge that Jarratt's latter statement does not amount to a threat, we find merit in the General Counsel's contention that the Administrative Law Judge erred in failing to find that Jarratt unlawfully interrogated Mason and Campbell.

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[2] When asked by counsel for the General Counsel if he fired Mason, Harvey J. Hall, co-owner of Kyle and Stephen, Inc., answered: "Under the conditions he was laying down to me, I told him I couldn't have him work for me. I suppose that's telling him he is fired." When asked if he had fired Campbell, Hall answered: "I sent him home until I had a place for him. I suppose that is firing him, yes."

Further, when Mason was asked by counsel for the General Counsel if he had quit his job or had intended to quit his job, Mason answered that he did not quit, nor did he intend to quit, adding, "I done talked to the man at the Labor Board. He said, under their law, they would have to pay me backpay."

[3] In so finding, the Administrative Law Judge relied, in part, upon his conclusion that Respondent was involved in an "unresolvable" dispute with Mason and Campbell. However, contrary to the Administrative Law Judge, the conflict between Respondent and employees Mason and Campbell could be and was being resolved by the State Department of Labor and, in any event, the record is devoid of evidence of any actual "refusal" to work by these employees.

[4] We note that Hall testified that after he told Mason, "I don't have a job for you," Mason replied, "that was the only basis on which he was willing to work." This testimony by Hall is, at best, ambiguous. It is based on Hall's impression of Mason's intent. Further, even if such a statement was made by Mason, it occurred after he had been discharged by Hall.

[5] 211 NLRB 870, 871–872 (1974).

Unlike the situation in *Pepsi-Cola, supra*, the questioning here did not arise during the course of a lengthy informal conversation between two passengers in an automobile away from the employer's facility. To the contrary, Jarratts questioning came directly on the heels of the meeting Mason and Campbell had with State Department of Labor Representative Doughty and occurred at Respondent's facility. Jarratt, having been introduced to Doughty, was clearly aware of Doughty's identity when he asked Mason and Campbell "what they told the man," and then informed them that they were not going to accomplish anything by their actions. In these circumstances, this inquiry was directly addressed to their protected concerted activity under the Act. Further, even if the proximity of Jarratt and Mason in Respondent's administrative hierarchy lessened the significance of Jarratt's inquiry *vis-a-vis* Mason, as found by the Administrative Law Judge, this reasoning falls short as to Campbell who was only a helper. Accordingly, since Jarratt interrogated Mason and Campbell regarding their protected activity, we find that Respondent violated Section 8(a)(1) of the Act.[6]

The Administrative Law Judge also dismissed the allegation that Respondent, by its attorney, Harvey Lee Hall, violated Section 8(a)(1) of the Act by interrogating Campbell. In preparation for the hearing, attorney Hall asked Campbell if he knew if Mason had been fired or quit. Campbell replied that the Labor Board attorney told him he was not required to talk with anyone. Hall did not inform Campbell that any statements he (Campbell) made would be voluntary and that no reprisals would be taken against him if he refused to answer the questions. The Administrative Law Judge found that, although Hall failed to comport with the criteria set forth in *Johnnie's Poultry Co., and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964), such failure was inadvertent and was not an attempt to circumvent the *Johnnie's Poultry* standards. The Administrative Law Judge further found the attempted questioning "isolated, inconsequential . . . and of no impact on the principal allegations of the complaint." The General Counsel excepts to the Administrative Law Judge's failure to find that attorney Hall interrogated Campbell in violation of Section 8(a)(1) of the Act. We find merit in the General Counsel's exception.

Johnnie's Poultry requires that, when an employer has legitimate cause to inquire into matters concerning an employee's Section 7 rights, such as in preparing the employer's defense in an unfair labor practice proceeding, the employer must follow specific guidelines in questioning the employee to avoid incurring 8(a)(1) liability. Among other requirements, an employer must tell the employee the purpose of the questions, assure the employee freedom from reprisal, and secure the employee's voluntary participation. These safeguards are designed to minimize the coercive impact of employer interrogation and, contrary to the Administrative Law Judge's suggestions, are applicable irrespective of the employer's intent to coerce, the extent of the questioning or number of employees so interrogated, or the remoteness of the interrogation to the alleged unlawful conduct. Since Harvey Lee Hall did not adhere to the required guidelines in questioning Campbell, we find that Respondent interrogated Campbell in violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, we shall order that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. We shall order that it offer Jerry Mason and Harold Campbell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of their unlawful discharge by Respondent. Backpay with interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

We shall further order Respondent to cease and desist from interrogating its employees concerning their protected concerted activities.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Kyle & Stephen, Inc., Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall:

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[6] See *Synadyne Corp.*, 228 NLRB 664 (1977).

[7] Member Jenkins would compute interest on the backpay due in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of their protected concerted activities.

(b) Interrogating its employees concerning their protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Jerry Mason and Harold Campbell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnigs they may have suffered by reason of their unlawful discharge by Respondent in the manner set forth in the section herein entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Baton Rouge, Louisiana, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that copies of said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against employees because of their protected concerted activities.

WE WILL NOT interrogate employees concerning their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 the National Labor Relations Act, as amended.

WE WILL offer Jerry Mason and Harold Campbell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jerry Mason and Harold Campbell whole for any loss of earnings they may have suffered by reason of their unlawful discharges, with interest.

KYLE & STEPHEN, INC.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on March 27, 1980, at Baton Rouge, Louisiana, upon the General Counsel's complaint which alleged generally that on November 28, 1979,[1] the Respondent interrogated, threatened reprisals, and discharged two employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* At the hearing, the complaint was amended to allege also that, in preparation for the hearing of thie matter, counsel for the Respondent unlawfully interrogated an employee in violation of Section 8(a)(1) of the Act.

The Respondent generally denied the substantive allegations of the complaint.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are in 1979 unless otherwise indicated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is a Louisiana corporation engaged in commercial construction with its principal office in Baton Rouge, Louisiana. In connection with its business, the Respondent annually receives directly from points outside the State of Louisiana goods and materials valued in excess of $50,000, and during the 12 months preceding the issuance of the complaint herein received approximately $75,000 in services performed for the United States Army at the Fort Polk Ryan Army Reserve Center in Leesville, Louisiana. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The substance of this matter concerns a dispute between employee Jerry Mason and the Respondent over the wage rate to be paid Mason.

Mason is by trade a carpenter. Indeed, according to the Respondent's vice president (and general field supervisor), Harvey J. Hall, he is an "outstanding" craftsman. Mason began working for the Respondent in about mid-April at a wage rate of $9 per hour. Though the precise time is unclear, in early fall Mason's rate was raised to $10 per hour; however, he felt entitled to $12.45.

The Respondent is a relatively small general contractor whose employees are not represented by any labor organization nor is it a party to any collective-bargaining agreements. However, when the Respondent has contracts with the State of Louisiana then that State's prevailing wage law becomes applicable, the effect of which is to require the Respondent to pay employees "union scale." While application of the prevailing wage law must certainly be more complex than this, the parties agree that such is the effect of the law and such suffices for purposes of this Decision.

In the summer and fall, the Respondent was working on at least two projects for the State of Louisiana both of which involved buildings at Louisiana State University (LSU). It appears that sometime in the summer one or more of the Respondent's employees complained to the State Department of Labor that the Respondent was not paying the prevailing wage. There was an investigation and the Respondent was ordered to make restitution. Thus, for instance, on September 18, Harold Campbell received a check for $39.73 "in full and final satisfaction of all sums due me with respect to a deficiency concerning the payment of prevailing wages on State project No. LDL 5697-alterations to John M. Parker Agriculture Center judging arena for the period 7-13-79 to 9-14-79." Mason testified that he also received such a check. (There is no indication that either Mason or Campbell instigated the complaint.)

In late September Hall called a meeting of all of his employees at the Pitt Restaurant, where they were finishing a job. He told them that the department of labor had checked out one of his jobs at LSU and found him deficient but that he had attempted to learn what was required. He told the employees that the restaurant job was the largest private (e.g., nonprevailing wage) job Respondent had going and it was about to be finished, and thereafter most of the people would be working on prevailing wage jobs. While they might go out on a nonprevailing wage job, most likely further employment would be on prevailing wage jobs and he wanted them to understand what he understood was required by the State's labor board.

For instance, the Respondent employed people as carpenter's helpers, a classification not recognized by the State. Thus, those he felt to be competent carpenters would be paid at the carpenter's wage scale but others, who theretofore had been considered carpenter's helpers, would have to be reclassified as laborers and would be paid accordingly—at a lesser rate. Further, according to Hall's generally credible testimony, it was his understanding that he would have to pay the prevailing wage only for the specific time an employee worked in a particular job classification. But because the Respondent does relatively small jobs, all employees are called upon from time to time to do a variety of job functions throughout the working day. A carpenter who would spend most of his time working as such might nevertheless also put in some time each day as a basic laborer, a cement finisher, an iron worker, etc.

Such was the situation with regard to Jerry Mason. Hall testified that inasmuch as Mason did not spend more than about 60 percent of his working day actually doing carpentry work, with the rest of his time being devoted to tying steel rods, cement finishing, and the like, the Respondent was not required to pay the prevailing wage of $12.45 per hour for each hour Mason was actually on the job. On the other hand, Hall determined that it would be very difficult on each working day to break out precisely the amount of time Mason was engaged in carpentry work as against the time that he was performing other job functions. Thus, Hall told Mason that he felt a flat rate of $10 per hour for Mason would reasonably comply with the prevailing wage requirements.

According to Mason he started on the one LSU project at $9 per hour and in about 2 weeks was raised to $10 per hour, "taking for granted" that he had been put on a salary of $400 per week. This was apparently satisfactory until he was not paid $80 for 1 day he missed work. This is when Mason claims he learned that he was being paid $10 per hour although he should have been making $12.45. Accordingly, he determined in late November to press the matter with the state department of labor and this in turn, inferentially, resulted in an investigation by that department on November 28. (Mason further testified, unconvincingly, that he did only carpenter work, though ultimately admitting that he did other job functions.)

On November 28, following the investigatory interview by the state labor department, Hall came to the jobsite and at that time had a discussion with Mason and Campbell. Present also was Job Superintendent James J. Jarratt. The parties are in general agreement concerning the substance discussed, although the General Counsel's witnesses contend that Hall interrogated Mason and Campbell concerning the investigation by the labor department and then threatened them.

Principally this discussion concerned the pay of Jerry Mason. In essence, Hall said that in the normal course of Mason's workday he did a variety of things from shoveling, which is laborer's work, to concrete finishing and so on. As Hall testified:

> And, Mason protested that he was a carpenter. And, I don't recall how many times we went back and forth between, "But this morning you were finishing concrete." "I'm a carpenter." "Yesterday you were putting up a fence," "I'm a carpenter."
>
> And, finally when I saw that I wasn't getting any place I said to Mason, "I don't have a job for a man who is just a carpenter, and that wasn't the basis on which you were hired. I don't have a job for you."
>
> He said that was the only basis on which he was willing to work.
>
> And, I really don't recall whether I said, "Well, you are fired," or he said, "Well, I quit," or whether we just turned our backs on each other and just left I don't remember.

Hall's version of this discussion was substantially corroborated by the General Counsel's witness, Harold Campbell:

> Mr. Hall was addressing—And, when he was talking, it was mostly dealing with the carpenter's salary, most we were going on, and Jerry Mason being a carpenter, it was mostly addressed towards him.
>
> Now, he was telling us that when you go on some jobs, you are a carpenter, some minutes you're tying steel and the other, pouring concrete. So, they average them in.
>
> Jerry Mason said, "I'm a carpenter all the time."
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> Mr. Hall said, "Yes, you're a fine carpenter." Then he said to me, "You all do good work."[2]

Even Mason testified that, during this discussion, Hall stated:

> "This is my company, I'm going to run the company the way I want to, I'm going to keep the books the way I want to. The way I figure it, Jerry," he was talking to me, "You don't do carpenter work one hundred percent of the time. Part of the time you tie steel, part of the time you pour concrete, part of the time you wreck forms. The way I break it down, I'm going to pay you twelve forty-five an hour for what time I figure you do carpenter work, seven eighty for the time you are not doing it. The way I figure it, it averages out to ten dollars an hour." He asked me did I agree with that.
>
> I told him, "No. I been a carpenter for almost 15 years and I expect to be paid as a carpenter.[3]

When Mason and Hall came to a parting of the ways over the wages Mason was to be paid, the question then developed concerning the status of Campbell, who was Mason's helper. Hall told Campbell that until he could find another carpenter for Campbell to work with, he had no work for him either. Thus Campbell was off for a time, although the record does not disclose how long.

B. *Analysis and Concluding Findings*

1. The discharges

The General Counsel contends that Mason and Campbell were discharged on November 28 because they had engaged in protected concerted, activity; namely, pursuing a wage claim under state law. While I have no doubt that Mason was engaged in activity protected under the Act,[4] I conclude that he was not discharged for this reason.

Based on the credible testimony, I believe that Mason's employment was terminated because he would not work for less than $12.45 per hour and Hall was unwilling to pay more than $10.

Certainly employees may present a wage claim to an employer, and the employer may not discharge them for this reason.[5] On the other hand the employer does not have to accede to their demands.

I conclude that Hall did not discharge Mason because Mason and Campbell concertedly presented the demand for a wage increase or contacted the state labor department. Rather, I conclude that during the course of Hall's discussion about the prevailing wage matter with Campbell and Mason, Mason categorically stated that he was a carpenter and should be paid carpenter's wages for every hour that he was on the payroll. Hall told him that he had no work for one who was "a carpenter all the time." Whether Mason was discharged or quit in the context of this situation is more a semantic nicety than a matter of substance. The crucial element here is that Mason's employment relationship with the Respondent was terminated because he and the Respondent had an unresolvable dispute concerning his wage rate, Mason holding out for $12.45 an hour for all hours worked while the Respondent contended that he was entitled to an average of $10 an hour.[6]

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[2] The comma and quote marks are misplaced in the transcript, which is hereby corrected as set forth.

[3] Mason went on to testify that Hall said if he did not like the way Hall was running the Company and keeping books and if he kept "complaining to the Labor Board" he no longer had a job with the Company. I discredit this aspect of Mason's testimony finding him to be generally not a reliable witness. Rather, I believe his recall of this, which is seemingly crucial to the theory that he was discharged for having engaged in protected, concerted activity, was for purposes of this litigation. This alleged statement by Hall does not really fit into the generally agreed nature of the discussion between the parties. And, it was not corroborated by Campbell. Beyond that, I found Hall to be a very candid, credible and straightforward witness and he denied any statement along these lines. Based on their relative demeanor, where there is a conflict, I credit Hall over Mason.

[4] See *Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB 75 (1978); *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979).

[5] *Hale Manufacturing Co., Inc.*, 228 NLRB 10 (1977).

[6] It is immaterial whether Hall's determination to pay Mason $10 an hour in fact complied with the State's prevailing wage law.

Campbell's termination (or more precisely his layoff) similarly was not motivated by his having engaged in protected concerted activity. Rather, it was, I conclude, a result of Mason's employment having been terminated and the Respondent not having work for Campbell to do.[7] Campbell was competent only to be a carpenter's helper or laborer, although, according to Hall he was a very willing worker.

No doubt Mason and Campbell engaged in concerted activity protected under the Act when they sought to have the state labor department investigate the Respondent, and no doubt they engaged in protected, concerted activity when they talked to that department's investigator on November 28. Nevertheless, based on the credible testimony of Hall, I conclude that these factors had no bearing on Mason's termination. Hall had previously concluded that Mason should be paid $10 per hour, a matter which Mason protested, as he had a right to do. But when Mason in effect announced that he would not work for less than $12.45 each hour, Hall considered him terminated which was his right.

The General Counsel has suggested that Mason and Campbell should be credited and Hall should be discredited. This I decline to do. Based primarily on their relative demeanor, I found Hall to be an exceptionally candid witness whereas I question the veracity of Mason particularly, and to a lesser extent Campbell.

Secondly, the General Counsel contends that, according to the Respondent's own witness, Hall called his office to have the paychecks for Campbell and Mason made up before noon, whereas the discussion took place after noon. Therefore, argues the General Counsel, Hall must have made up his mind to discharge these employees prior to his conversation with them and therefore it would be appropriate to draw the inference that the reason for the discharge was that the state labor department had been contacted.

While it may be that no employer likes to be investigated by a Government agency, there is no evidence in this record to suggest that the Respondent in general or Hall in particular had any particular animosity towards being investigated by the state labor department or had any concern other than compliance with the prevailing wage law. Secondly, since the events took place several months prior to the hearing in this matter, a time error of a couple hours is not unreasonable. Further while the discussion occurred after lunch, the parties involved could very well have eaten before noon. I therefore do not believe that the fact that one witness testified that Hall called in to have the checks prepared prior to noon is critical in determining the outcome in this matter. Again, even Campbell and Mason corroborated Hall's general testimony with regard to the subject matter of their confrontation, in which there is no indication that Hall had predetermined to terminate either of them.

Finally, the General Counsel contends that because it is an industry practice for one who quits to wait for his paycheck, whereas when one is fired he gets his check that day, Mason and Cmmpbell must have been discharged rather than having quit. Again, the matter of whether they were discharged or quit is of secondary importance. The crucial question is that their employment relationship wae mutually terminated for the reasons noted above. For Hall to make their paychecks available to them on that day, while conceivably relevant, is of insubstantial weight.

Accordingly, I conclude that Mason and Campbell were not terminated because they engaged in concerted activities protected under Section 7 of the Act. Rather, Mason was terminated because he refused to work for the pay the Respondent was willing to pay. Campbell was terminated because following Mason's termination there was no work available for him at that time.

I will therefore recommend that the complaint insofar as it alleges the unlawful discharges of Mason and Campbell be dismissed.

2. The alleged interrogation and threats

According to the undenied testimony of Campbell, when the labor department investigator came to the jobsite on November 28, Jarratt talked to him a few minutes and then told him that Mason was a carpenter and Campbell was his helper. Jarratt left and the investigator began his interviews with Mason and Campbell. Jarratt then returned sometime later, and the three of them ate lunch together. At this time Jarratt undeniably asked Campbell, "What did you tell the man?" Campbell testified that he said, "He asked me my name, classification, how much money I'm making and what do I do." And then Jarratt asked Mason, who told him the same. Jarrett said, "You are not going to accomplish anything."

Contrary to Campbell, who testified that Jarratt was gone, Mason testified that, during the interviews, Jarratt was in the area "pacing back and forth in front of us." Mason testified that after the interviews Jarratt asked what they told the man and then stated, "You know you going to keep on talking to him, you'll get yourself in trouble. All you're going to do is get yourselves in trouble."

While the testimony of Mason was undenied by Jarratt, it is in substantial and material conflict with the testimony of Campbell, which necessitates resolving the credibility conflict between the two General Counsel witnesses.

Based on their relative demeanor, I conclude that Campbell's version is probably more truthful than Mason's. And Mason's recall of this conversation, as with much of his other testimony, is I believe an exaggeration to enhance his case.

I find that, following the state labor department investigation, Jarratt did ask Mason and Campbell what they had told the investigator and then did say something to the effect, "You are not going to accomplish anything." I do not conclude, however, that in this conversation Jarratt either interrogated employees in violation of Section 8(a)(1) of the Act or threatened them.

Jarratt, although the job superintendent, is at best a low-level supervisor on substantially the same level as

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[7] To the extent Campbell's version differs from Hall's, I credit Hall again based primarily on their relative demeanor.

Mason.[8] Jarratt's question was, I believe, an innocent inquiry among individuals who work together and does not rise to the level of unlawful interrogation. E.g., *Pepsi-Cola Bottling Co. of Los Angeles*, 211 NLRB 870 (1974).

The statement, "You're not going to accomplish anything," does not imply a threat of reprisal.

Jarratt credibly testified that he, Mason, and Campbell, as well as other employees, had had numerous conversations with regard to the prevailing wage rate. Jarratt testified that it made no difference to him whether Mason or anybody else was making $12.45 an hour or not.

I therefore conclude that Jarratt did not interrogate or make threats on November 28 in violation of Section 8(a)(1).

It is also alleged that, during the November 28 confrontation, Hall interrogated and threatened Mason and Campbell. There is nothing even in the testimony of either Mason or Campbell which would indicate that Hall asked them any questions concerning their activity with regard to talking to the state agency or that he in any way threatened them should they continue to engage in such activity.

I therefore conclude that the allegations with regard to unlawful interrogation and threats set forth in paragraphs 6 and 7 of the complaint should be dismissed.

3. The pretrial interrogation of Harold Campbell

At the hearing, the General Counsel amended the complaint to alleged that on or about March 29, 1980, by attorney Harvey Lee Hall, the Respondent unlawfully interrogated Campbell in violation of Section 8(a)(1) of the Act.

Harvey Lee Hall is an attorney and the son of Harvey J. Hall. In his representation of the Respondent in this matter, he sought to interview employees, and specifically Campbell, concerning the events set forth in the complaint. According to Campbell's undisputed testimony, Hall asked him what had happened to Jerry Mason—whether he had been fired or quit. Campbell told Hall that he had been advised he did not have to talk to anyone and he refused not to talk to Hall. Hall then wrote out and gave to Campbell a statement, which reads in material part:

> As you know, no one with Kyle and Stephen has previously attempted to discuss the events of November 28, 1979 with you.
>
> This will make note of the fact that you have refused to inform Kyle or Stephen or its attorney as to your impression of the events that date and following. Particularly: Whether Jerry Mason was fired, whether you filed any complaint, or even had a complaint, and the nature of your subsequent treatment by Kyle or Stephen.

Campbell further testified that at no time was he advised by Hall that any statements would be voluntary or that he did not have to fear reprisals should he refuse to be interrogated.

The General Counsel contends that the attempted interrogation of Campbell by Hall was violative of Section 8(a)(1) of the Act, citing *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964).

While it does appear that the Respondent's attorney did not specifically comport to the criteria set forth in *Johnnie's Poultry*, it is also clear that Hall's failure in this respect was inadvertent and that there was no attempt on his part to circumvent the Board's *Johnnie's Poultry* standards. Beyond this, the attempted interview was isolated, inconsequential, and occurring when it did, of no impact on the principal allegations of the complaint. There is no evidence that any threats were made or reprisals taken following Campbell's refusal to discuss the matter.

While the failure of counsel to conform to the *Johnnie's Poultry* standards makes a technical violation of Section 8(a)(1), it would not serve the purposes of the Act to issue a remedial order in this respect. Accordingly, I will recommend this allegation be dismissed.

[Recommended Order for dismissal omitted from publication.]

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[8] There is evidence in the record to the effect that Mason had sufficient authority set forth in Sec. 2(11) of the Act to conclude he was a supervisor. The Respondent, however, specifically, does not contend that Mason was.

Mathews Ready Mix, Inc. *and* Bill Callaway *and* General Teamsters Local No. 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 20-CA-15262 and 20-CA-15354

December 16, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On June 18, 1981, Administrative Law Judge Leonard N. Cohen issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the General Counsel filed limited cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified below.

The Administrative Law Judge found that Respondent discriminatorily transferred employee William Callaway from its Gridley facility to its Corning facility because of his union and other activities protected concerted activities and refused in a disparate fashion to allow Callaway to work 2 hours' overtime on a daily basis while assigned to the Corning facility to compensate him for travel expenses. Accordingly, he recommended that Respondent make Callaway whole for any loss of earnings, including overtime, suffered as a result of this discrimination.

The General Counsel excepts to this remedy contending that the Administrative Law Judge's finding that 2 hours' overtime on a daily basis as compensation for travel expenses is merely speculative, finding its genesis in Respondent's arrangement with Callaway's vacation replacement. The General Counsel contends that, since Callaway's transfer was discriminatorily motivated, Respondent should be required to make Callaway whole by paying him for both the time he spent traveling to and from the Corning facility and the actual expense of that travel. We agree, for it is clear that except for the discriminatory transfer to Corning Callaway would not have expended either the travel time or money. Accordingly, we shall amend the remedy as follows:

Amended Remedy

Having found that Respondent discriminatorily transferred William Callaway from the Gridley facility to the Corning plant on or about May 13, it is recommended that Respondent immediately transfer Callaway from the Corning facility to the Gridley facility and pay Callaway for the time he spent commuting to the Corning facility and reimburse him for all travel expenses incurred as a result of his transfer to that facility. Having further found that Respondent discriminatorily denied William Callaway the opportunity to work overtime while employed at the Gridley facility during the period of mid-February to on or about May 12, it is further recommended that Respondent make Callaway whole for any loss of earnings, including overtime, from mid-February 1980 to the date he is transferred back to the Gridley facility with such earnings to be computed within the meaning of and in accordance with the Board's Decision in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Mathews Ready Mix, Inc., Gridley, California, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. Substitute the following for paragraph 2(b):

"(b) Make whole William Callaway for any loss of earnings and expenses including overtime and travel expenses suffered as a result of the discrimination against him in the manner set forth in the section of the Board's Decision and Order entitled 'Amended Remedy.'"

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

259 NLRB No. 92

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their union activities, sympathies, and desires.

WE WILL NOT instruct our employees to furnish the National Labor Relations Board with written statements concerning the protected concerted activities of our employees.

WE WILL NOT inform our employees that we have denied overtime and transferred employees because of the employees having engaged in union activities or other protected concerted activities.

WE WILL NOT restrict our employees in their access to our offices and use of the telephone because of their having engaged in union activities or other protected concerted activities.

WE WILL NOT deny overtime to our employees because of their having engaged in union activities or other protected concerted activities.

WE WILL NOT transfer our employees from one facility to another facility because they engaged in union activities or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer to William Callaway immediate transfer from the Corning facility to the Gridley facility in his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority and to any other rights and privileges previously enjoyed. WE WILL make William Callaway whole for any loss of earnings or other benefits, including travel time, travel expenses, and overtime, suffered as a result of our discrimination against him, with interest thereon.

MATHEWS READY MIX, INC.

DECISION

STATEMENT OF THE CASE

LEONARD N. COHEN, Administrative Law Judge: This matter was heard before me in Oroville, California, on November 25, 1980.[1] On July 16, the Regional Director for Region 20 of the National Labor Relations Board issued an order consolidating cases and consolidated complaint and notice of hearing based on unfair labor practice charges filed on March 31 in Case 20-CA-15262 by Bili Callaway and on May 15 in Case 20-CA-15354 by General Teamsters Local No. 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, alleging violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, herein called the Act.

The consolidated complaint, as amended at hearing, alleges that between November 1979 and May 1980 Respondent, through several admitted supervisors and agents, committed various independent violations of Section 8(a)(1) including, *inter alia*, creating the impression of surveillance of its employees' union activities, soliciting letters of criticism from employees concerning the union and/or protected concerted activities of employee Callaway, threatening Callaway with reprimand and other economic reprisals for engaging in union and/or protected concerted activities, and informing employees that Callaway was restricted both in his movements and in the use of the telephone, and subsequently transferred to an isolated facility because he had engaged in union and/or other protected concerted activity. The consolidated amended complaint further alleges that Respondent violated Section 8(a)(3) by denying Callaway the opportunity to earn overtime, by discontinuing Callaway's reimbursement for travel expenses, and by transferring Callaway to an isolated facility in retaliation for his union and/or other protected concerted activities.

All parties have been afforded full opportunity to appear, to introduce evidence and to examine and cross-examine witnesses, to argue orally, and to file briefs. Counsel for the General Counsel and Respondent filed briefs which have been carefully considered. Upon the entire record of the case and from my observation of witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent, a California corporation, is engaged in several locations within the State of California in the business of manufacture and retail and nonretail sale of ready mix concrete. Jurisdiction is not in issue. Respondent admits and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[1] Unless otherwise indicated, all dates hereinafter are in 1980.

II. THE UNION'S LABOR ORGANIZATION STATUS

Respondent admits and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*[2]

Respondent's manufacturing operations consist of five separate facilities or batch plants in north central California: Gridley, Chico, Oroville, Yuba City, and Corning, California. The Gridley facility, which sits in the middle of the others, serves as Respondent's headquarters.[3] Each facility employs both truckdrivers and batch plant operators. Additionally, Respondent employs approximately six mechanics who are responsible for the repair and maintenance of various trucks as well as batch plant equipment throughout the entire system. With some rare exceptions, the mechanics are generally assigned to the Gridley facility and are then sent out to the other four plants on daily assignments.[4]

For some years prior to 1977, Respondent's truckdrivers and mechanics employed at the Gridley, Oroville, Yuba City, and Chico facilities have been represented in one overall bargaining unit. The collective-bargaining agreement in effect at the time the instant controversy arose was effective from May 1977 to April 30, 1980.[5]

In either late 1979 or early 1980,[6] Don Lovett, a supervisor directly under Gordon Mathews, Respondent's president, approached Callaway, a mechanic and the "informal" shop steward.[7] Lovett, after first stating that he viewed Callaway as the employees' union representative, asked what the men were going to ask for in the upcoming contract negotiations. Before Callaway had an opportunity to respond, Lovett stated that Respondent was going to stick to President Carter's guidelines and that Callaway should inform the rest of the employees of that fact.[8]

Two separate and distinct incidents involving Callaway occurred during February and apparently account for and form the basis of Respondent's subsequent treatment of Callaway. The first incident occurred while Callaway was working at the Chico facility. On this occasion, Callaway walked into the batchroom[9] where approximately six employees were present and already discussing the upcoming contract. Callaway was asked for his feelings and he responded that the men should seek parity with other similar employees in the area. Callaway added that although some of the employees at Oroville did not believe that they should seek that much, he suggested that the men work together as a group to get a good contract. Callaway, at some point, relayed Lovett's earlier message to the group regarding the guidelines.

A few days following this meeting, Bill Goggia, a supervisor at Chico, approached Leonard Healey, one of the Chico employees who had been present at the lunchtime meeting with Callaway. Goggia asked Healey if he would write a letter or a statement concerning what was said at the meeting. Goggia added that in asking for the statement, he was merely following the instructions of Al DeMuth, the assistant manager.[10] Healey answered that he would prefer not to prepare such a statement or letter, and the matter was then dropped.

The second February incident involved a conversation between Callaway and Steve Landis, a loader-operator at Respondent's Oroville facility. Callaway informed Landis that Landis was receiving $1 an hour less than an employee performing the same function at the Yuba City facility. Callaway then suggested that Landis ask Respondent for a raise.[11] Then Mechanic Supervisor Tom Clark and Oroville's plant manager, Jim Seamon, were both in the area during the conversation and both may have been present during all or part of this conversation.

A few days later, Landis spoke to DeMuth at Oroville and asked about the wage differential. DeMuth answered that he thought it was true that a Yuba City operator was receiving more than he and that DeMuth would get back to Landis. Sometime later, DeMuth in the presence of Seamon informed Landis that he would get $1 an hour raise. DeMuth then asked if Callaway had told him about the wage differential. When Landis answered that he had, DeMuth asked Landis if he would be willing to make a written statement saying that. DeMuth added that Callaway was causing the Company trouble and they needed a written example. Landis answered that he would prepare the statement. A day or two later, Landis called DeMuth and informed him that he had changed his mind and would not make the written statement. DeMuth simply said, "okay," and the matter was dropped for the time being.

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[2] The material facts are not in dispute. In support of the complaint, the General Counsel called 10 employee and former employee witnesses. Although Respondent did not call any witnesses, it did introduce documentary evidence relating to overtime assignments of mechanics and the increased output at the Corning facility during 1980. The above account is based on the uncontradicted, and in many respects corroborative, testimony of the General Counsel's witnesses, whom I found to be generally trustworthy. In crediting their testimony, which was adverse to Respondent, I note that many of these witnesses are still employed by Respondent. In these circumstances, it is unlikely that their testimony would be false. See *Georgia Rug Mill*, 131 NLRB 1304, 1305 (1961), modified in other grounds 308 F.2d 89 (5th Cir. 1962).

[3] The Oroville facility is located approximately 14 miles northeast of Gridley; the Chico facility approximately 35 miles north of Gridley; Yuba City facility approximately 20 miles south of Gridley; and Corning approximately 70 miles northwest of Gridley.

[4] One of the exceptions to this practice was Callaway's transfer in May to the Corning facility. This assignment will be discussed in detail below.

[5] Sometime prior to May 1979, Respondent built and/or acquired the Corning facility. In late May 1979, Respondent and the Union executed a separate collective-bargaining agreement covering the Corning employees employed as truckdrivers, batch operators, and mechanics. This agreement, like the contract covering the other four facilities, expired on April 30.

On May 16, Respondent and the Union executed new 3-year collective- bargaining agreements in the two separate bargaining units discussed above.

[6] Although Callaway originally testified that this conversation occurred in late November, Callaway later in his testimony stated that it occurred in either late 1979 or early 1980. In view of Callaway's February discussions with employees regarding this conversation, it appears likely that it in fact occurred during the early portion of 1980.

[7] Callaway's status as informal union steward was apparently acknowledged as fact by all concerned.

[8] Callaway testified that in March Supervisors DeMuth and Seamon informed him that they had just spoken to Lovett who denied that he had ever talked to Callaway about the upcoming contract negotiations. Callaway was then instructed that he was no longer to be Lovett's spokesman.

[9] Apparently an area where employees customarily ate their lunch.

[10] While DeMuth was at all times an admitted supervisor of Respondent, it is not clear prior to April precisely what his title or responsibilities were. It appears that at all times he worked out of the Gridley facility. In April, DeMuth was given the responsibility for the ultimate supervision of the mechanics.

[11] As noted earlier, this job classification was not covered by the collective-bargaining agreement.

A few weeks later, Landis received a paycheck showing that he had in fact been given a 50-cent-an-hour raise. Landis called Seamon who said he would check into it. A short time later, Seamon called Landis back and said that that was all he could do and that he (Landis) could thank Callaway for it.

That same day Seamon spoke to Callaway about Landis' raise. Seamon told Callaway that Landis had Callaway to thank for getting only half of the promised raise.

During June, Seamon approached Landis and informed him that the National Labor Relations Board wanted him to make a written statement concerning his conversations with Callaway about his raise. Landis prepared such a statement and gave it to Seamon.

Immediately following these February incidents, Callaway was "grounded" or restricted to the Gridley facility.[12] These restrictions lasted until Callaway was transferred on May 13 on a permanent basis to Corning. Tom Clark, the then immediate supervisor of the mechanics, on several occasions informed both Callaway and the other employees that DeMuth had ordered the "grounding" because Callaway was causing union problems.

In assigning overtime to mechanics, Respondent followed a well-established practice of making such assignment wherever practical upon seniority.[13] Callaway was the most senior mechanic in Respondent's employ. The General Counsel contends that during the period Callaway was grounded Respondent deviated from this practice and denied Callaway the opportunity to take numerous overtime assignments both at the Gridley facility as well as at the other facilities. In support of these contentions, the General Counsel relies primarily on the testimony of Callaway. While Callaway's testimony is not contradicted, it is, unfortunately, vague and lacking in details.

In this regard, Callaway testified that on several occasions between mid-February and mid-April batch belts broke at the Gridley facility which required overtime work by a mechanic. On those occasions, Respondent sent Callaway home after the completion of his 8-hour shift and instead assigned a junior mechanic to work overtime. Callaway stated that he filled out a timecard when he lost this overtime and also filed a grievance with the Union.[14]

In April, Callaway was called into a meeting with DeMuth, Gordon Mathews, Al Azevedo, who by then had replaced Tom Clark as the supervisor of the mechanics, and Tom Sanford, Respondent's attorney. At the meeting, Mathews stated that he could not allow Callaway to be filling out timecards for overtime not worked and, if Callaway continued to do so, he would receive a pink slip (warning notice).

Callaway responded by arguing that overtime assignments were not being made strictly by seniority. Callaway then mentioned that fellow mechanic Richard Watson had submitted a similar timecard for work he had been denied and that Watson had in fact been paid for those hours.[15] Respondent's officials indicated that they were not aware of Watson's actions and they then called Watson into the meeting. Watson confirmed the facts and was then dismissed. As Watson was leaving, he heard DeMuth state to Mathews, "Clark again." The group then continued for a short time thereafter to discuss overtime. Callaway never received payment for any overtime he felt he had been denied.

Callaway further testified to three other specific instances where he felt he had been denied overtime. This entire testimony consists of the following questions and answers:

> Q. (By Mr. Jemison) Okay. Now, were there occasions where you would fave received more overtime than you actually received had you been allowed to leave the Gridley facility; and; if so, can you give us examples?
>
> A. Yes, I can give you examples.
>
> Q. Would you do so?
>
> A. On one occasion when Larry Taber was sent to Corning, which it was known it would be about ten hours of work, and I requested to go and I was denied that request.
>
> On another occasion, Larry Taber was sent to Oroville and it was late in the afternoon when it was known there would be overtime and I was denied that request.
>
> Another occasion Gerald Pounds went to Oroville and done some work on a truck and also it was overtime involved and I was denied that request.
>
> Plus the time at the plant in Gridley which is already on testimony when the batch belt broke.
>
> Q. So it's your testimony that there was other overtime that you could have received, even maybe days that you worked overtime had you been allowed to leave the facility?
>
> A. Yes.

In defense of this allegation, Respondent introduced records showing by workweek the number of overtime hours worked by each of the six mechanics. These records indicate that, in most of the weeks both prior to and during Callaway's grounding, Callaway generally worked at least as much as, if not more than, any other mechanic. Notwithstanding this factor, it is impossible to determine solely from a review of this chart that Callaway did not indeed lose overtime work to which he was entitled. For example, during the week of February 3, Callaway worked 11 hours' overtime while Watson worked 16-1/2, and Taber, the most junior mechanic, worked 11-1/2 hours' overtime. Further, for the week of March 9, Callaway worked 5 hours' overtime, Watson 6-1/2 hours, and Gene George, the next to the most junior mechanic, worked 5 hours. Similar comparisons are available for the weeks of March 23 and 30 and April 13.

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[12] As noted earlier, mechanics customarily reported to the Gridley facility where they were then dispatched to one or more of the other facilities.

[13] According to Callaway's understanding of the practice, if another more junior mechanic was closer to the overtime work and it was more economical for the Company to use the junior mechanic, he was sent. However, if the overtime required a mechanic to be sent from the plant, the most senior mechanic available was asked first. The collective-bargaining agreement is silent on the subject of overtime assignments.

[14] The record does not disclose the identity of the junior mechanic given the work. Further, it is not clear from the record whether Callaway filed more than one timecard and grievance. Copies of the timecards and/or grievances were not offered at hearing.

[15] Watson's testimony corroborates that of Callaway's.

On or about May 12, Callaway was informed by Mechanic Supervisor Azevedo that he was being transferred to the Corning facility.[16] Callaway asked Azevedo if he would be paid mileage for the daily round trip of approximately 120 miles. Azevedo answered that Callaway would have to go at his own expense and on his own time.[17]

That same evening, Callaway received a telephone call at home from Gary Huddleston, the plant manager at Corning. Huddleston stated that he had received a telephone call from Mathews and DeMuth, and was instructed to call them immediately if Callaway had not reported to work by 7 a.m. the following morning and to send Callaway home if he arrived late.[18]

Mechanic Watson testified that in the spring he was assigned to the Corning facility to relieve Callaway.[19] During a lunch break that week Watson and some of the other employees asked Huddleston about the fact that Callaway was forced to drive to Corning every day without receiving remuneration for mileage and time. Huddleston answered that, because Callaway was making "union troubles," they were making an example of him.

In late July or early August, mechanic Lawrence Taber was assigned to Corning to replace Callaway who was then on vacation. When this assignment was made, Azevedo stated to Taber that, while he could not pay Taber mileage and Taber would have to make the trip on his own time,[20] Taber, in order to defray his expense, should put in a couple hours' overtime every day, even if overtime work was not necessary.[21]

Timmy Drews, a batch operator and dispatcher at the Corning facility, testified that at some time after Callaway had been assigned to Corning, DeMuth called him and instructed Drews that he was not to allow Callaway in the office for any reason and that Callaway was only permitted to use the telephone when calling DeMuth, Azevedo, or Mathews.[22] During the same conversation, Drews asked DeMuth how long Callaway would be assigned to Corning. DeMuth replied simply that Callaway would be there "until either he quit or other arrangements were made."

Vern Jackson, a mixer driver employed at the Corning facility, testified that Huddleston instructed him not to talk to Callaway. No similar instructions were given regarding any other employee.

Respondent, in defense of the allegation that Callaway was assigned to the Corning facility for unlawful reasons, points out that the production records clearly establish that there was substantial increase in output of concrete at that facility from May on and that the increase required the permanent assignment of a mechanic. Like the overtime records discussed above, these production records are inclusive on the complaint allegation before me. While they do show a dramatic increase in production commencing in mid-May and lasting for the most part until mid-August, they in no way shed any light on the specific question of why Callaway, the most senior mechanic, was selected for this assignment.

B. *Analysis and Conclusion*

The Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), set forth the applicable test in all cases alleging violations of Section 8(a)(3) and (1) which turn on employer's motivation. First, the General Counsel is required to make a *prima facie* showing sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Here, the General Counsel alleges that Respondent, in retaliation for Callaway's union and/or otherwise protected concerted activities, embarked on an unlawful campaign aimed at both punishing Callaway for his conduct, as well as dissipating, if not totally eliminating, Callaway's influence with his coworkers. A review of the entire record, including the various admissions by supervisors regarding Respondent's basis for its actions, not only merely convinces me, but also in fact compels me to reach the conclusion that the General Counsel has indeed made out an extremely strong *prima facie* case. Respondent presented little, if any, evidence even tending to demonstrate that any of its actions would have taken place in the absence of Callaway's protected conduct.

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[16] As set forth above, it was extremely unusual, although not unprecedented, for a mechanic to be assigned on a permanent or semipermanent basis to a facility other than Gridley. In fact, Callaway himself had been previously assigned to Corning for an unspecified period after Respondent first acquired the property.

[17] Prior to this assignment, Callaway, as with most of the other mechanics, had the use of the company pickup truck for trips to Corning. On the occasions prior to February when Callaway was assigned to Corning on a daily basis, he was "on the clock" during the trip to and from his home.

[18] Callaway testified that he normally reported to work 10 to 15 minutes early and that he had never been reprimanded or warned regarding tardiness.

[19] The documentary evidence indicates that Callaway was on vacation during the week of May 25.

[20] By memorandum dated April 25, Respondent changed its transit policy to require, *inter alia*, that personnel who were directed to commence their workday at a given plantsite must get to that site on their own time at their own expense.

[21] Respondent's overtime records show that Callaway was on vacation the weeks of July 27 and August 3. During those 2 weeks, Taber worked 9 and 6 hours' overtime, respectively. During the entire time from May 13 through the time he went on this vacation, Callaway worked only 16-1/2 hours' overtime at Corning, with 9 of those hours coming in 1 workweek.

[22] These restrictions were applicable only to Callaway.

In February, Callaway, while at the Chico facility, urged his fellow represented employees to work together to demand higher wages in the upcoming contract negotiations. Callaway took this action with the full knowledge that Respondent strongly opposed any increase that exceeded the President's wage guidelines. A short time following this Chico meeting, Supervisor Giggia, on the orders of Assistant Manager DeMuth, requested that an employee furnish Respondent with a written statement of what was said at the meeting. Clearly, such a request constitutes a coercive interrogation of its employees' union activities, and Respondent is not relieved or absolved of any liability for such conduct by virtue of the fact that the request was not accompanied by any threats.[23]

A second event occurred during February which added to Respondent's already existing resentment of Callaway. Callaway informed nonunit employee Landis that he was not receiving the same wage rate as another nonunit employee employed in the same classification at another facility. Callaway then suggested that Landis request a raise to bring his salary in line with the other employees. When Landis requested the raise, DeMuth asked if Callaway had told him of the wage differential. DeMuth then stated that Callaway was causing Respondent trouble and asked Landis for a written statement. As was the case with Healey above, DeMuth's discussions with Landis constituted unlawful interrogation of employees' protected concerted activities.[24]

Respondent's reaction to Callaway's conduct was swift and blatant. In short order, it "grounded" Callaway with the result that it not only prevented him from communicating with employees at the four other facilities, but also kept him stationed at headquarters under the watchful eyes of Respondent's officials. Apparently not satisfied with merely denying Callaway the opportunity to associate with his coworkers, Respondent affirmatively sought to punish him for his past transgressions. Respondent deviated from its established practice of assigning overtime on the basis of seniority and instead assigned overtime on several occasions to junior employees.[25]

In the mid-April meeting with Respondent's management, Callaway was reprimanded regarding the filing of timecards for overtime not worked. The General Counsel alleges that this warning violated Section 8(a)(1). As noted earlier, the record regarding the procedure Callaway followed in disputing overtime assignments is less than clear. It appears that Respondent was not, as contended by the General Counsel, warning Callaway over filing grievances, but was merely warning him regarding the method he followed. In these circumstances, I find that Respondent's conduct does not amount to an unlawful threat.

Respondent in its communication with employees made no secret of the basis for its actions against Callaway. Mechanic Supervisor Clark informed several employees, including Callaway, that Respondent restricted Callaway to the Gridley facility because he was causing "union problems." Respondent further informed first Landis and then Callaway himself that, because of Callaway's role in the Landis affair, Landis was receiving only half of his promised raise. Each of these conversations constitutes unlawful threats in violation of Section 8(a)(1).

On May 12, Respondent transferred Callaway to Corning, the most remote facility within Respondent's five-plant system.[26] Respondent contends that the substantial increase in the production output at the Corning facility, which commenced in May, warranted the permanent assignment there of a mechanic. While this may well be the case, Respondent offered no evidence explaining why Callaway, the most senior mechanic, was selected for this assignment. Once again, the statements and actions of the various supervisors remove any reasonable doubt on the question of why Callaway was indeed selected.

On the evening Callaway received the assignment, Huddleston called him and warned him that DeMuth and Mathews would take immediate action if he reported for work late on the following morning. This warning was given despite the fact that Callaway had never previously received a warning or reprimand for being tardy and in fact had a practice of normally reporting 10 to 15 minutes early for work.

Respondent, during the month prior to Callaway's transfer to Corning, changed its policy regarding both the use of the company vehicles and/or compensation for the employees' use of private vehicles, as well as its policy on compensation for travel time. The record evidence establishes that Respondent applied this new policy in a disparate manner, at least regarding the assignment of mechanics to Corning. In this regard, Callaway was not compensated for time or expense in his daily trips to and from Corning. Yet, when another employee was assigned to relieve Callaway while on vacation, he was expressly authorized to put in 2 hours' overtime each day whether or not work existed in order to compensate him for his expenses in travel. Callaway was offered no such similar opportunity.

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[23] The complaint, as amended at hearing, alleges that this incident, as well as several others, constitutes unlawful creation of the impression of surveillance. I do not agree with this interpretation since the actions of Callaway were at all times open and notorious with no attempt on the part of any employee to conduct union business in secret.

[24] Respondent contends that Callaway's conversation with Landis is not protected since Callaway was admittedly not acting in his official capacity as union steward and that Landis was not a member of the Union. This contention, of course, totally ignores the concept of protected concerted activity as distinct from union activity. On the question of whether Callaway's first informing Landis that he was not receiving the same wage as a comparable employee and then suggesting that Landis request a raise constitutes protected concerted action, I find the Board's decision in *Richard M. Brown, D. O. and Donald R. Janower, D. O., a Co-Partnership d/b/a Park General Clinic*, 218 NLRB 540, 546–547 (1975), enfd. 546 F.2d 690 (1976), as analogous. There, the Board affirmed without comment the Administrative Law Judge's conclusion that an employee and a coworker who joined the employee in meeting with the employer solely to discuss the employee's wage rate were engaged in protected concerted activity. See also *Hotel and Restaurant Employees and Bartenders Union, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO*, 252 NLRB 1124, fn. 2 (1980). In any event, based on the statements of supervisors, it is abundantly clear that Respondent's overriding concern was isolating Callaway and thereby diminishing his effectiveness in rallying the other employees into seeking a substantial raise in the upcoming negotiations. Respondent merely used this incident with Landis as a possible justification for its unlawful actions.

[25] The fact that the record does not disclose with certainty both the dates and the amounts of the overtime Callaway lost while "grounded" does not constitute a barrier to reaching the obvious conclusion that Callaway was in fact unlawfully denied overtime. I leave for the compliance stage resolution of the question of how much overtime Callaway lost.

[26] As set forth above, not only was the Corning facility located some 70 miles from Gridley, it was also the one facility that had its own collective-bargaining agreement.

Respondent further placed restrictions on Callaway even when at the Corning facility. Employees were told not to associate with him and he was specifically prohibited from using the telephone except when speaking to one of Respondent's managers. This restriction was not applicable to any other employee.

Respondent's purposes for transferring Callaway were clear. Huddleston informed employee Watson that Callaway was transferred because he was making "union troubles," and Respondent was making an example of him. DeMuth, in a conversation with employee Drews, explained further when he stated that Callaway would be assigned to Corning "until either he quit or other arrangements were made." These statements, like Supervisor Clark's earlier ones, not only established the purpose behind Respondent's conduct, but also constituted unlawful coercive threats to other employees should they also wish to cause Respondent problems by making "union troubles."

Finally, the complaint alleges that Respondent further violated Section 8(a)(1) when Supervisor Seamon instructed employee Landis that the National Labor Relations Board wanted Landis to prepare a written statement concerning Callaway's conversation with him about his wage rate. The evidence does not establish that Landis was informed of the purpose of the request,[27] was assured that no reprisals would take place against him, and/or that his participation was on a voluntary basis. *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770, 775 (1964). Clearly, Seamon's request did not meet these requirements.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent discriminatorily denied William Callaway the opportunity to work overtime while employed at the Gridley facility during the period of mid-February to on or about May 12, transferred Callaway from the Gridley facility to the Corning plant on or about May 13, and further refused to allow Callaway to work 2 hours' overtime on a daily basis to compensate him for travel expenses, it is recommended that Respondent immediately transfer Callaway from the Corning facility to the Gridley facility. It is further recommended that Respondent make Callaway whole for any loss of earnings, including overtime, from mid-February 1980 to the date he is transferred back to the Gridley facility with such earnings to be computed within the meaning and in accordance with the Board's Decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[28]

Upon the basis of the above findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Mathews Ready Mix, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Teamsters Local No. 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily denying William Callaway the opportunity to work overtime from mid-February to mid-May while employed at the Gridley facility, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By transferring Callaway on or about May 13 from the Gridley facility to the Corning facility because of Callaway's union and other protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By refusing in a disparate fashion to permit Callaway to work 2 hours' overtime daily while assigned to the Corning facility in order to compensate him for travel expenses, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By interrogating employees concerning their union and other protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

7. By requesting employees to furnish the National Labor Relations Board with written statements concerning its employees' protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

8. By informing employees that Respondent denied overtime opportunities to Callaway, transferred Callaway to the Corning facility, and disparately refused to permit Callaway to work overtime to compensate for his travel expenses, Respondent violated Section 8(a)(1) of the Act.

9. Respondent did not violate the Act by any other conduct as alleged in the complaint, as amended at the hearing.

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[27] If in fact the Board agent conducting the investigation of the unfair labor practice had even informed Respondent that he wished to have Landis prepare such a statement.

[28] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[29]

The Respondent, Mathews Ready Mix, Inc., Gridley, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Denying its employees the opportunity to work overtime because of the employees' union and other protected concerted activities.

(b) Transferring its employees from one facility to another because of the employees' union and other protected concerted activities.

(c) Interrogating its employees concerning their union activities, sympathies, and desires.

(d) Requesting its employees to furnish the National Labor Relations Board with written statements concerning the protected concerted activities of fellow employees.

(e) Informing its employees that Respondent denied overtime and transferred employees from one facility to another because of the employees' union and other protected concerted activities.

(f) Restricting its employees in their access to the office and the telephone because of their union and other protected concerted activities.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Transfer William Callaway from the Corning facility to his former job at the Gridley facility or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make whole William Callaway for any loss of earnings, including overtime, suffered as a result of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records, and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Gridley, Yuba City, Oroville, Chico, and Corning, California, facilities copies of the attached notice marked "Appendix."[30] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[29] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[30] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

High Energy Corporation *and* International Brotherhood of Electrical Workers, Local 1448, AFL-CIO. Cases 4-CA-11089 and 4-RC-14152

December 16, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On July 28, 1981, Administrative Law Judge Robert M. Schwarzbart issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, High Energy Corporation, Parkesburg, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discriminatory discharge of Robert Burket on May 12, 1980, and notify Burket in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future discipline against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

It is further ordered that the challenge to the ballot of Robert Burket, cast in the election conducted in Case 4-RC-14152 on May 16, 1980, be overruled and the ballot counted, and that the Regional Director for Region 4 issue and serve on the parties a revised tally of ballots. If the revised tally of ballots indicates that the Union has received a majority of the valid votes cast in the election, the Regional Director shall issue a Certification of Representative. If the revised tally of ballots indicates that the Union has not received a majority of the valid votes cast, the Regional Director shall set aside the election and order a new election to be scheduled at a time and place found appropriate by the Regional Director.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

We will not threaten to close our plant if you select Local 1448, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization to represent you.

We will not coercively interrogate you with respect to your union membership, activities, or sympathies, or those of other employees.

We will not threaten you with the elimination of benefits, the imposition of stricter working conditions, or other reprisals, if you select the above-named Union, or any other labor organization, to represent you.

We will not solicit grievances or complaints from you in order to discourage your support for and activities on behalf of the above-named Union.

We will not offer to assist you or otherwise encourage you to form a company union to induce you to give up support for the above-named Union, or any other labor organization.

We will not unlawfully lay off, discharge, or otherwise discriminate against you because of membership in or activity on behalf of the above-named Union, or any other labor organization.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We shall modify the Administrative Law Judge's remedy to require that Respondent expunge from Robert Burket's employment records any reference to his discharge and to require Respondent to notify Burket that its unlawful action will not be used as a basis for future discipline against him.

259 NLRB No. 97

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed under Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Robert Burket immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole, with interest, for any loss of pay or other benefits he has suffered since his discriminatory discharge.

WE WILL expunge from our files any references to the disciplinary discharge of Robert Burket on May 12, 1980, and WE WILL notify Burket in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future discipline against him.

HIGH ENERGY CORPORATION

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge: These cases were heard in Philadelphia, Pennsylvania, on February 2-5, 1981, upon a complaint issued July 9, 1980,[1] pursuant to a charge filed by International Brotherhood of Electrical Workers of America, Local 1448, AFL-CIO, herein the Union. Specifically, the complaint alleges that High Energy Corporation, herein the Respondent, violated Section 8(a)(1) of the Act by repeatedly threatening its employees that the plant would be closed if they selected the Union as their bargaining representative; by coercively interrogating employees concerning their own union sympathies and activities and those of other employees; and by soliciting grievances to discourage employee support for the Union.[2]

The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Robert Burket because of his union sympathies and activities. The Respondent, in its answer, denies the commission of unfair labor practices.

Pursuant to a petition filed by the Union in Case 4-RC-14152 and a Stipulation for Certification Upon Consent Election, approved on April 25 by the Regional Director for Region 4, a representation election by secret ballot was conducted on May 16 among the employees of the Respondent in an agreed bargaining unit.[3] The tally of ballots served on the parties immediately following the election showed that of approximately 78 eligible voters 76 cast ballots, of which 35 were cast for the Union, 35 were cast against the Union, and 6 ballots were challenged. There were no void ballots, but the challenged ballots were sufficient in number to affect the results of the election.[4] The Union filed timely objections to conduct affecting the results of the election. In its objections, the Union alleged that in the critical period before the election[5] the Respondent discharged or permanently laid off its employee Robert Burket for engaging in union activity, and threatened employees at various times that the plant would be closed if they selected the Union as bargaining representative. On January 23, 1981, the Regional Director, in furtherance of his Report on Objections to Election and Challenged Ballots, dated July 9, issued his Order that certain objections to the election and determinative challenges to ballots in Case 4-RC-14152 be resolved in consolidated hearing with Case 4-CA-11089.[6]

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel, the Respondent, and the Union, have been carefully considered.

Upon the entire record of the case and my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, High Energy Corporation, a Pennsylvania corporation, is engaged at its Parkesburg, Pennsylvania, facility in the manufacture of ceramic and oil-filled capacitors.[7] During the year ending July 9, 1980, a representative period, the Respondent received gross revenues valued in excess of $1 million and purchased materials and supplies valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

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[1] All dates hereinafter are within 1980, unless stated to be otherwise.

[2] Although not specifically alleged in the complaint, the Union argues in its brief that the Respondent also violated Sec. 8(a)(1) of the Act by threatening more stringent working conditions if the employees selected the Union as their bargaining representative.

[3] The stipulated appropriate bargaining unit is as follows:

> All production and maintenance, warehouse, shipping, quality control, welders, and clerical employees employed at the Respondent's Parkesburg, Pennsylvania, location, excluding all other employees, including guards and supervisors as defined in the Act.

[4] Four ballots were challenged by the Union and two by the Employer.

[5] In *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962), the Board defined the critical period before an election as the interval from the date of the filing of the petition to the time of the election. Conduct occurring during this period found to have interfered with the employees' freedom of choice at the polls may be grounds for setting aside the election. Accordingly, in the present case, the critical period is from April 8, when the petition was filed, to May 16, the date of the election.

[6] In the Report on Objections to Election and Challenged Ballots, the Regional Director overruled so much of Objection 2 as alleged that the Employer had shown or played coercive slides, movies, and tape recordings containing antiunion propaganda, and concluded that Objection 1, the remaining allegation of Objection 2, and Objection 3, and the six determinative challenged ballots should be consolidated herewith for hearing.

[7] Capacitors are electrical components that are used in transmitters, satellites, and various electronic products. Basically, on receiving a small charge, capacitors build up greater charges of electricity. The Respondent, through different technologies, produces both ceramic and oil-filled capacitors.

The complaint alleges, the answer admits, and I find that the Respondent is, and has been at all material times herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers of America, Local 1448, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent, 1 of about 25 operating subsidiaries of Inductotherm Industries, is engaged in the manufacture of ceramic and oil-filled capacitors at its Parkesburg, Pennsylvania, plant. Henry M. Rowan is chairman of the Respondent's board of directors and president of Inductotherm Industries, Robert Q. Buss is the Respondent's president, while Thomas Kennedy is plant manager or manager of manufacturing of the Parkesburg plant. During the relevant period, Earl F. Myers and Joann Johnson were plant superintendents over that plant's ceramic and oil-filled capacitor divisions, respectively.

In March, the Union, with the assistance of warehouseman James Cook and maintenance worker Robert Burket, began an organizational campaign among the Respondent's employees. As part of its campaign, the Union conducted meetings, solicited employee signatures on authorization cards, and, in early April, sent a written request to the Respondent for recognition. On April 8, the Union filed its petition in Case 4-RC-14152 for a representation election, which, as noted, was conducted on May 16.

B. *Alleged Interference, Restraint, and Coercion*

1. The conduct of Thomas Kennedy—fact and findings

On April 7, Thomas Kennedy[8] met with the Respondent's employees in the Respondent's cafeteria, where they had been summoned by a public address system announcement. During this meeting,[9] Kennedy declared that he had received notice from the United Brotherhood of Electrical Workers that they wished to represent High Energy employees, that he was going to ignore the Union's request, that he was very disappointed, and saw no need for the employees to go to the Union. The Respondent could not afford a union, its chairman, Rowan would not accept a union, and would go out of business if the Union got in. He wanted the employees to know that the Company had an open door policy. If the employees had problems, they should come to him and let him resolve them; if the employees would just walk in and talk to him about their problems he would do everything he could. In addition to the open door policy, employees also would be able to file complaints without having to sign them and to make suggestions by putting them into a complaint box that was going to be set up in the cafeteria. Patricia Robins[10] would be collecting the suggestions. Very shortly, picnic tables, too, would be placed outside the plant.

Kennedy stated that what the employees had was a country club and, when the Union gets in, the country club was going to stop. There would be no more running for coffee and going to the bathroom whenever the employees so desired.

Kennedy observed that the Company was small, was undergoing economic difficulties, and could not afford to pay union wages. When he stated that if the Union came in and demanded $1.50 an hour in wages and new benefits, the Respondent might not be able to afford this, employee James Cook interjected that he did not think that unions ruin a company and that Kennedy was assuming the Union would ask for outrageous rates. Kennedy replied that if the Union did come in and received substantial increases in wages and in the cost of benefits, the Company would be placed at further economic disadvantage and might not have any economic alternative but to close the plant.

According to Robert Burket,[11] after Kennedy had stated two or three times during the course of the meeting that in all probability the plant would close if the Union came in because the Company could not afford to pay for it, Burket had responded that Kennedy was unlawfully threatening employees by saying that the plant would close if the Union were chosen. Kennedy answered that he did not mean it that way, but there was a possibility that the plant would close if the Union came in.

In response to Kennedy's invitation to bring problems to him, Burket had retorted that he had gone to Kennedy with a problem and, not only had Kennedy not resolved the matter, but had not given Burket a truthful answer.[12]

Kennedy testified that the April 7 meeting was held shortly after the Respondent had received a letter from the Union that it had signed authorization cards and that the Respondent's employees wanted the Union to represent them; his first notice of the Union's campaign. Kennedy related that after the arrival of this letter, he and other members of management discussed the matter and decided to conduct the meeting of employees to keep them informed.

At the meeting, the employees were reminded by Kennedy of the benefits they enjoyed and of their favorable work environment. However, under bargaining table regulations, should the Union be chosen to represent them, there would be stricter enforcement of certain work rules. Kennedy denied having invited employees to come to him with problems or suggestions, or having referred to an open door policy or a suggestion box. He also denied having said that Rowan, the Respondent's chairman and president of the parent concern, would not accept the Union.

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[8] Kennedy, plant manager at the Respondent's Parkesburg facility, has filled a variety of managerial positions with the parent concern and certain of its subsidiaries for approximately 15 years. At the time of the hearing, Kennedy had held his present position for about 2 years.

[9] The following account is a synthesis of the testimony of James Cook, Robert Burket, Norman Jelke, and Peggy Keylor, present and past employees of the Respondent.

[10] Robins is the Respondent's purchasing agent.

[11] As noted, Burket's subsequent discharge is alleged as unlawful in the complaint.

[12] Burket's reference was to his earlier unsuccessful request of Kennedy for a pay raise. Burket contends that Kennedy failed to discuss the matter with the Respondent's president, Buss, as assertedly promised.

When, after the meeting, certain employees asked whether the plant would be closed and for what reason, Kennedy had replied that if the Company could not make its product profitably, it would be assumed that the plant would close. The plant's profits then were quite low and any added expense would be detrimental.

Elaine Pearl, secretary to President Buss, testified that she transcribed her following verbatim shorthand notes of Kennedy's April 7 meeting with employees:[13]

> Tom Kennedy read the letter from the Union and also our (HEC's) reply to the Union. He stated both letters would be posted and all communication with the Union would be posted so the employees were informed.
>
> He stated he didn't know how many employees signed the Union cards and was not interested as he would find out when the total count was taken and it all comes about. Continued, we are a new company here, just getting feet on ground, profits a nil. A lot of pay scales not like Diversified, Lukens, ours are not there. We are well aware. Trying to run a company and get decent profits; can't get blood out of a stone.
>
> Don't particularly like the idea of a Union coming in, it hampers building a company to the point it might put us out of business. Don't sell idea short. Think before you sign cards, get some facts. Don't think it's going to get new insurance, $1.50/hr. it won't. That would put us out of business. I'm not joking and not making threats. Think carefully. I feel a little bad about this. I know I haven't lived up to everything I said I was going to do, have not kept my promises. You people come in for coffee, things to eat, anytime not just during breaks and nothing is said, think about it. Think about the things you do have.
>
> R. Burket—You mean the only time you can get coffee is during breaks?
>
> T. Kennedy—That's Union rules not our.
>
> R. Burket—That's not so.
>
> T. Kennedy—That's negotiated at the table.
>
> R. Burket—You saying the company will shut down if the Union comes in.
>
> T. Kennedy—It's possible I did not say it would.
>
> R. Burket—That sounds like a threat to me.
>
> T. Kennedy—That isn't a threat, if we don't have profits now, Union demands could cause us to shut down. I did not mean it as a threat.
>
> R. Burket—It's against federal law.
>
> J. Cook—I've head [sic] from different people time after time raises are due and 3 to 4 months down the road before they get them. I don't think Union's ruin a company. Your assuming that a union asks for outrageous rates. The Union would be these people here and they aren't going to ask for that. That doesn't seem to sit well with me because people have been promised raises have not gotten them.
>
> R. Burket—We agreed we had a problem. I came to you with a problem the other day.
>
> T. Kennedy—Yes, I agreed with you and told you I could not do anything but would see the other person.
>
> R. Burket—But you did nothing about it.
>
> T. Kennedy—I talked to the other party.
>
> R. Burket—He said you did not.
>
> T. Kennedy—(speechless)
>
> Tom—I stand in fault of some of the so called evaluations and I stand guilty that I have not taken care of in time. Have tried to rectify and in most cases have done so. How about ones I didn't miss, I don't hear about them. . . .

Although the accounts of Kennedy and Pearl of this meeting deny or do not include reference to a suggestion box, within a week thereafter, such a box was installed in the cafeteria.[14]

Even from Pearl's notated account of what was said, I find that the Respondent separately violated Section 8(a)(1) of the Act when Kennedy, during the April 7 meeting, threatened that if the employees selected the Union more stringent work rules would be implemented by restricting coffee and food breaks, and/or that the plant would be closed.

In *Gissel Packing Co., Inc., et al.* v. *N.L.R.B.*,[15] the Supreme Court articulated the rigorous standards to which an employer's statement predicting the effects unionization will have on employees must conform in order not to be found threatening. Noting that the Employer's words in such situations are colored by the economic dependence of the employees, the Court ruled:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, *the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control* or to convey a management decision already arrived at to close the plant in case of unionization. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only

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[13] Pearl claimed 30 years' experience with the Gregg shorthand method used during earlier employment with various Pennsylvania agencies.

[14] The circumstances surrounding installation of the suggestion box and the General Counsel's contention that the use of this box and Kennedy's invitation to employees to come to him with their problems, also denied, constituted unlawful solicitation of grievances to discourage employee support for the Union, will be considered below.

[15] 395 U.S. 575, 618 (1969). Also see *Components, Inc.*, 197 NLRB 163-164 (1972).

> to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. . . . "Conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." [Emphasis supplied.]

Kennedy's statement concerning the possibility of plant closure in the event of unionization failed to meet the *Gissel* standards because the Respondent introduced no evidence to prove that the statements were based on fact or that the eventuality of plant closing was a demonstrably probable consequence of such fact. For the record shows that, while the financial position of the Respondent could be improved, the Respondent pointed up the inaccuracy of Kennedy's remarks when, at a second meeting of employees on May 8, as will be considered below, Henry M. Rowan, the Respondent's chairman, assured employees that the plant would not be closed in the event of unionization.

As Kennedy's statement concerning possible plant closure does not meet *Gissel* standards in that it did not contain objective facts, his statement appears as part of an effort by the Respondent to instill in its employees the conviction that the plant's continued existence—and its employees' jobs—hinged on the outcome of the election. As such, the statement contained a threat of retaliation in violation of Section 8(a)(1) of the Act.

I also find that Kennedy's warning that unionization would bring a loss of present benefits and the imposition of stricter working conditions to be further violative of Section 8(a)(1).[16]

Leadman Norman Jelke[17] testified that in May, before the representation election, he had gone to Kennedy's office to discuss problems arising in the weld shop and to gain Kennedy's approval. During their conversation, Kennedy, initiating the topic, told Jelke that if the Union came in the employees would not get better benefits; if anything they would probably lose the benefits they have. Kennedy also stated that if the Union did come in, employees probably would get only one raise a year.

From Jelke's undisputed testimony it is concluded that the Respondent violated Section 8(a)(1) of the Act by Kennedy's statement that if the employees selected the Union, employees probably would lose the benefits they have and, further violated Section 8(a)(1) by Kennedy's statement that if the Union came in, the employees probably would get only one raise a year.[18]

2. The alleged unlawful solicitation of grievances

a. *The supervisory status of Patricia Robins*

The General Counsel contends that at the April 7 meeting Kennedy had unlawfully invited employees to bring their problems to him and had promised to install and installed a suggestion box to solicit grievances in order to discourage employee support for the Union. Kennedy, while denying the imputed motive, agreed that he had authorized the construction of the box and its installation some days after the April 7 meeting at the suggestion of Patricia Robins.[19] While the evidence concerning inception of the suggestion box conflicts, it is clear that Robins played a role in its implementation and collected and processed suggestions placed therein.

At the time of the hearing, Robins had been the Respondent's purchasing agent for approximately 2-1/2 years. As such, Robins obtained bids and quotations, negotiated contracts for purchases, and placed orders. Before negotiating, Robins compares the Respondent's use of raw materials over a 2-year period to determine the quantities that might be used during the forthcoming contract period, gathering such data through conversations with salesmen and by noting the prices and scheduled projections. She then requests bids from about five companies and negotiates on the basis of the submitted bids. Robins can enter independently into a purchase agreement for below $1,000, but for more costly contracts Robins must first obtain authorization from the Respondent's president. On those occasions, she recommends to Buss which suppliers should receive contracts. Sometimes these recommendations are followed. Robins also accompanies Buss to inspect the facilities of new vendors to see if they are capable of meeting the Respondent's needs.

From May 5 to August, Robins was assigned a secretary, Debbie Morrison, to assist in her work. Robins had been authorized by Buss to hire Morrison after her request for a secretary had been twice rejected by Kennedy for financial reasons. On receiving approval, Robins interviewed approximately 15 applicants, including Morrison, for the secretary's job, making her selection independently. Robins' first choice, before Morrison, worked for 16 days when Robins decided that she should be discharged. Seeking Buss' approval to terminate the first secretary, Robins informed his secretary, Pearl, of her desire to terminate her secretary for excessive absenteeism. Robins asked if such absenteeism, to the extent described, was grounds for discharge and whether she had authority to fire the secretary. Pearl promised to report back, and, the next day, told Robins that she had stated sufficient reasons for discharge and that the decision was Robins' to either terminate the secretary then or to try her longer to see if her attendance would improve. Robins opted for discharge and notified the secretary that her position was ended. She then, without further consultation or reinterviewing, notified Morrison, her second choice among the original 15 job applicants, that she had the job. In August, Morrison was laid off by Kennedy for financial reasons. The two secretaries were the only ones to work for Robins. Robins, who did not attend management meetings or exercise responsibility with regard to other employees, had interviewed only in connection with the hiring of the two secretaries.

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[16] *Jamaica Towing, Inc.*, 236 NLRB 1700 (1978); *Robert E. Anderson and Richard E. Anderson, co-partners d/b/a Anderson Cabinets*, 241 NLRB 513 (1979).

[17] Jelke, employed by the Respondent from October 1979 to August, was leadman over the cans and covers areas in the oil-filled division. Cans are the receptacles used to house capacitors. Although as many as five people have worked in Jelke's group, the parties do not contend that Jelke was a supervisor within the meaning of the Act.

[18] As Respondent followed a system of affording merit increases, it was possible for employees to receive more than one pay increase a year.

[19] At the representation election, Robins' ballot was among those determinatively challenged by the Union on the ground that she was a supervisor within the meaning of the Act. Although Robins was not alleged as a supervisor in the complaint, it is relevant to consider her status at this time as her conduct is germane to the complaint allegation concerning the suggestion box.

While with the Respondent, Morrison worked 5 hours a day, 5 days a week, spending 4 hours daily working for Robins and 1 hour on switchboard relief. Robins determined her secretary's duties and priorities. While Morrison was with her, Robins continued to perform her regular duties, which consumed about 95 percent of her time. The remaining 5 percent was spent in directing and training Morrison, a percentage which decreased as Morrison became more familiar with her work. For Robins, Morrison principally typed letters and purchase orders and did filing, working to eliminate a backlog and to keep Robins current.

From the foregoing, it is evident that Robins, at least during the period relevant to this proceeding, had independent authority to hire two consecutive secretaries, assign work to, and discharge them. The decision to terminate the first secretary clearly was made by Robins. Accordingly, I find that during the relevant period before the election that Robins was a supervisor within the meaning of Section 2(11) of the Act.

b. *The suggestion box—and Kennedy's invitation to submit problems—facts and findings*

Robins testified that the suggestion box had been her idea. On April 11, during a conversation with Buss, she recommended the installation of a suggestion box in the cafeteria to learn employee complaints.[20] Buss corroborated Robins' testimony that it had been he not Kennedy who had approved the suggestion box.

On April 13, Robins took home the box which a maintenance man had made and given her that day. The maintenance man placed it in the cafeteria on the following day. Robins placed a note on the box to the effect that if employees wanted changes, they would have to make known their suggestions. She signed this note so as to inform employees of her sponsorship.[21]

The box is kept locked. Robins has the only key, which she uses to open the box about once a day. It is her practice to keep the suggestions for a while and then submit them to Buss. Robins related that, as a result of certain suggestions submitted before the election, employees were polled and, as they desired, the Respondent installed a different soda machine that dispensed beverages in cans rather than in cups. Before this, no suggestion box had been made available to employees.

Administrative Law Judge Silberman, in his Board-approved Decision in *McMullen Corporation, d/b/a Briarwood Hilton*,[22] restated the rule as follows:

> The solicitation of employee grievances during an organizational campaign accompanied by a promise, express or implied, that the grievances will be remedied is a violation of the Act. Such conduct constitutes an unlawful restraint upon and interference with employees' self-organizational rights guaranteed under the Act because implicit therein is the promise that benefits will be awarded to them by their employer so long as they are not represented by a labor organization and because it tends to frustrate the employees' organizational efforts by showing them that union representation is unnecessary.[12]
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> [12] *House of Mosaics, Inc., Subsidiary of Thomas Industries, Inc.*, 215 NLRB No. 123 (1974); *N.L.R.B. v. Tom Wood Pontiac, Inc.*, 447 F.2d 383, 384–385 (C.A. 7, 1971).

In the present matter, several employee witnesses called by the General Counsel testified that during the April 7 meeting they, for the first time, had been invited by Kennedy to submit their problems to him and learn that a suggestion box would be set up for their ideas and complaints. While Kennedy's denial that he had done this is supported by Pearl's notes of the meeting, it is not necessary to resolve credibility to reach a conclusion concerning the suggestion box. Even accepting Kennedy's statement that he did not refer to a suggestion box during his meeting with employees, both he and Buss testified that they had approved the box at Robins' suggestion. The record shows that the box was duly authorized and installed during the Employer's counter-campaign, within 2 weeks after receipt of the Union's letter requesting recognition, less than 1 week after the Respondent's reply refusing same,[23] and about 1 week after Kennedy's meeting with the staff. Robins, in fact, admitted that she had proposed the suggestion box as a response to the Union's organizational drive.

Noting that this was the first time a suggestion box had been used in the plant, that ideas placed in the box were accepted and implemented at cost to the Respondent, I conclude that implicit in the establishment of the suggestion box was the promise that suggestions or complaints placed within would be acted on or remedied, as applicable, and that by so doing the Respondent has violated Section 8(a)(1) of the Act.[24]

I also credit testimony that Kennedy, at the meeting, solicited grievances by inviting employees to bring their problems to him, for the first time in the context of the Union's campaign, as such conduct is consistent with Kennedy's approach. For the above reasons, it is concluded that this, too, was in violation of Section 8(a)(1) of the Act.

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[20] Although nothing was said about the Union when Buss authorized the suggestion box, Robins testified that her recommendation concerning the suggestion box was a response to the Union's letter, dated April 4, claiming majority status.

[21] At the time of the hearing, the suggestion box was still in the cafeteria.

[22] 222 NLRB 986, 989 (1976).

[23] Buss' letter of reply to the Union was dated April 7.

[24] Also see *Moody Nursing Home, Inc.*, 251 NLRB 147 (1980).

3. The conduct of Kevin Kuklewski and Peter Phiambolis

The complaint alleging that management trainees[25] Kevin Kuklewski and Peter Phiambolis had engaged in conduct violative of Section 8(a)(1) of the Act, the Respondent has placed in issue their status as supervisors.[26] Both men had been hired as salaried management trainees[27] and were working as such during the first half of 1980.

a. *Kevin Kuklewski's supervisory status*

When hired at the beginning of August 1979, Kuklewski was interviewd by six company officials, including President Buss, his secretary, Pearl, and the then-incumbent management trainee, Doug Zuirys.[28] Buss, the principal interviewer, told Kuklewski that he initially would go to the production floor to learn the product, after which he would become involved in a computer project. Kuklewski's training program would not be rigidly structured. Nothing was said about where the program might lead.

Kuklewski first was assigned to the oil-filled division where he spent 2 to 3 weeks learning about the capacitors produced there.[29] After this, Kuklewski was assigned on a rotating basis to work in several different departments within the oil-filled division, spending about 3 to 4 weeks in the parts department. There, he assisted in the general work of that newly relocated department, helping to move machinery and doing cleanup work. He reported directly to Kennedy.

At the end of September 1979, Kuklewski was transferred to the finishing department as leadman, while still reporting to Kennedy. Kuklewski assigned work to the three to four finishing department employees.

While in finishing, at the request of inventory control clerk Margaret Elizabeth Wright, he was one of those who interviewed James Cook for a job in the Respondent's warehouse, and, as Kuklewski put it, successfully recommended that Cook be hired. Also, in September 1979, soon after the start of his employment with the Respondent, Kuklewski, after an interview, successfully recommended that small assembly employee David Moore be hired. He also effectively recommended to Kennedy that shipping employee David Brown be fired for excessive absenteeism, preparing and signing the supervisor's evaluation on Brown's termination form.[30]

While in finishing, Kuklewski made recommendations to Kennedy with respect to the manning of that department, requesting that additional help be assigned there when he thought necessary. In approximately 40 percent of those instances when Kuklewski sought an additional employee to temporarily assist with the workload, Kennedy would accompany him back to his department to check the amount and type of work that was required. On the remaining occasions, Kennedy would merely grant verbal authorization for the additional help based on Kuklewski's stated need. While Kuklewski could authorize employees who so requested, to leave work an hour early, he had no authority concerning the employees' timecards.

While still in finishing, Kuklewski sent an undated 2-page memorandum to the Respondent's personnel department criticizing the work of Ken Weaver whom, according to Kuklewski's memorandum, management had decided to remove as head of shipping and warehouse and to reassign to work under Kuklewski. This memorandum contained the following paragraph wherein Kuklewski described his duties on assuming the newly constituted position of shipping clerk:

> My task was defined by my supervisors, to identify and remedy the existing problems in the shipping department and expand the responsibilities of the shipping clerk position to include impregnation. The shipping clerk title would be changed to finishing department head. The project was to be started at the beginning of September and completed by the end of December.

In his memorandum, Kuklewski went on to recognize "the failures and inefficiencies" of the current system and its supervisor, specifying their shortcomings in general, Weaver's deficiencies in particular, and to explain why he had appointed Bill Franks, instead of Weaver, to replace him as "finishing department trainee" when he left that department.[31] Kuklewski signed his memorandum as assistant to the president.

From mid-January through August, Kuklewski was assigned to a computer project in the engineering department of the oil-filled division, where he attempted to estimate production costs, measuring material and work times in the performance of certain operations. Data thus accumulated was keypunched into a computer. While so engaged, Kuklewski no longer was considered a leadman and had no direct involvement in production. His contacts with other employees related principally to the information he was seeking, except that a summer employee, with the Respondent during school vacation, keypunched for him. Although Kuklewski gave this employee her work assignments, she technically was under the supervision of design engineer Gary Greiser, and Kuklewski kept Greiser aware of his use of her time.

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[25] The Respondent has followed a practice of hiring one or two management trainees annually. Their future with the Company varies.

[26] At the time of the hearing, and since September, Kuklewski has occupied a managerial position with the Respondent as production scheduler in the ceramic division. Phiambolis has not been with the Respondent since June.

[27] All bargaining unit employees and those whose ballots were challenged during the representation election are hourly rated.

[28] Zuirys subsequently became a salesman for the Respondent.

[29] As stated, capacitors are electronic components, in various sizes and shapes, that build up a greater charge of electricity than that received. The Respondent produces ceramic and oil-filled capacitors. The ceramic capacitor is made of different types of clay, while the oil-filled capacitor is made of aluminum and steel shells with foil wound in various configurations inside. These are impregnated with oil. The manufacturing processes used to produce these two types are different and the plant is separated into two divisions for their respective production. Few of the Respondent's employees work interchangeably in both divisions.

[30] Under the Respondent's policy, employee termination notices are issued on forms which provide for the supervisor's final remarks. In completing Brown's form, Kuklewski had received authorization from Kennedy.

[31] Kuklewski testified that, in fact, he did appoint Franks to replace him as finishing department head on leaving that assignment and that Franks continued in this role for some time thereafter. Earlier, having been authorized by Kennedy to fill a vacancy in finishing, Kuklewski had interviewed applicants responding to the Company's advertisement and had selected Franks for employment.

Since leaving the finishing department, Kuklewski does not take breaks or lunch at the same time as unit employees. The lunch hour for production workers was 12:30 to 1 p.m. Kuklewski's assigned lunch recess was from noon to 1 p.m., coinciding with that of managers and clerical employees.

Kuklewski participated in the Respondent's efforts to counter the Union's organizing campaign by preparing material for Buss' speeches. He also assisted Buss in writing letters and, in consultation with Buss and Kennedy, scheduled employee meetings at breaktimes. Kuklewski attended most such meetings.

Around 2 weeks before the May 16 election, Kuklewski, at Buss' request, conducted two meetings of employees in the cafeteria during work hours, using a tape player to deliver prerecorded messages clarifying the Respondent's position with respect to the Union's Campaign. Kuklewski began each meeting by announcing that he was going to play tapes and describing what they were about. After playing the tapes, Kuklewski told the employees that Pennsylvania was not a right-to-work State. Kuklewski generally attempted to avoid answering employees' questions.

On April 24, Kuklewski accompanied Buss and Kennedy to the Board's Regional Office as a member of the management group that signed the agreement for an election in Case 4-RC-14152.

Kennedy testified that in anticipation of the election he had instructed Myers and Johnson, plant superintendents of the ceramic and oil-filled divisions, respectively, and Kuklewski and Phiambolis to be very careful about what they said to employees; not to make promises, intimidate anyone, or make threats. Kennedy explained that he did not also so instruct his lead personnel as they were hourly paid.

From the foregoing, it is clear that, while a management trainee, Kuklewski enjoyed a special status distinct from that of rank-and-file employees. As leadman in finishing, he had the power to assign work, make effective recommendations concerning hire, discharge, supervisory replacement and manning requirements affecting his department, and, as he actively did, signing a memorandum as assistant to the president and an employee termination notice as supervisor. After leaving the leadman's position to work on the computer project, he continued to be held out and regarded by the Respondent as a member of management. Accordingly, he not only was instructed by Kennedy as to how to conduct himself with employees and assisted in the Employer's efforts to counter the Union's campaign in helping Buss prepare speeches and letters, but also was presented as a management representative at two meetings with employees to help present the Respondent's position against the Union's campaign. He was part of the management group that met at the Board's Regional Office to sign the agreement for a representation election.

From the foregoing, I find that at all material times Kuklewski was a supervisor within the meaning of the Act, was so regarded by Kennedy, and, in any event, was so held out as a management representative that employees would believe that he spoke for management.[32]

b. *Peter Phiambolis' supervisory status*

Phiambolis, who like Kuklewski, was a salaried management trainee, was with the Respondent from August 1979 to the end of June 1980.[33] Kennedy and Kuklewski testified that Phiambolis, like Kuklewski, reported to Kennedy. Phiambolis, too, was assigned to rotate among several departments, including parts, finishing, and small and large assembly, so as to gain familiarity with the plant's operation.

Leadman Norman Jelke testified that on November 30, 1979, the day that welder Dave Rogers left the Respondent's employ, he was called into Kennedy's office by Phiambolis. There, Kennedy, in Phiambolis' presence, told Jelke that he was going to be responsible for the work going out of the weld shop, that Phiambolis would be telling him certain things that he wanted done and that Jelke would have to do them.

Thereafter, Jelke received work assignments from Phiambolis, who also set Jelke's work priorities, taking Jelke off what he was doing at given times to immediately attend to other work.

Kennedy's initial testimony that Phiambolis had not signed any employee termination notices was countered by the General Counsel's introduction of two such notices, dated October 31, 1979, and February 1, wherein Phiambolis detailed the reasons for the respective discharges.

From the foregoing, noting that Phiambolis was authorized to assign work independently, to set work priorities, and to evaluate employees, in the context of the broad range of supervisory duties afforded Kuklewski, the other management trainee, it is found that in the first half of 1980 Phiambolis was a supervisor within the meaning of Section 2(11) of the Act. In so concluding, it is further noted that the Respondent regarded Phiambolis, as well as Kuklewski, as supervisors, not only by allowing both to sign employee termination notices as such, but also in having separately instructed them as to how to conduct themselves toward employees during the Union's organizational campaign.

c. *Kuklewski's conduct—facts and findings*

Leadman Norman Jelke testified that, after attending Kennedy's April 7 meeting with employees in the cafeteria, he was told by Kuklewski that the employees were foolish to bring the Union into the plant. If the Union came in, it definitely would make things worse instead of better. Jelke did not reply. As this statement was merely an expression of sentiment, unaccompanied by interrogation, threat of reprisal, or promise of benefit, I conclude that it was not violative of Section 8(a)(1) of the Act.

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[32] *Edgar L. Landen t/a Speed Mail Service*, 251 NLRB 476 (1980).

[33] Phiambolis, who, as noted, no longer was employed by the Respondent at the time of the hearing, did not testify.

Maintenance employee Robert Burket testified that during the first week in May he was approached by Kuklewski in the shipping department, who told him that if the Union got in the plant would be closed because management did not understand unions; they would not be able to handle the Union which would overwhelm the Company. Kuklewski continued that the employees should form their own union, a company union. If they did that, the Respondent would help them form the union, write the rules, and provide general assistance. An outside union would require very costly dues and the employees would not be able to get anything in return. If there were an inside union, there probably would not be any dues.

During that conversation, Kuklewski stated that if the Union did come in Hank Rowan would close the plant because he did not like unions and would not tolerate them in one of his plants. Rowan had closed many plants and he would close this one, too. Kuklewski declared that all these union problems were the fault of Tom Kennedy. Kennedy would promise the employees something one day and forget the next day. According to Burket, Kuklewski declared that Tom Kennedy was getting old and that he was going to replace Kennedy.

Burket testified that this incident continued for an hour as Kuklewski was repetitive, following him from the shipping area to his workplace.

Kuklewski, in turn, testified that some time before the agreement for an election was signed on April 24, he encountered warehousemen James Cook and Burket while passing through the plant. They were joined by another employee, no longer employed by the Respondent, who was working nearby. When Cook asked Kuklewski if Rowan or Buss would close down the plant if the people elected the Union, he had replied that if that was their intention that is what they would do. If that was not their intention they would not do that. He denied having information concerning plant closure.

Although other matters were discussed, Kuklewski could not recall them. Burket remained after the others had left and told Kuklewski that he was upset by a number of things arising from his treatment by High Energy. When Kuklewski told Burket that it sounded as though he was taking these matters personally, Burket replied forcefully that he was. Kuklewski vaguely recalled some reference to Burket's dissatisfaction with wages.

Kuklewski averring that the above was his only conversation with Burket, denied having stated that management could not handle the Union, that the plant would be closed, or that Rowan would not tolerate the Union and had closed other plants. He similarly denied having made like statements to any other employees.

I credit Burket's account of what Kuklewski had said to him before the representation election, as Burket's testimony, unlike Kuklewski, was detailed, precise, and rendered with authority. In addition, from Jelke's undisputed testimony, described above, Kuklewski had expressed a strong antiunion bias to him following Kennedy's meeting with employees where Kennedy, too, had threatened plant closure if employees selected the Union. Accordingly, noting that Kuklewski's conduct, as described by Burket, was consistent with other conduct imputable to the Respondent, it is concluded that Kuklewski's repetitive statements to Burket that the plant would be closed if the employees selected the Union violated Section 8(a)(1) of he Act. I also find that Kuklewski's accompanying suggestion to Burket that the employees should form a company union with the Employer's help also was an unlawful offer of assistance in violation of Section 8(a)(1).[34]

d. *Phiambolis' conduct—facts and findings*

Jelke testified that approximately 8 days before the election he was approached by Phiambolis, who asked how Jelke was going to vote and if he knew how anyone else was going to vote. When Jelke did not respond, Phiambolis stated that Rowan would close down the plant if the Union came in.

Employee Peggy Keylor[35] related that on or about April 9 Phiambolis, who appeared tearful, declared in the plant area that he guessed that he would have to look for another job. He was afraid that if the Union got in the plant would close. The girls in the office were concerned as to what was going to happen.

It is concluded from the above-uncontradicted testimony that Phiambolis interrogated Jelke as to his own union sentiments and those of other employees in violation of Section 8(a)(1) of the Act, and further violated Section 8(a)(1) by threatening Jelke and Keylor that the plant would be closed if the Union were selected.

4. Rowan's May 8 meeting with employees

The Respondent contends that Rowan's assurances to employees at a meeting conducted at the plant on May 8 effectively retracted Kennedy's remarks a month before that the plant would be closed in the event of unionization, and later statements to the same effect by Kuklewski and Phiambolis, thereby erasing these violations of the Act.

Rowan testified that he had received a call from Buss who told him that a union election would be conducted in the plant and that he had agreed to Buss' suggestion that he come to the plant and speak to the employees. During this conversation, Buss expressed concern that a rumor was circulating that the plant might be closed if the Union was selected, and asked if Rowan would comment on this matter to assure the employees that the plant would not be closed.

Accordingly, when, on May 8, Rowan met with the employees he told them that he was there because he had heard there was a rumor that the plant might be closed if the Union got in. He stated his desire to assure the employees that this was not the case and that the plant would not be closed if the Union was successful in the election. The Company would not be so stupid as to take such an approach, recognizing that such conduct would constitute an unfair labor practice, and the employees thereafter might find themselves with a union even if they did not want one.[36]

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[34] See *Womac Industries, Inc.*, 238 NLRB 43, 46 (1978). Although the complaint does not allege unlawful assistance in violation of Sec. 8(a)(2), I find that Kuklewski's offer to assist employees to form a company union was litigated at the hearing, and was closely related to matters actually alleged.

[35] Keylor testified as an extremely reluctant witness for the General Counsel.

When Rowan completed his talk, which covered aspects of the election, maintenance employee Robert Burket declared that Rowan's statement was all a pack of lies. When Rowan asked Burket if he would please tell him what he had said that Burket claimed was untrue, Burket retorted that it was not any one statement, the whole thing was a lie. Rowan again asked Burket what he found to be untrue. Burket did not have any specific answer, but merely repeated that the entire thrust of Rowan's talk had been a lie.

Following Rowan's talk at the meeting, Buss apologized for Burket's behavior; he had not wanted Rowan to be embarrassed. Rowan replied that Buss should not worry, he was used to this sort of thing as he talked to employees all the time and had been challenged far more extensively.

Burket's recollection of the May 8 meeting differs somewhat in detail. Burket testified that all employees, including those who worked in the office, were present. Rowan began by stating that he was there because he had heard a rumor in the shop that the Company would close the plant if the Union came in, and declared that this was not true. Burket interjected that that was not a rumor, but the truth; Rowan's own plant manager had stated that the plant would close if the Union came in, in the very lunchroom where Rowan was standing. When Rowan asked if he could prove that, Burket said that he could, and asked that all employees who had heard Tom Kennedy make such a statement raise their hands. Approximately 10 to 15 employees did raise their hands.

At that meeting, according to Burket, Rowan also recalled one contract negotiation that had continued for a number of weeks where the Union had not made monetary proposals, and also referred to another negotiation during which the union representative had come to Rowan in private and asked what Rowan would give him to disappear.

As Rowan's comments at that meeting are not alleged to be unlawful, as Burket agreed that Rowan had declared that the plant would not be closed, and as Rowan's account, even if accepted, would be insufficient to erase the earlier threats of plant closing, no credibility resolutions are required to more fully resolve what was said at that meeting.

The law concerning repudiation is summarized in *Passavant Memorial Area Hospital,*[37] as follows:

> It is settled that under certain circumstances an employe[r] may relieve himself of liability from unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

Applying these criteria to Rowan's May 8 talk, I find that although there was adequate publication, the notice was not timely, having been delayed for a month from the time of Kennedy's speech so that employees could fully ponder the impact of the earlier threat made by Kennedy and, thereafter by the other supervisors.[38] Rowan admitted no wrongdoing, on the Respondent's part and, most importantly, did not assure employees that in the future the Respondent would not interfere with the exercise of their Section 7 rights by such coercive conduct. He did not address other violative conduct by Kuklewski in offering assistance to form a company union, by Phiambolis in coercively interrogating an employee, or by the Respondent in soliciting grievances. There is no basis in law or in logic for allowing the Respondent to minimize its responsibility for unlawful conduct by partial, selective repudiation.

Summarizing, it has been found that at the various times and in ways disclosed above, the Respondent violated Section 8(a)(1) of the Act by:

a. Summoning employees to a meeting where they were: (1) Threatened that the plant would be closed if the Union were selected. (2) Threatened with loss of existing benefits, fewer pay raises, and more stringent working conditions, if the Union were selected. (3) Invited to submit grievances to the plant manager to discourage support for the Union.

b. Installing a suggestion box to solicit employee grievances and suggestions to discourage support for the Union.

c. Threatening Jelke that employees would lose benefits if the Union were selected.

e. Encouraging Burket to form a company union and offering him assistance with respect thereto.

f. Coercively interrogating Jelke concerning his union activities and sympathies and those of other employees.

g. Threatening Jelke and Keylor, on separate occasions, that the plant would be closed if the Union were selected.

C. *The Discharge of Robert Burket*

1. The facts

Burket, a maintenance worker, was employed by the Respondent from October 1978 until his permanent layoff on May 12, 4 days before the election. Countering the General Counsel's assertion that Burket was let go because of his union activities, the Respondent contends that Burket was terminated for attending to personal business at home while on company-paid time.[39]

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[36] Rowan explained that he previously had been involved in about six Board-conducted elections and knew that certain types of statements could constitute unfair labor practices.

[37] 237 NLRB 138-139 (1978).

[38] See *Precision Graphics, Inc.*, 256 NLRB 381 (1981).

Burket testified that he had been hired by Maintenance Supervisor Earl Myers, who oversaw Burket's work until Myers' promotion to plant superintendent of the ceramic division in October 1979. Burket thereafter reported to John Hawk, who replaced Myers as maintenance supervisor.

Approximately 90 percent of Burket's time was spent working principally alone on a special project; the building of a geconol mixing system to mix oil and additives to produce an oil for use in the Respondent's capacitors. Such oil was to have the properties of a product that the Respondent had been purchasing from an outside supplier and, presumably, alleviate that dependence. When not working on the geconol system, Burket did maintenance work in the oil-filled division.

In building the geconol system, Burket worked from hand-drawn designs less detailed than a blueprint. Pipelines, fittings, and various other specifics were designed by Burket. Burket ordered parts for the system as needed and about three times a week it was necessary for him to leave the plant to obtain components and tools as needed. The duration of these trips varied, depending on destination and requirements, but from January 1980 he obtained most of the parts brought in from the outside from suppliers in a town about 8 miles from the plant. Burket also supplied his own tools, some of which were kept at home and others at the plant. Before leaving the plant, he always notified John Hawk.

In March, Burket attended a meeting at James Cook's home, with a union representative and about six or seven of the Respondent's employees, where they discussed how to introduce the Union to the Company. All employees present signed union authorization cards. Cook and Burket took extra cards which Burket distributed among other employees at the Respondent's premises. Burket did not believe that any supervisor with the exception of Hawk,[40] knew about his distribution of authorization cards, he did ask Hawk to sign such a card.

Burket, as noted, confronted Kennedy during the latter's April 7 meeting with employees, accusing Kennedy of threatening to close the plant if the Union was selected, and of failing to keep his promises. Thereafter, during the first week in May as found above, Kuklewski unlawfully threatened Burket with plant closure if the Union came in and offered him assistance in forming an inside union. Burket's confrontation with Rowan during the latter's May 8 meeting with employees where he accused Rowan of falsely denying previous threats that the plant would be closed if the Union came in, has also been described.

Burket testified that on May 12 he reported for work at 7 a.m., his usual starting time. At approximately 8:30 a.m., he told Hawk that a recently purchased extension cord was defective and that it would be necessary to return it to the store. Burket also informed Hawk that he had to pick up a tool from his home. Hawk approved his departure and Burket left the plant between 9:45 and 10 a.m.

Burket testified that using a company pickup truck he went directly to a hardware store in the town of Coatesville, approximately 8 miles from the plant, where he obtained a new extension cord after 10 to 15 minutes of discussion with the clerk.

From the store, Burket went to his home to obtain the needed tool. He explained that, after leaving the truck, it was necessary to go by the garden to enter his house where the tool was. Burket's wife, then in the garden, asked him to show her how to weed turnips. He complied and had been so engaged for about 5 minutes when Kennedy appeared over the front bank of the house. Kennedy loudly asked Burket what he was doing there. Burket, from the garden, called back that he was there to pick up a tool. When Kennedy responded that Burket was in his garden, Burket called back that he was showing his wife how to weed turnips but that he had just stopped in garden. Kennedy replied that he wanted to see Burket when he returned to the plant. Burket went into his house, obtained the tool, and went back to the plant. After entering the plant, Burket asked Maintenance Supervisor John Hawk to accompany him to Kennedy's office to verify that Burket had had Hawk's permission to be away from the plant.

Burket related that at 11 a.m. he, Kennedy, and Hawk met in Kennedy's office. At Burket's request, Hawk confirmed that Burket had gone to his home and the hardware store with Hawk's permission. Burket denied Kennedy's assertion that he had left the plant at 9 a.m., asserting that he had departed closer to 10 a.m., a time corroborated by Hawk. Kennedy announced that they were going to see Buss about this. Hawk returned to the shop and Kennedy and Burket went to Buss' office.

Buss was at a meeting when they arrived but met with Kennedy and Burket in a side room. Kennedy told Buss that Burket was supposed to be working but had been in his garden picking or weeding turnips. Kennedy did not understand why it had been necessary for Burket to be gone from the plant for 2 hours. Burket, Kennedy continued, contended that he had been gone for only an hour.[41] Kennedy declared that 1 hour would have been a reasonable time for Burket to have been away for purposes approved but that Burket was a thief because he had been stealing time from the Company.

Burket pointed out that he had always been a good employee, but all of a sudden the Respondent wanted to fire him. Buss asked what the penalty was for such an infraction of the rules. Kennedy told him that there was no written penalty. Burket interjected that if they fired him he was going to the Union, but if they laid him off, fine. Accordingly, Buss told Kennedy to put Burket on permanent layoff.

Burket's termination notice, signed that day by Kennedy, showed that Burket had been given "Permanent layoff, due to employee observed gardening at home on company time." Burket's comments in the space on the form reserved for the employee was, "I do not accept supervisor's final remarks as true. They are not complete."

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[39] The parties stipulated at the hearing that Burket's work skills played no role in the decision to terminate him.

[40] While the Respondent disputes the determinative challenge to Hawk's ballot by the Union based on asserted supervisory status, it readily admits knowledge of Burket's union activities at the time of separation.

[41] It is Burket's position that he had been gone between 60 to 80 minutes.

The Respondent contends that Burket was disciplined on May 12 for abusing company time by gardening at his home while being paid.

Kennedy testified that while in the office of Joann Johnson, plant superintendent of the oil-filled division,[42] on the morning of May 12, she showed him gasoline purchase slips signed by Burket on five different days between April 28 and May 7, asking him whether this did not show that an awful lot of gas was being charged to the truck[43] during that period.[44] Kennedy responded that he wanted to check this out and to know when Burket next went on a trip. Johnson replied that Burket already was out on an errand that morning. At that point, around 10 a.m., Earl Myers, plant superintendent for the ceramic division, entered Johnson's office. Kennedy asked Myers, who, when he was maintenance supervisor, had worked directly with Burket, if he knew where Burket lived. When Myers said that he did, Kennedy suggested that they take a ride. Kennedy testified that his only stated reason to Johnson for going to Burket's house was that he suspected that Burket was siphoning gasoline from the truck. There had been no discussion as to how long Burket was away from the plant.

Kennedy and Myers drove to Burket's address in Kennedy's car. As they passed Burket's home, they could see him and his wife in the garden. They continued on, stopping at a small parking area on the corner where they waited for approximately 15 minutes, until 10:45 a.m. Kennedy then drove from the parking area back to Burket's house, left the car, approached, and asked Burket what he was doing. Burket replied that he had stopped at home to pick up a drill. Kennedy retorted that the drill was not in his garden and that they would talk about the matter when Burket got back to the shop. Kennedy and Myers then returned to the plant.

When Kennedy arrived at the plant, he called Hawk into his office and asked if he knew where Burket had gone. Hawk had replied that Burket had to go to the hardware store at Coatesville and to his house to pick up an electric drill. In response to Kennedy's inquiry, Hawk told him that Burket had left the plant between 9:30 and 10 a.m.

At or about that time, Burket arrived. Kennedy told Burket that they would go together to Buss' office and let Buss judge where they would go from there.[45]

Kennedy told Buss that while reviewing gasoline receipts that morning he had found that a higher amount of gasoline was being charged to the company pickup truck. Suspecting that Burket might be siphoning gas, he and Myers had driven to Burket's house and had found him hoeing in his garden. Kennedy related that they had waited exactly 15 minutes, had made themselves known to Burket, and had come back to the plant. Kennedy stated that he now was there with Burket who was being paid for the time at issue.

When Buss asked Burket if this was true and why, Burket agreed that it was and that he had made a mistake.

After some discussion, Buss went to another office and called Rowan. After telling Rowan what had happened, Buss stated that, in the past, whenever employees had left the plant without authorization while on the clock, they always had been let go. He asked whether a like course should be followed here as a union election was pending and as Burket was active on behalf of the Union.[46] Rowan replied that Buss could not alter his procedure just because the election was pending. He instructed Buss to do exactly what he would have done if there had been no union election.

Buss returned to Burket and Kennedy and discussed discharge. Burket responded that if the Company fired him he would be very violent and cause a lot of problems. However, he agreed to accept permanent layoff. Accordingly, Burket was permanently laid off.

In support of Kennedy's contention that Burket had been using extraordinary amounts of fuel in the company truck, the Respondent introduced receipts showing that Burket had charged gasoline purchases for the truck as follows: April 3—$12.30, April 28—$14.20, April 29—$7, May 1—$13.80, May 5—$12.80, and May 7—$11.65.[47] The record of an earlier state unemployment compensation hearing conerning Burket shows that Kennedy had testified that his suspicions had been aroused after Burket had purchased $14 worth of gasoline when plant superintendent Johnson had filled the truck's tank the same morning on the way to work. As the truck had but a 4-cylinder engine, large gasoline purchases would not ordinarily appear to be warranted.[48]

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[42] Johnson was responsible for the Company's vehicles.

[43] The truck used by Burket had a 4-cylinder engine.

[44] Others, including Johnson and maintenance man Ed LaMarche, also were authorized to use this truck. LaMarche had fueled the truck twice in March and on two occasions in April. Johnson, who uses the truck on a regular basis, filled the gas tank four times in April. Kennedy explained that Burket had just started using the company truck after Kennedy had instructed him to do so as Burket had been putting so many miles on his own vehicle and that it had become too costly to the Respondent to continue its use.

[45] The following account of Burket's terminal interview is a synthesis of the testimony of Kennedy, Buss, and Rowan.

[46] Rowan testified that when Buss had called him earlier, before his May 8 meeting with employees, he told Rowan about the Union's campaign, stating that warehouseman Jim Cook was greatly over qualified for his job, that he felt that Cook was there as a union organizer, and that Burket, too, was a union instigator.

[47] The May 7 purchase included $2.50 for oil.

[48] The transcript of the state unemployment compensation hearing indicated certain mild inconsistencies in the testimony of both Kennedy and Burket from that given during the hearing in this matter. In this proceeding, as noted, Kennedy testified that he had driven to Burket's home on the morning of May 12 following a conversation with Johnson where she had called to Kennedy's attention the quantity of gasoline purchases charged to the Respondent by Burket. At the state hearing, Kennedy, in explaining his trip to Burket's home, did not refer to such a conversation with Johnson. Instead, he related only his independent suspicions raised by multiple purchases of gas for the truck on the same day and purchasing agent Robins' accepted suggestion of the month before, based on costliness, that Burket no longer be permitted to charge mileage for use of his own vehicle for errands, but, instead, require that Burket use a Company-owned truck. Burket, in turn, also had testified at the state proceeding that, while he had been in the garden on May 12 for what

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The Respondent further contends that it was aware for some while that Burket was not effectively utilizing his worktime. Buss testified that in late March, Duane Jenson, a consultant responsible for the design of the oil system Burket was building, expressed concern that its construction was taking too long. Jenson told Buss that it seemed as though Burket was gone half the time getting parts and that the job would never be completed if Burket did not "shape up." Although Buss had hoped that the project would be completed by the end of March, he neither spoke to Burket nor discussed Burket's trips from the plant with other members of the supervision.

Earlier, in December 1979, Plant Superintendent Myers, while driving past Burket's home during working hours, had seen Burket's car parked by his house, but did not see him.

Myers testified that about 2 weeks after the foregoing incident, when he looked for Burket in the plant, he learned that Burket had been gone for over 2 hours. Myers thereupon drove to Burket's home, but, after having traveled about 1-1/2 miles, Myers, seeing Burket driving by him en route back to the plant, around and also returned. On that occasion, Myers had seen Burket depart at around 8:30 a.m. and did not go out after him until around 11 a.m.

Myers did not report the first incident, when he had seen Burket's car parked at home during working hours, to Kennedy until 3 or 4 months later, after the occurrence of several other incidents, when he also had been unable to find Burket in the plant. On the day he went out after Burket, only to follow him back to the plant, he had asked Burket where he had been. Burket replied that he had gone to a certain supplier for parts. When Myers reported this incident to Kennedy, Kennedy merely agreed that Burket had taken a long time for the trip.

Although before becoming a plant superintendent in October 1979, Myers had noticed that Burket, who then reported to him in maintenance, had been gone from the plant for long periods on about three or four occasions, he mentioned only one such instance to Kennedy. John Hawk, Myers' successor as maintenance supervisor, did not call Myers' attention to any subsequent prolonged absences by Burket from the plant. In any event, it is undisputed that before May 12 nothing was said to Burket by the Respondent's management or supervision concerning time he was spending away from the plant during work hours. Burket was never disciplined nor his work criticized.

The Respondent's published "Rules and Regulations of Personal Conduct," issued January 1, provide progressive discipline for various work rule infractions. Accordingly, the rules establish, in relevant part, that employees who frequently are absent from work without proper authorization or reasonable cause (three times in a 30-day period), who habitually fail to punch their timecards, who are absent without authorization from their regular work station, or who "loaf" on the job—in washrooms or elsewhere—are subject to a written notice for the first two offenses, a 3-to 5-day disciplinary layoff for a third offense, and discharge for the fourth offense occurring within a 1-year period of time. It also is provided that employees who engage in personal work of any nature without authorization shall receive a written warning for the first offense, a 5- to 10-day disciplinary layoff for the second offense, and discharge for a third offense. Employees are subject to immediate discharge for, among other things, knowingly punching, or removing, another employee's timecard or permitting it to be done by another.

The Respondent argues, however, that it consistently has followed a policy of immediately terminating employees without prior warning for improperly taking paid time away from the plant while not performing their duties. Gary Greiser[49] testified that on Saturday, January 15, 1979, while manager of the Respondent's Malvern plant, he discharged Allen Linderman, employed there in the assembly area, when he found Linderman's timecard in the rack showing him to be at work on overtime premium pay,[50] but when, in fact, he had gone home 2 hours before. Linderman had not received prior warning before discharge. On Linderman's termination notice, Greiser noted the following final remarks, "Employee caught cheating on timeclock."[51]

Buss testified that employee James McWilliams was terminated when Buss was unable to find him in the plant during working hours in October 1978, following a search. The next day, Buss, without providing prior warning, terminated McWilliams. The reasons for discharge given on McWilliams' termination notice were, "Employee left work before quitting time without permission and had another employee clock out his timecard which is against rules and regulations of company policy." Employee Stephen Bodnar, Jr., also was concurrently terminated without having received prior warning for having punched out McWilliams' card.

2. Discussion and conclusions

Analyzing the above evidence under *Wright Line, a Division of Wright Line, Inc.*,[52] I find that the General Counsel made a *prima facie* showing that Burket's protected activities were a motivating factor in the Respondent's decision to lay him off permanently. The Respondent's president, Buss, who finally made the decision to discipline Burket, admitted that he knew at the time of layoff that Burket was one of the main organizers for the Union. About 6 days before, management trainee Kuklewski had told Burket several times during a conversation that if the Union came in the plant would be closed, and had encouraged and offered assistance for the formation of a company union. Earlier, on April 7, when Kennedy, during his meeting with employees, also had men-

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seemed to him to have been 5 minutes, he had not checked the time. He generally appeared less certain as to how long he had been in the garden than his testimony in the present matter would indicate.

[49] Greiser, currently the Respondent's design engineer, had held a variety of positions with the Respondent since May 1973. From October 1974 through August 1979, he served as plant manager of the Respondent's Malvern, Pennsylvania, plant, heading the oil-filled division.

[50] According to Greiser, Linderman had been putting in much overtime.

[51] On cross-examination, Greiser conceded that Linderman subsequently was rehired by the Respondent.

[52] 251 NLRB 1083 (1980).

aced them with the prospect of plant closure and for more stringent work rules if they selected the Union, he was confronted by Burket, who accused him of making a threat.[53] It also is noted that Burket's services to the Respondent were valuable as he was the only employee involved in the skilled work of building the Respondent's geconol system, the quality of his work was satisfactory, and his summary layoff without prior warning or reprimand, timed but 4 days before the representation election, for the reasons stated, contravened the Respondent's published policy of progressive discipline where discharge is rendered only after a series of lesser penalties.[54] Contrary to the Respondent, no clear policy has been followed of terminating employees for leaving work without punching their timecards and instances of prior discharge on these grounds cited by the Respondent are distinguishable. Although Linderman, who had been drawing much suspicious overtime at premium pay, initially was terminated without prior warning for leaving the plant without punching out while again on overtime, his subsequent rehire illustrates that such an infraction is not a final determinant for employability with the Respondent.[55] Also, McWilliams' earlier discharge differs in circumstance from that of Burket as his termination notice affirms that he was let go not only for having left work before quitting time without permission, but also because he had breached company rules by having Bodnar clock out his timecard. Accordingly, McWilliams' offense was multiple because, in addition to absenting himself, he also had induced another employee to wrongfully punch his card—which at the time warranted the summary termination afforded Bodnar.[56] McWilliams' inducement of another employee to engage in an offense calling for summary discharge involved considerations not present with respect to Burket.

The Respondent's other activities in violation of Section 8(a)(1), particularly Kennedy's statement to Jelke, also in May, that if a union came in the employees could probably lose existing benefits and be relegated to only one raise a year, Phiambolis' coercive interrogation of Jelke, and the unlawful solicitation of grievances by both implementation of the suggestion box and Kennedy's invitation to employees to bring their problems to him further indicate the Respondent's hostility toward the Union's campaign.

This evidence submitted by the General Counsel and Union effectively shifted the burden to the Respondent to show that it would have permanently laid off Burket even in the absence of his protected activities. The Respondent's contention that it disciplined Burket because he attended to personal business away from the plant while "on the clock," therefore stealing company time, is countered by the tolerance it previously has shown in this regard. Buss had received reports from Jenson in late March that Burket was taking too much time to build the geconol system, while, from Myers, Kennedy had known for months that Burket had been taking too long to run errands. However, as noted, Burket was never cautioned about these practices.

Noting that the Respondent recognized Burket as a principal union activist; its hostility to the Union expressed through the various acts found unlawful herein, some of which were directed at Burket; the timing of his discipline but 4 days before the election in the context of previous toleration of his prolonged errands; that under the circumstances involved, the permanent layoff afforded, without prior warning, did not conform to the Respondent's published system of progressive discipline; and Burket's usefulness to the Respondent as a skilled maintenance employee principally assigned to building the geconol system, show that such discipline as might have been afforded because of the garden incident would not, without prior warning, have resulted in loss of employment.[57]

In view of the foregoing, I conclude that the Respondent has failed to show that the same action would have taken place in the absence of Burket's protected activities. I, therefore, find that his permanent layoff was in violation of Section 8(a)(3) and (1) of the Act.[58]

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[53] Threats to close the plant if the Union was designated also were made to other employees by management trainee Phiambolis. It had been found above that these threats were not effectively retracted by Rowan during his May 8 meeting with employees.

[54] The work rules breached by Burket which appear most applicable on their face are those prohibiting unauthorized absenteeism by employees from their work stations, idling on the job and engaging in personal work of any nature without authorization. All of these infractions are included under the progressive discipline policy and, in such instances, first offenses do not lead to summary discharge.

[55] Burket's impropriety was less severe than Linderman's as Burket was on straight time when found in his garden.

[56] When McWilliams and Bodnar were discharged in October 1978, the Respondent's published "Rules and Regulations of Personal Conduct" provided for immediate discharge for employees who knowingly punched or removed the timecards of other employees. Following the McWilliams-Bodnar incident, this rule was broadened to subject any employee to immediate discharge who knowingly punched or removed another employee's timecard or permitted it to be done by another.

[57] Contrary to the Respondent, even the gasoline purchase slips charged by Burket to the Company, and asserted by Kennedy as the reason for his trip to Burket's home on May 12, do not provide a consistent, proximate cause for his going there on that date. Burket's last fuel purchase was on May 7, 1 week before layoff. While Kennedy, at the state unemployment compensation hearing, had taken particular exception to a $14 charge by Burket, the last slip approximating that amount was dated May 1, almost 2 weeks before layoff. Burket made two gas purchases after that. As noted, in his testimony at the earlier state hearing as to reasons for going to Burket's home on May 12, Kennedy made no reference to a current reminder from Johnson concerning these slips and had never asked Burket to account for expenditures deemed unusual.

[58] *Pork King Company, Inc.*, 252 NLRB 99 (1980), cited by the Respondent, is not applicable. There, a shop steward, active in processing grievances, was discharged after he had left the ignition key in his truck while he went into an off-track betting office. This was learned by a supervisor who, on the stated concern that the steward had been taking too long to make deliveries, followed the steward on his truck route. The Board majority found that the steward had been lawfully terminated for exposing the respondent's truck and its freight to theft. In fact, the truck had been driven back to the employer's premises while the steward was still inside the betting office. In the present matter, Burket's infraction of working in his garden, while hardly to be condoned, afforded far less potential for employer loss than did the steward in *Pork King*, who had placed a truck and its cargo at hazard. The most significant difference, however, is that here, unlike *Pork King*, where a bargaining relationship was established, Burket's separation occurred close to the time of a representation election in the context of numerous unlawful acts by the Employer intended to discourage union activity and to defeat the Union.

D. *The Representation Case*

1. The challenged ballots

The Report on Challenged Ballots issued by the Regional Director found that challenges to the ballots of six individuals raised substantial issues which warranted a hearing.

a. Robert Burket

Burket's ballot was challenged by the Employer on the ground that he had been permanently laid off on May 12, 1980. Having found that Burket was discriminatorily discharged by the Respondent before the election in violation of Section 8(a)(3) and (1) of the Act, and thereby entitled to reinstatement, I further find that he was eligible to vote in the election conducted on May 16, 1980, and, therefore, recommend that the challenge to his ballot be overruled.

b. Wanda J. Wharton

The Employer challenged Wharton's ballot on the ground that she had been permanently laid off on February 15, 1980.

Wharton, who was hired in December 1978, and was employed in painting ceramic capacitors, was laid off twice by the Respondent. The first incident occurred in September 1979, and was announced by Plant Manager Kennedy who notified Wharton and other employees that he had to lay off a certain number of people in each department for a few weeks.

Wharton was recalled that November and continued to work in the ceramic division until February 15, 1980, when Plant Superintendent Myers summoned her and other employees to the office and announced that he was going to have to lay them off for 3 to 4 weeks because of lack of work.[59] Wharton testified that after her February layoff she returned to the plant on a number of occasions to check her recall prospects. On such an occasion in April 1980, she asked Myers how long she would be laid off. In response, Myers asked how long Wharton could collect unemployment compensation, to which she expressed belief that her benefits would not expire for 8 more months. Myers told her that it was his guess that she would be collecting unemployment compensation for that period of time. In June, Wharton obtained employment with another concern, where she was employed at the time of hearing.

At the hearing, the parties stipulated the names and seniority dates of seven employees, including Wharton, who were laid off on February 15 and March 21, 1980. Three of the employees so identified were employed in the oil-filled division and, unlike Wharton, did not report to Myers. Myers explained that Wharton and other ceramic division employees were laid off in February because of work reductions caused by a sales slump. Only the one senior-most employee of those laid off was thereafter recalled on September 8. Wharton was next in seniority.[60]

Myers testified that at the time of the February layoff, in response to questions by affected employees, including Wharton, Myers replied that he estimated that the layoff would last approximately 2 to 3 months. However, sales did not thereafter increase.

Myers related that between February 15 and the May 16 election date, Wharton returned to the plant several times to inquire about her status. During the first such conversation, Myers told Wharton that she might be recalled at some time in the future. However, as time passed, he told her that there had not been much change, that chances of recall did not look good and that he had no way of knowing how long she would be on layoff. The last time Myers spoke with Wharton, he told her that the situation looked even gloomier than before and that he was going to have to lay off additional people, persons senior to herself. Myers does not recall whether in April he had asked Wharton how much more unemployment compensation she could collect.

It is established that the entitlement of laid-off employees to vote in a representation election depends on whether such employees have a reasonable expectancy of recall in the near future. The determination of this expectancy, in turn, depends on objective factors, including the past experience of the employer, the employer's future plans, and the circumstances of the layoff, including what employees were told as to the likelihood of recall.[61] The appropriate time frame when determining expectancy of recall is the situation as it existed at the time of the election rather than subsequent developments.[62]

While Wharton did not know if her job benefits had been discontinued during her first described layoff, she was informed by Buss' secretary, Pearl, that such benefits were discounted following her February layoff.

The Respondent's adverse business climate at the time of Wharton's layoff, while not documented by company records, is illustrated by the stipulation describing the individuals laid off in the same period and what was done with respect to recall. Although seven persons were laid off, none were recalled by the date of the election.

I find it unnecessary to resolve on the basis of credibility any conflicting testimony between Wharton, that she, at first, had been told that the layoff would be for 3 to 4 weeks, and Myers' statement that he initially had given Wharton a hopeful estimate of from 2 to 3 months, as Myers concedes that when the layoff began, he had stated a belief that Wharton would be recalled sometime in the future. However, optimism dissolved as time passed with no improvement in sales. Myers' earlier expressed intent to recall Wharton, without more, is not dispositive of her actual expectancy of recall months later when the election was held,[63] and such hopeful statements were clearly superseded when, as the election day approached, Myers told Wharton that the recall situation was gloomier than before. According to both Myers and Wharton, after the initial layoff period, the latter clearly was given no encouragement as to recall, and her job benefits had been canceled throughout her period on layoff. Her recall from an earlier layoff during the preceding November, in view of the continued furlough of other employees and Myers' subsequent discouragement of her recall prospects, represented no assurance that she could expect recall.[64]

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[59] At the time of each layoff, Wharton signed a termination notice that she was being laid off for lack of work.

[60] As few employees could work interchangeably in both divisions because of differences in product and technology, it is not clear that Wharton could have been recalled to a position in the oil-filled division.

[61] *Precision Tumbling Company, Inc.*, 252 NLRB 1014 (1980).

[62] *Thomas Engine Corporation and Upshur Engine Co., Inc., d/b/a Tomadur, Inc.*, 196 NLRB 706, 707 (1972).

[63] *Precision Tumbling Company, Inc., supra.*

For the above reasons, I conclude that Wanda Wharton did not have a reasonable expectancy of returning to work. It, therefore, is recommended that the challenge to Wharton's ballot be sustained.

The Union challenged the ballots of Patricia Robins, John Hawk, C. Thomas Sheehan, and Margaret Wright as supervisors within the meaning of the Act.

c. *Patricia Robins*

Having found above in connection with the discussion concerning solicitation of grievances via the suggestion box that Robins, in the preelection period, had been authorized to interview, hire, assign work to, and discharge her respective secretaries, it was concluded that she was a supervisor within the meaning of Section 2(11) of the Act. It, therefore, is recommended that the challenge to Robins' ballot be sustained.

d. *John Hawk*

Hawk, hired by the Respondent in August 1979 as a maintenance worker, served as maintenance supervisor from January to September 1980, replacing Earl Myers who, during that period, was plant superintendent of the Respondent's ceramic division.[65] When Hawk became maintenance supervisor, the two maintenance workers, beside himself, divided their tasks according to their specialized skills. Ed LaMarche did most of the electrical work, Robert Burket usually worked on the oil-filled side, while Hawk, who continued to perform maintenance services, worked in both the ceramic and oil-filled divisions.

As an hourly rated maintenance supervisor, Hawk spent about 75 percent of his time in maintenance work and the remainder in ordering parts and related paperwork. He spent little time in making work assignments as the men were quite familiar with what had to be done and, having been with the Respondent longer than he, often worked on their own initiative. However, Hawk coordinated their assignments, and requests for maintenance services customarily were filtered through him.[66]

While Hawk was maintenance supervisor, no additions were made to the maintenance staff and Hawk was not called upon to interview, hire, discipline, or discharge any employee or recommend that such actions be taken.[67]

Before Hawk's promotion to Myers' maintenance supervisor position, Myers, while still maintenance supervisor, had effectively recommended the hiring of Burket. Although no pay raises were given to maintenance men while Hawk was maintenance supervisor, in March or April 1980, Kennedy had asked Hawk for a recommendation concerning a pay raise for Burket. When Hawk advised against this, Burket did not receive a pay increase. Also, it is clear from the testimony of both Burket and Kennedy in connection with Burket's permanent layoff, that maintenance employees were expected to seek Hawk's permission before leaving the plant during worktime[68] and that Hawk was responsible for knowing where they were. Employees also would notify Hawk if they were leaving early.

As the record shows that Hawk, while maintenance supervisor, was called on to make an effective recommendation concerning Burket's pay increase, was generally responsible for maintenance work performed in the plant, assigned work on a limited basis, could authorize employees to leave work early, and his approval was required before an employee could leave the plant during working hours on company business, I find that Hawk, while maintenance supervisor, was a supervisor within the meaning of Section 2(11) of the Act. In so concluding, it also is noted that while Hawk was not called on to hire or fire an employee or make recommendations concerning the same, Myers, while in that capacity, had effectually recommended Burket's hire. In assuming Myers' position as maintenance supervisor, without stated limitation, it would appear that Hawk also was vested with authority to effectively recommend hire.

Having found that Hawk during the preelection period was a supervisor within the meaning of the Act, it is recommended that the challenge to his ballot be sustained.

e. *C. Thomas Sheehan*

Sheehan, during the preelection period, was employed as a working leadman over pressing, machining, and firing (starting) the ceramic kilns. Four employees worked with him.[69]

His duties included setting up the five presses in his department, which then were run by the four operators who worked with him. Approximately 85 percent of Sheehan's time is spent in performing regular production work. During the balance, he does setup work and a certain amount of paperwork.

Assignments made by Sheehan appear to be routine as certain of his operators usually work on the presses and others principally do machining work. Work is generally assigned to employees on the basis of their respective skills and often is based on the job involved and which employee usually works the machine that produces the work required.

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[64] *All-American Distributing Co., Inc.*, 221 NLRB 980, 981 (1975).

[65] In September, when Myers again became maintenance supervisor, Hawk was returned to his original position as maintenance employee.

[66] On becoming maintenance supervisor, Hawk did not receive a pay increase, continued to be paid time and a half for overtime work, and received the same benefits as other hourly employees.

[67] As found, Burket was terminated in May. LaMarche was laid off by either Kennedy or Myers in July 1980, but not by Hawk.

[68] It is undisputed that Kennedy consulted with Hawk on May 12 to learn whether Burket had been authorized to leave the plant, his approved destinations, and time of departure.

[69] Sheehan was hired as a leadman and has worked in the same position during his 3 years with the Respondent.

However, in June 1978, Sheehan interviewed job applicant Steven Bodnar, Jr., who, thereafter, was hired. While Sheehan's role in Bodnar's hire is not clear, the record shows that in April 1979 Sheehan completed and signed the supervisor's final remarks on the employee termination notices of Clinton W. Cox and Ronald P. McLaughlin. On Cox's form, Sheehan had written "Excessive time off from work," while McLaughlin's form shows that he was terminated for "Excessive absence from work. Ronald's performance was good when he was working, but personal problems interfered with his attendance."

Sheehan explained that, when he is not satisfied with an employee's performance, he takes the employee to Kennedy's office, which was done with McLaughlin. When Sheehan, on that occasion, told Kennedy that McLaughlin was not doing a good job because he was not there most of the time, Kennedy told Sheehan to take care of it. Accordingly, Sheehan completed and signed McLaughlin's termination notice.

Sheehan, that month, also reported to Kennedy that Cox had missed too much time from work and did not call in. Kennedy told Sheehan to terminate Cox and to fill out the papers, which Sheehan did, effective April 25, 1979.

A third employee, Cheryl Mann, resigned from her job after Sheehan told Kennedy of her lack of interest and lost time. When Sheehan informed Mann that Kennedy wanted to discuss these matters with her, Mann resigned her position. Sheehan reported this to Kennedy and also completed and signed Mann's termination notice, effective November 29, 1979, noting as reasons "Missed time—lack of interest."

Sheehan also initialed timecards for employees who had forgotten to punch in, writing in times of arrival.

From the foregoing, it is clear that Sheehan has authority to evaluate employees and to effectively recommend discharge, which he has done. Having also been authorized to sign employee termination notices as the responsible supervisor, the record establishes that the Respondent had placed Sheehan in a position where employees could reasonably believe that he spoke on behalf of management in bringing about these terminations. Therefore, it is found that Sheehan is a supervisor within the meaning of Section 2(11) of the Act, and it is recommended that the challenge to his ballot be sustained.

f. *Margaret Elizabeth Wright*

During the preelection period, Wright worked alone in a clerical capacity in inventory control.[70] She received orders for capacitors from the sales department, checked computer reports to see what was needed to make the ordered capacitors, and determined from other computer printouts if the parts were in the warehouse or had to be ordered. Available parts were set aside, as required. Wright worked closely with the Respondent's purchasing agent, Robins, who, at Wright's request, would place orders. Wright, herself, did not deal with suppliers.

While in inventory control, Wright also worked closely with the warehouse. If the warehousemen did not function properly, this could affect Wright in that inventory reports used in the performance of her duties were not correct. Accordingly, while she was not specifically authorized to tell warehousemen how to do their jobs, she would do so from time to time, partly because of her personal nature and partly because of their impact on her work.

At Kennedy's request, she interviewed Michael Huffman for a warehouse job and, thereafter, reported to Kennedy that she had been impressed with Huffman's ability, had known Huffman personally, and recommended his hire. Thereafter, Kennedy engaged Huffman.

Wright also interviewed James Cook and two other applicants to fill a vacancy in the warehouse. She reported to Kennedy and management trainee Kuklewski that Cook was her first choice. Kuklewski also conducted his separate interviews of these applicants and, according to Wright, the decision to hire Cook was made by Kennedy and Kuklewski.

Thereafter, Wright recommended to Kennedy that Huffman and Cook receive pay increases. Wright explained that, after a probationary period of about 3 months, employees are entitled to be reviewed for pay raises. Wright had reminded Kennedy that Huffman had been with the Company for 3 months and asked if Kennedy would consider reviewing him. When Kennedy asked her opinion, she told him that, in her view, Huffman had been doing an excellent job in the warehouse.

After Cook had been with the Respondent for 3 months, Kennedy asked if Wright thought that Cook was doing a good job. She replied in the affirmative, that Cook was doing a good job and that he should get a pay raise. Thereafter, both Huffman and Cook received pay raises.

Wright, like the others whose ballots were challenged, was hourly paid, received time and a half for overtime work and had the same benefits as unit employees.

Noting that Wright could effectively recommend hire of and pay increases for warehouse personnel and that her views on these matters were sought by Kennedy, it is concluded that she was a supervisor within the meaning of Section 2(11) of the Act. In so concluding, it is noted that Wright had been involved by Kennedy in the process of interviewing various applicants to fill vacancies in the warehouse. While she may have proceeded on her own initiative in injecting herself into certain personnel matters, such efforts were not discouraged by management. It, therefore, is recommended that the challenge to Wright's ballot be sustained.

2. The objections to the election

The Union's objections to the election closely parallel certain of the unfair labor practice allegations set forth in the complaint, including the discriminatory discharge of Robert Burket and the Respondent's several threats, through various supervisors, to close the plant if the employees selected the Union as bargaining representative.

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[70] Wright began her employment with the Respondent in September 1978, working in inventory control. Since September 1980, she has been a production leadperson in ceramic assembly.

These unfair labor practices precluded the exercise of a free and uncoerced choice in the election.[71]

Therefore, having sustained the challenges to the ballots of Wanda J. Wharton, John Hawk, Patricia Robins, C. Thomas Sheehan, and Margaret E. Wright, and having overruled the challenge to Robert Burket's ballot, it is found that Burket's ballot should be opened and counted and that a revised tally of ballots be issued. In the event that the Union receives a majority of the valid ballots cast, a certification of representative should issue. In the event that the Union fails to receive a majority of the valid ballots cast, as there is substantial evidence that the Respondent has engaged in unlawful conduct during the period subsequent to the filing of the petition and prior to the election, it is concluded that the Union's objections to the election consolidated herewith be sustained and that a new election be scheduled at a time found by the Regional Director to be appropriate.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discharged Robert Burket in violation of the Act, I recommend that the Respondent be ordered to offer him reinstatement to his former position, or, if such job no longer exists, to a substantially equivalent job, and to make him whole for any loss of earnings and other benefits resulting from his discharge by payment to him of a sum of money equal to the amount he normally would have earned as wages and other benefits from the date of his discharge to the date on which reinstatement is offered, less net earnings during that period. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*,[72] with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*.[73]

It also is recommended that the ballot of Robert Burket be opened and counted and a revised tally of ballots issued. In the event that the Union receives a majority of the valid ballots cast, a certification of representative should issue. In the event that the Union fails to receive the majority of the valid ballots cast, the election in Case 4-RC-14152, held on May 16, 1980, should be set aside and a second election conducted at an appropriate time.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Coercively and repeatedly threatening employees with closure of its plant if they should select the Union as bargaining representative.

(b) Coercively interrogating an employee with respect to his union sympathies or activities, and those of other employees.

(c) Threatening to eliminate existing benefits, grant fewer pay raises, and impose stricter working conditions if its employees assisted or supported the Union.

(d) Soliciting grievances from employees to discourage them from selecting the Union to represent them.

(e) Offering assistance and otherwise encouraging employees to abandon support for International Brotherhood of Electrical Workers, Local 1448, AFL-CIO, and to form a company union.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging Robert Burket because of his activities and support for the Union.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent's unlawful conduct interfered with the representation election held on May 16, 1980.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[74]

The Respondent, High Energy Corporation, Parkesburg, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to close its plant if its employees select International Brotherhood of Electrical Workers, Local 1448, AFL-CIO, or any other labor organization as their bargaining representative.

(b) Coercively interrogating employees with respect to their union sympathies or activities, or those of other employees.

(c) Threatening employees with the imposition of stricter working conditions, elimination of benefits, and other reprisals because of their assistance to or support for the above-named union, or any other labor organization.

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[71] The Regional Director also had found that so much of Objection 2 as alleged that the Employer had interfered with the election by showing slides or movies of antiunion propaganda at meetings with employees be overruled.

[72] 90 NLRB 289 (1950).

[73] 231 NLRB 651 (1977). Also see *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[74] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Soliciting grievances from employees to discourage them from selecting the above-named Union, or any other labor organization, to represent them.

(e) Offering assistance and otherwise encouraging employees to form a company union, thereby inducing them to abandon support for the above-named labor organization.

(f) Permanently laying off, discharging, or otherwise discriminating against any employee because of his support for and activities on behalf of the above-named Union or any other labor organization.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Robert Burket immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay and other benefits in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its plant in Parkesburg, Pennsylvania, copies of the attached notice marked "Appendix."[75] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the challenge to the ballot of Robert Burket, cast in the election conducted in Case 4-RC-14152 on May 16, 1980, be overruled and the ballot counted,[76] and that the Regional Director for Region 4 shall issue and serve on the parties a revised tally of ballots. If the revised tally of ballots indicates that the Union has received the majority of the valid votes cast in the election, the Regional Director shall issue the appropriate certification. In the event the revised tally of ballots shows that the Union has not received a majority of the valid votes cast, the election shall be set aside and a new election scheduled at a time and place found by the said Regional Director to be appropriate.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations not found herein.

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[75] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[76] As found above, the challenges to the ballots of Wanda Wharton, John Hawk, Patricia Robins, C. Thomas Sheehan, and Margaret Wright have been sustained, and accordingly their ballots should not be counted.

The Bakery, Incorporated *and* American Federation of Grain Millers, AFL-CIO, Local 58. Case 8-CA-14856-2

December 16, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

Upon a charge filed on May 15, 1981, an amended charge filed on June 4, 1981, and a second amended charge filed on June 25, 1981, by American Federation of Grain Millers, AFL-CIO, Local 58, herein called the Union, and duly served on The Bakery, Incorporated, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint on June 29, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 23, 1981, following a Board election in Case 8-RC-12270,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about May 11, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so, and in addition has refused and continues to date to refuse, as requested by the Union, to provide the Union with information necessary for collective bargaining. On July 10, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 23, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 29, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause and a Cross-Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, its response to the Notice To Show Cause, and its Cross-Motion for Summary Judgment, Respondent admits its refusal to bargain with the Union and to supply the Union with the requested information. Respondent denies, however, that it thereby violated Section 8(a)(5) and (1) of the Act, arguing that the election held on November 13, 1980, should have been set aside for the reasons set forth in its exceptions to the Regional Director's Report on Objections to Election. Respondent also asserts that, since the Regional Director did not conduct a hearing on Respondent's objections to the election, all affidavits referred to and relied on in his Report on Objections should be included in and made part of the record in Case 8-RC-12270.

Review of the record herein, including the record in Case 8-RC-12270, shows that on November 13, 1980, an election was held pursuant to a Stipulation for Certification Upon Consent Election in which a majority of the unit employees designated the Union as their representative for purposes of collective bargaining. Thereafter, Respondent filed timely objections to the conduct of the election alleging, *inter alia*, that the Petitioner engaged in improper preelection offers to waive its initiation fee for any employee who joined the Petitioner prior to the election and that such conduct interfered with the holding of a free election. The objections were overruled in their entirety by the Regional Director in his Report on Objections, issued December 12, 1980. In so doing, the Regional Director stated that the only evidence that was presented concerning an objectionable waiver of initiation fees under *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1975), was the testimony of an employee witness that she believed she had been told by another employee that the waiver was contingent upon signing a union membership card prior to the election. The Regional Director found there was no evidence that the employee alleged to have made the statement was acting as an agent of the Petitioner and he concluded that such a statement by one employee to another employee would

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[1] Official notice is taken of the record in the representation proceeding, Case 8-RC-12270, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

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not constitute grounds for setting aside the election. Thereafter, Respondent filed with the Board its exceptions to the Regional Director's Report on Objections, essentially reiterating the allegations and contentions set forth in its objections and citing additional authority in support thereof. In addition, Respondent contended that, if the election were not set aside, the Board should order a hearing on the issues raised by its objections. On March 23, 1981, the Board issued its Decision and Certification of Representative[2] in which it adopted the Regional Director's findings and recommendations and certified the Union as the exclusive bargaining representative of the employees in the appropriate unit. In so doing, the Board found that the exceptions raised no issues requiring a hearing.

By letter dated April 29, 1981, the Union requested a meeting with Respondent to negotiate a collective-bargaining agreement and also requested certain information for purposes of collective bargaining.[3] By letter dated May 11, 1981, Respondent refused, and to date is continuing to refuse, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees and to furnish the Union with information requested by it for purposes of collective bargaining.

In opposing the General Counsel's Motion for Summary Judgment, Respondent contends that the affidavits and other materials relied on by the Regional Director in his Report on Objections should have been forwarded to the Board as part of the record in Case 8-RC-12270 and that the failure to do so renders the certification invalid. In support of this position, Respondent relies on decisions by various courts of appeals, including the Sixth Circuit's decision in *N.L.R.B.* v. *North Electric Company, Plant No. 10*, 644 F.2d 580 (1981).[4] However, in two recent cases[5] the Sixth Circuit has recognized that "Congress has entrusted to the Board considerable latitude in resolving disputes concerning representation . . ." and has declared that the "Court should be wary of reversing the Board on procedural irregularities absent evidence of prejudice." Specifically, the Sixth Circuit has reaffirmed the position taken in *N.L.R.B.* v. *Tennessee Packers, Inc., Frosty Morn Division*, 379 F.2d 172, 178 (6th Cir. 1967), cert. denied 398 U.S. 958, in which the court said:

> To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support findings contrary to those of the Regional Director. The Board is entitled to rely on the report of the Regional Director in the absence of specific assertions of error, substantiated by offers of proof.

Respondent has failed to meet the criteria set out by the court in Tennessee Packers. Thus, in its brief in opposition to the General Counsel's Motion for Summary Judgment, it failed to provide offers of proof to support findings contrary to those of the Regional Director. Consequently, we find that Respondent has failed to raise substantial and material issues that would require reconsideration of our decision in Case 8-RC-12270.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment.[7]

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[2] Not reported in volumes of Board Decisions.

[3] The information which the Union sought included the wages paid each employee, the classification of each employee, the hospitalization, life insurance, sickness and accident benefits, and any other benefits provided to employees and cost-of-living data.

[4] On October 5, 1981, Respondent filed a motion to take administrative notice of recently effective changes in the Board's Rules and Regulations. In its motion, Respondent directs the Board to the revisions to Sec. 102.69(g) of the Board's Rules and Regulations, Series 8, as amended, which appeared in the September 15, 1981, Federal Register (29 CFR 102; 46 F.R. 45922, *et seq.*) In response to Respondent's motion, on October 15, 1981, the General Counsel filed a cross-motion in which counsel for the General Counsel also moves the Board to take administrative notice of the revisions to the Rules and Regulations. Both Respondent's and the General Counsel's motions are granted to the extent they ask the Board to take administrative notice of the revisions to Sec. 102.69(g) of the Board's Rules and Regulations which appeared in the September 15, 1981, Federal Register; however, we reject Respondent's argument that these revisions are an admission by the Board that former Sec. 102.69(g) required the transmittal to the Board of statements of witnesses as part of the representation case underlying the proceeding herein. Rather we agree with the General Counsel's assertion that the supplementary information published with the revisions makes clear that in no-hearing cases "witnesses' statements always have been and 'still are' excluded from the record." Thus, the revisions support our finding that the full record in the underlying representation case was forwarded to the Board.

[5] *Reichart Furniture Co.* v. *N.L.R.B.*, 598 F.2d 66 (6th Cir. 1981); *Revco D.C., Inc., and/or White Cross Stores, Inc. No. 14* v. *N.L.R.B.*, 653 F.2d 264 (1981).

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] In light of our decision to grant the General Counsel's Motion for Summary Judgment, Respondent's Cross-Motion for Summary Judgment is hereby denied.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Ohio corporation, is located at 4063 Fitch Road, Toledo, Ohio, where it is engaged in the operation of a bakery. Annually, in the course of its business, Respondent receives goods valued in excess of $50,000 directly from points located outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

American Federation of Grain Millers, AFL-CIO, Local 58, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production employees, maintenance employees, and packing employees employed by the Employer at its 4063 Fitch Road facility in Toledo, Ohio, but excluding all office clerical, professional employees, guards and supervisors as defined in the Act.

2. The certification

On November 13, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 8, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on March 23, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 29, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. In addition, since on or about April 29, 1981, the Union by letter, has requested the Respondent to provide information including wages, classifications, hospitalization benefits, life insurance, sickness and accident benefits, cost-of-living data, and information on any other benefits provided by Respondent to its employees. This information is necessary for the Union's performance of its function as the exclusive bargaining representative of the unit employees. Commencing on or about May 11, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 11, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that Respondent has since that date and at all times thereafter refused to supply information requested by the Union, which information is necessary for collective bargaining. We find, that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. We shall also order Respondent to supply the information necessary for collective bargaining requested by the Union.[5]

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[5] See *Dynamic Machine Co.*, 221 NLRB 1140 (1975).

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Bakery, Incorporated, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Federation of Grain Millers, AFL–CIO, Local 58, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production employees, maintenance employees, and packing employees employed by the Employer at its 4063 Fitch Road facility in Toledo, Ohio, but excluding all office clerical, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 23, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 11, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing on or about May 11, 1981, to supply information requested by the Union including wages, classifications, hospitalization benefits, life insurance, sickness and accident benefits, cost-of-living data, and information on any other benefits provided by the Respondent to employees, which information is necessary for collective bargaining, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Bakery, Incorporated, Toledo, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with American Federation of Grain Millers, AFL–CIO, Local 58, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production employees, maintenance employees, and packing employees employed by the Employer at its 4063 Fitch Road facility in Toledo, Ohio, but excluding all office clerical, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to provide the above-named labor organization with information requested by it for purposes of collective-bargaining including wages, classifications, hospitalization benefits, life insurance, sickness and accident benefits, cost-of-living data, and information on any other benefits provided to its employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, provide the above-named labor organizaton with information requested by it for the purpose of collective bargaining, including wages, classifications, hospitalization benefits, life insurance, sickness and accident benefits, cost-of-living data, and information on any other benefits provided to its employees.

(c) Post at its Toledo, Ohio, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with American Federation of Grain Millers, AFL–CIO, Local 58, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to supply the below-described information requested by the Union which is relevant to and necessary for the purpose of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production employees, maintenance employees, and packing employees employed by the Employer at its 4063 Fitch Road facility in Toledo, Ohio, but excluding all office clerical, professional employees, guards and supervisors as defined in the Act.

WE WILL provide the Union with information requested by it for the purpose of collective bargaining, including wages, classifications, hospitalization benefits, life insurance, sickness and accident benefits, cost-of-living data, and information on any other benefits provided to our employees.

THE BAKERY, INCORPORATED

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Local 32E, Service Employees International Union, AFL-CIO *and* Cadillac Fairview Shopping Centers (U.S.) Ltd. d/b/a The Galleria. Case 2-CP-700

December 17, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 23, 1981, Administrative Law Judge Edwin H. Bennett issued the attached Decision in this proceeding. Thereafter, Respondent filed an exception, and the General Counsel filed a letter-brief in support of the Administrative Law Judge's Decision, and an answer to Respondent's exception, and the Charging Party filed a brief in opposition to Respondent's exception.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Local 32E, Service Employees International Union, AFL-CIO, Elmsford, New York, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge: This proceeding was heard on January 26, 1981, on a complaint which issued November 3, 1980, and on a charge filed on October 17, 1980, by Cadillac Fairview Shopping Centers (U.S.) Ltd. d/b/a The Galleria (herein called the Charging Party or Employer). The complaint alleges, *inter alia*, that Local 32E, Service Employees International Union, AFL-CIO (herein called Respondent or the Union), violated Section 8(b)(7)(C) of the National Labor Relations Act, as amended (herein called the Act), by its picketing of the Employer for recognition in a unit of guards, notwithstanding that the Union could not be certified for such unit because it admits to membership employees other than guards. An answer was filed by Respondent by its attorneys of record, Miller & Bush, in which it specifically denied certain allegations of the complaint and made no response to certain other allegations. The allegations specifically denied were that the Employer employed guards within the meaning of Section 9(b)(3) of the Act; that Respondent admits to membership employees other than guards; and that Respondent could not be certified for a guard unit by virtue of its admissions policy and the provisions of Section 9(b)(3) of the Act (par. 8 (b) of the complaint).

By its failure to specifically deny the other allegations of the complaint, Respondent is deemed to have admitted the following allegations: service of the charge; the jurisdictional allegations of the Employer; and the fact that it is engaged in commerce within the meaning of the Act, that Respondent is a labor organization within the meaning of the Act, that certain officials are agents of Respondent, that Respondent threatened to and did picket the Employer for an object of compelling the Employer to recognize Respondent as the collective-bargaining representative of its guards and security officers and to force or require said employees to accept Respondent as their collective-bargaining representative, and that Respondent could not be certified as the collective-bargaining representative of said employees nor could it file a valid petition pursuant to Section 9(b)(3) of the Act (par. 13 of the complaint). Further, by failing to deny that its conduct described above was in violation of Section 8(b)(7)(C) of the Act that also is deemed admitted. Nevertheless, presumably because of the specific denials as aforesaid and the apparent inconsistencies in the answer, a hearing was conducted at which the General Counsel proceeded as if it was put to its proof on all material allegations. Notwithstanding proper and sufficient notice of the hearing, Respondent failed to have any representative appear on its behalf and the hearing was conducted with the General Counsel and the Charging Party introducing evidence by way of witnesses and exhibits.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Charging Party, I make the following:

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[1] We find no merit in Respondent's only exception which contends that the Administrative Law Judge's failure to grant it a further postponement of the hearing was arbitrary and capricious and a denial of Respondent's right to a hearing. The record shows that Respondent's counsel received a postponement pursuant to its request for a new Board hearing date, and, subsequent to the establishment of such new hearing date, established a trial court hearing date which created a conflict with the Board hearing date previously agreed upon and established by Respondent's counsel.

[2] In the absence of exceptions on the merits, we adopt *pro forma* the Administrative Law Judge's findings and conclusions that Respondent violated Sec. 8(b)(7)(C) of the Act by threatening to picket the Employer, and by picketing the Employer, with an object of forcing or requiring the employees of the Employer to accept or select Respondent as the collective-bargaining agent of its guard employees, although Respondent cannot be certified as a representative of such employees by virtue of Sec. 9(b)(3) of the Act, inasmuch as it admits to membership employees other than guards.

Member Fanning also finds it unnecessary in this proceeding to reach the merits. However, it is his position that Sec. 8(b)(7)(C) of the Act does not prohibit threats by a union to picket an employer with an object to require recognition of a unit guards, nor does it bar a nonguard union from engaging in any picketing to gain recognition and bargain for a unit of guards. See *General Service Employees Union Local 73 (Certain Teed Corp.)*, 240 NLRB 462 (1979), and cases cited in his dissent therein.

FINDINGS OF FACT

I. JURISDICTION

The Employer operates a shopping mall in the city of White Plains, New York, called the Galleria, in which approximately 150 retail establishments of various kinds are situated on 4 levels. The mall is open for shopping 6 days a week from 10 a.m. to 9 p.m. and on Sunday from noon to 5 p.m. Among the tenants from whom the Employer annually derives gross revenues in excess of $100,000 is a large department store known as Abraham and Strauss from whom revenues are derived in excess of $25,000 annually. Abraham and Strauss in turn has revenues in excess of $500,000 annually, and has goods and materials delivered to its New York State locations from outside said State in excess of $50,000 annually. The answer, as noted, does not deny and I now find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

The mall opened for shopping to the public on August 1, 1980, but appears to have had many employees working prior to that date who became covered by a collective-bargaining agreement entered into between the Employer and the Union on said date.[1] In said agreement the Union was recognized as the exclusive collective-bargaining representative of the approximately 80 "Housekeeping Employees" at the mall engaged in custodial and cleanup work. Specifically excluded from the unit were, among others, "all security employees." The agreement contains union-security and dues-checkoff clauses which have been applied to the unit employees. In the performance of their housekeeping duties the employees wear various uniforms depending upon their particular job. Thus, those who were engaged primarily in cleaning functions wear a brown colored outfit while those working in the food service areas wear red and white pinstripe jackets. The only equipment used by them are those incidental to and required by their assignments, e.g., mops, brooms, cleaning paraphenalia, etc. Respondent's agent servicing the agreement is one Joan Kelly who has met on occasion with the members of the Employer's managerial staff to discuss various issues arising thereunder.

In addition to a cleaning service, the Employer also provides security and protective services at the mall. To accomplish this objective it employs a security force of 25 persons both full and part time, working three shifts a day, 7 days a week, thus furnishing 24-hour coverage. These 25 employees are directed by 5 sergeants, 2 lieutenants, and 1 captain. They all wear military type uniforms and a police type hat with the Employer's logo pin on the front. The uniform, which consists of a brown shirt and slacks, has on the arm of the shirt the Employer's logo as well as a security patch, and a name tag is worn on the shirt front which shows name and rank. In addition they wear shields with an identifying number and rank as well as the words "Galleria Security." The uniforms also reflect the rank of the wearer by the usual military emblems for sergeants, lieutenants, and captains. All the security personnel carry flashlights approximately 18 inches, which also can be used as a defensive weapon, two-way radios, and handcuffs.

Captain Robert Jackson, a former New York City police officer, testified in great detail concerning the duties and functions of the security force which is under his overall supervision. All the security employees receive training from the city of White Plains police department in matters such as the applicability of state laws pertaining to shoplifting, criminal trespassing, harassment and assault, first aid, self-defense, and how to detain and arrest a criminal suspect. When the mall is closed to the public, security personnel patrol the grounds to guard against unauthorized entry and fire hazards. Any intruder is placed under arrest and a call is made to the White Plains police department. If they have reason to believe there is a suspicious situation, such as unlocked doors to a store, they notify either the police or the owner of the store and guard the area until such authorities arrive. When the mall is open for normal business, they are concerned with insuring the safety of customers and security generally within the mall and its stores. Again, they patrol the grounds to observe for any suspicious or illegal activity such as shoplifting or disorderly conduct. If they apprehend a shoplifter they place that person under arrest by escorting the individual to the security office within the mall and call for the police. When required, they engage in surveillance of a store in order to identify and apprehend shoplifters. They control crowds and unruly individuals, and they apply first aid in the case of an accident and place a call for appropriate medical assistance. They will issue notices to disruptive or disorderly individuals prohibiting them from reentering the mall under penalty of arrest for criminal trespass. In the performance of their duties they are required to fill out written reports in detail describing any arrests they make, illegal activity they observe, or accidents they attend to.

No other employees of the Employer perform any of the duties delineated above and most of the tenants in the mall depend for their security on the services funished by the Employer as performed by the security force. It was estimated by Jackson that perhaps no more than six of the merchants in the mall employ individuals in a security or guard capacity, and then only during business hours. However, even in those instances the Employer's security force renders assistance as a regular practice, and, when the mall is closed, it is the Employer's security force alone that guards against breaking and entering and against fire hazards.

On September 5, Henry F. Chartier, Respondent's president, wrote to the Employer's manager of the mall, Larry Brown, stating that the Union had been designated by the Employer's "security guards" as their "collective-bargaining agent" and for that reason he was scheduling

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[1] Unless otherwise indicated all dates hereinafter are in 1980.

September 11 for Brown to meet with him to discuss an "agreement covering wages, hours, working conditions and benefits for such employees." At or about the same time, a business agent of Respondent, Joseph DiBucci, had a few telephone conversations with Brown in which DiBucci stated that a majority of the security guards had designated Respondent as their collective-bargaining representative and accordingly Respondent was requesting that the Employer sign a collective-bargaining agreement.

On September 30, Brown replied by letter to Chartier that on advice of counsel the Employer would not recognize Respondent as the bargaining agent for the security guards. On October 17, Brown had a telephone conversation with Raymond McDonough, Respondent's vice president, in which the latter again stated that Respondent represented a majority of the guards and that it would be "mutually beneficial" if they could sit down and work out an agreement. According to Brown, when he replied that the Employer would not recognize Respondent in a guard unit, McDonough stated, "[H]ow many trucks, truck drivers do you think will cross over and make deliveries at the Galleria? How many construction workers do you think will cross over and work in those stores?"

On Monday, October 20, at approximately 8 a.m. Respondent began picketing on the perimeter of the mall. Approximately 15 to 20 pickets including security employees, patrolled at the public entrances with picket signs bearing Respondent's name and a legend stating that the employees were on strike. The picketing continued on almost a 24-hour basis until it was enjoined by a temporary restraining order issued by a Federal district court pursuant to Section 10(l) of the Act on October 24, 1980. During the course of that picketing on or about October 23, Kelly, who was present during the picketing, told Brown that the picketing would cease if a contract were signed. In her district court testimony, Kelly swore that the purpose of the picketing was to secure recognition of the guards. One of the Employer's guards who participated in the picketing activity, Donna Varian, told Captain Jackson at the picket line, that the employees were picketing in order to have Respondent represent them. On October 22, Respondent filed a petition[2] in the National Labor Relations Board's Region 2 office in Case 2-RC-18864, in which, *inter alia*, it requested an election in a unit consisting of "customer security personnel" excluding all others. The petition further referred to the fact that a request for recognition had been made on September 5. On October 23, the petition was dismissed by the Regional Director for the stated reason that Respondent admitted to membership employees other than guards, that the unit consisted of guards as defined by Section 9(b)(3) of the Act and consequently Respondent could not be certified pursuant to the provisions of Section 9(b)(3) of the Act. On January 12, 1981, the Board issued a "Ruling on Administrative Action" in which the Board considered the Union's request for review of that dismissal and "concluded that the allegations are insufficient to warrant reversal." The Board therefore affirmed the dismissal of the petition.[3]

III. DISCUSSION AND FINDINGS

Section 8(b)7(C), *inter alia*, prohibits a labor organization from picketing for a recognitional or organizational objective beyond a reasonable period of time not to exceed 30 days. However, such picketing is not proscribed if within that reasonable time the labor organization has filed a petition pursuant to Section 9(c) of the Act. In the instant case, the Union did file such a petition in which it claimed that a substantial number of employees in the proposed unit wished to be represented by it for purposes of collective-bargaining and that it desired to be certified as such representative, thereby seeking to avoid any restraint on its picketing. But Section 9(b)(3) of the Act provides, in pertinent part, that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." Harmonizing Sections 8(b)(7)(C) and 9(b)(3) of the Act the Board, with court approval, held in *General Service Employees Union Local No. 73, affiliated with Service Employees International Union, AFL-CIO (A-1 Security Co.)*, 224 NLRB 434 (1976) (see fn. 9 and cases cited therein), enfd. 578 F.2d 361 (D.C. Cir. 1978), that a union which is disqualified from certification because of the applicability of Section 9(b)(3) may not avail itself of the statutory right granted other labor organizations to engage in recognitional picketing. Such picketing by a disqualified union, or even a threat to picket, constitutes a violation of Section 8(b)(7)(C). Under these circumstances, it is reasoned that any period of picketing by a union which carries the 9(b)(3) disqualification would be unreasonable because no valid petition could be filed. Accord: *General Service Employees Union Local No. 73, affiliated with Service Employees International Union AFL-CIO (Active Detective Agency)*, 240 NLRB 462 (1979). The General Counsel and the Charging Party assert that the facts and circumstances of the case at bar place Respondent's picketing and threats thereof squarely within the rationale of the aforesaid holdings. I agree.

In the first place, notwithstanding the Union's denial that it admits to membership employees other than guards, the evidence clearly and unmistakably establishes otherwise.[4] Guards are defined by Section 9(b)(3) of the

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[2] The petition was signed by Algernon M. Miller, of the Miller & Bush law firm as the Union's general counsel.

[3] This ruling was brought to my attention in the Charging Party's brief.

[4] The Board action upholding the dismissal of the Union's petition in Case 2-RC-8864, including the underlying reasons for the Regional Director's finding that Sec. 9(b)(3) disqualified the Union from obtaining a certification for the unit of guards requested, is binding on me. *Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 71, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Wells Fargo Armored Service Corporation)*, 221 NLRB 1240, 1242 (1975). However, because the General Counsel litigated these issues fully and is not seeking to rely solely on the previously made administrative findings, it is only appropriate that I address the issues on the basis of the record evidence.

Act as individuals employed "to enforce against employees and other persons rules to protect property of the Employer or to protect the safety of persons on the Employer's premises." Quite apart from whether the Union by virtue of its ties to its parent international organization is directly or indirectly affiliated with an organization which admits to membership employees other than guards, and quite apart from whether the Union by virtue of its represenative status elsewhere itself admits to membership employees other than guards (matters the General Counsel would have hoped to prove had Respondent appeared and complied with certain subpenas), the evidence is overwhelming that with respect to the very Employer herein the Union represents employees other than guards and admits such persons to membership. The collective-bargaining agreement between the Union and the Employer as applied to the housekeeping unit is conclusive proof on this issue. The testimony establishes without any doubt whatsoever that there are approximately 80 employees within this unit whose duties consist solely of the performance of custodial and janitorial chores such as cleaning floors, polishing glass and chrome, and cleaning tables in food areas, and that they use standard cleaning equipment and materials. In no sense can they be considered guards and it is clear they are not. Further, not only does Respondent represent these employees but it compels their membership pursuant to the union-security and checkoff provisions in the collective-bargaining agreement.

The second question to be determined is whether or not the Respondent was seeking to represent a unit of guards. Although the Union's answer admits that it was picketing the Employer to force it to recognize and bargain with it as the representative of the Employer's guards and security officers, the answer also somewhat inconsistently denies that the Employer employed individuals as guards and security officers. In view of this, I place no reliance on Respondent's answer in finding that it demanded to be recognized as the bargaining agent for the Employer's guards as that term is defined by the Act. The evidence leaves no doubt that the "security personnel" encompassed by the Union's petition are statutory guards. The uniforms they wear and the equipment they carry are typical of such employees and aid them in performing their duties which includes apprehending shoplifters and other law violators. They protect the security of merchandise against theft from the stores in the mall, and they guard and protect the premises of the mall itself. They perform safety functions by administering first aid, attending to the injured, and securing competent medical help when needed. Their training by the White Plains police department is required so that they may fulfill effectively the function of arresting wrongdoers and barring such persons from the premises of the mall and they are required to have a knowledge of applicable criminal laws to carry out these protective functions. They also patrol the mall's premises to guard against fire as well as theft. Thus, they are trained to and function in the capacity of protecting the safety of persons and the safeguarding of property by responsibly observing and reporting infractions of the rules and laws and by physically securing property and apprehending those who violate such rules and laws. Such individuals long have been recognized as guards within the meaning of Section 9(b)(3) even where, as here, certain of the protective duties they perform are designed to secure and safeguard not only their employer's property, i.e., the premises of the mall proper, but also the property of their employer's customers such as the merchandise in the stores. *Purolator Courier Corp.*, 254 NLRB 599 (1981), and cases cited therein; *The Wackenhut Corporation*, 196 NLRB 278 (1972); see, generally, *Drivers, Chauffeurs, Warehousemen and Helpers Local No. 71, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *N.L.R.B.*, 553 F.2d 1368, 1372, 1373 (D.C. Cir. 1977).

It is clear therefore and I find that Respondent admits to membership employees other than guards, that it was seeking recognition for a unit of guards, and that pursuant to Section 9(b)(3) of the Act it could not file a valid petition and could not be certified in such unit. Consequently, if the Union picketed or threatened to picket for such recognitional objective the violation would be complete.

The Union admits that it has engaged in picketing for recognition of the individuals found here to be guards and no more need be said on that score. Furthermore, the record evidence demonstrates conclusively that Respondent's picketing was for the prohibited recognitional objective. Thus, the picketing on October 20 closely followed numerous demands for recognition starting in early September, a petition filed on October 22 and dismissed on October 23, Respondent's agent, Kelly, and one of the picketing guards conceded that the picketing was to obtain recognition and Kelly also told the Employer's representative, Brown, during the course of the picketing, that such activity would cease if a collective-bargaining agreement would be negotiated. In addition, Union Agent McDonough told Brown, during the course of a prepicketing conversation in which recognition was requested that "how many trucks, truckdrivers do you think will cross over and make deliveries at the Galleria? How many construction workers do you think will cross over and work in those stores?" These statements in labor parlance are susceptible to no other interpretation than that a picket line would be established which in fact is what occured. As such they constitute a threat to picket for recognition as alleged in the complaint.

Under the circumstance described above, Respondent's picketing and threat thereof constitute clear violations of Section 8(b)(7)(C), for as the court stated in *Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 71, etc.* [*Wells Fargo Armored Service Corporation*], 553 F.2d 1368 at 1377 (1977), enfg. 221 NLRB 1240 (1975). "To tolerate continued picketing after dismissal of the Union's petition would bestow on petitioner greater rights than are afforded qualifying unions, and would, in particular clothe the Union with a coercive power under circumstances in which Congress clearly did not intend it to exist."

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. Cadillac Fairview Shopping Centers (U.S.) Ltd. d/b/a The Galleria is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Since on or about September 5, 1980, Respondent has demanded that the Employer recognize and bargain with it as the representative of guard/employees although Respondent has not been, at any relevant time, the certified or recognized collective-bargaining representative of said employees.

4. Respondent admits into membership employees other than guards and is barred by Section 9(b)(3) of the Act from obtaining certification as the collective-bargaining representative of employees in a bargaining unit comprised of guards.

5. Respondent violated Section 8(b)(7)(C) of the Act by threatening to picket the Employer, and by picketing the Employer, with an object of forcing or requiring the Employer to recognize or bargain with Respondent as the representative of the Employer's guards, or forcing or requiring the employees of the Employer to accept or to select Respondent as their collective-bargaining agent, although Respondent has not been certified as a representative of such employees and cannot be certified by virtue of Section 9(b)(3) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(7)(C) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Local 32E, Service Employees International Union, AFL-CIO, Elmsford, New York, its officers, agents, and representatives shall:

1. Cease and desist from picketing, causing to be picketed, or threatening to picket Cadillac Fairview Shopping Center (U.S.) Ltd. d/b/a The Galleria, where an object thereof is forcing or requiring Employer to recognize or bargain with Respondent as the collective-bargaining representative of employees who function as guards, or forcing or requiring employees who function as guards to accept or select Respondent as their collective-bargaining representative, under circumstances where Respondent has not been certified as the representative of such employees and cannot be certified by virtue of the provisions of Section 9(b)(3) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post in conspicuous places at its business offices, meeting halls, and all places where notices to members customarily are posted copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms to be provided by the Regional Director for Region 2, shall, after being duly signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 2 for posting by the Employer, if willing, at all locations where notices to its employees customarily are posted.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT picket, cause to be picketed, or threaten to picket Cadillac Fairview Shopping Center (U.S.) Ltd. d/b/a The Galleria, where an object thereof is to force or require that Employer to recognize or bargain with Local 32E, Service Employees International Union, AFL-CIO, as the collective-bargaining representative of employees who function as guards, or force or require employees who function as guards to accept or select Local 32E as their collective-bargaining representative, under circumstances where Local 32E has not been certified by the National Labor Relations Board as the representative of such employees and cannot be certified by virtue of the provisions of Section 9(b)(3) of the National Labor Relations Act.

LOCAL 32E, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations ofthe National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Cote Bros. Bakery, Inc. ***and*** **Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO.** Cases 1-CA-17666 and 1-CA-17762

December 17, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On July 9, 1981, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, a motion to reopen the record, and a motion to dismiss.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Cote Bros. Bakery, Inc., Manchester, New Hampshire, its officers, agents, successors, and assigns. shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten to discharge employees who engaged in a lawful strike by telling them that they are "through" if they continue to engage in the strike.

WE WILL NOT insist, to the point of bargaining impasse, on nonmandatory subjects of bargaining, including an amnesty for all our employees who pass through or work behind the Union's picket line.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively in good faith with Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, in the below-described unit with respect to wages, hours, and other terms and conditions of employment and embody any understanding reached in a signed agreement:

> Bakery Production Department, Porters, Plant Maintenance and Shipping Departments, excluding Executives, office and clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL, upon their unconditional offer to return to work, reinstate the strikers to their old jobs, dismissing, if necessary, any replacements hired in their place, except where such replacements occurred before June 24, 1980, and make them whole for any loss of earnings that they may incur, with interest. Striking employees who were premanently replaced or whose jobs were abolished before June 24, 1980, shall be offered jobs when and if the pre-

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[1] Respondent moves to reopen the record to adduce evidence that its assets have been foreclosed and are being liquidated, and that an involuntary bankruptcy petition has been filed against the Company. Inasmuch as this evidence if established would not in any way affect the findings and result herein, see Sec. 102.48(d)(1) of the Board's Rules and Regulations, Series 8, as amended, and inasmuch as such matters are more appropriately handled at the compliance stage of this proceeding, we decline to grant Respondent's motion. For the reasons discussed by the Administrative Law Judge in fn. 10 of his Decision, we also deny Respondent's motion to dismiss.

[2] Respondent has implicitly excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In agreeing with the Administrative Law Judge that Respondent violated Sec. 8(a)(5) of the Act, we find it unnecessary to pass upon the alternative theory (which he characterized as "legally unnecessary" to decide) which he discussed in pars. 9 and 10 of the section of his Decision entitled "Discussion and conclusions" and in the section entitled "The Strike as of June 24, 1980."

We note that the Administrative Law Judge inadvertently miscited *Nelson Filter, a Division of Nelson Industries, Inc.* The correct citation is 255 NLRB 1080 (1981).

Finally, we shall conform the Administrative Law Judge's notice with his recommended Order.

259 NLRB No. 101

manent replacements leave, or when positions become available for which they are qualified.

COTE BROS. BAKERY, INC.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: The charge in Case 1-CA-17666 was filed and served on July 15, 1980, by Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, herein called the Union or Local 348, upon Cote Bros. Bakery, Inc., herein called Respondent. The charge in Case 1-CA-17762 was filed and served by the Union on August 19, 1980, on Respondent. The Regional Director for Region 1 of the National Labor Relations Board, herein called the Board, acting for and on behalf of the Board's General Counsel, issued a complaint and notice of hearing on October 15, 1980. Pursuant to the second charge herein, the aforesaid Regional Director, on January 25, 1981, issued an order consolidating cases and amended complaint and notice of hearing. Respondent filed timely answers to both the original and the amended complaint on October 23, 1980, and January 15, 1981, respectively. The consolidated amended complaint, herein referred to as the complaint, alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by virtue of various alleged threats to employees on June 10 and 11, 1980, after the commencement of a strike and by virtue of a refusal to bargain by Respondent as shown by certain acts it committed during collective-bargaining negotiations occurring on June 24, 1980. The complaint, as modified at the hearing, also alleges that the strike, which commenced on or about June 10, 1980, was converted into an unfair labor practice strike on or about June 24, 1980. In its answers Respondent admits various allegations of the complaint but denies the commission of any unfair labor practices.

Pursuant to notice, a hearing was held on the issues raised by the pleadings in Boston, Massachusetts, on May 13 and 14, 1981. After close of receipt of the evidence, the parties waived oral argument and thereafter filed timely briefs which have been duly considered.

Upon the entire record in this case, including the briefs, and upon my observation of the witnesses as they testified, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that, at all material times, Respondent, a New Hampshire corporation, maintained its office and principal place of business at 87 Elm Street, Manchester, New Hampshire, where it has been, and is now, engaged in the manufacture, sale, and distribution of bread and rolls, annually shipping products valued in excess of $50,000 directly to points outside the State of New Hampshire, and annually receiving products valued in excess of $50,000 directly from points located outside the State of New Hampshire. Respondent, at all material times, has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

At the hearing, the General Counsel and Respondent substantially amended their respective pleadings: The General Counsel withdrew various allegations of independent violations of Section 8(a)(1) of the Act. Respondent admitted that it and the Union were parties to a collective-bargaining agreement effective from May 4, 1977, through May 7, 1979, encompassing the following unit:

> Bakery Production Department, Porters, Plant Maintenance and Shipping Departments, excluding Executives, office and clerical employees, guards, professional employees and supervisors as defined in the Act.

Respondent, in addition, also admitted that the above unit is one appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and that since on or about 1951 the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the above unit[1] and had been recognized as such by Respondent for purposes of Section 9(b) of the Act until on or about June 30, 1980.

The parties agree that the Union engaged in an economic strike commencing at or about noon, June 10, 1980, but the General Counsel alleges, and Respondent denies, that the strike became an unfair labor practice strike on June 24, 1980. There is no dispute that the strike continued through the time of the hearing herein.

It is admitted by the General Counsel that Cote Bros. Bakery has been in substantial financial difficulty at least since 1979. At all material times from the end of 1979 until June 1980, Respondent maintained an $800,000 debt to the Indian Head Bank, Nashua, New Hampshire, herein called the Bank. By June 1980, Respondent had defaulted on repaying this loan and was insolvent in excess of $323,000. Furthermore, for at least 6 months prior to June 1980, Respondent had defaulted on its obligation to pay contributions to the Union's pension fund under an expired collective-bargaining agreement (G.C. Exh. 2; expired May 7, 1979), which agreement had been orally extended by the parties subsequent to its expiration. Lastly, Respondent had been in default of paying the interest on its bank debt for at least that same 6-month period. Negotiations regarding a new collective-bargaining agreement occurred from time to time since expiration of the old agreement.

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[1] The actual collective-bargaining representative prior to June 1, 1979, was another local of the same International. On June 1, 1979, that local was merged into Local 348.

By April 1979, the Bank had employed a financial consultant, Charles R. Hefford, to review and evaluate Respondent's financial condition and prospects. In a report to the Bank (not presented at this hearing), Hefford advised the Bank that, notwithstanding Respondent's defaults, it need not at that time take over Respondent's assets (apparently pursuant to its right as a creditor) and that Respondent could continue as a viable business provided various internal changes and economies were instituted. Thereafter, Hefford became a financial consultant to Respondent.[2]

Sometime no later than May 1980, in bargaining with Respondent, the Union demanded an economic package which consisted of a 92-1/2-cent-per-hour increase. The Bank authorized Respondent to offer no higher than a total of 30 cents per hour: 17-1/2 cents per hour for maintenance of existing benefits; and a 12-1/2-cent-per-hour wage increase. Respondent made this cnunteroffer in May 1980.

In support of its continued claim of financial inability to pay higher wages, it is undisputed that as early as October 1979 Respondent offered, and the Union agreed, to have the Union inspect its books and records. The Union did so on or about October 3, 1979. I further find that, at all material times thereafter, Respondent has offered to prove its continued financial inability to pay greater economic increases.

On June 10, 1980, the parties held a collective-bargaining session in which the Union demanded 92-1/2 cents per hour as a total economic package. Respondent offered 30 cents per hour and offered to prove, again, its inability to make a more fruitful economic offer. The Union nevertheless insisted on its demand of 92-1/2 cents per hour and engaged in an economic strike commencing at or about noon on that day. At noon, a picket line was authorized by the Union's officials, including Kenneth McLellan, an International vice president of the Union.

At the start of the June 10 strike, Bruce Ullrich, general manager of Respondent, telephoned Louis Murray, a senior vice president and chief loan officer of the Bank, for help and counsel. He told Murray that the Union apparently did not believe Respondent's poor financial position and that perhaps Murray and the Bank could convince the Union that Respondent was unable to pay more.

Within a half hour, Murray, together with the Bank's attorney and another bank official, arrived at Respondent's bakery, met with Ullrich and asked Ullrich what they could do. They decided that the Bank, as a "neutral third party," should speak to the Union's officials in the absence of Ullrich (or any other of Respondent's supervisors) and denonstrate to them Respondent's financial difficulties. Murray also credibly testified that, at that time, he considered it to be a prudent act, in protecting the Bank's interest, to activate the legal machinery to take over Respondent's assets but, pursuant to a telephone call from Respondent's attorney, he acceded to the request not to do so for at least 1 day.

Louis Murray testified that he agreed with his attorney (Horton) and the other bank official (O'Brian) that there would be no negotiations by the Bank with any union people and no involvement in Respondent's union affairs. Their only function was to demonstrate Respondent's unhappy financial position to the Union. Thus, at their request, Ullrich went to the picket line and returned with several union business agents and officers, including McLellan and Local 348 Business Manager David Murray, as well as several picketing employees. Ullrich left them. With the union business agents as well as the striking employees standing in Respondent's loading area, a conversation ensued between the parties. Local 348 Business Manager David Murray testified that Bank Vice President Louis Murray said that if a strike continued for 2 days Respondent would "fold." He said that Bank Official O'Brian added that the Bank had given Respondent the 30-cent-per-hour economic package and, if the Union did not believe Respondent's financial condition, the Union could inspect the books. David Murray said that he answered that the Union knew of Respondent's financial problems; the Union had given Respondent a 1-year extension without increases and believed that they already had an agreement for a zero increase for the first year of a new contract and 75 cents per hour for the second year. O'Brian then allegedly answered that the Bank had told Respondent that it could offer only 30 cents per hour and was telling the Union the same thing. The Union said that the strike would continue.

Frank Volpe, a Local 348 business agent, testified that the bank officials not only said that Respondent would have greater financial problems if the strike continued, but the Bank would foreclose its loans to Respondent and sell Respondent's equipment and everybody would lose their jobs.

Louis Murray, who on June 10 caused O'Brian, to serve Respondent with a demand for payment of the defaulted loan, testified that he told the union officials and the employees that the Bank was there not to negotiate or get involved between the parties but merely as an independent third party; that the Bank's interest concerned whether to foreclose its loan and liquidate Respondent's business; that Respondent was $361,000 into insolvency; that "any slowdown of revenue coming in could have a fatal impact on the Company"; and that the Union should "draw its own conclusions as to what would happen with the continuation of the strike." He denied telling them that a continuation of the strike would force Respondent to close or even mentioning 30 cents per hour or anything with regard to negotiations. He testified that he told the employees and union officials only that he was there as a third party giving the Bank's point of view with regard to Respondent's financial condition.

B. *Louis Murray's Statements as Alleged Violations of Section 8(a)(1)*

The complaint alleges that Respondent, by the Bank's officials as its agents, told the employees that the Bank would foreclose and the employees would lose their jobs if the employees continued to strike. Respondent contests this agency status, but no finding on the point is necessary since I dispose of the Bank's action on the merits.[3] The General Counsel did not call McLellan to corroborate the testimony of Volpe and David Murray. Similarly, Respondent called neither its attorney (Horton) nor its agent (O'Brian) to substantiate and corroborate the testimony of Louis Murray.

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[2] There is no suggestion that he remained an agent of the bank.

I resolve the testimonial conflict between the Bank and the union officials as follows. I conclude that Louis Murray did tell the assembled union officers and employees that continuing the strike would cause Respondent such loss of revenue as to cause it to fold, and that the Bank would foreclose the loan, and sell the equipment and everybody would lose their jobs if the strike continued. That is the meaning of his "draw [your] own conclusions remark." I also conclude that Louis Murray's and the other bank officials' statements to the union officials and employees, that a continued strike meant such a loss of revenue as to necessarily cause the Bank to foreclose, Respondent to go out of business, and the employees to lose their jobs, in the presence of the objective financial data known to the Union for at least 6 months, were insulated from any coercive effect as an unlawful "threat" within the meaning of the Act. Thus, such statements, in conjunction with Louis Murray's unchallenged testimony that, in the Bank's interest, it should have immediately taken over and liquidated Respondent's assets and that it contemporaneously presented a demand to Respondent for payment of its defaulted loan (as a legal preliminary to taking over Respondent's assets), were based on clear and open economic data which demonstrated a reasonable belief on the Bank's part that Respondent could not continue in business suffering the anticipated economic losses due to the strike. This is legally far different from an attempt, without objective, supporting economic data, by an employer to coerce employees into giving up their right to strike by a threat to go out of business. The Supreme Court recognized this in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969). Under *Gissel*, I conclude that Louis Murray's statements concerning Respondent's going out of business ("draw [your] own conclusions") in the face of a loss of revenue due to the strike was a "reasonable prediction based on available facts." *Gissel, supra* at 618. Certainly, there is no evidence of the Bank's insincerity in making these predictions. I therefore recommend that paragraph 8(d), which alleges an independent violation of Section 8(a)(1) of the Act by virtue of the bank officials' June 10 statements to Respondent's striking employees of a threat to go out of business, be dismissed.

C. *Other Alleged 8(a)(1) Violations*

According to the testimony of Scott Tuthill, an employee engaged in the June 10 strike, he met Bruce Ullrich in the bakery parking lot in the afternoon on June 10 while the strike was in progress. He testified that Ullrich approached him and told him that he was trying to get a shift together for that night to continue to work; that if Tuthill wanted to come to work he could; but that if the strike continued, the plant would close permanently. Ullrich denied having any such conversation with Tuthill. I credit Tuthill and discredit Ullrich. I do so on the basis of the specificity of Tuthill's recollection and on the demeanor of the witnesses. I conclude, nevertheless, that Respondent did not violate Section 8(a)(1) of the Act by telling Tuthill, a striking employee, that Respondent would close its plant permanently if the employees continued to strike. I note that, although economic elements were mentioned by Ullrich to Tuthill, the statement was insulated by the then existing facts, above stated. I recommend that this allegation be dismissed.

The only remaining alleged violation of Section 8(a)(1) is in paragraph 8(b) and involves Respondent's vice president, Colette Cote, and a telephone conversation she had with striking employee John Shea in the evening on June 11, 1980. According to Shea, Cote telephoned him at his home and asked him to return to work and he replied that he would not do so without the Union's approval. To this, Shea testified, Colette Cote said that if he did not return that day, "You're through."

Cote could not recall any particular conversation with John Shea, although she testified that she telephoned 30 of the 60 striking employees in order to have them return to work because, as she told them, the Company had decided to operate and was trying to get a shift together. Cote testified that she told all 30 employees whom she telephoned that Respondent was merely trying to start a production line and asked them to return. While she could not recall what Shea answered, she denied telling him, or any other employee, that they were "through" if they did not return to work.

On the basis of his demeanor and the specificity of his testimony, together with the particular lack of recollection of Cote regarding her conversation with him, I credit Shea and conclude that, as alleged, Cote told him that, if he did not return to work that day, he was "through"; and that such statement was a threat of discharge uttered to a striker in violation of Section 8(a)(1) of the Act. This is far different from an objective prognostication of going out of business.

D. *The Alleged 8(a)(5) Violations*

1. The collective-bargaining session of June 17, 1980

Following the June 10 bargaining session which resulted in the strike of that day, the Federal Mediation and Conciliation Service called a further meeting for June 17, 1980. The Union's witnesses, particularly David Murray and Frank Volpe, testified that at Respondent's attorney's (Bennett) request the Union's full committee of employees and union agents selected and worked principally through a subcommittee consisting of Volpe, David Murray, and McLellan (succeeded by Joseph Thibodeau at meetings after June 17). The testimony is in dispute as to whether at this June 17 collective-bargaining session the parties resolved the question of the Union's acceptance of Respondent's outstanding offer of a 30-cent-per-hour economic package. Contrary to the testimony of Respondent's witnesses Ullrich and Hefford, I credit the particular testimony of Volpe, who testified that the union subcommittee, at that bargaining session, agreed to present the 30-cent-per-hour package to the full committee, that the full committee ultimately agreed to recommend the 30-cent-per-hour package to the membership, and that the subcommittee so notified Respondent.

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[3] Were a finding necessary, I would conclude that Respondent used the bank officials to persuade the Union of Respondent's insolvency and the economic consequences of a continued strike. Within the scope of such activities, they were Respondent's agents.

Further, I conclude, while the ultimate question of whether the subcommittee told Respondent that the Union was going to recommend to the membership the 30-cent-per-hour economic package is not dispositive and while this is not an "acceptance" of Respondent's offer, I also make the subsidiary finding that at the beginning of the meeting (after the Union acknowledged that it knew that Respondent was in deep financial trouble) Respondent initially inquired whether the Union was prepared to submit Respondent's offer to its membership with an affirmative recommendation. While the Union at first said that it would submit the recommendation without comment, it then agreed to meet with the full committee on the matter and submit it to them. It was after this caucusing that the subcommittee returned and, as above noted, told Respondent that the Union would recommend the 30-cent-per-hour package to the membership. I also find that it was Union Vice President McLellan who, before caucusing with the full committee, told Respondent that the Union would submit the 30-cent-per-hour wage package "without recommendation." I conclude that after caucusing the Union notified Respondent that it was prepared to recommend the 30-cent-per-hour economic package to the membership for a vote, and that the vote, in accordance with Respondent's request, would be by secret ballot.

At the time of this June 17 meeting, the strike was in progress for 1 week. During the meeting, and before the Union's caucus to consider acceptance of the economic package, Ullrich told the Union of a number of incidences of strike misconduct affecting some (about 17) employees who had crossed the picket line and worked for Respondent during that week. Ullrich read off a list of allegations of attempted rape, scratching and painting cars, and threats to employees who crossed the picket line. McLellan denied knowledge of the incidents but added that he would pass the word that the members should abstain from violence.

I further find that, after the subcommittee returned and advised Respondent that the Union committee would recommend the 30-cent-per-hour economic package, Respondent (Bennett) said "great" but that the parties still had to resolve the problem of protecting the working employees against any threats or reprisals from the returned strikers. I find, in accordance with Ullrich's testimony, that Bennett and Ullrich told the Union that Respondent sought to protect employees who crossed the picket line and any "new hires." Ullrich and Bennett told the Union of Respondent's concern with the Union's anticipated retaliation against its members who crossed the Union's picket line. David Murray recalled that, when Respondent, through Ullrich and Bennett, demanded a contract provision that there be no reprisals against the employees who crossed the picket line, McLellan said that what Respondent was asking for was against the International constitution; that members had a right to bring charges against other members; and that, in view of the fact that he thought that there was an existing agreement, that Respondent had "doublecrossed" the Union. McLellan recalled that, in addition, he told Bennett that while the Union could not agree to a provision against reprisals against members who crossed the picket line because the members had a right to file charges under the union constitution, the union officers had no interest in taking reprisals against such members. Volpe's testimony corroborates David Murray's and McLellan's credited testimony.

Charles R. Hefford, present at the meeting as Respondent's financial consultant, credibly recalled that, when the Union stated that it could not bind the membership from making charges against the members who crossed the picket line, but that the officers had no interest in taking retaliation, Bennett or Ullrich said that such an assurance from the Union was not sufficient and that Respondent wanted an assurance against retribution or retaliation by the membership. He recalled Ullrich saying that the union officers' assurance, as it stood, was not good enough; and that Respondent needed an agreement against retaliation from any quarter against the employees who passed through the picket line since they were the older, experienced employees needed by Respondent to operate. He recalls that Respondent called them its "key" people. Ullrich recalled that McLellan said he hoped Respondent was not trying to tell him how to run "his Union."

I credit Hefford's testimony that at that point McLellan said that, since there could be no agreement with regard to the issue of retribution or retaliation against members who had crossed the picket line, he would not present Respondent's 30-cent-per-hour economic offer to the membership. At that point, after McLellan said that the members had a constitutional right under the International constitution to file charges against members who crossed the picket line, Bennett asked for a copy of the constitution to see what the members' rights were. McLellan said that he did not have a copy of the constitution with him but would provide Bennett with a copy thereafter, and suggested that Bennett, as a lawyer, might find a way around this problem. A copy of the constitution was subsequently served on Bennett.

Volpe credibly testified, and Ullirch's and Hefford's testimony supports the conclusion, that this June 17 meeting broke up after Bennett said that Respondent could not allow the employees who crossed the picket line to have problems and would have to have an agreement that these "key people" would not be subject to any union retribution either by having them fired by the Union through loss of union membership or through the imposition of heavy union fines which might cause them to quit their employment.

2. The collective-bargaining session of June 24, 1980

The Federal Mediation and Concilation Service called a meeting on June 24. The meeting opened with the mediator asking the Union to explain its International constitution and the members' right to file charges against members who crossed the union picket line.

Attorney for Respondent (Bennett) then stated that since he had been provided with the copy of the union constitution between the two meetings, and the Union had rejected a premeeting suggestion that the Union exact a token $25 fine on each member who had crossed through the picket line, the way around the problem of union retaliation was that the Union agree to an "agency shop." Bennett said that an agency shop would require merely the payment of union dues and fees without requiring union membership and that the union members who had crossed the picket line could neither be heavily fined nor retaliated against. This would permit their continued employment as key people by Respondent. The Union refused to agree to the offer. Thereafter, Bennett suggested, and the Union rejected, an agreement for an initial 1-year agency shop to be followed by the reinstitution of a union-shop provision in the second year of a 2-year contract. The Union told Respondent that it would not agree to any form of agency shop.

David Murray recalled that at that point Attorney Bennett asked whether the Union could discharge the employees who crossed the picket line and the Union responded that it could not and even gave reasons (not disclosed in this record either by direct examination or cross-examination) why it could not cause a discharge of such employees. David Murray testified that after the Union again said that the union officials would not retaliate, and would even recommend to its members that *they* take no reprisals but could not guarantee that, Bennett said that he agreed that the Union had done everything possible and that he understood and approved of the Union's action. I do not credit David Murray's further testimony that Bennett then said that the parties had "an agreement." I do, however, credit Volpe's testimony that at the June 24 meeting the Union told Respondent that, in the intervening week since the June 17 meeting, the union committee had met with the employee-members and that the members would not cause problems with reprisals against members who had crossed the picket line. This substantially corroborates David Murray's testimony that at one point Bennett said that he agreed that the Union had done everything possible and that he understood and approved of the Union's conduct with regard to gaining as much as possible from the membership with regard to an assurance and agreement against the filing of retaliatory charges by union members against those who crossed the picket line.

According to the General Counsel's witnesses, particularly David Murray, Volpe, and International Union Representative Thibodeau (who on June 24 had replaced McLellan), Bennett then said, after hearing union assurances (there would be no trouble from the union membership in filing charges against members who had crossed the picket line), that in order to help insure the protection of employees who had crossed the picket line from retaliation by individual members Respondent required the right to "pick and choose" from among the returning striking employees since some of the strikers were responsible for alleged acts of violence and intimidation against the members who had crossed the picket line. Thibodeau testified that he could not recall the latter phrase being used: that the Company wanted to pick and choose because it did not want to reinstate those responsible for violence. I do not credit Thibodeau's lack of recollection, and I conclude that such a right was linked with the question of Respondent's desire to pick and choose among employees, rejecting those whom it thought responsible for various acts of intimidation and violence. Thibodeau, in any event, denied asking Bennett why or who he wanted to pick and chose.

Volpe testified that Bennett, after hearing that the Union had met with the unit employees regarding the filing of charges, said that the parties had another problem and that Respondent wanted to pick and choose from among those strikers who returned. Volpe recalled that the Union's response was that it could never agree to that, that the meeting broke up, and that the bargainers returned to the picket line. Volpe could not recall any linkage between the alleged violence and Respondent's desire to pick and choose. As aforesaid, I find that there was a linkage mentioned by Respondent between its desire to pick and choose from among returning strikers and its appraisal of whether the strikers were engaged in acts of violence or intimidation.

3. The June 24 collective-bargaining session according to Respondent's witnesses

Hefford recalled that the Federal mediator, at the conclusion of the June 17 collective-bargaining session, stated that he saw the possibility of progress if the retaliation or "retribution" issue could be addressed. He recalled that the opening of the June 24 session concerned the question of the Company's desire for assurances protecting the employees who crossed the picket line during the strike; and that, after the Union rejected Bennett's suggestions both of an agency shop and of a secondary variation requiring a union shop following 1 year of an agency shop, Bennett said that the Union had also rejected an intermediate position taken during the period between the collective-bargaining sessions (of a $25 fine for members who had crossed the picket line) and that it now seemed to him that the Union actually did want to take retaliation against those members who had crossed the picket line during the strike. Ullrich then added that Respondent was in the business of selling bread "not people."

Hefford and Ullrich denied that any "pick and choose" statement was ever made by Respondent, that Respondent ever expressed the desire to pick and choose from among returning strikers, and that seniority among returning picketers was ever discussed; and both assert that the meeting broke up only after the Union could not give assurances to Respondent against retaliation or retribution against members who had crossed the picket line.[4]

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[4] To the extent Respondent asserts (br., p. 4) that at the June 24 session Respondent stated that the issue of union reprisals against nonstriking employees who returned to work was no longer in issue, such assertion is not supported by the evidence and is rejected. Similarly rejected is Re-

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Ullrich testified that the only statement remotely concerning "picking and choosing" was made at the June 17 meeting when he said that, if Respondent caught any of its employees engaging in violence or intimidation, Respondent would prosecute such employees and they would then have a hard time returning to work for Respondent.

Thus, Hefford and Ullrich denied that any "pick and choose" condition was attached to any agreement. Rather, Ullrich and Hefford testified that the June 24 collective-bargaining session broke up because and after Bennett asserted that the Union evidently desired to take retaliation against the members who had passed through the picket line and Ullrich said that Respondent sold bread and not people. They thus *deny* not only that there was a "pick and choose" condition attached by them after reaching an agreement on union retaliation (as the General Counsel's witnesses testified), but also that there was any agreement on retaliation. They testified that the June 24 session broke up only because of the Union's refusal to give assurances from its members that there would be no retaliation against the members who had passed through the picket line and worked during the strike.

4. Discussion and conclusions

The complaint (par. 13) alleges a violation of Section 8(a)(5) of the Act because Respondent, on or about June 24, 1980, demanded as conditions of agreement that (1) the Union agree not to take reprisals against union members who did not honor the picket line, and (2) Respondent be given power to choose the striking employees who would be allowed to return to work. In addition, the complaint, as amended at the hearing, alleges that the economic strike of June 10 was converted, on June 24, 1980, by Respondent's demand for the imposition of the aforesaid conditions, into an unfair labor practice strike.

At the hearing the parties appeared to take the position that in order to resolve the above issues it was necessary to first decide whether the parties had reached an agreement on an economic package, and, if so, whether such an agreement established a basis for violation of the Act if the only remaining elements at issue were the questions of a union guarantee against reprisals and alleged demand by Respondent of a right to pick and choose from among returning striking employees. The Board precedents fail to suggest that an agreement on some or all economic or other elements is necessary in order to establish an 8(a)(5) violation.

The instant case is not concerned with surface bargaining, unlawful action to forestall reaching an agreement, or alleged overall bad-faith bargaining in violation of Section 8(a)(5). Rather, it is concerned with the narrow problem of whether Respondent unlawfully insisted to "impasse" on matters which Sections 8(a)(5) and 8(d) of the Act do not permit to form the basis of an "impasse" and whether such tactic on June 24 converted the June 10 economic strike into an unfair labor practice strike upon Respondent's insistence on such conditions.

Thus, the resolution of the question of whether the parties agreed to Respondent's 30-cent-per-hour economic package or, indeed, whether the Union agreed to submit to its membership the 30-cent-per-hour package with a recommendation for acceptance (as the General Counsel suggests) or with a neutural recommendation (as Respondent argues) is not dispositive. The question to be resolved with regard to Respondent's bargaining stance is solely whether it refused to bargain within the meaning of Section 8(a)(5) of the Act by insisting on either or both of the elements alleged in paragraph 13 of the complaint, as set forth above.

If Respondent's witnesses are to be believed, Respondent's main bargaining issue and problem was its desire for, and demand to receive, assurances from the Union that there would be no retaliation against the Union's members who had passed through its picket line and worked during the strike. These assurances were of two types: (1) assurances with regard to their physical safety and (2) assurances that Respondent would neither levy fines against them nor cause them to lose union membership, nor, in any event, exercise any rights to have them discharged or retaliated against so that the employees would either quit or no longer be able to work for Respondent. Thus, Hefford and Ullrich insisted that Respondent and the Union could not agree on the Union's ability to give sufficient assurances against retaliation against the union members who had worked during the strike and continue to work for Respondent.

Since the Union denied knowledge of and responsibility for the acts of alleged violence and intimidation, and Respondent, apart from physical safety, was most concerned about (1) the filing of charges by union members which might result in fines against key personnel who might then leave Respondent's employ and (2) the power of the Union to cause key personnel to lose union membership and perhaps thereby run afoul of the contract's union-security clause (G.C. Exh. 2, art. I) requiring union membership as a condition of employment, I conclude that what caused impasse here was the Union's inability to satisfy Respondent's desires with regard to protecting its key personnel from retaliatory action by the union membership. Thus, Ullrich testified, with regard to Respondent's demand that the "key personnel" be protected, that on June 24 Attorney Bennett said that the Union's rejection of both the "agency-shop device" and the "small fine device" forced Bennett to affirmatively conclude that the Union did want to take retaliation against the members who had worked behind the picket line. Thus, after Ullrich said that Respondent sold bread and not people, the parties left and there were no further bargaining sessions or meetings.

Respondent's demand as a condition of agreement that the Union, in substance, guarantee by contract provision that its members would not take action or file charges which would result in discipline, including fines, of the members who crossed the picket line and worked (and continue to work) for Respondent, obviously related to matters of internal union affairs. The Board has clearly

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spondent's contention (br., p. 5) that impasse resulted from Respondent's insistence on a new union-security clause in the contract. Respondent, in any event, appears to admit (br., p. 19) that it insisted on a guarantee against reprisals binding on all union members as a condition of agreement. Alone, impasse on such an issue is unlawful.

held that internal union affairs are not mandatory subjects of bargaining[5] included within the terms, wages, hours, or other terms or conditions of employment. While not illegal subjects of bargaining, they are merely "nonmandatory" subjects of bargaining. *Nordstorm, Inc., supra; Fetzer Broadcasting Company*, 227 NLRB 1377, 1387 (1977). An employer may not *insist* that a union accept provisions which intrude on the disciplinary powers over its members expressly reserved to unions by the proviso to Section 8(b)(1)(A) of the Act.[6] *Independent Stave Company*, 175 NLRB 156, 159 (1969). In *Nordstorm, Inc., supra*, the Board held that a proposal that employees who crossed the picket line be granted amnesty from union discipline was a nonmandatory subject of bargaining.

Thus, if *Respondent's* witnesses' version of the basis for disagreement and the breakup of bargaining at the June 24 collective-bargaining session is credited, the parties reached disagreement, and ceased thereafter to bargain, on the Union's refusal to accede to Respondent's demand that the Union agree that there would be no union retribution from its members against the members who had crossed the picket line. Under the above cited cases, Respondent's insistence on such a clause relates to a nonmandatory subject of bargaining, and insistence to impasse, as here, on such a nonmandatory subject of bargaining violates Section 8(a)(5) of the Act.[7] As I have said above, it is immaterial whether the parties had reached agreement on other mandatory subjects of bargaining. Respondent's insistence, as a condition of agreement, upon the Union's agreeing to a nonmandatory subject of bargaining violates Section 8(a)(5) and (1) of the Act. I will recommend that Respondent cease bargaining to impasse on this, *and any other nonmandatory issue.*

It is thus, it seems to me, legally unnecessary for remedial purposes to reach or decide the further question posed by any crediting of the General Counsel's witnesses who testified that on June 24 agreement was reached on the issue of retaliation when Respondent, through Respondent's attorney, Bennett, said that the Union's efforts in having its members not make charges against the members who had passed through the picket line, although not a guarantee, were understood by Bennett and acceptable by him. They also testified that Bennett said that there was a further problem, however, in that Respondent insisted on the right to pick and choose from among the remaining striking employees for the existing jobs in their return to work.

Insistence to impasse on such a right would violate Section 8(a)(5) of the Act since many, if not most, of the strikers apparently had not been permanently replaced as of June 24 and were unfair labor practice strikers. While the issue of reinstatement of economic strikers may be a mandatory subject of bargaining (*Nordstrom, Inc., supra* at 610, fn. 16, citing *Pepsi-Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477 (1970); *Midwestern Instruments, Inc.*, 133 NLRB 1132, 1141 (1961)), here some of the strikers appear to be unfair labor practice strikers. If an agreement to treat unfair labor practice strikers as economic strikers for purposes of reinstatement is of no effect and is in derogation of the strikers' rights and contravenes Board policies (*Nordstrom, Inc., supra; Wooster Division of Borg-Warner Corp.*, 121 NLRB 1492, 1495 (1958)), then an employer's demand to impasse that it be accorded the right unilaterally to decide whom to reinstate from among unfair labor practice strikers would be insisting on a right the Union may not give; i.e., an unlawful condition under *N.L.R.B. v. Wooster Division of Borg-Warner Corp., supra*. Insistence to impasse on such a demand would violate Section 8(a)(1) and (5) of the Act.

As above noted, however, I need not reach or decide this issue since the remedy would be the same if agreement were reached on the issue of union retaliation but a new impasse occurred on Respondent's alleged demand of unilateral power to pick and choose among returning strikers.

F. *The Strike as of June 24, 1980*

As above noted, I regard as immaterial and, in any case, not dispositive the resolution of the question whether the parties had reached agreement on many or, indeed, all other subjects of bargaining on June 24. The issue with regard to the conversion of the admitted June 10 economic strike into an unfair labor practice strike on June 24 is whether unfair labor practices on June 24 precipitated, in whole or in part, the continuation of the strike. Again, it is not a question of whether there were open issues involving mandatory subjects of bargaining which remained unsettled; rather, the issue is whether Respondent's insistence upon nonmandatory (or unlawful) subjects of bargaining, in whole or in part, caused the continuation of the strike. *Tufts Brothers, Inc.*, 235 NLRB 808, 810 (1978). While it might be argued that there was no agreement on the economic package, there is no question that the economic package appeared on its way to resolution and, indeed, would have been submitted to the unit by the union representatives (according to Respondent's witnesses, without the union's recommendation, by a secret-ballot vote, which procedure was satisfactory to Respondent). What caused the breakup of the June 24 collective-bargaining session and the continuation of the strike was Respondent's insistence (on the evidence adduced from its own witnesses) on the Union's agreeing, as a condition to overall agreement, to have its members not seek or engage in any disciplinary acts or charges against the members who worked, and continue to work, for Respondent during the strike and who had passed through the picket line. I have concluded that such insistence was unlawful within the meaning of Section 8(a)(5) since Respondent was insisting to impasse on a mere permissible bargaining subject (*N.L.R.B.* v. *Wooster Division of Borg-Warner Corp., supra* at 350; *Nordstrom, Inc., supra* at 609; *Independent Stave Co., supra* at 159); and I further conclude that Respondent's insistence to impasse on this nonmandatory subject of bargaining was the predominant, if not the entire, cause of the continuation of the 15 strike on and after June 24, 1980. *N.L.R.B.* v. *Laredo Coca Cola Bottling Company*, 613 F.2d 1338 (5th Cir. 1980); *Latrobe Steel Company*, 244 NLRB 528 (1979). Again, I would reach the same conclusion if the General Counsel's witnesses were credited: that the collective-bargaining session of June 24 failed because of Respondent's insistence to impasse on a right to pick and choose among the striking employees (who, after June 24, were unfair labor practice strikers) concerning their return to jobs with Respondent. *Nordstrom, Inc., supra* at 609, citing *Wooster Division of Borg-Warner Corp., supra* at 1495. I might note, in passing, that regardless of whether the right to pick and choose from among returning *economic* strikers is a mandatory subject of bargaining (especially including the method and means by which they are returned to jobs), where the number of jobs available is less than the number of outstanding striking employees (cf. *Nelson Filter, a Division of Nelson Industries, Inc.*, 255 NLRB 131 (1981); *United Aircraft Corporation (Pratt and Whitney Division)*, 192 NLRB 382 (1971)), what respondent here was insisting upon was not an agreement and schedule with regard to picking and choosing and was not bargaining towards such an agreement, but was (to impasse) the unilateral right to do so. Such a position, not bargaining, would from the outset arrogate to Respondent the sole right to pick and choose from among striking employees. Such conduct would be the arrogation to itself of the power concerning a subject (return of striking employees to their jobs) which the Union was vitally involved in. Such conduct, as I have suggested, likewise would have violated Section 8(a)(5) of the Act if the issue were actually reached.

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[5] Mandatory subjects of bargaining (*Nordstorm, Inc.*, 229 NLRB 601, 609 (1977), citing *International Union of Operating Engineers, Local Union No. 12 (Associated General Contractors of America, Inc., etc.)*, 187 NLRB 430, 432 (1970)) "are those comprised in the phrase 'wages, hours, and other terms and conditions of employment' as set forth in Section 8(d) of the Act. While the language is broad, parameters have been established, although not quantified. The touchstone is whether . . . the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees." Cf. *First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666 (1981).

[6] The proviso to Sec. 8(b)(1)(A) states: "[T]his paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

[7] The Supreme Court, in *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), cited in *Nordstrom, Inc., supra*, at 609:

> [G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining . . . . [S]uch conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects . . . . *But it does not follow that, because the company may propose these* [*nonmandatory*] *clauses, it can lawfully insist upon them as a condition to any agreement*. [Emphasis supplied.]

CONCLUSIONS OF LAW

1. Respondent Cote Bros. Bakery, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employees engaged in an economic strike, or or about June 10 or 11, 1980, that they were "through" if they did not return to work and abandon the strike, Respondent violated Section 8(a)(1) of the Act.

4. By insisting to impasse on a nonmandatory subject of bargaining on June 24, 1980, Respondent violated Section 8(a)(5) of the Act.

5. By unlawfully insisting to impasse, on June 24, 1980, on a nonmandatory subject of bargaining, Respondent thereby and then converted the economic strike, which commenced on June 10, 1980, into an unfair labor practice strike.

6. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

The General Counsel concedes that there is no monetary loss involved in this case. The parties agree that the strike, which originated on June 10, 1980, is still in progress and that the Union and the striking employees, as of the time of the hearing, have failed to offer unconditionally to return to their jobs.

Having found that Respondent is engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, Respondent will be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The remedies herein will relate, *inter alia*, to the employees engaged in an economic strike from June 10 through June 23, 1980. With regard to the period June 10 through June 23, 1980, the record is unclear concerning how many employees crossed the picket line and returned to work, when and for which jobs permanent replacements were hired, how many jobs remained available for the strikers in the period ending June 23, 1980, and which, if any, jobs were abolished. The determination of such matters is better left to the compliance stage of the proceeding. *Marlene Industries Corporation, et al.*, 255 NLRB 1446 (1981). In any event, the rights of the economic strikers whose jobs were filled by permanent replacements between June 10 and 23 are governed by the Board's rule in *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). In restating the *Laidlaw* rule, in *Giddings & Lewis, Inc.*, 255 NLRB 742 (1981), the Board declared that economic strikers who unconditionally apply for reinstatement are to be reinstated; but, when their positions are filled by permanent replacements, they are entitled to full reinstatement either upon the departure of the permanent replacements or when jobs for which they are otherwise qualified become available (*Flatiron Paving Company, d/b/a Flatiron Materials Company*, 250 NLRB 554 (1980)), unless they have in the meantime acquired other regular and substantially equivalent employment or the employer can sustain its burden of proof that the failure to offer reinstatement was for legitimate and substantial business reasons. It will therefore be recommended that, upon these economic strikers' or the Union's (in their behalf) making an unconditional offer to return to their old jobs, Respondent offer them their old jobs; but to such strikers whose jobs were permanently filled on or prior to June 23, 1980, their rights to jobs in the bakery will be subject to the above rights, conditions, and limitations.

With regard to the striking employees whose jobs were not filled by permanent replacements on and before June 23, 1980, or whose jobs were not abolished in that period, or, in any case, where jobs for which they are qualified have become available after any such permanent replacement or abolition, I will recommend that their rights be governed by the rules relating to the reinstatement of unfair labor practice strikers. Cf. *Nelson Filter, a Division of Nelson Industries, Inc., supra; Latrobe Steel Co., supra.* Thus, any permanent replacements hired on and after June 24, 1980, or any new hires for jobs which were opened commencing on that date for which the strikers were qualified, must be dismissed for the benefit of any striker who makes an unconditional offer for reinstatement to his old job which job, as above noted, was not filled before June 24, 1980, when the economic strike ceased. Thus, I shall recommend to the Board that, upon the Union's or the employees' offer unconditionally to abandon the strike and return to their old jobs, Respondent shall reinstate and recall the formerly striking employees to their old jobs, or to vacancies in jobs for which the strikers are qualified, dismissing, if necessary, any employees incumbent in those jobs who were hired on or after June 24, 1980.

The Board's rule also requires that unfair labor practice strikers be made whole for any loss of earnings they may have suffered as a result of Respondent's refusal, if any, to reinstate them in a timely fashion by paying to each of them that which he would have earned as wages in the period commencing 5 days after the date on which each unconditionally offers to return to work to the date of Respondent's offer of reinstatement, less any net earnings during such period, said backpay to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

The Board's further rule is that if Respondent has already rejected, or hereafter rejects, unduly delays, or ignores, any unconditional offer by employees to return to work, or attaches unlawful conditions to its offer of reinstatement, the above 5-day period serves no useful purpose, and backpay will commence as of the unconditional offer to return to work. *Newport News Shipbuilding and Dry Dock Company*, 236 NLRB 1637 (1978).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Cote Bros. Bakery, Inc., Manchester, New Hampshire, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with discharge by telling them that they are "through" if they do not return to work and abandon a lawful economic strike.

(b) Refusing to bargain in good faith with Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, by insisting to bargaining impasse upon amnesty from union discipline for employees who are members of the Union who crossed the Union's picket line and worked during a lawful strike, or upon any other nonmandatory subject of bargaining, in the following appropriate unit:

> Bakery Production Department, Porters, Plant Maintenance and Shipping Departments, excluding Executives, office and clerical employees, guards, professional employees, and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with the Union, as the exclusive collective-bargaining representative of all its employees in the above-noted appropriate unit, with respect to wages, hours, and other terms and conditions of employment, and embody any understanding reached in a signed agreement.

(b) Upon their unconditional offer to return to work, reinstate the strikers to their old jobs, dismissing, if necessary, any replacements hired in their place, except where such replacements occurred before June 24, 1980, and make them whole for any loss of earnings that they may incur in the manner set forth in the section of this Decision entitled "The Remedy." Striking employees who were permanently replaced or whose jobs were abolished before June 24, 1980, shall be offered jobs when and if the permanent replacements leave, or when positions become available for which they are qualified.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, seniority records, timecards, collective-bargaining agreements, personnel records and reports, and all other records necessary to analyze the basis for the reinstatement of economic and unfair labor practice strikers and the amount of backpay, if any, due under the terms of this recommended Order.

(d) Post at its plant at 87 Elm Street, Manchester, New Hampshire, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not specifically found herein.[10]

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[10] Bearing the date of June 26, 1981, Respondent filed a post-trial motion, supported by an annexed affidavit of the same date (herein ALJ Exh. 1) by its attorney, Peter R. Kraft, Esq., to dismiss the consolidated complaint on the grounds that, effective June 13, 1981 (subsequent to the close of the record herein), Respondent's assets have been taken over and are being liquidated by Indian Head National Bank of Nashua, New Hampshire; Respondent has apparently ceased operations and will not resume operations; Respondent's employees were terminated effective June 13, 1981, without any possibility of returning to their former jobs; no meaningful remedy can now be granted; and further proceedings would be vain, costly, and contrary to the purpose of the Act and the powers of the Board.

Respondent's motion is hereby denied. The matters alleged in the motion and affidavit are not part of the record in this case, as defined by Sec. 102.45(b) of the Board's Rules and Regulations, Series 8, as amended, and are not properly before me. Moreover, the issues raised by Respondent's allegations are for the compliance stage of this proceeding. See *S. Freedman Electric, Inc.*, 256 NLRB 432, fn. 1 (1981).

Union Craft *and* **Resilient Floor & Decorative Covering Workers Local Union No. 1179, International Brotherhood of Painters and Allied Trades of North America and Canada.** Case 17-CA-10198

December 21, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

Upon a charge filed on February 24, 1981, by Resilient Floor & Decorative Covering Workers Local Union No. 1179, International Brotherhood of Painters and Allied Trades of North America and Canada, herein called the Union, and duly served on Union Craft, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a complaint on March 30, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent failed to file an answer to the complaint.

On August 7, 1981, counsel for the General Counsel filed directly with the Board a Motion To Transfer Proceeding to the Board and for Summary Judgment, with exhibits attached, based upon Respondent's failure to file an answer as required by Section 102.20 of the National Labor Relations Board Rules and Regulations, Series 8, as amended. On August 12, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent has filed no response to the Notice To Show Cause and, accordingly, the allegations of the Motion for Summary Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The Respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

According to the uncontroverted allegations of the Motion for Summary Judgment, on May 5, 1981, after certified mail was returned unclaimed, counsel for the General Counsel personally served Respondent's president and owner with copies of the charge, and the complaint and notice of hearing. The complaint and notice of hearing served on Respondent specifically states that, unless an answer to the complaint is filed by Respondent within 10 days from the service thereof, "all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board." According to the further uncontroverted allegations of the Motion for Summary Judgment, on May 19, 1981, counsel for the General Counsel mailed a letter to Respondent reiterating the requirement that Respondent filed an answer to the complaint and stating that counsel for the General Counsel would consider filing a motion for summary judgment if an answer was not filed by May 27, 1981. No answer has been filed.

Accordingly, under the rule set forth above, no good cause having been shown for the failure to file a timely answer, the allegations of the complaint are deemed admitted and are found to be true, and we shall grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a sole proprietorship engaged in the installation of carpeting at various facilities including a facility located at 14200 Midland Drive, Shawnee Mission, Kansas. Respondent, in the course and conduct of its business operations within the State of Kansas, annually sells goods and services valued in excess of $50,000 directly to customers located outside the State of Kansas.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Resilient Floor & Decorative Covering Workers Local Union No. 1179, International Brotherhood of Painters and Allied Trades of North America and Canada, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Unit*

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees of the Respondent handling the tools and materials of the trade in doing all work which may consist of measuring, cutting and laying old and new carpet, linoleum, and all types of resilient floor and wall covering material, whether in sheets, rolls, squares or interlocked, including plastic, laminated plastic, and metal wall tile, fitting devices for attachment of carpet, linoleum, rubber and all other resilient floor and wall coverings, and fitting of metal or plastic caps and corners used in the installation of linoleum and plastic counters, tables and steps, as well as artificial turf and its derivatives including monolithic covering as well as handling and preparatory work for all the above-mentioned including underlayment in the area of Kansas City and all areas in Missouri over which the Union exercises jurisdiction and the following counties in Kansas: Wyandotte, Johnson, Leavenworth, Bourbon, Linn and Miami, and such other area as may be assigned by the International Brotherhood of Painters and Allied Trades.

B. *The 8(a)(5) and (1) Violation*

On or about December 20, 1979, a majority of the employees in the above-described unit designated and selected the Union as their representative for the purpose of collective bargaining within the meaning of Section 9(a) of the Act. At all times material, Respondent and the Union have been parties to a collective-bargaining agreement effective from April 2, 1979, through March 31, 1982, covering the terms and conditions of employment of the employees in the unit described in section III, A, above. Pursuant to this agreement, Respondent is required to make payments into the pension fund, health and welfare fund, holiday and vacation fund, apprenticeship fund and advertising fund and to pay for the employees' travel expenses. Since on or about August 1, 1980, and continuing to date, Respondent has failed and refused and continues to fail and refuse to make payments into the aforementioned funds and has failed and refused to pay employees' travel expenses.

By the aforesaid conduct Respondent has, since on or about August 1, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit. By such action, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1), and Section 8(d) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist herefrom. We shall also order Respondent to make whole his employees by making payments into the pension fund, health and welfare fund, holiday and vacation fund, apprenticeship fund and advertising fund, as required by Respondent's collective-bargaining agreement with the Union, effective April 2, 1979, through March 31, 1982.[1] We shall also order Respondent to make whole his employees by paying for their travel expenses, if any, as required by the aforementioned collective-bargaining agreement that Respondent has with the Union, with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).) We shall further order Respondent to post the attached notice.

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[1] Since the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Fitzpatrick Electric, Inc.*, 242 NLRB 739 (1979); *Merryweather Optical Company*, 240 NLRB 1213, 1216, fn. 7 (1979).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Union Craft is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Resilient Floor & Decorative Covering Workers Local Union No. 1179, International Brotherhood of Painters and Allied Trades of North America and Canada, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees of the Respondent handling the tools and materials of the trade in doing all work which may consist of measuring, cutting and laying old and new carpet, linoleum, and all types of resilient floor and wall covering material, whether in sheets, rolls, squares or interlocked, including plastic, laminated plastic, and metal wall tile, fitting devices for attachment of carpet, linoleum, rubber and all other resilient floor and wall coverings, and fitting of metal or plastic caps and corners used in the installation of linoleum and plastic ounters, tables and steps, as well as artificial turf and its derivatives including monolithic covering as well as handling and preparatory work for all the abovementioned including underlayment in the area of Kansas City and all areas in Missouri over which the Union exercises jurisdiction and the following counties in Kansas: Wyandotte, Johnson, Leavenworth, Bourbon, Linn and Miami, and such other area as may be assigned by the International Brotherhood of Painters and Allied Trades, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times herein, the above-named labor organization has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 1, 1980, and at all times thereafter, to make payments into the pension fund, health and welfare fund, holiday and vacation fund, apprenticeship fund and advertising fund and to pay for the employees' travel expenses, as required by Respondent's collective-bargaining agreement with the Union, effective April 2, 1979, through March 31, 1982, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and Section 8(d) of the Act.

6. By the aforesaid refusal to make payments into the funds and by the aforesaid refusal to pay travel expenses, Respondent as interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Union Craft, Shawnee Mission, Kansas, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Resilient Floor & Decorative Covering Workers Local Union No. 1179, International Brotherhood of Painters and Allied Trades of North America and Canada, by refusing to make payments into the pension fund, health and welfare fund, holiday and vacation fund, apprenticeship fund and advertising fund and to pay for the employees' travel expenses, as required by the collective-bargaining agreement between Respondnet and the Union, effective April 2, 1979, through March 31, 1982.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make payments into the pension fund, health and welfare fund, holiday and vacation fund, apprenticeship fund and advertising fund, as required by Respondent's collective-bargaining agreement with the Union, effective April 2, 1979, through March 31, 1982.

(b) Pay for the employees' travel expenses, if any, as required by Respondent's collective-bargaining agreement with the Union, effective April 2, 1979, through March 31, 1982, with interest thereon, as set forth in the section of this Decision entitled "The Remedy."

(c) Post at its place of business at 14200 Midland Drive, Shawnee Mission, Kansas, copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

I WILL NOT refuse to bargain collectively with Resilient Floor & Decorative Covering Workers Local Union No. 1179, International Brotherhood of Painters and Allied Trades of North America and Canada, by refusing to make payments into the pension fund, health and welfare fund, holiday and vacation fund, apprenticeship fund, and advertising fund and to pay for the employees' travel expenses, as required by the collective-bargaining agreement that I have with the Union, effective April 2, 1979, through March 31, 1982.

I WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

I WILL make payments into the pension fund, health and welfare fund, holiday and vacation fund, apprenticeship fund, and advertising fund and pay for employees' travel expenses, as required by the collective-bargaining agreement that I have with the Union, effective April 2, 1979, through March 31, 1982.

I WILL pay for employees' travel expenses, if any, as required by the collective-bargaining agreement that I have with the Union, effective April 2, 1979, through March 31, 1982, with interest.

UNION CRAFT

Lake Development Management Co. *and* the Greater New Orleans Maintenance Employees Association (GNOMEA). Cases 15-CA-7751-4, 15-CA-7915, and 15-RC-6650[1]

December 21, 1981

DECISION, ORDER, AND DIRECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 5, 1981, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs and Respondent filed cross-exceptions and a brief in support thereof and in response to the General Counsel's and the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] recommendations,[3] and conclusions[4] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

1. The Administrative Law Judge concluded that Respondent violated Section 8(a)(1) of the Act by announcing and granting a change in its vacation benefits on August 1, 1980, for its maintenance employees. While we agree with his conclusion, we do so only for the following reasons.

Before March 1, 1980, both full-time maintenance employees and salaried personnel received 5 days of vacation after 1 year of employment and 10 days after 2 years. On March 1, prior to the onset of union activity, Respondent issued two separate notices which granted salaried personnel 10 days of vacation after 1 year but reaffirmed its prior policy with respect to the maintenance employees. On August 1, 1980, prior to the August 20 representation election but after the beginning of the organizational campaign, Respondent issued a new notice regarding the maintenance employees' vacation policy. This notice read, in part, as follows:

> Note—this new policy on paid vacation applies to new hourly full time maintenance personnel hired as of 3/1/80:
>
> After 1 year employment—10 days paid vacation and each year thereafter.
>
> * * * * *
>
> Note—prior to this date of 3/1/80, full time hourly maintenance personnel vacation policy stays as such:
>
> After 1 year employment—5 days paid vacation.
>
> After 2 years employment—10 days paid vacation and each year thereafter.

Thus, employees hired after March 1 received 10 days' vacation after 1 year, but those hired before

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[1] The Administrative Law Judge inadvertently omitted the numbers of Cases 15-CA-7915 and 15-RC-6650 from the caption of his Decision.

[2] The General Counsel, the Charging Party, and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III, A, of his Decision, the Administrative Law Judge refers to Supervisor Allen Barry as Joseph Alfred Barry. He also states that a consent agreement was reached in the representation proceeding herein, whereas the election was conducted pursuant to the Acting Regional Director's Decision and Direction of Election. These inadvertent errors are insufficient to affect our decision.

[3] In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's recommendations that the challenges to the ballots of employees Roberson, Capretto, Johnson, David, Carroll, Giroux, Gossen, and Hurlbert be overruled.

[4] In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's conclusion that Respondent did not violate the Act in unilaterally changing its health, accident, and life insurance plan by assuming the entire cost of the premiums.

We adopt the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(3) and (1) of the Act by discharging employees Gilbert, Bennett, and Toups for refusing to accept overtime assignments in the form of "beeper duty" on June 23, 1980. In so doing, we emphasize that it appears that beeper duty was mandatory in the past, as is evidenced by employee Melanta's admission that he was once told he was "going to need to take [the beeper]" and that he did so even though he originally was not interested in volunteering. We further find that, even assuming, *arguendo*, that beeper duty previously had been voluntary, it is clear that on June 23 it was mandatory, and that Respondent fully apprised the employees that it was mandatory. Furthermore, we note that there is no allegation or evidence that the imposition of mandatory beeper duty was for discriminatory reasons, that it has not been shown that Gilbert, Bennett, and Toups were selected for beeper duty on a discriminatory basis, and that the employees intended their refusal to accept beeper duty to be on a continuing basis. Accordingly, we conclude that the employees were engaged in an intermittent partial strike and that Respondent could lawfully discharge them. *John S. Swift Company, Inc.*, 124 NLRB 394, 397 (1959).

We agree with the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act by President Artigues' threat to discharge employees for their union activity during her discussion with employee Gilbert concerning a union meeting. In so doing, we find without merit Respondent's contention that no such violation should be found because Artigues' threat was effectively retracted. Thus, even accepting the record testimony that Maintenance Manager Solari, at Artigues' instruction, subsequently told the employees they could attend union meetings without fear of termination, we conclude that such statement did not amount to an effective repudiation of unlawful conduct and therefore did not relieve Respondent of liability for its unlawful conduct. In this regard, Solari's statement did not disavow Artigues' threat as unlawful, disavow her other contemporaneous unlawful conduct of interrogating Gilbert, or give assurance to employees that Respondent in the future would not interfere with their exercise of Sec. 7 rights. Additionally, Respondent subsequently violated Sec. 8(a)(1) of the Act by threatening employees with reprisals for engaging in union activity and by changing its vacation policy. See, e.g., *United States Postal Service*, 253 NLRB 1203 (1981); *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

March 1 received 10 days' vacation only after 2 years.[5]

Absent an affirmative showing of some legitimate business reason for the timing, an inference of improper motivation and improper interference with employee rights may be drawn from a grant of benefits which coincides with employee union activity. *J. P. Stevens and Company, Inc.*, 247 NLRB 420, 431–433 (1980); *The May Department Stores Company*, 191 NLRB 928 (1971). Respondent, in arguing that it has made such a showing, contends that the August 1 notice was not an announcement of increased benefits but rather a corrected statement of the policy then in effect. It therefore contends that prior to March it had decided to give all its employees 10 days' vacation after 1 year, that due to an administrative error the notice to maintenance employees did not reflect this change, and that it was not aware of the error until unidentified employees pointed it out to President Artigues in July, at which time she directed the preparation and posting of the August 1 notice. We find Respondent's contentions unpersuasive. Thus, despite Artigues' testimony that prior to March Respondent decided to grant all its employees 10 days' vacation after 1 year, there is no documentary evidence to support her bald assertion. Furthermore, there is no showing Respondent had a consistent past practice of granting all employees the same benefits; to the contrary, prior to May 1978, after 2 years salaried employees received 10 days of vacation, but maintenance employees received only 5 days. Additionally, although she testified that she did not see the March 1 notice before it issued, she also testified that she generally reviewed notices issuing from her office. We also note that although according to Artigues no employee pointed out the alleged error to her until sometime in July, nearly 5 months later, she also testified that the employees would normally have received the March 1 notice in their pay envelopes. Finally, we note that the August 1 notice failed to correct the alleged error, as it limited maintenance employees hired before March 1 to only 5 days of vacation after their first year of employment. It is unlikely that, after issuing an allegedly erroneous statement of its new vacation policy on March 1, Respondent would fail to remedy fully the alleged error in the August 1 notice.

In light of the above factors, we find that Respondent has not affirmatively shown legitimate business reasons for its actions. Accordingly, we conclude that, by issuing the August 1 notice announcing and granting improved vacation benefits to the maintenance employees shortly before the election, Respondent interfered with the employees' rights in violation of Section 8(a)(1) of the Act.

2. Based on his finding that Artigues asked Gilbert what his grievances were and that Gilbert answered that Respondent had failed to give him a 50-cent-per-hour pay increase, the Administrative Law Judge concluded that Respondent violated Section 8(a)(1) of the Act by soliciting employee complaints and grievances. Although we agree with the Administrative Law Judge's finding that Artigues questioned Gilbert on June 18 regarding his grievances, we do not agree that this question constituted an unlawful solicitation of grievances. While the solicitation of grievances raises an inference that the employer is promising to correct those inequities it discovers as a result of its inquiries, this inference is rebuttable by the employer. *Cutting, Incorporated*, 255 NLRB 534 (1981); *Uarco Incorporated*, 216 NLRB 1 (1974). We find that the inference of such a promise has been rebutted here. Thus, Artigues testified without contradiction that, after Gilbert told her he was unhappy with his salary increase, she told him that Maintenance Manager Solari gave the salary increases and that, if that were the decision, he would stand behind it. This express statement that she would not take corrective action regarding Gilbert's grievances negated any possible inference of a promise to cure his grievances. Accordingly, we conclude that Respondent did not violate Section 8(a)(1) of the Act by soliciting employee complaints and grievances. However, we conclude that Artigues, by questioning Gilbert about his grievances, sought to determine his reasons for supporting the Union, and that Respondent thereby engaged in unlawful interrogation in violation of Section 8(a)(1) of the Act.[6]

3. Respondent excepts to the Administrative Law Judge's recommendation that the challenge to the ballot of Willie Clark be overruled. We find merit in this exception.

Artigues testified that Clark was employed for approximately 1 week prior to the beginning of the strike on June 23, 1980, and that he did not return to work with the other employees following the end of the strike. Clark testified that he was employed by Respondent as a maintenance man for 2 to 3 weeks before he went out on strike, that on August 1 he obtained employment elsewhere as a maintenance man, and that since obtaining that employment he had never had any intention of returning to work for Respondent. He also testified that in September the Union's consultant informed him that Respondent had offered him reinstatement, and that he advised the consultant that he had decided not to return to Respondent.

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[5] Following the election, on August 29, Respondent issued a revised version of the August 1 notice which granted all maintenance employees 10 days' vacation after 1 year. The Administrative Law Judge, in concluding that Respondent violated the Act by announcing a change in its vacation benefits on August 1, relied on the August 29 notice, which he incorrectly stated was issued August 1 and which was not alleged to be unlawful.

[6] Member Jenkins agrees that Artigues' questioning of Gilbert constituted unlawful interrogation in violation of Sec. 8(a)(1) of the Act. However, he adheres to his view, as fully set forth in his dissent in *Uarco Incorporated, supra*, that the mere solicitation of grievances is itself coercive conduct violative of Sec. 8(a)(1) of the Act. See also his separate position in *Cutting, Incorporated, supra*. Accordingly, Member Jenkins additionally would find that Respondent coerced Gilbert in violation of Sec. 8(a)(1) of the Act by its solicitation of employee grievances.

The Administrative Law Judge noted that there is a presumption of continued eligibility for an economic striker, and that such presumption is not rebutted by the mere fact that the striker takes a job elsewhere. *Pacific Tile and Porcelain Company*, 137 NLRB 1358 (1962). He found that apart from Clark's having obtained another job there was no evidence that Clark had abandoned his employment with Respondent. Accordingly, he recommended the challenge to Clark's ballot be overruled.

Contrary to the Administrative Law Judge, we find that Respondent has presented evidence rebutting the presumption of continued eligibility. Thus, Clark testified not only that he obtained other employment before the election, but also that he at no time thereafter had any intention of returning to work for Respondent. The conclusion that Clark in fact never had any intention of returning to work for Respondent is further supported by the absence of any evidence that after obtaining new employment he manifested any interest in the affairs of Respondent and by his failure to accept Respondent's offer of reinstatement. Accordingly, we conclude that by and before the August 20 election Clark had abandoned any interest in employment by Respondent and that the challenge to his ballot should be sustained.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Lake Development Management Co., Metairie, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(c) and reletter the subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED with respect to the election conducted in Case 15-RC-6650 on August 20, 1981, that the challenges to the ballots cast by Gaylord Baham, Jr., Lionel Boudreaux, Whitfield Clark, Dennis Chun, Mario Garetano, Randall Kowalewski, Lance Lanier, George Lara, Stephen Martin, Edward Montz, Jr., Kent Murphy, Joseph West, Richard Williams, James Roberson, David Capretto, Jeff Johnson, Paul David, Frank Carroll, Mike Giroux, Robert Gossen, and Lloyd Hurlbert be, and they hereby are, overruled, and that the challenges to the ballots cast by Willie Clark, Henry Gonzales, Ronald Bennett, Robert Gilbert, and Allen Toups be, and they hereby are, sustained.

DIRECTION

It is hereby directed that the Regional Director for Region 15 shall, within 10 days from the date of this Decision, Order, and Direction, open and count the ballots cast by Gaylord Baham, Jr., Lionel Boudreaux, Whitfield Clark, Dennis Chun, Mario Garetano, Randall Kowalewski, Lance Lanier, George Lara, Stephen Martin, Edward Montz, Jr., Kent Murphy, Joseph West, Richard Williams, James Roberson, David Capretto, Jeff Johnson, Paul David, Fank Carroll, Mike Giroux, Robert Gossen, and Lloyd Hurlbert in the election conducted in Case 15-RC-6650 on August 20, 1980, and thereafter prepare and cause to be served on the parties a revised tally of ballots, upon the basis of which he shall issue the appropriate certification.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten employees with discharge or other reprisals should they engage in union or other activity for their mutual aid or protection.

WE WILL NOT interrogate our employees concerning their interest in or activity on behalf of Greater New Orleans Maintenance Employees Association (GNOMEA).

WE WILL NOT interfere with employee freedom of choice by instituting or announcing the

institution of benefits to employees during the course of a union organizational campaign.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

LAKE DEVELOPMENT MANAGEMENT CO.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on February 18-20, 1981, at New Orleans, Louisiana, upon the General Counsel's complaint which alleged principally that on June 23, 1980,[1] the Respondent discharged three employees in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* The General Counsel further alleges that this unfair labor practice precipitated a strike of other employees; that the Respondent engaged in several violations of Section 8(a)(1); and that the Respondent by its unilateral institution of certain employee benefits on or about November 1 violated Section 8(a)(5) of the Act, should the Union be certified as the employees' collective-bargaining representative.

The Respondent generally denied that it committed any unfair labor practices and specifically alleges that the three employees were discharged for cause on June 23—for refusing, in effect, an overtime assignment. The Respondent further contends that the strike was economic; that its supervisors did not threaten or interrogate employees; and that, even if the Union should be certified as the employees' collective-bargaining representative, it had the right, during the pendency of these proceedings, to change the insurance benefits program.

Consolidated with the unfair labor practice allegations is the hearing on challenged ballots in Case 15-RC-6650.

Upon the record as a whole, including my observation of the witnesses and excellent briefs submitted by counsel for the General Counsel and the Respondent, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE BUSINESS OF THE RESPONDENT

Lake Development Management Co. (herein the Respondent, the Company, or the Employer) is a partnership engaged in the business of managing about 5,000 apartment units in 40 complexes in the greater New Orleans area. The Respondent has about 200 employees of whom about 75 are hourly paid. Most of the hourly employees are maintenance men divided generally into two groups. Specifically there are one or two onsite maintenance men at the larger complexes and the others work out of a central location. The central maintenance group are the principals involved in this matter.

In the course and conduct of its business, the Respondent annually receives goods and revenues in excess of $500,000 and annually purchases and receives goods directly from points outside the State of Louisiana valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Greater New Orleans Maintenance Employees Association (herein the Union) was formed on or about June 16 by employees Robert Gilbert and Ronald Bennett, with assistance from Richard Allen Neville, who styles himself a labor relations consultant and so appeared at the hearing of this matter. However, there is testimony that he advised employees that he is an attorney licensed to practice in New England.

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Principal Facts*

During the times material there were nine central maintenance employees supervised by Joseph Alfred Barry and Clarence Thomas Johnson and more remotely by Alvin F. Solari, the general property manager. These employees worked Monday through Friday from 8 a.m. until 5 p.m. and earned from $6 to $7, or so, per hour. In addition these employees were occasionally allowed to do specific maintenance jobs on a contract basis after hours and were given the opportunity to carry a beeper.

The Respondent's beeper system is the core of this controversy. Beepers are used by the Respondent primarily as a means of contacting maintenance employees for after-hours emergency service, although some maintenance employees carry beepers throughout the normal workday. The beepers are fixed channel radio receivers which one can carry and through which one can be reached by telephone for short messages. Usually the beeper carrier then follows up by placing a telephone call.

Until about April the Respondent had two beepers. Then two more were added. Thus during the time material here, the Respondent used four beepers, each of which was for certain designated apartments.

The pay week, and hence beeper duty, runs from Thursday through Wednesday. Each Thursday morning the four beepers would be on a table in the central maintenance area for employees to take and keep for 1 week. An employee carrying a beeper would be compensated $75 for the week. He would be expected to answer any calls and if necessary physically go to the appropriate apartment and perform the necessary maintenance service. Employees sometimes carried more than one beeper, substituting for the one originally on duty.

The number of messages one would receive, and after-hours calls one would have to make, varied substantially. The evidence on this is far from conclusive, although it is clear that most employees carrying the beepers were simply oncall. Most hours they neither responded to messages nor performed any kind of maintenance function.

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[1] All dates are in 1980 unless otherwise indicated.

For reasons unstated in the record, on June 16 Robert Gilbert decided to form a union. He and Ronald Bennett met with Neville and they determined to have an organizational meeting in Neville's apartment on the evening of June 18. That morning Gilbert posted a notice to this effect on the bulletin board of the maintenance lounge. At this time he had a discussion with Barry about the Union, *infra*, and later that day was called into the office of the Respondent's president, Patricia Artigues, *infra*.

At the employees' meeting on June 18, among other things Neville told them that the Company was in violation of the Fair Labor Standards Act with regard to the beeper system. He told them, or at least led them to believe, that when carrying a beeper they were entitled to be paid at the rate of one and one half-times their hourly rate for each hour. Gilbert, for instance, testified that he was then earning $7.25 an hour and was advised that when carrying the beeper he would be entitled to one and one-half times that amount for 128 hours each week (5 p.m. to 8 a.m. Monday through Saturday plus 48 hours from 8 a.m. Saturday to 8 a.m. Monday). Gilbert testified that he was led to believe, and presumably so were the others, that the Company should be paying him some $1,300 a week extra for carrying the beeper.

Neville further advised these employees that inasmuch as the Company was in violation of the Fair Labor Standards Act, if they continued the practice of taking the beepers for $75 a week that they too would be in violation of the Federal law.[2]

After being advised by Neville that they should have been paid substantially more for carrying the beeper, all those at the June 18 meeting determined that they would not carry the beeper until the Respondent agreed to pay them their due.

Thus on Thursday, June 19, the beepers were set out as usual but none was taken. Barry asked if anyone was going to take a beeper but they all declined, telling him that they would not carry the beepers unless the Company paid them what they were entitled. About 5 o'clock that afternoon and again about 4:45 p.m. on Friday, Barry asked each of the maintenance employees if he would take a beeper and each refused. He told them that their continued refusal to take the beepers could result in their discharges.

Sometime after the employees first announced that they would refuse to carry the beepers, and were threatened with possible discharge for failure to do so, they all agreed that should any one of them be discharged for failure to carry a beeper the others would go on strike. They agreed to "stick together."

On Monday, June 23, the maintenance employees were called together again, were asked to take the beepers and were told by Barry that if they refused, beepers would be assigned to individuals and if those individuals refused to take them they would be discharged. They continued to refuse.

Then Bennett, Gilbert, and Allen Toups were selected for specific assignment because, according to Barry, in the previous 3 months these individuals had beeper duty the least of any then active employee. Each refused to take the beeper and each was discharged. Bennett testified, for instance,

> When I refused to take the beeper, Al Barry told me that refusing to take the beeper—he's to be terminated for refusing to take the beeper. Then, Mr. Solari said, "Ron, read this paper first."
>
> Q. Okay.
>
> A. And I read the paper.
>
> Q. And then, you were asked again weren't you?
>
> A. Yes.
>
> Q. And you still refused, didn't you?
>
> A. Yes.

Most of the remaining maintenance employees, pursuant to their agreement among themselves, then went on strike to protest the Respondent's alleged unfair labor practice.

On June 19, Neville filed a petition for representation on behalf of the Union. A consent agreement was reached. The Union waived blocking by the unfair labor practice charge, and an election was held on August 20. There were 3 votes cast for the Union and 4 cast against it, with 26 challenged ballots. Generally, the ballots challenged by the Union were cast by individuals who replaced the striking employees. Generally, the ballots challenged by the Respondent were of those individuals the Respondent contends were terminated for cause or had abandoned their employment.

B. *Contentions of the Parties*

The General Counsel alleges that the discharges of Bennett, Gilbert, and Toups were violative of Section 8(a)(3) because they were discharged for having engaged in protected concerted activity, namely, refusing to carry the beepers without being appropriately compensated under the Fair Labor Standards Act; and, alternatively, because they had engaged in activity on behalf of the Union.

The General Counsel further contends that the strike of employees was precipitated by the Respondent's unfair labor practice of discharging these individuals.

It is also alleged that the Respondent engaged in violations of Section 8(a)(1) when Barry and then Artigues confronted Gilbert on June 18 and that the Respondent violated Section 8(a)(1) on August 1 by posting new vacation holiday rules which applied to strike replacements.

Finally, the General Counsel contends that, if the Union is certified as the collective-bargaining representative of the employees, the Respondent violated Section 8(a)(5) of the Act by unilaterally instituting changes in insurance coverage effective November 1.

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[2] The General Counsel offered to prove that employees carrying the beepers averaged from 10 to 20 hours of work a week, and sought to litigate here the issue of whether or not they were appropriately compensated under the Fair Labor Standards Act. I conclude that the Board is not the appropriate forum to decide that issue. However, notice is taken of 29 C.F.R. 785.17 which provides that employees oncall away from the employer's premises are not entitled to pay for that time. Inasmuch as the facts demonstrate that these employees were oncall and did not actually do any work more than a few hours each week (even assuming the General Counsel's offer), it is clear that the Respondent was not liable to pay them anything remotely close to time and one-half their hourly rate for 128 hours a week. Whether the $75 a week was sufficient under the Fair Labor Standards Act is for another tribunal to decide.

In addition to the matters alleged by the General Counsel, the Union contends that its challenges to certain ballots should be sustained and those of the Respondent should be overruled.

The Respondent argues that Gilbert, Bennett, and Toups were discharged for having engaged in the unprotected act of a partial work stoppage—refusing an overtime assignment. The Respondent argues that the following strike was economic and therefore replacements were eligible to vote in the election.

The Respondent further contends that the conversations Barry and Artigues had with Gilbert on June 18 did not contain threats or interrogation in violation of Section 8(a)(1).

The Respondent claims that the announcement of vacation and holiday benefits on August 1 was simply a correction of a plan put into effect in March and therefore was not violative of Section 8(a)(1).

And, finally, the Respondent argues that, even though it unilaterally implemented a change in insurance coverage, it had the right to do so pending resolution of the challenged ballots to the election. Thus, even if the Union is certified, it should not be held to have violated Section 8(a)(5).

The Respondent also suggests that its challenges should be sustained and those of the Union should be overruled.

C. *Analysis and Concluding Findings*

1. The discharges

Principally the General Counsel contends that the employees had the protected right to refuse to take the beepers (a) because accepting a beeper assignment was voluntary and (b) because the Company was in violation of the Fair Labor Standards Act in its compensation to employees who carried the beepers. I disagree on both accounts.

The General Counsel concedes that beeper assignment was overtime and that the employees acted in concert in refusing. And the General Counsel recognizes the general proposition that refusal to work overtime is unprotected activity since such is an attempt by employees to prescribe for themselves their terms of work. "The Board and the courts have squarely held that such a refusal to work provides the employer with valid ground for discharge." *John S. Swift Company, Inc.*, 124 NLRB 394, 397 (1959).

The General Counsel's argument is founded on the assertion that beeper assignment had been voluntary and therefore did not constitute a routine part of the maintenance employees' duties. Refusal to do the work, therefore, was protected strike activity, citing *Polytech Incorporated*, 195 NLRB 695 (1972); *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962); and *First National Bank of Omaha*, 171 NLRB 1145 (1968).

In analyzing whether a particular act of refusing overtime is protected or not the Board often focuses on whether it is mandatory. Thus, in *GAIU Local 13-B, Graphic Arts International Union (Western Publishing Co., Inc.)*, 252 NLRB 936, 938 (1980):

> It is also clear that the repeated refusal of employees to perform mandatory assigned overtime work is unprotected by the Act because it constitutes a recurring or intermittent partial strike.

In *The Dow Chemical Company*, 152 NLRB 1150 (1965), weekend overtime was voluntary; hence to refuse it was protected activity. And more recently in *Jasta Manufacturing Company, Inc.*, 246 NLRB 48 (1979) (Member Penello dissenting), 2 hours a day overtime had always been voluntary. The company intended to change this but did not tell employees the voluntary nature of the overtime had been changed nor that they would be disciplined if they refused. Then without warning, four employees were discharged. The Board refused to conclude that by not working an hour on three occasions "they lost protection of the Act because they sought to impose on Respondent their own terms and conditions of employment."

In *John S. Swift Company, Inc., supra* at 397, the Board rejected a semantic argument similar to that made here by the General Counsel:

> We find no basis in this record for the distinction drawn by the Trial Examiner that the employees were not "ordered," but were merely requested, to work overtime. It is quite clear that the Respondent's intention was to order them, under pain of discharge, to work overtime, and the employees could not have understood it otherwise . . . .

The General Counsel places substantial emphasis on testimony that when hired none of the maintenance men were told that taking a beeper would be mandatory. However, what one remembers he was not told a year or more before a hearing is not as probative as an analysis of the work itself.

The Respondent had 5,000 apartment units. Without question it needed some method of providing emergency maintenance service on a regular basis. The beeper system filled this need.

Beyond this, the record is clear that prior to the events here neither the Respondent nor the employees thought in terms of whether beeper duty was mandatory. It was available for those who wanted to make some extra money. The duty was sufficiently desirable so that there was no lack of volunteers—except one time.

In early June, according to Barry, he could not get enough volunteers for the beeper and thus told employee Joseph C. Melanta (Milano in Barry's testimony) to take it. Melanta testified that the beeper was never assigned to him and it was "all voluntary." However, on cross-examination he testified to a time when Barry told him he would have to take a beeper, whereupon, "I decided I'd go ahead and take it because I could use the extra money."

There is no question that having maintenance employees on call was important to the Respondent's business; that emergency service was a job function required to be performed by maintenance employees and had in fact been done by maintenance employees for many years. And as the number of apartments increased so did the number of beepers.

That the Respondent was able to provide service by using supervisors from June 19 to June 23 is beside the point. The Respondent had a right to require of its employees that they be available for emergency service on a regular basis, and such is what they were refusing.

This work was not the kind of overtime which employees could take or not, as in *Dow Chemical* or *Jasta Manufacturing*. Nor was the refusal a one-time matter as in *Polytech*.

They were refusing to take the beepers in order to force the Employer to meet their pay demand with regard to them. Their announced intention was to continue refusing the beepers. But they were as clearly unwilling to accept status as strikers.

Certainly employees have a right to protest an employer's perceived violation of Federal law. If they do so concertedly such acts are generally protected, even if they are wrong. But the issue is not whether the Employer violated the Fair Labor Standards Act (as contended by the General Counsel) but whether the employees' concerted activity lost its protected character because of the means used. I conclude it did.

Had the employees protested the alleged violation of the Fair Labor Standards Act by a general strike, for instance, such would have been protected. However, the means chosen here was that of a partial work stoppage.

It may be that the method of compensating these individuals for beeper duty was violative of the Fair Labor Standards Act; however, that is far from obvious. What is obvious is that employees were not entitled to anything close to $1,300 a week for being on emergency call. In any event, the employees did not have the protected right to press their contention by means of a partial strike.

Finally, a crucial fact found wanting in those cases where the refusal to work overtime was held protected was present here. Here the Respondent warned the employees of possible discharge, and continued to the time of the discharges to try to persuade them to accept the beepers.

The General Counsel alternatively contends that Bennett, Gilbert, and Toups were discharged because they engaged in union activity, in view of the timing of the discharges, the Company's demonstrated animus, *infra*, and knowledge that Bennett and Gilbert were the Union's two leaders.

While timing, knowledge, and animus are factors from which an antiunion motive may be inferred, such an inference here is not warranted. The overwhelming evidence is that these employees were discharged because, and only because, they refused to take beepers when assigned to do so on June 23. The employees initiated the beeper confrontation when on Thursday they concertedly refused them. And this confrontation continued to Monday when the Respondent decided to make specific assignments, and discharge employees if necessary.

Barry kept a list of how often employees had had a beeper since April, when two beepers were added. He determined that Gilbert, Bennett, and Toups had the fewest weeks.[3] Although the Respondent had four beepers to be used, it could not be determined who should be assigned the fourth one because two employees were tied. Thus, for purposes of assignment on June 23, the Respondent decided to assign three beepers, and to terminate those employees who refused them.

There is simply no basis on this record to infer that Toups, Bennett, or Gilbert would have been discharged on June 23 absent their refusal to accept an assignment of a beeper. Indeed, they were warned again and again that refusal would mean discharge. Bennett was told before making his final decision to read the discharge letter. I believe, and conclude, that had any one of them accepted the assignment he would not have been terminated. I therefore conclude that the General Counsel did not establish by a preponderance of the credible evidence, through reasonable inference or otherwise, that the union activity of these three employees, or others, played any part in their discharge other than that associated with their decision to refuse beeper duty. The discharges of Gilbert, Bennett, and Toups on June 23 were not violative of Section 8(a)(1) or (3) of the Act.[4]

2. The strike

Although the Respondent through Barry and Artigues did commit some violations of Section 8(a)(1) on June 18, *infra*, it is clear from the testimony of the General Counsel's witnesses that these matters played no part in the strike. The sole basis of the strike was the employees' decision to "stick together." They struck because Gilbert, Bennett, and Toups were discharged. Inasmuch as I concluded that the discharge of these individuals was not an unfair labor practice, I necessarily conclude that the strike was not an unfair labor practice strike. It was, and remained, an economic strike, which is material only to eligibility of voters in the representation matter, *infra*.

3. The 8(a)(1) activity

a. *Allen Barry*

It is alleged that on June 18 after Gilbert posted the notice of the union meeting Barry threatened employees with more onerous working conditions, threatened employees with discharge if they selected the Union, impliedly promised employees increased benefits, and solicited employee complaints and grievances.

It is generally undisputed that following the posting of the notice Barry made several comments to the assembled maintenance employees. While the testimony of the General Counsel's witnesses is somewhat conflicting, basically all agree that Barry said employees were "going to get hurt by attending meetings and stuff like this" and that "the Union would only get us in trouble."

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[3] To the extent that Bennett's testimony conflicts with Barry's list, I discredit Bennett. The list was made up, and seen, prior to any of the events here.

[4] In view of this conclusion, it is unnecessary to decide the Respondent's assertion that Bennett and Gilbert, having been deemed uninsurable by their automobile insurance carrier, would not be entitled to reinstatement or that Bennett engaged in sufficient post-discharge misconduct to render him unemployable.

From the generally credible testimony of the General Counsel's witnesses, I do conclude that on June 18 Barry did threaten employees with reprisals, including discharge, should they continue with their union activity. There is nothing, however, in any of the witnesses' testimony to indicate that Barry made any kind of implied promise of increased benefits and improved working conditions or solicited complaints and grievances.

It is also alleged that on June 23 Barry threatened employees with unspecified reprisals if they selected the Union as their collective-bargaining representative. Bennett did testify that on that day Barry told several of the maintenance employees "the only thing y'all are going to get out of this union shit is hurt." Inasmuch as this statement was made to maintenance employees in the context of the confrontation that they were then having with the Company concerning the matter of taking beeper assignments, I conclude that in fact such amounted to a generalized threat. It was therefore violative of Section 8(a)(1), notwithstanding that the ultimate issue over which the three employees were discharged was their having engaged in unprotected activity.

b. *Patricia Artigues*

On the afternoon of June 18 Gilbert was called to the office of the Respondent's president. Their conversation, she testified, lasted about an hour. Although she stated that their talk about the Union lasted only about 3 minutes, it is clear that the purpose of this meeting with Gilbert related specifically to his posting the notice of the union meeting. She did not deny that she told him that a union meeting of employees was against company policy. She admitted saying that employees could be terminated if there was a "lack of communication." She also admitted asking him which employees were involved, and then followed by asking him what his grievances were. His grievance then was the Respondent had failed to give him a 50-cent-an-hour pay increase. (This was before Neville told employees that the Company was violating the Fair Labor Standards Act.)

Inasmuch as Gilbert's testimony was largely undisputed by Artigues, although there are some differences in emphasis, I find that on June 18, as alleged, the Respondent through Artigues orally interrogated an employee concerning his and others' union activity, orally threatened to discharge employees because of their union or other protected activity, and solicited employee complaints and grievances. All of this, I conclude, was violative of Section 8(a)(1) of the Act.

c. *The vacation and holiday notice*

On August 1 the Respondent posted a notice on the subject of vacation, sick leave, and holiday pay for both the salaried and full-time maintenance (hourly and weekly) employees. The memorandum for maintenance employees has the following:

> Note—This new policy on paid vacation applies to hourly, full-time maintenance personnel who are eligible for a vacation in 1980.

Even though there is the handwritten note "revised" by the date of "8/1/80," it is clear that the policy was posted on August 1 and did by its terms offer new employees 2 weeks' vacation after 1 year rather than 1 week.

Although the Respondent contends that the change in policy occurred in March and it was through inadvertence that the change was incorrectly posted, I find that the policy was announced to employees following the beginning of the organizational campaign, before the election and during the time when there were new employees as striker replacements. Accordingly, I conclude that this announcement of the change in vacation policy made particularly applicable to striker replacements necessarily had an intimidating and coercive effect on the rights of employees to engage in protected concerted activity and was therefore violative of Section 8(a)(1).

4. The refusal to bargain

Undeniably, on or about November 1 the Respondent announced a change in its health, accident, and life insurance plan to all employees, including those in the bargaining unit. The Respondent unilaterally and without negotiating with the Union changed the plan by assuming all of the premiums.

The Union had not at the time demonstrated that it represented a majority of the employees in the bargaining unit and the matter of the election was still unresolved because of the pending challenges. Thus the Respondent contends that it was not obligated to bargain with the Union.

Citing *Allis-Chalmers Corporation*, 234 NLRB 350 (1978), the General Counsel contends that pending postelection challenges an employer may not with impunity institute unilateral changes. In *Allis-Chalmers*, however, the postelection issue involved the employer's objections to conduct affecting the results of the election which the union had won. Challenged ballots were not determinative. In *Allis-Chalmers* the employer knew the union had been designated by a majority of those voting and would be certified, absent the election being set aside. The employer raised the objection issue and therefore acted at its peril should that issue be resolved against it.

Such is not the case here. The vote here did not demonstrate the Union's majority status. Challenges are determinative, some of which were made by the Union. Thus even if it is finally found that a majority voted for the Union, I conclude that the Respondent did not commit an unfair labor practice by making the unilateral change. *Cooks Markets, Inc.*, 159 NLRB 1182 (1966).

IV. THE CHALLENGES

As indicated above, the principal issue with regard to the challenged ballots concerns whether the strike of June 23 was an economic or an unfair labor practice strike. Having concluded that it was and continued to be an economic strike, it follows that the striking employees could be permanently replaced and those replacements eligible to vote, absent a showing by the Union that they were hired on a temporary basis. *Kable Printing Company*, 238 NLRB 1092 (1978). There is no such evidence here, hence the union challenges to the votes of strike replacements should be overruled, and the ballots of the following employees counted: Gaylord Baham, Jr., Lionel Boudreaux, Whitfield Clark, Dennis Chun, Mario Garetano, Randall Kowalewski, Lance Lanier, George Lara, Stephen Martin, Edward Montz, Jr., Kent Murphy, Joseph West, and Richard Williams.

The Employer challenged the ballots of James Roberson, David Capretto, Jeff Johnson, Paul David, Willie Clark, Frank Carroll, and Mike Giroux because they were "employed elsewhere." There is a presumption of continued eligibility for economic strikers, which is not rebutted by the mere fact that one takes a job elsewhere. *Pacific Tile and Porcelain Company*, 137 NLRB 1358 (1962). And here there is otherwise no evidence that these employees abandoned their employment. Quite the contrary, they all appeared at the polls and voted. Accordingly, I conclude that the challenges to these ballots should be overruled and the votes counted.

The Union also challenged the ballot of Robert Gossen because he is a supervisor. I find insufficient evidence in the record to sustain the Union's position that he has the authority set forth in Section 2(11) of the Act. On the other hand Gossen's testimony concerning his duties, as an onsite maintenance man, was credible. Accordingly, I recommend that the challenge to this ballot be overruled.

The Union challenged the ballot of Henry Gonzales, Jr. Although he was challenged as a "permanent replacement" the record supports the conclusion that he was, in fact, a security guard. Gonzales was a member of the New Orleans police department and was hired, according to Artigues, as a security guard and also to do small amounts of maintenance. While she testified that he went on full-time status in July, as a maintenance man, she did not testify that he gave up his guard duties. Some days before the election he escorted Gilbert off the Respondent's premises after flashing his badge. Thus even if Gonzales began putting in more time as a maintenance employee in July, the evidence reveals that he continued to work as a guard. Therefore he was ineligible to vote and the challenge to his ballot should be sustained.

And the Union challenged the ballot of Lloyd Hurlbert because he said he was a porter. This, of itself, is an insufficient basis to deny a voting employee the right to have his ballot counted. There is no evidence concerning his duties and only one hearsay statement that he was a porter—a job classification excluded from the bargaining unit. I recommend that the challenge to his ballot be overruled.

Finally, having concluded that Bennett, Gilbert, and Toups were discharged for cause, I conclude that the challenges to their ballots be sustained.

I recommend that Case 15-RC-6650 be remanded to the Regional Director for Region 15, that the challenges overruled be opened and counted, that a revised tally of ballots issue, and that the Regional Director issue the appropriate certification.

V. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above occurring in connection with the Respondent's business have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

VI. THE REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Further having concluded that certain challenges be overruled, I recommend that Case 15-RC-6650 be remanded to the Regional Director for purposes of opening and counting these ballots, issuing a revised tally of ballots and certifying the results of the election or the Union as the bargaining representative, as the case may be.

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Lake Development Management Company, Metairie, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge or other reprisals should they engage in union or other concerted activity for their mutual aid or protection.

(b) Interrogating employees concerning their interest in or activity on behalf of the Union.

(c) Soliciting grievances from employees to discourage their activity on behalf of the Union.

(d)Instituting or announcing the institution of benefits to employees during the course of a union organizational campaign.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[6]

2. Take the following affirmative action:

(a) Post at its Metairie, Louisiana, facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] The unfair labor practices engaged in by the Respondent in this matter are not so pervasive as to suggest a proclivity to violate the Act. Therefore the narrow injunctive relief is appropriate. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that Case 15-RC-6650 be remanded to the Regional Director for Region 15 to open and count the following ballots: Gaylord Baham, Jr., Lionel Boudreaux, David Capretto, Frank Carroll, Dennis Chun, Willie Clark, Paul David, Mario Garetano, Mike Giroux, Robert Gossen, Lloyd Hurlbert, Jeff Johnson, Randall Kowalewski, Lance Lanier, George Lara, Stephen Martin, Edward Montz, Jr., Kent Murphy, James Roberson, Joseph West, Richard Williams, and Whitfield Clark; and to issue a revised tally of ballots and appropriate certification.

IT IS FURTHER ORDERED that the complaint in all respects not found herein is dismissed.

Fuelgas Company, Inc. *and* Local 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 7-CA-17225 and 7-CA-17263

December 21, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 8, 1981, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief. Respondent filed cross-exceptions to a part of the Administrative Law Judge's Decision, and also filed a brief in support of part of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Fuelgas Company, Inc., West Branch and Rose City, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This case was heard at West Branch, Michigan, on November 24 and 25, 1980. The charges were filed by the Union on December 27, 1979,[1] and January 7, 1980. The complaint alleges several independent violations of Section 8(a)(1) of the Act, and the discharge of Jack Wesch, in violation of Section 8(a)(1) and (3) of the Act.[2]

Respondent denies commission of the alleged violations.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent maintains its principal office and place of business at 2290 East Hill Road, P.O. Box 1490, in Flint, Michigan, herein called the Flint office. It maintains 26 distribution branches in the State of Michigan and is, and has been at all times material herein, engaged in the sale and distribution of propane gas and related products. Respondent's distribution branches located at 2147 I-75 Business Loop, West Branch, Michigan, herein called the West Branch branch, and Route 33 North, Rose City, Michigan, herein called the Rose City branch, are the facilities involved in this proceeding. During the year ending December 31, 1979, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, had gross revenues in excess of $500,000, and delivered at its distribution branches propane gas and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its distribution branches in various locations throughout the State of Michigan, directly from points located outside the State of Michigan.

II. THE LABOR ORGANIZATION

It is admitted, and I find, that Local 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

In July 1979, the Union commenced an organizing campaign at Respondent's West Branch and Rose City facilities. On July 26, the Union filed a petition in Case 7-RC-15531 for the following unit of employees:

> All truck drivers, servicemen, cylinder men, utility men employed at the Employer's West Branch and Rose City, Michigan facilities, but excluding all

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[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) by soliciting grievances, Member Jenkins relies on his dissenting opinion in *Uarco Incorporated*, 216 NLRB 1 (1974).

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[1] All dates are in 1979, unless otherwise specified.

[2] Subsequent to the close of the hearing, on January 27, 1981, counsel for the General Counsel filed a motion to dimiss par. 13 of the complaint which alleges the illegal discharge of Leo Nicefield. The basis for this motion was Nicefield's proffer to withdraw Case 7-CA-17263. Both Nicefield and Respondent concurred in counsel for the General Counsel's motion. Therefore, I am granting the motion.

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office clerical employees, guards and supervisors as defined in the Act.

An election was conducted on October 5, at both facilities voting as a single unit. Of the approximately 11 eligible voters, 9 votes were cast for the Union, 1 vote was cast against the Union, and 2 ballots were challenged. The two challenged ballots were not sufficient to affect the results of the election. On November 30, the Regional Director issued a supplemental decision certifying the Union as the collective-bargaining agent for the employees referred to in the above-described unit.

After receiving the petition, Thomas Lambert, vice president and general manager of Respondent, asked Lane Powell, industrial relations manager of Marathon Oil Company (of which Respondent is a wholly owned subsidiary), to conduct a training session regarding standards of conduct during the union organizational drive. All of Respondent's supervisory hierarchy, including branch managers, were present at this session, where Powell pointed out what kind of conduct would constitute an unfair labor practice. He stressed what to do, and what not to do, during the Union's organizational campaign. John Miller, attorney for Respondent, also advised management as to standards of conduct during the campaign. Miller was not present at this session.

Beginning on August 2, Lambert held a series of four meetings with the employees at Rose City and West Branch. At the first meeting, at West Branch, David Jacklyn, a serviceman, stated that he thought he should be paid the wage rate in a higher classification. According to the testimony of Jacklyn and Wesch, Lambert allegedly responded that he could not give the employees a raise even though they may have been in a higher job classification unless the employees got their cards back from the Union (union authorization cards), and then he could check into it, and give them a raise if they had one coming. At this same meeting employees complained about Frank Toms, branch manager, and about unsafe working conditions. Lambert, in his testimony, denied the statement attributed to him regarding the return of union authorization cards. He testified that employees, in particular Jacklyn, discussed wages. He reviewed the benefit policies of Fuelgas and pointed out his inability to grant any wage increases because of the wage and price guidelines.

Later that same day Lambert met with the employees at Rose City. At this meeting Lambert reviewed the history of Respondent and its acquisition of Greene's Gas Company. Employees brought up problems they believed existed at the plant. Lambert also asked the employees to give him a chance. Nicefield questioned the wage rate he was receiving and Lambert responded that he would check out all the problems the employees had raised. At the first meeting in West Branch, and later in Rose City, Lambert asked the employees what their problems were and why they needed the Union. The employees complained that they were lifting tanks which were filled with gas beyond the proper capacity, that they were working too much overtime, and as stated earlier they complained about Toms. Lambert told the employees he would talk to Toms and get the problems resolved. Also at the first meeting in Rose City, Lambert asked employees why they needed the Union and Nicefield complained he was not making as much money as other employees who were engaged in the same duties. Lambert allegedly responded that he could take care of that problem immediately. Moreover, he asked the employees to give him some time, that he was going to get to these problems and they should let him see what he could do. In late August, Lambert held a second meeting with the West Branch employees where he informed them that he had spoken with Branch Manager Toms, and that Respondent would make every effort to resolve the problems that had been discussed.

Thereafter, the branch managers of West Branch and Rose City commenced to conduct weekly meetings with their employees. Lambert advised the employees at West Branch during the second meeting with them that the weekly meetings would be for the purpose of employees communicating any problems they had to their branch managers. Employee Wesch testified that, during his 9 years in Respondent's employ, this was the first time such meetings had been conducted. The weekly meetings with management ceased at the Rose City branch approximately 1 week after the election, according to the testimony of Nicefield.

During the latter part of August, Jacklyn, who was the union observer at the election in West Branch, was experiencing problems with his truck. On the day in question Jacklyn called Toms at the Rose City office complaining about his truck. Toms told Jacklyn to work at the dock at West Branch until he, Toms, could get there to look at the truck. After hanging up the phone in the presence of some other employees, Jacklyn stated that he would like to kick his (Toms') ass if he were there. When Toms arrived at West Branch an employee informed him about Jacklyn's statement. Toms followed Jacklyn to the auto repair shop and brought him back to the plant in his truck. On the way back to the plant, Toms asked Jacklyn about this comment. Jacklyn admitted that he had made the alleged statement and the two of them discussed the situation and concluded that there was no sense fighting and they worked the incident out, as "gentlemen and friends." Jacklyn testified that during this conversation Toms told him "he was raising too much hell with the Union" and that Jacklyn would end up getting fired or, if the Union won the election, Respondent would "make it very hard for me to work there." Toms denied making the statements that Jacklyn attributed to him, although on cross-examination Toms testified that it was possible that the subject of the Union came up, and that he truthfully did not recall what was said about the Union.

In late August Lambert conducted a second meeting with the West Branch employees. Jacklyn testified that he told them that if the Union was voted in they would not receive the scheduled cost-of-living increase in January 1980. Jacklyn worked for Respondent from June 1977 until October 1979. He testified that, during his tenure of employment with Respondent, employees received cost-of-living raises in January of from 5 to 7 percent.

Lambert testified that he was discussing the collective-bargaining relationship between Respondent and the Union. According to him, he told the employees that cost-of-living raises were a point of negotiations and asked them rhetorically whether Respondent should give them the raises if they had voted for the Union, but if no contract had yet been negotiated.

According to the testimony of Jacklyn, Lambert held a third meeting at West Branch sometime around the middle of September. Lambert allegedly stated at this meeting that since they (the employees) received their raises they did not need the Union and that Frank Toms was working with them better. He asked the men if the reference to Toms was not so and, allegedly, stated again that they did not need the Union. In early September the employees received wage increases in varying amounts. The raises were allegedly "classification raises"; i.e., increases in pay reflecting different steps within the same classifications. Respondent takes the position that, during Lambert's meeting with the Rose City employees, Nicefield questioned his wage rate of $5 an hour. Because this rate was not specified on the Company's pay scale, Lambert became concerned and checked into the situation. He discovered that at 19 or 20 of Respondent's branches there were about 43 employees who were incorrectly classified. Accordingly, after discovering these errors he consulted with his attorney and industrial relations manager. They advised Lambert to correct the classifications and implement the wage increases. Respondent's witness, Richard Anderson, a branch manager at New Baltimore,[3] testified that Respondent's policy is to give an employee a classification raise after 6 months of employment, and then again after 18 months, at which time the employee reaches the maximum third step in the classification system.

Wesch was known to be a union adherent by virtue of the fact that he testified in mid-August on behalf of the Union at the Board representation hearing. Wesch testified in this proceeding that approximately a week before the election he talked to Frank Toms privately on or about three occasions. The conversations took place in Toms' office and according to Wesch, "He asked me what I would get out of the Union and I told him that, well, I was not sure, I would not know until the union got in there, but he said that the Union wouldn't get in, and he told me to be sure to vote no for the Union." Respondent does not deny that these statements were made by Toms to Wesch but contends that under the circumstances they do not amount to unlawful interrogation. Respondent avers that the conversation was one where Toms was merely expressing his opinion and there were no threats or statements that could in any way be construed as coercive. Moreover, Wesch's presence in Toms' office was not unusual. Respondent contends, further, that asking employees who are openly prounion why they are supporting a union is not violative of the Act.

Nicefield and James Rau, a serviceman, testified that on the night before the election they were called on the telephone by Branch Manager Richard Anderson. According to Nicefield Anderson told him that he would "hate to see me lose my job but if the Union went through, that we would all be singled out one at a time and be fired within 3 months—." According to Rau, Anderson allegedly stated "—we was making a mistake by getting a union in and he said that if it was voted in, that we would all be weeded out and fired and that he hated to see us lose our jobs." Respondent takes the position that Anderson was calling Nicefield and Rau as personal friends and merely asking them to reconsider their support for the Union and give Fuelgas a fair shake, pointing out advancement possibilities similar to his promotion. He denies telling Rau or Nicefield that they would lose their jobs. Respondent avers again that Anderson knew how they felt about the Union and he was simply expressing his own opinions; moreover, no threats were made about jeopardizing any individual's jobs.

The Termination of Jack Wesch

Wesch began his employ with Respondent in 1970. In July 1979, during the union organizational campaign, he signed a union card and distributed cards to other employees. Wesch worked at the West Branch branch; he also contacted employees at Respondent's other facilities to induce them to join the Union. He attended union meetings in July and August. Wesch testified at the representation case hearing in August on behalf of the Union. A short time after the Union was certified, Wesch asked for, and received, permission from Toms to post a notice in the West Branch facility, informing the employees that the Union had been certified and there would be a union meeting. Wesch was a transport truck-driver and he also performed light maintenance[4] on Respondent's vehicles.

Sometime after the election, Respondent discovered several unexplained acts of destruction to its property. They all occurred at the West Branch facility. The damages are documented by Respondent's records which were received into evidence. Instead of oil being used as a lubricant in a compressor, methanol was found, costing Respondent approximately $950. Truck 803 was found to contain gravel or sand in the crankcase, costing Respondent almost $1,400. Truck 801, with only 5,000 miles on it, was found to have rivets in the front assembly missing, and one wheel about to fall off.

When truck 906 was in use at West Branch, it was driven by Wesch. Wesch inspected this truck on October 22, and noted on the form used by Respondent that the foot brakes were "o.k." In December, it was discovered that transmission/power steering fluid was in the master brake cylinder rather than brake fluid. This cost Respondent almost $700 to replace and rebuild the parts in the brake system, which had been destroyed by the transmission fluid. Respondent considered these incidents to be acts of sabotage and requested the state police to keep a watch on the yard.

Generally, Wesch was assigned to drive and maintain truck 808. On November 26, the microbrake on this truck locked up. This is a switch located on the dashboard of the truck, which locks the brakes. To correct the situation, Wesch borrowed a wrench from an employee and loosened the fitting on the brakeline to purge off some of the brake fluid. By doing this he was able to release the microbrake. Wesch testified that he had trouble with this truck before, and he advised management of this 6 months prior to his termination.

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[3] Not involved in this proceeding.

[4] He changed oil, tires, and filters. During the period involved in this proceeding, he was responsible only for the vehicle he drove.

Wesch testified that he had to wait until the morning of November 27 to replace the brake fluid, because it was past quitting time on November 26 when he had the problem. According to Wesch, the backroom where the brake fluid was kept was locked.[5] He testified further that brake fluid is kept in a tall plastic bottle about a foot high and it is labeled brakefluid. The transmission/power steering fluid was also kept in the backroom, and it was in a quart container similar to an oilcan, also labeled transmission fluid. Moreover, according to Wesch's testimony, and the testimony of other witnesses, transmission fluid has a reddish color and brake fluid is clear in color.

Wesch drove the truck on November 27, 28, and 29 before going on vacation on December 6. He testified that after replacing the fluid he had no further problems with the brakes. Respondent's records revealed that no one was assigned to drive the truck from December 1 through December 5. Record evidence reveals that the truck was driven by other employees on December 6, 7, 8, 10, 11, 13, and 14.

On December 11, Toms went out on deliveries with another employee on truck 808. They were making their deliveries when they began to experience problems with the brakes "hanging up." As a result they had to release fluid from the line leading to the master cylinder in order to release the brakes. As they continued making deliveries they experienced the same problems and were forced to constantly bleed the brake system. Red fluid came out of the system. After approximately six deliveries they assessed the situation and decided to return to the facility. The employee was driving and, as he approached an intersection at approximately 5:30 p.m., where there was no stoplight, the brakes failed completely. Toms told the driver to stop the truck before reaching the intersection, even if he had to drive into a dirt bank adjacent to them or into cars parked on the side of the road. They managed to stop the truck before they reached the intersection and very carefully drove it a quarter of a mile back to the facility and parked it. Toms investigated the situation and concluded that the brake system contained transmission fluid. He had the truck taken to a garage for repairs and the entire master cylinder had to be rebuilt and all of the brake lines purged. This cost Respondent $764.

Toms investigated further and found that the last individual to service the truck was Wesch. Toms called Lambert, Respondent's vice president and general manager, on December 12, and informed him what had happened and what he had discovered. Lambert advised Toms to interview Wesch and to have Thomas Jaenicke,[6] Respondent's northern Michigan regional manager, present for the interview. Lambert instructed Toms that, if Wesch admitted he had put transmission fluid into the master cylinder, then Toms was to discharge him. If Wesch did not admit to this act, Lambert advised Toms not to fire Wesch, but to investigate the matter further.

On December 17, at approximately 8:15 a.m., when Wesch returned from his vacation, he was interviewed in Toms' office by Jaenicke and Toms. Toms told Wesch what had happened, and that transmission fluid had been found in the master cylinder and had damaged the system. Toms and Jaenicke testified that Wesch admitted he had put automatic transmission fluid in the master cylinder but stated he did not think it would make any difference and, indeed, that he did the same thing to his personal truck. Wesch was told he was being terminated. He asked Toms if it was because of the Union. Toms told him that it was not because of the Union, it was strictly because of the dangerous and unsafe conditions Wesch had created. That afternoon Jaenicke prepared a summary of the investigation and the exit interview with Wesch, which has been received into evidence as Respondent's Exhibit 22. Wesch testified that he told Toms and Jaenicke he had not put transmission fluid into the master cylinder, but he had put brake fluid into it.

Conclusions and Analysis

Record testimony developed by Respondent reveals that, after receiving the petition, Lambert asked Powell, industrial relations manager, and John Miller,[7] Respondent's attorney, to meet with Respondent's supervisory hierarchy, including the branch managers, where they would be instructed as to standards of conduct during a union organizational campaign. Unfortunately, in some cases, and in my opinion this is one, clients do not always listen to the advice given to them by their attorneys. I believe the testimony of Jacklyn, who was corroborated by Wesch, that Lambert told employees in the meeting at West Branch that he could not give them classification raises unless they requested the Union to return their authorization cards. Jacklyn impressed me as a credible witness who possessed a good memory and made a sincere effort to recount the details of the meetings. I therefore find that Respondent's unlawful promise was made to employees for the purpose of having them relinquish their support for the Charging Party in violation of Section 8(a)(1) of the Act.

Lambert testified at some length about the various meetings he conducted. He went into great detail as to what he told the employees with respect to company policy, benefits, and Federal wage and price guidelines. I am convinced, though, that he simply chose to leave out those aspects of the meeting that counsel for the General Counsel has alleged as violative of Section 8(a)(1) of the Act.

Lambert testified that Respondent did not just decide to have weekly meetings of employees in August 1979, that they had extensive training programs in the summer of 1977. Furthermore, according to his testimony he directed his branch managers in 1977 to conduct weekly meetings with employees. For 2 years[8] he did not know that the branch managers were not carrying out his directives. Thus, Lambert contends that the reason he updated this directive in the summer of 1979 was because these meetings were not being held. I discredit Lambert and reject this as being inherently untrue. I do not believe it is merely a coincidence that concurrent with receiving the petition and becoming aware of the Union's organizational campaign Respondent decided to revive an old policy which had been dormant for 2 years.

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[5] The unrefuted record testimony reveals that all employees had keys to the plant gate and the backroom.

[6] Record testimony reflects that it is commonplace for Jaenicke to attend similar conferences.

[7] He did not attend this meeting.

Furthermore, the credited evidence is clear that employees were solicited with respect to problems, complaints, or grievances they had, and Respondent impliedly promised to rectify their grievances in violation of Section 8(a)(1) of the Act. I am also cognizant of the fact that Wesch, an employee of 9 years, testified that Respondent never conducted weekly meetings during his tenure.

Jacklyn, whose credibility has already been discussed, testified regarding a conversation which occurred between him and Toms in a truck that Toms was driving. I completely credit the testimony of Jacklyn with respect to the specifics of the conversation. I discredit Toms with respect to the violative comments made during the conversation, although I believe that he got carried away because of the emotional nature of the conversation. Accordingly, I find that the statements made by Toms to Jacklyn constituted threats to impose more onerous working conditions and threats of discharge because of Jacklyn's union adherence, in violation of Section 8(a)(1) of the Act.

It is uncontroverted that, at the meetings Lambert held with the employees, the question of a cost-of-living increase, in January 1980, was raised. Lambert, according to his testimony, attempted to couch his discussion in terms of negotiations. Jacklyn's version, which is the version I credit, reflects that Lambert told the employees at West Branch that they would not receive a scheduled cost of living raise in January 1980 if the Union won the election. Even accepting Lambert's version at best, he implied that the employees would lose the raises if they selected the Union as their collective-bargaining representative. Accordingly, I conclude that this was a threat of a loss of benefit in violation of Section 8(a)(1) of the Act.

Respondent implemented a companywide wage increase after discovering errors in the classifications. However, there was no past practice of granting these increases. The timing of the increases would necessarily create the impression on the employees who received the increases that their complaints and grievances gave rise to the wage increases.[9] Moreover, Respondent had been put on notice some time earlier of Nicefield's classification, which was not one specified on Respondent's pay scale, but did nothing to remedy the situation until after the Union filed a petition. Furthermore Jacklyn, whom I believe, testified that Lambert told the employees after they received their raises, that they no longer needed the Union as a result of having received said raises. I therefore find that by implementing the wage increases pursuant to employee complaints and grievances, Respondent attempted to undermine the employees' support for the Union in violation of Section 8(a)(1) of the Act.

Respondent concedes that Toms made the statements and inquired of Wesch what he would get out of the Union under the circumstances as testified to by Wesch. Respondent defends its position by pointing out that Wesch was a known union supporter, and that it was not unusual for him or any other employee to be in Toms' office under informal circumstances. Moreover, according to Respondent, the statements do not amount to unlawful interrogation because Respondent was merely attempting to stress its position and persuade Wesch, a known union adherent, to recognize Respondent's position. In my opinion this was not permissive interrogation, because it reasonably tended to interfere with the free exercise of Wesch's Section 7 rights. As pointed out by counsel for the General Counsel no assurances were given that the information elicited would not result in reprisals. Accordingly, I find this to be interrogation within the purview of Section 8(a)(1) of the Act.

Anderson admitted calling Nicefield and Rau to urge them to vote against the Union. Their credible testimony reflects that Anderson told them they would lose their jobs if the Union won the election. Respondent bases its defense on the fact that Anderson was a friend of these employees, knew them socially, and had previously worked with them. Assuming this to be true, Board law still does not relieve a respondent for the statements made by its agents under the circumstances herein. I therefore find that Anderson's statements to these employees were threats in violation of Section 8(a)(1) of the Act.

The Termination of Wesch

In my opinion, Wesch, who had been driving a truck for over 30 years, did in fact put transmission fluid into the master cylinder of truck 808. I further believe that, at the exit interview, Wesch admitted to Toms and Jaenicke that he had put transmission fluid in the brake system, and stated he did not think it would make any difference because he did the same thing with his personal truck. With all the destruction that had occurred to Respondent's equipment I do not believe it was unreasonable for management to act as they did, even though Respondent had no way of proving that Wesch was engaging in sabatoge. It was not in my opinion unreasonable for Respondent to have suspected Wesch. It is also noted that the individuals who were working on the other pieces of equipment which they discovered to have been damaged are the same individuals who reported these acts to management. In Wesch's case this was not the situation, because the individuals driving the truck were the ones who experienced the brake failure, not Wesch. I am not unmindful of the fact that Wesch testified that he advised Respondent 6 months prior thereto that he was experiencing difficulty with the brakes.

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[8] Rose City was not acquired until January 1979.

[9] Moreover, it is noted that Respondent, at an earlier date, held out the promise of remedial action in violation of Sec. 8(a)(1) of the Act. See *St. Francis Hospital*, 249 NLRB 180 (1980).

Although I have concluded that Respondent engaged in various acts in violation of Section 8(a)(1), during the preelection period, I find that the motivation for discharging Wesch almost 3 months later was his admission with respect to putting transmission fluid in the master cylinder of the truck, and not his union activity.

I do not regard Wesch as a credible witness with respect to the testimony he offered in support of his discharge. For example, he testified that he had to wait until the morning after he had trouble with the brakes, because it was after quitting time, and the backroom where the brake fluid was located was kept locked. The uncontroverted testimony by Toms is that all employees had access to the plant and the backroom, 24 hours a day, by virtue of the fact that they all had keys to the plant gate and the back door of the building.

The record is clear that there were other individuals who were equally active on behalf of the Union (e.g., Jacklyn) who were not discharged. The record is also clear that these individuals were known union adherents. I do not believe that Respondent waited 3 months to retaliate against Wesch because of his union activities.

Accordingly, I will recommend that the allegations that Wesch was discharged in violation of Section 8(a)(1) and (3) of the Act be dismissed.

Respondent raises an affirmative defense, that the allegations in the complaint alleging independent violations of Section 8(a)(1) of the Act exceed the scope of the unfair labor practice charges. In section 2 of the form "Charge Against Employer," there is a "catchall" clause which is part of the form itself stating, "[b]y the above and other acts, the above named employer has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act." Thus, the complaint does not expand upon the charges and the allegations are related to the charges. Therefore, Respondent's defense in this regard is without merit.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employees that they would receive higher wages in exchange for relinquishing their support for the Union, Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By soliciting complaints and grievances from employees, with the implication or promise that Respondent would favorably resolve those complaints and grievances, Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By threatening employees with more onerous working conditions and/or discharge because of their support for the Union, Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

6. By threatening to withhold a scheduled wage increase if the employees selected the Union as their collective-bargaining representative, Respondent committed a violation of Section 8(a)(1) of the Act.

7. By implementing a wage increase pursuant to employee complaints and grievances, Respondent committed a violation of Section 8(a)(1) of the Act.

8. By interrogating an employee regarding his union sympathy and support, Respondent committed a violation of Section 8(a)(1) of the Act.

9. By threatening employees with discharge in the event the Union won the election, Respondent committed a violation of Section 8(a)(1) of the Act.

10. The allegations of the complaint that Respondent has engaged in conduct violative of Sections 8(a)(1) and (3) of the Act have not been supported by substantial evidence.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[10]

The Respondent, Fuelgas Company, Inc., West Branch and Rose City, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees they would receive higher wages in exchange for relinquishing their support for the Union.

(b) Soliciting grievances and complaints with the implication that it would favorably resolve those complaints and grievances in an attempt to undermine the employees' support for the Union.

(c) Threatening employees with more onerous working conditions and/or discharge because of their support for the Union.

(d) Threatening to withhold scheduled wage increases if the employees select the Union as their collective-bargaining representative.

(e) Implementing a wage increase pursuant to employee complaints and grievances in an attempt to undermine employees' support for the Union.

(f) Interrogating employees regarding their union sympathies.

(g) Threatening employees with discharge in the event that the Union becomes the collective-bargaining representative for its employees.

(h) We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

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[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Post at both premises at Rose City and West Branch, Michigan, copies of the notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by an authorized representative of Respondent, shall, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT tell our employees they will receive higher wages in exchange for relinquishing their support for the Union.

WE WILL NOT solicit complaints and grievances from our employees with the implication that we will favorably resolve those complaints and grievances in an attempt to undermine our employees' support for the Union.

WE WILL NOT threaten employees with more onerous working conditions and/or discharge because of their support for the Union.

WE WILL NOT threaten to withhold scheduled wage increases from employees if they select the Union as their collective-bargaining representative.

WE WILL NOT implement wage increases pursuant to employee complaints and grievances in an attempt to undermine their support for the Union.

WE WILL NOT interrogate our employees regarding their union sympathies and support.

WE WILL NOT threaten employees with discharge in the event the Union becomes their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

FUELGAS COMPANY, INC.

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[11] In the event this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of a United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Painters District Council No. 36 *and* Sammie L. Brown, d/b/a Brown & Co. Painting Contractor. Case 31-CB-3895

December 21, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 24, 1981, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified below, and to adopt his recommended Order, as modified herein.

We agree with the Administrative Law Judge that Respondent represented, or at least showed an interest in representing, the Charging Party's employees at the time it disciplined supervisor-member Jacob Brown for working for the Charging Party, a "nonaffiliated contractor," and that the imposition of such discipline violated Section 8(b)(1)(B) of the Act because it had the reasonably foreseeable effect of interfering with the Charging Party's chosen representative for purposes of adjusting grievances.

Respondent contends that the instant case is governed by the Ninth Circuit's decision in *Chewelah Contractors,*[1] where the court found that a union does not violate Section 8(b)(1)(B) of the Act by disciplining a member who works for a nonsignatory employer if it neither represents nor shows an intent to represent the employer's employees. The Administrative Law Judge found that *Chewelah Contractors* is inapposite because Respondent's representative status was presumed to continue after the collective-bargaining agreement expired,[2] since, prior to the contract's expiration, Respondent expressed its intent to bargain with the Charging Party on an individual basis, and since Respondent did not affirmatively abandon its interest in bargaining for a new agreement as shown by its failure to respond negatively to the Charging Party's September 24 letter which granted Respondent until October 6 to request negotiations.

We agree that *Chewelah Contractors* is inapposite. We find it unnecessary, however, to rely on the Charging Party's September 24 letter as evidence of Respondent's representative intent. Instead, we find that Respondent's continuing interest in representing the Charging Party's employees is clearly shown by the series of telephone calls between the parties in July, a month after the contract expired, wherein Respondent stated that it would not dispatch workers or apprentices until the Charging Party signed a new contract. We further find that Respondent failed to present any evidence which showed that, thereafter, it abandoned its intent to continue to represent the employees. Therefore, we find, in agreement with the Administrative Law Judge, that Respondent represented or maintained an interest in representing the Charging Party's employees at the time the discipline was imposed against Brown.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Painters District Council No. 36, Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Restraining or coercing Sammie L. Brown, d/b/a Brown & Co. Painting Contractor in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative performing supervisory, managerial, or grievance-adjustment functions for said Employer."

2. Substitute the attached notice for that of the Administrative Law Judge.

259 NLRB No. 106

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[1] *N.L.R.B.* v. *International Brotherhood of Electrical Workers, Local Union No. 73, AFL-CIO* [*Chewelah Contractors, Inc.*], 621 F.2d 1035 (9th Cir. 1980), denying enforcement of 231 NLRB 809 (1977).

[2] See *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel*, 229 NLRB 1094 (1977).

[3] *Plumbers, Steamfitters and Refrigeration Local No. 364, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (William Stewart d/b/a West Coast Contractors)*, 254 NLRB 1123 (1981).

In finding that Respondent violated Sec. 8(b)(1)(B), Member Fanning relies upon the views set out in his separate opinion in *International Brotherhood of Electrical Workers, Local Union No. 323 (Drexel Properties, Inc.)*, 255 NLRB 1395 (1981), and he would not find that in all instances a supervisor is immune from union discipline, as suggested by the Order, as amended, in this case.

APPENDIX

Notice To Employees and Members
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not restrain or coerce Sammie L. Brown, d/b/a Brown & Co. Painting Contractor, in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative performing supervisory, managerial, or grievance-adjustment functions for said Employer.

We will not in any like or related manner restrain or coerce Sammie L. Brown, d/b/a Brown & Co. Painting Contractor, in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances.

We will rescind and expunge from our records all disciplinary action taken against Jacob Brown, including the fines, because of his working for Sammie L. Brown, d/b/a Brown & Co. Painting Contractor, and **we will** notify Jacob Brown, in writing, that the fines levied against him have been rescinded and that all records of disciplinary action against him have been expunged.

Painters District Council No. 36

DECISION

Statement of the Case

Jay R. Pollack, Administrative Law Judge: This matter was heard before me in Los Angeles, California, on May 7, 1981. Pursuant to a charge filed against Painters District Council No. 36 (Respondent) by Sammie L. Brown, d/b/a Brown & Co. Painting Contractor (the Charging Party),[1] on September 12, 1980,[2] the Regional Director for Region 31 of the National Labor Relations Board issued a complaint against Respondent on October 20, alleging that Respondent committed certain violations of the National Labor Relations Act, as amended (the Act). In substance, the complaint alleges that Respondent, by disciplining Jacob Brown, a supervisor employed by the Charging Party, has restrained and coerced, and is restraining and coercing, the Charging Party in the selection of its representatives for the purpose of collective bargaining or adjustment of grievances in violation of Section 8(b)(1)(B) of the Act. Respondent filed an answer denying that Jacob Brown was a supervisor and denying the commission of the alleged unfair labor practices.

Upon the entire record,[3] from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the General Counsel and the Charging Party,[4] I make the following:

Findings of Fact and Conclusions

I. JURISDICTION

The Charging Party is now, and has been at all times material herein, a sole proprietorship of Sammie L. Brown, with an office and principal place of business located in Los Angeles, California, where it is engaged as a painting subcontractor in the building and construction industry. During calendar year 1980, Respondent performed services in excess of $50,000 for Shirley Brothers and Goldrich & Kest, both general contractors located in California. I find that Shirley Brothers meets the Board's jurisdictional standards on a direct inflow basis by virtue of annual purchases in excess of $50,000 of materials and suppliers from suppliers located outside the State of California. I also find that Goldrich & Kest meets the Board's jurisdictional standards on a direct inflow basis by virtue of annual purchases in excess of $50,000 of materials and supplies from suppliers located outside the State of California.

Accordingly, I find that the Charging Party meets the Board's indirect outflow standard for asserting jurisdiction over a nonretail enterprise. See *Siemons Mailing Service*, 122 NLRB 81 (1958). Thus, I find that the Charging Party is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Bargaining Relationship*

As stated above, the Charging Party is a sole proprietorship of Sammie L. Brown who normally employed eight or more journeymen painters. The parties agree that the Charging Party was bound to a collective-bargaining agreement between the Los Angeles County Painters and Decorators Contractors Association, Inc., and Respondent (including all of its affiliated local unions), which agreement was effective by its terms from July 1, 1977, until June 30, 1980 (hereinafter referred to as the 1977-80 agreement).

On January 31, 1980, Sammie L. Brown wrote the Los Angeles County Painters and Decorators Joint Committee, Inc., with a copy to Respondent, giving notice of his intent to terminate the 1977-80 agreement as of June 30. On February 20, Ray De Namur, Respondent's executive secretary, wrote Sammie L. Brown acknowledging receipt of Brown's intent to terminate the contract and advising Brown that Respondent desired to negotiate with the Charging Party "on an individual basis prior to the expiration date of June 30." Although the Charging Party, through its attorneys, requested negotiation meetings with the Union, negotiation on a single-employer basis never commenced. On September 24, the Charging Party, through its attorney, notified Respondent's attorneys that:

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[1] The name of the Charging Party appears as corrected at the hearing.

[2] Unless otherwise stated, all dates refer to calendar year 1980.

[3] On May 28, 1981, counsel for the General Counsel made a motion to correct the record. As the motion was unopposed, the corrections contained therein are hereby granted and incorporated, *sua sponte*, into the record as ALJ Exh. 1.

[4] Respondent argued orally at the hearing but did not file a brief.

> In light of the union's failure to respond to any of these requests for negotiations, the company can only assume that the union no longer wishes to represent Brown & Company's employees. Therefore, effective October 6, 1980, the company intends to implement the terms and conditions contained in the attached bargaining proposals, unless the union requests negotiations prior to that date.

Apparently, Respondent did not request negotiations with the Charging Party, nor did it respond to the letter.

B. *The Supervisory Status of Jacob Brown*

Jacob Brown is the brother of Sammie L. Brown and has been employed by the Charging Party for approximately 10 years. Jacob Brown serves as painting foreman for the Charging Party and, except for occasional visits by his brother, is the individual in charge at the jobsites. Jacob Brown's general duties are to see that the painting work is performed safely and correctly. Jacob Brown is paid $2 an hour more than the journeymen painters. During his 10 years of employment, Jacob Brown has recommended the discharge of three or four employees for inadequate performance, with the result that all such employees were discharged by Sammie L. Brown. With respect to hiring, Jacob has hired three or four applicants and rejected others, without checking with Sammie. Finally, Jacob testified that he resolves employee complaints about working conditions without checking with Sammie and that, therefore, Sammie does not have to deal with such complaints.

Based on the foregoing facts, I find that Jacob Brown is now, and has been at all times material herein, a supervisor of the Charging Party within the meaning of Section 2(11) of the Act. I further find that Jacob Brown was a natural and potential representative of the Charging Party for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act. See *Norwalk Typographical Union No. 529 (The Hour Publishing Co.)*, 241 NLRB 310 (1979).

C. *The Union Discipline*

Jacob Brown has been a member of affiliate local unions of Respondent for approximately 14 years. On August 20, charges were filed by Jack Mike, a business representative, against Jacob for "working for Brown & Co. Painting. A nonaffiliated contractor."[5] On August 28, Respondent notified Jacob of the charges filed against him and set a trial of the case for the evening of September 18 at Respondent's offices in Los Angeles, California. On September 9, Jacob wrote Respondent requesting the specifics of the charges against him. On September 12, Respondent, by Executive Secretary De Namur, sent Jacob copies of the notice of his alleged violations, the applicable provisions of the Union's constitution and bylaws, and the applicable contract provisions. Jacob did not attend the trial on September 18, but was notified by letter dated September 19 that he had been found guilty of the alleged violations and had been fined $600, $300 payable within 30 days and the remaining $300 suspended provided that there were no further violations for a period of 2 years. The record is silent as to whether Jacob paid any portion of the fine.

D. *Conclusions*

Section 8(b)(1)(B) of the Act provides that "it shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances." The applicable principles of law are as follows:[6]

> Section 8(b)(1)(B) prohibits both direct union pressure—for example, strikes—to force replacement of grievance representatives and indirect union pressure—for example, union discipline of supervisor-members—which may adversely affect the chosen supervisors' performance of their representative functions. *American Broadcasting Companies* v. *Writers Guild of America, West, Inc., et al.*, 437 U.S. 411 (1976); *New Mexico District Council of the United Brotherhood of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 177 NLRB 500, 502 (1969), enfd. 454 F.2d 1116 (C.A. 10, 1972); and *Wisconsin River Valley District Council of Carpenters (Skippy Enterprises Inc.)*, 218 NLRB 1063, 1064 (1975), enfd. 532 F.2d 47 (C. A. 7, 1976).
>
> It is also well settled that union discipline of supervisor members who cross a picket line or otherwise violate a union's no-work rule in order to perform their normal supervisory functions constitutes indirect union pressure within the prohibition of Section 8(b)(1)(B). In reaching this conclusion, the Board and courts have recognized that the reasonably foreseeable and intended effect of such discipline is that the supervisor-member will cease working for the duration of the dispute, thereby depriving the employer of the grievance adjustment services of his chosen representative. *American Broadcasting Companies, supra*, 437 U.S. at 433-437, note 36; *N.L.R.B.* v. *International Union of Operating Engineers, Local Union No. 501*, 580 F.2d 359, 360 (C.

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[5] Jacob testified that on August 15, the date of his alleged violation, he was probably showing employees how he wanted certain items painted.

[6] As recently set forth by Administrative Law Judge Shapiro in *Plumbers, Steamfitters and Refrigeration Local No. 364 (West Coast Contractors)*, 254 NLRB 1123 (1981).

> A. 9); *A. S. Horner, supra,* 177 NLRB at 502; and *Skippy Enterprises, supra,* 218 NLRB 1064, enfd. 532 F.2d at 52-53. Such discipline is unlawful even where as here the supervisor defies the union and continues to work for the employer during the dispute; the discipline is unlawful because the supervisor, having been disciplined for working during a labor dispute, may reasonably fear further discipline and hence will be deterred from working during any future disputes. The employer, in such circumstances, must either replace the disciplined supervisor or risk loss of his services during a future dispute; in either event, the employer is coerced in the selection and retention of his chosen grievance adjustment representative. *American Broadcasting Companies, supra,* 437 U.S. at 433-437.

In light of the foregoing principles, Respondent's discipline of the Charging Party's supervisor, Jacob Brown, because he worked for a nonunion employer, restrained and coerced the Charging Party in the selection and retention of its grievance adjustment representative.

Respondent, relying on the decision of the United States Court of Appeals for the Ninth Circuit in the *Chewelah Contractors* case,[7] argues that union discipline of a member who works for a nonsignatory contractor is not a violation of Section 8(b)(1)(B), even though that member is a supervisor, unless it is clear that the union's object is to influence the supervisory function.

In *Chewelah Contractors,* the court, in refusing to enforce the Board's finding of a violation of Section 8(b)(1)(B), stated that the purposes of the section were to prevent unions from forcing employers into or out of multiemployer bargaining units and to guarantee that an employer's bargaining representative would be completely faithful to the employer's desires. The court noted that, in any decision involving Section 8(b)(1)(B) that had come to its attention, the charged union had been the bargaining representative of the complaining company's employees. However, the charged union in *Chewelah Contractors* neither represented the company's employees nor demonstrated a desire to represent the employees. The court reasons that the union had no incentive to influence the company's choice of representative or affect the member's loyalty to the company. Thus, the court held that a union does not violate Section 8(b)(1)(B) by disciplining a member, even though that member is also the bargaining representative of an employer if the union neither represents nor shows an intent to represent the employer's employees.

I find that the court's opinion in *Chewelah Contractors* is inapposite because the record establishes that Respondent represented or showed an interest in representing the Charging Party's employees at the time of the subject discipline. As noted above, Respondent represented the Charging Party's employees for some time prior to the expiration of the 1977-80 agreement. At the expiration of the agreement, Respondent was presumed to be the exclusive bargaining representative of the employees. See, e.g., *Pioneer Inn Associates, d/b/a Pioneer Inn and Pioneer Inn Casino,* 228 NLRB 1263 (1977), enfd. 578 F.2d 835 (9th Cir. 1978); *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel,* 229 NLRB 1094 (1977). Further, Respondent had expressed an intent to continue representation and bargain for a contract on an individual employer basis. The record does not establish that Respondent affirmatively abandoned its intent to bargain for a new agreement for the Charging Party's employees. Rather, Respondent failed to respond to the Charging Party's correspondence which, by its terms, granted Respondent until October 6 to request negotiations. Thus, during August, when the intraunion charges were filed against Jacob Brown, and September, when the discipline was imposed, Respondent represented the Charging Party's employees or at least showed an interest in representing said employees.

Respondent argues that the General Counsel must prove that the union's object is to influence the supervisory function. However, in *Chicago Typographical Union No. 16 (Hammond Publishers, Inc.),* 216 NLRB 903, 903-904 (1975), the Board stated that a violation of Section 8(b)(1)(B) does not turn on a determination of the motivation behind a union's act of discipline, but rather on a determination of the reasonable effect of that discipline on the supervisor's activities as an 8(b)(1)(B) representative.

The Board has continued to adhere to the reasonable effect test. See e.g., *Chewelah Contractors, supra,* 231 NLRB at 811-812; *West Coast Contractors, supra; New York Newspaper Printing Pressman's Union No. 2 (New York News, Inc.),* 249 NLRB 1284, 1285 (1980). Applying the effect test here, I find that the reasonable and foreseeable consequences of Respondent's discipline of Jacob Brown is that the supervisor-member would cease working for his employer until a contract was signed or cease working for his employer in future disputes, thereby depriving the Charging Party of its chosen representative for the purposes of grievance adjustment. See *American Broadcasting Companies, supra,* 437 U.S. at 436, fn. 36; *N.L.R.B.* v. *International Union of Operating Engineers, Local 501, supra,* 580 F.2d at 360. Thus, I conclude that by disciplining Jacob Brown, Respondent has violated Section 8(b)(1)(B) of the Act.

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and on the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) and Section 8(b) of the Act.
2. The Charging Party is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[7] *N.L.R.B.* v. *International Brotherhood of Electrical Workers, Local Union No. 73, AFL-CIO [Chewelah Contractors, Inc.],* 621 F.2d 1035 (9th Cir. 1980), denying enforcement of 231 NLRB 809 (1977).

3. Jacob Brown, at all times material herein, was a supervisor for the Charging Party within the meaning of Section 2(11) of the Act and a natural and potential representative of the Charging Party for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

4. By preferring intraunion charges against Jacob Brown, holding hearing on said charges, and imposing a fine against him, Respondent restrained and coerced the Charging Party in the selection and retention of its representative for the purposes of collective bargaining and the adjustment of grievances, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Painters District Council No. 36, Los Angeles, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing Sammie L. Brown d/b/a Brown & Co. Painting Contractor in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative for performing supervisory, managerial, or grievance adjustment functions for said Employer.

(b) In any like or related manner restraining or coercing Brown & Co. Painting Contractor in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind and expunge from its records all disciplinary action taken against Jacob Brown, including the fines, because of his working for Brown & Co. Painting Contractor.

(b) Notify Jacob Brown, in writing, that the fines levied against him have been rescinded and all records of disciplinary action against him expunged.

(c) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by its authorized representative, shall be posted by said Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Deliver to the Regional Director for Region 31 signed copies of said notice in sufficient number for posting by Sammie L. Brown d/b/a Brown & Co. Painting Contractor, said Employer willing, at all locations where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[8] All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

RPM Beef, Inc. *and* Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO. Case 32-CA-3847

December 21, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on August 10, 1981, by Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO, herein called the Union, and duly served on RPM Beef, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on September 2, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 14, 1981, following a Board election in Case 32-RC-1211, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about July 20, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so.[2] On September 16, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 6, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 8, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent contends that the Board erroneously issued a Certification of Representative for the Union because it improperly overruled Respondent's objections to the election. The General Counsel argues that all material issues have been previously decided in the related representation proceeding. We agree with the General Counsel.

Review of the record herein, including the record in Case 32-RC-1211, reveals that on December 3, 1980, the Regional Director for Region 32 approved a Stipulation for Certification Upon Consent Election agreed to by the Union and Respondent. An election was conducted on December 23, 1980, which resulted in a vote of 11 for, and 4 against, the Union. There were four challenged ballots, a number insufficient to affect the results of the election. On December 29, 1980, Respondent filed objections to conduct affecting the results of the election. On January 21, 1981, the Regional Director issued and served on the parties his Report on Objections, Order, and Notice of Hearing, in which he directed a hearing on Respondent's Objections 1, 2, 5, 19, and 20. At the hearing, conducted on February 11, 1981, Respondent alleged that the Union made material misrepresentations to the employees regarding the Employer's profitability, the compensation received by the owners of the Employer, and benefits and wages provided at union plants. Respondent also alleged that the Union made unlawful promises of wages and benefits in return for favorable votes. Both independently and cumulatively these acts were claimed to have destroyed the "laboratory conditions" required for the election.

In her Report on Objections and an Amendment to Report on Objections, issued on April 2 and April 7, 1981, the Hearing Officer found that no material misrepresentations or unlawful promises were made, and therefore recommended that Respondent's Objections 1, 2, 5, 19, and 20 be overruled in their entirety. On April 9, 1981, Respondent filed with the Board exceptions to the Hearing Officer's Report on Objections. On July 14, 1981, the National Labor Relations Board issued its De-

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[1] Official notice is taken of the record in the representation proceeding, Case 32-RC-1211, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] By letter dated August 26, 1981, Respondent confirmed to an agent of the Regional Director that it was engaging in a "technical refusal to bargain" with the Union.

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cision and Certification of Representative, in which it adopted the Hearing Officer's recommended disposition of Respondent's Objections 1, 2, 5, 19, and 20 and certified the Union as the exclusive collective-bargaining representative of the employees of Respondent in the unit described in the stipulation.

In its response to the Notice To Show Cause, Respondent alleges as the basis to deny the General Counsel's Motion for Summary Judgment the same union conduct it raised in its objections to the election and its exceptions to the Hearing Officer's report. It thus appears that Respondent is attempting to raise herein issues which were raised and determined in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a California corporation, with an office and place of business in Fresno, California, engaged in the retail and nonretail sales of meat products. During the past 12 months Respondent, in the course and conduct of its business operations, purchased and received goods and services valued in excess of $50,000 directly from suppliers located outside the State of California, and derived gross revenues in excess of $500,000.[4]

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time butchers, wrapping employees, shipping and receiving employees, and drivers employed by the Employer at its 2413 S. Fruit Street, Fresno, California, location; excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act.

2. The certification

On December 23, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 32, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 14, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 20, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 20, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since July 20, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

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[3] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] In its answer to the complaint and response to the Notice To Show Cause, Respondent denied that it is engaged in the retail sale of meat. In the Stipulation for Certification Upon Consent Election, however, Respondent agreed that it did engage in retail sales. In any event, Respondent does not contest the Board's jurisdiction.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of RPM Beef, Inc., set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.[5]

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. RPM Beef, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time butchers, wrapping employees, shipping and receiving employees, and drivers employed by the Employer at its 2413 S. Fruit Street, Fresno, California, location; excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 14, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 20, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, RPM Beef, Inc., Fresno, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time butchers, wrapping employees, shipping and receiving employees, and drivers employed by the Employer at its 2413 S. Fruit Street, Fresno, California, location; excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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[5] In its Joinder in Motion for Summary Judgment, the Charging Party requests that attorney's fees be awarded to it. That request is denied. See *Trustees of Boston University*, 228 NLRB 1008, 1010 (1977), enfd. 575 F.2d 301 (1st Cir. 1978).

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 2413 S. Fruit Street, Fresno, California, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Butchers Union Local No. 126, United Food and Commercial Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time butchers, wrapping employees, shipping and receiving employees, and drivers employed by the Employer at its 2413 S. Fruit Street, Fresno, California, location; excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act.

RPM BEEF, INC.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Kern Council Services to the Developmentally Disabled, Inc. *and* Social Services Union, Local 535, Service Employees International Union, AFL-CIO, CLC, Petitioner. Case 31-RC-4995

December 23, 1981

DECISION AND CERTIFICATION OF REPRESENTATIVE

By Chairman Van de Water and Members Fanning and Hunter

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to and determinative challenges in an election held on October 7, 1980,[1] and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the briefs and hereby adopts the Hearing Officer's findings and recommendations,[2] except as modified herein.

The Hearing Officer found that Judy Crawford was not a supervisor under Section 2(11) of the Act and recommended overruling the challenge to her ballot. His determination that Crawford was not a supervisor was based, *inter alia*, on his conclusion that her alleged supervisory functions were isolated and routine in nature and did not require the use of independent judgment. Additionally, the Hearing Officer found that Crawford had no authority to assign work, hire, fire, suspend, lay off, transfer, or promote employees, or to effectively recommend such action.

The Petitioner has excepted to the Hearing Officer's recommendation to overrule the challenge to Crawford's ballot and contends that Crawford is a supervisor because, based on the Hearing Officer's own findings, Crawford has the authority to grant or deny sick leave and vacation leave, to discipline an employee, to evaluate her work performance, and effectively to recommend that her salary be increased. We find merit in the Petitioner's exceptions.

Crawford is a secretary in the Employer's "assessment and consultation" (herein AC) unit working directly under the executive/administrative assistant to the Employer's director. The only other secretary in the unit is Paula Antell. Crawford and Antell each receive work assignments from and perform primarily secretarial duties for one of two separate groups of professionals in the AC unit. When one of the secretaries is absent for a significant length of time, the other assumes both sets of secretarial duties.

Crawford trained Antell when the latter was hired by the Employer in September 1979. Additionally, since approximately June 1980, Crawford has approved Antell's request for time off and has filled out monthly time summary sheets for Antell. Crawford signs both the leave approval and time summary forms in the space designated for supervisory approval.[3] Further, as the Hearing Officer found, Crawford has authority to discipline Antell and has exercised this authority in the past. Thus, on one occasion when a nutritionist for whom Antell performed secretarial work had a problem with Antell's work attitude, Crawford counseled Antell regarding her attitude and disposition.On another occasion, Crawford directed Antell to make up work time lost due to her lateness.

Most significantly, Crawford prepared Antell's annual evaluation in which she recommended that Antell be raised to a higher salary level. Crawford discussed this evaluation with Antell and signed it in the space designated for "supervisor." There is no evidence of any additional independent supervisor investigation of Antell regarding the salary increase. Crawford's recommendation was approved by the Employer's director.

Section 2(11) of the Act defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommended such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." It has repeatedly been pointed out that, since this definition is stated in the disjunctive, possession of any of the enumerated powers or attributes is sufficient to establish the existence of supervisory status.[4]

Here, Crawford possesses several of the indicia of supervisory authority since the record estab-

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[1] The election was conducted pursuant to a Decision and Direction of Election. Of approximately 17 eligible voters, 8 cast ballots for and 7 against the Petitioner. There were two challenged ballots, a number sufficient to affect the election results. In addition, the Petitioner filed objections to the election. Following an investigation, the Regional Director issued his Supplemental Decision in which he overruled the Petitioner's Objections 1 and 2 and ordered that a hearing be held to resolve the factual and legal issues raised by the Petitioner's Objections 3 and 4 and by the two challenged ballots. Thereafter, a hearing was held and the Hearing Officer issued a report on challenges and objections.

[2] In the absence of exceptions thereto, we adopt, *pro forma*, the Acting Regional Director's recommendations that the challenge to the ballot of Terry Wilson be sustained, that the Petitioner be allowed to withdraw its Objection 3, and that the Petitioner's Objection 4 be overruled.

[3] The Hearing Officer found that the Employer's accounting office considered Crawford to be Antell's supervisor and automatically sent her the personnel forms for Antell which are generally sent to an employee's supervisor.

[4] *Penn Industries, Inc.*, 233 NLRB 928, 930-931 (1977), and cases cited therein.

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lishes that she counsels and disciplines Antell,[5] evaluates her performance, and has effectively recommended an increase in her salary.[6] Additionally, Crawford has authority to grant or deny Antell's leave requests. Concededly, these supervisory functions do not occupy the majority of Crawford's time, but Crawford's constant possession of supervisory authority, regardless of the frequency of its exercise, is to be distinguished from instances where an individual lacks supervisor status because he *possesses* supervisory authority sporadically or infrequently.[7] Moreover, the relatively few instances of Crawford's exercise of supervisory authority are explicable by her relatively recent assumption of supervisory authority over Antell (June 1980), and the fact that she supervises but one employee, a factor that in itself does not bar supervisory status.[8] Finally, Crawford performs her disciplinary and evaluation functions independently and these functions are those which require discretion and independent judgment.

In view of the foregoing, we find that Crawford is a supervisor within the meaning of Section 2(11) of the Act. Accordingly, we conclude that the challenge to Judy Crawford's ballot should be sustained. Since both the challenges to ballots in the election have been sustained, the tally shows that a majority of valid ballots have been cast for the Petitioner. Accordingly, we shall issue a Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Social Services Union, Local 525, Service Employees International Union, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

> All clerical employees employed by the Employer at its facilities located in Bakersfield, Ridgecrest, Shafter, Delano and Lamont, California, excluding professional employees, Client Program Coordinator Assistants, guards and supervisors as defined in the Act, as amended.

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[5] See, e.g., *J.K. Electronics, Inc., d/b/a Wesco Electrical Company*, 232 NLRB 479 (1977).

[6] See, e.g., *Our Way, Inc./Our Way Machine Shop, Inc.*, 238 NLRB 209, 213 (1978).

[7] Cf. *Complete Auto Transit, Inc.*, 214 NLRB 425 (1974).

[8] *Cartwright Hardware Co., Inc.*, 229 NLRB 781, 783, fn. 17 (1977).

Nathan Yorke, Trustee in Bankruptcy, Successor in Bankruptcy, or Alter Ego to the Seeburg Corporation and Seeburg Service Parts Co.,[1] a Single Employer *and* Local Union 743, Warehouse, Mail Order, Technical and Professional Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 13-CA-19631

December 28, 1981

DECISION AND ORDER

On April 23, 1981, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Union filed exceptions and supporting briefs and Respondent filed cross-exceptions and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(5) and (1) of the Act by terminating its operations at its Chicago, Illinois, facility without prior notice to the Union and without affording it an opportunity to bargain with Respondent concerning the effects of such conduct on unit employees. However, we disagree with her further finding that no *Transmarine* backpay order[2] is warranted in the circumstances of this case.

The record shows that the unit employees were covered by a 3-year collective-bargaining agreement effective to September 1980. Prior to the vacation period which traditionally ends in mid-August, Respondent Seeburg had in mid-July 1979 an active payroll of about 385 or 395 employees. However, as Seeburg had financial or cash-flow problems, no one was called back to work until mid-September 1979 when only 250 unit employees were recalled.

On October 19, 1979, Seeburg filed a petition for reorganization under Chapter 11 of the Bankruptcy Act. At this time, there were further layoffs and, by January 1980, the complement was reduced to about 60 employees. By February 4, 1980, only seven employees were still actively working.[3] It appears the layoffs and recalls took place in accordance with the seniority provisions of the parties' collective-bargaining agreement and that the Union did not request bargaining or object to any of the layoffs when they occurred.

On February 4, 1980, the bankruptcy court appointed Nathan Yorke to act as Seeburg's trustee in bankruptcy and Yorke was given authority to continue to operate the business. At a creditors' meeting on February 8, 1980, Yorke learned from Joseph P. Dillon, Seeburg's treasurer and chairman of its board, that Seeburg had lost about $350,000 since it had filed its October 19, 1979, petition, and that its liabilities exceeded $8 million and the book value of its assets approximated $6 million which, when liquidated, amounted to about $1.5 million. On February 11, 1980, Yorke requested, and the bankruptcy court issued, an order authorizing him, *inter alia*, to curtail Seeburg's operations by "terminating all personnel save certain key individuals who will be retained for services the trustee deems necessary in furtherance of the instant reorganization . . . ."

Upon receipt of the order on February 11, Yorke shut down the plant facility used by both Seeburg and Seeburg Service and released all personnel including the seven unit employees who were still working on that date.[4] Four days later, the Union found out about the shutdown and demanded that an immediate meeting be set up to discuss, *inter alia*, the effects of Yorke's action. In his reply of February 25, Yorke failed to accede to this demand. Thereafter, the bankruptcy court authorized Yorke to offer some parts for sale and, in April 1980, Yorke and Dillon made arrangements with the Union to recall two or three individuals to assist in this endeavor. According to Yorke, he "operated the business" until July 1980, when, pursuant to a court-approved reorganization plan, Seeburg and its purchaser in liquidation, Stern Electronics, agreed to set aside $49,000 of the estate's assets should a finding of backpay liability ultimately be made by the Board.[5] In addition, Stern Electronics agreed to cover an additional $6,000 of potential backpay liability. Upon completion of the sale at the end of July 1980, Yorke terminated the employees who had been recalled in April 1980.

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[1] Herein respectively called Seeburg and Seeburg Service.

[2] *Transmarine Navigation Corporation and its Subsidiary, International Terminals, Inc.*, 170 NLRB 389 (1968).

[3] Their names appear in the record as follows: G. Pawlick, Mr. Szafader, Johnnie Miller, Mr. Kopczynski, T. Swienton, Mr. Lakos, and T. A. Valenza.

[4] Pursuant to an order of the bankruptcy court, Yorke paid these employees their wages through February 9, 1980. Yorke did not notify the Union of the shutdown. In fact, Yorke at that time did not know that a union represented Seeburg's employees.

[5] By that time the charge in the instant proceeding had been filed with the Board by the Union.

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As stated above, the Administrative Law Judge properly found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union regarding the effects on unit employees of its decision to terminate operations on February 11, 1980. However, as already indicated, she found that a *Transmarine* backpay remedy as sought by the General Counsel was not warranted. In this connection, she pointed to the fact that 97 percent of the unit employees had been laid off before Yorke became trustee, that Seeburg had suffered a $350,000 loss during the 4 months before Yorke became trustee, and that Yorke served as trustee for only 1 week before shutting down the plant. In these circumstances, she also relied on the Board's Decision in *National Terminal*[6] to support her holding that, contrary to the *Transmarine* line of cases upon which the General Counsel relied, Respondent's failure to bargain about the effects of the closing did not occur at a time when the Union was in a position of economic strength. We find that *National Terminal, supra*, is inapposite as the employer therein was forced to close "in an almost emergency situation" because of "a calamitous event," namely, the theft of its delivery trucks which made it impossible to continue its operations.[7] In significant contrast, Respondent still had valuable assets at the time of the shutdown and, in fact, found it necessary to recall some employees to operate the business until its sale to another company. Thus, we find, contrary to the Administrative Law Judge, that in the instant case, unlike the situation in *National Terminal, supra*, a measure of balanced bargaining power existed prior to and at the time of the shutdown. As we held in *Burgmeyer Bros., Inc.*, 254 NLRB 1027 (1981), and the cases cited therein, an employer is not relieved of its obligation to provide backpay in accordance with the *Transmarine* formula merely because it has become a debtor-in-possession under the Bankruptcy Act and believes that, as a result thereof, it would be financially unable to meet any of the union's bargaining demands.

Accordingly, we shall, in addition to ordering Respondent to bargain with the Union concerning the effects of the shutdown, accompany said Order with a limited backpay requirement for the seven employees who were actively working as of the time of the shutdown. The Union contends that the backpay remedy should also extend to the laid-off employees. We find no merit in this contention as the layoffs were lawfully made pursuant to the collective-bargaining agreement of the parties and the Union interposed no objection to them at the time they occurred. However, in view of the employee status of the individuals who were laid off prior to February 4, 1980, we specifically find that the bargaining order extends to them as well as to the employees who worked until the time of the shutdown.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We shall also order that Respondent bargain with the Union over the effects on its employees of the discontinuance of its operations. It is clear, however, that a bargaining order alone cannot fully remedy the unfair labor practices committed by Respondent because, as a result of Respondent's failure to bargain with the Union about the effects of discontinuing operations, Respondent's employees were denied an opportunity to bargain through their exclusive representative at a time when such bargaining would have been meaningful. Meaningful bargaining cannot now be assured until some measure of economic strength is restored to the Union. Accordingly, in order to effectuate the purposes of the Act, we shall accompany our order to bargain with a limited backpay requirement designed both to make whole the seven employees, who were on the payroll on February 11, 1980, for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for Respondent. We shall do so in this case by requiring Respondent to pay backpay to its employees in a manner similar to that required in *Transmarine Navigation Corporation, supra*. As in *Transmarine*, we shall require that the backpay for those employees be not less than the amounts they would have earned during a 2-week period of employment,[8] at the rate of their normal wages when last in Respondent's employ.

Accordingly, we shall order Respondent to bargain upon request with the Union about the effects on its employees of the discontinuance of its operations; and to pay these employees amounts at the rate of their normal wages when last in Respondent's employ from 5 days after the date of this Decision until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of Respondent's discontinuance of its operations; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount each would have earned as wages from the time Respondent discontinued its operations to the time each secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain, whichever occurs first; provided, however, in no event shall this sum be less than such employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent's employ. Backpay shall be based upon earnings which the discharged employees would normally have received during the applicable period, less any net interim earnings, and shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon computed in the manner provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9]

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[6] *National Terminal Baking Corp., a Subsidiary of Kosher Kitchens, Inc.*, 190 NLRB 465 (1971).

[7] See *National Terminal Baking Corp., supra* at 466-467.

[8] Despite his dissent in *Transmarine*, Member Jenkins notes that the remedy there has been accepted by the courts and the Board and, since some type of remedy for the misconduct is needed, he is therefore willing to join in the Decision herein. *Underwood Hair Adaption Process, Inc.*, 242 NLRB 1017, fn. 6 (1979); *Uncle John's Pancake House*, 232 NLRB 438, fn. 7 (1977).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Nathan Yorke, Trustee in Bankruptcy, Successor in Bankruptcy, or Alter Ego to the Seeburg Corporation and Seeburg Service Parts Co., a Single Employer, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following as paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act."

2. Add the following as new paragraphs 2(b) and (c) respectively and reletter the subsequent paragraphs accordingly:

"(b) Provide backpay to G. Pawlick, Johnnie Miller, T. Swienton, T. A. Valenza, Mr. Szafader, Mr. Kopczynski, and Mr. Lakos in the manner set forth in the section of the Board's Decision entitled 'The Remedy.'

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT fail to bargain with Local Union 743, Warehouse, Mail Order, Technical and Professional Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, about the effect on employees in the following unit of the decision to terminate operations on February 11, 1980:

> All plant clerical, and all production and maintenance employees on the payroll of The Seeburg Corporation and Seeburg Service Parts Corporation at the Chicago, Illinois, plant, excluding executive, supervisory employees, timekeepers, foremen with power to hire and fire or to effectively recommend such action, office clerical employees, guards and professional employees as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, upon request, bargain collectively with respect to the effect on employees in the above-described unit of the decision to terminate operations, and reduce to writing any agreement reached as a result of such bargaining.

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[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would compute interest on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146, 148 (1980).

WE WILL pay the following unit employees who were discharged on February 11, 1980, when we terminated our operations, their normal wages, for the period set forth in the remedy section of the Board's Decision and Order, plus interest:

G. Pawlick
Johnnie Miller
T. Swienton
T. A. Valenza
Mr. Szafader
Mr. Kopczynski
Mr. Lakos

NATHAN YORKE, TRUSTEE IN BANKRUPTCY
THE SEEBURG CORPORATION
SEEBURG SERVICE PARTS CO.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge: This proceeding was heard before me on February 17, 1981, pursuant to a charge filed on February 28, 1980, and amended on June 6 and 12, 1980, and a complaint issued on June 17, 1980, and amended on November 28, 1980. The complaint alleges that Respondent The Seeburg Corporation (herein called Seeburg) and Respondent Seeburg Service Parts Co. (herein called Seeburg Service) constitute a single integrated business enterprise and single and/or joint employer within the meaning of the National Labor Relations Act, as amended. The complaint further alleges that since about February 4, 1980, Respondent Nathan Yorke, who is admittedly trustee in bankruptcy for Seeburg, has had authority to continue operations and exercise all powers necessary to the administration of Seeburg and Seeburg Service. The complaint goes on to allege that Respondents violated Section 8(a)(5) and (1) of the Act about February 8, 1980, by terminating operations and discharging employees without prior notice to Local Union 743, Warehouse, Mail Order, Technical and Professional Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), and without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said conduct. An answer to the complaint was filed by counsel for Seeburg and counsel for Yorke, but not by Seeburg Service as such.

At the hearing, appearances were filed on behalf of Yorke and Seeburg, but not on behalf of Seeburg Service as such. On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for Yorke, counsel for the Union, and counsel for the General Counsel, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION; THE RELATIONSHIP BETWEEN SEEBURG AND SEEBURG SERVICE; THE APPROPRIATE UNIT

At all material times until February 8, 1980, Seeburg, a Delaware corporation, has been engaged in the manufacture of jukeboxes and other machinery in Chicago, Illinois. During the calendar year preceding November 28, 1980, a representative period, Seeburg sold and shipped goods and materials valued in excess of $50,000 directly to points outside Illinois. At all times material herein, Seeburg Service, a Delaware corporation, has been engaged in the manufacture and/or distribution of parts in Chicago, Illinois. During the calendar year preceding November 28, 1980, a representative period, Seeburg Service sold and shipped goods and services valued in excess of $50,000 directly to points outside Illinois. During the calendar year preceding November 28, 1980, a representative period, Seeburg, Seeburg Service, and Yorke as trustee, in the course of the business operations described above, collectively sold and shipped goods and provided services valued in excess of $50,000 directly to points located outside Illinois. I find that Seeburg and Seeburg Service were at all material times each engaged in commerce within the meaning of the Act; and that Respondents collectively were at all material times engaged in commerce within the meaning of the Act. Further, I find that the Board's jurisdictional standards are satisfied by the operations of Seeburg, Seeburg Service, and Respondents, collectively.

Seeburg and Seeburg Service are both owned by the same entity; are operated at the same Chicago, Illinois, facility; are run by the same management; purchased goods and services from the same customers; and shipped their products to the same customers. Seeburg Service kept an inventory and filled orders on request for spare parts relating to the finished product that Seeburg sold. All the employees on the Seeburg Service payroll had formerly been on the Seeburg payroll. I find that Seeburg and Seeburg Service constitute a single integrated business enterprise and single and/or joint employer within the meaning of the Act. *Sakrete of Northern California, Inc.*, 137 NLRB 1220 (1962), 140 NLRB 765 (1963), enfd. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965).

In November 1977, Seeburg and the Union entered into a collective-bargaining agreement effective between October 1977 and September 1980, with respect to a unit of "all plant clerical, and all production and maintenance employees of the Company [The Seeburg Products Division of the Seeburg Corporation of Delaware] at its Chicago, Illinois Plant" excluding "executive, supervisory employees, timekeepers, foremen with power to hire and fire or to effectively recommend such action, office clerical employees, guards and professional employees, as defined in the [National Labor Relations Act], as amended." In October 1978, certain employees on Seeburg's payroll were transferred to Seeburg Service's payroll. All of the employees on Seeburg Service's payroll about January 1980 had at one time worked for Seeburg. The terms of the 1977-80 collective-bargaining agreement were applied to the employees on the Seeburg Service payroll. Joseph P. Dillon, Seeburg's treasurer and the chairman of its board, testified that the contract was so applied on a "voluntary basis." However, Dillon further testified that at least some Seeburg Service employees were subject to the arrangement, set forth in the contract, that on an employee's written request, the Employer would deduct union dues from his wages and pay them to the Union. Also, the contract contains a union-shop clause; and all of Seeburg Service's plant clerical, production, and maintenance employees were union members. Sections 8(a)(3) and 302(c)(4) of the Act forbid an employer to pay to a union any membership dues deducted from its employees' wages, and to require union membership as a condition of employment, without a collective-bargaining agreement calling for such action. I conclude that the Seeburg-union agreement covered Seeburg Service's employees. Accordingly, I find that, at all material times herein, the appropriate unit consisted of both Seeburg's and Seeburg Service's employees with the job classifications described in the collective-bargaining agreement.

On February 4, 1980, Yorke was appointed by the United States bankruptcy court to act as Seeburg's trustee in bankruptcy. As shown *infra*, a few days later he closed down the operations of both Seeburg and Seeburg Service. At the hearing before me, Seeburg's attorney, Neil P. Gantz, stated without disagreement from any party that, in preparing the schedules in the bankruptcy court, he had considered Seeburg Service's assets to be Seeburg assets, "and as it turned out, we agreed later on that [Seeburg Service's assets] were, in fact, part of the assets of the Seeburg Corporation."[1] Gantz further stated, in effect, that parts received from Seeburg Service by various distributors after the filing of Seeburg's petition for reorganization were received by them pursuant to petitions filed with and ruled on by the bankruptcy court. I find that Yorke was the trustee in bankruptcy for both Seeburg and Seeburg Parts. I find that at all material times after February 4, 1980, Yorke has been an employer within the meaning of the Act, and (for reasons stated *infra*, part II, E) an *alter ego* of Seeburg and Seeburg Parts.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Before mid-July 1979, Seeburg and Seeburg Service had an active payroll of about 385 or 395 employees. The traditional vacation period was in late July or early August. However, because in 1979 Seeburg had financial or cash flow problems, the vacation period that year began in mid-July; and (although the vacation period ended in mid-August), nobody was called back to work until mid-September. Also, at that time only about 250 unit employees were recalled.

On October 19, 1979, Seeburg filed a petition for reorganization under Chapter 11 of the Bankruptcy Act. At or about this time, further layoffs were effected, and the complement was reduced to about 150 unit employees. About early January 1980, the complement was again reduced to no more than 60 employees, mostly on Seeburg's payroll. By February 4, 1980, only about seven unit employees were still actively working. Between October 19, 1970, and February 8, 1980, when except for the last 4 days Seeburg was a debtor-in-possession, Seeburg lost about $350,000.

The foregoing recalls and (inferentially) layoffs were effected in accordance with the seniority provisions of the collective-bargaining agreement. The Union never requested bargaining about the matter of the layoffs effected before February 4, 1980.

B. *The Appointment of Trustee Yorke; the Shutdown of Operations*

On February 4, 1980, the bankruptcy court appointed Yorke to act as trustee in bankruptcy for Seeburg. Yorke testified that his duties as trustee were to investigate Seeburg's financial condition and determine whether Seeburg had operated at a profit while it was a debtor-in-possession, to evaluate Seeburg's assets, and to attempt to file a plan of reorganization on which creditors could vote. He further testified that he assumed that, when he was appointed on February 4, he had full authority to operate Seeburg.

On February 4, 1980, at or about 2 p.m., Yorke paid his first visit to the plant being used by Seeburg and Seeburg Parts. He was accompanied by Attorney Malcolm Gaynor, who represented the creditors' committee, and a man named Greenhouse, who represented Seeburg. During this visit, Yorke saw only the first floor production area, where the lights were turned off and nobody was present, and the office, where he saw only Dillon and a bookkeeper. However, as of that date, about seven unit employees were still on the payroll.

At the first creditors' meeting on February 8, 1980, Dillon told them and Yorke under oath that Seeburg had lost about $350,000 since it filed its October 19 petition, it had about $5,000 in the bank, and it owed Seeburg's employees (unit and nonunit) more than $5,000 in wages.[2] Dillon further stated that Seeburg was on a secured-lending basis with the Chase Manhattan Bank, all of Seeburg's receivables and inventory were pledged to Chase in return for periodic loans to Seeburg, and Chase had joined with other creditors in the petition to appoint a trustee. As of that date, Seeburg's liabilities exceeded $8 million and the book value of its assets approximated $6 million; when liquidated, its assets amounted to about $1.5 million.

Yorke testified that, as trustee, he had the power to continue the business in operation without the approval of the bankruptcy court. He further testified that he sought an order to shut it down. On an undisclosed date between the close of the creditors' meeting on Friday, February 8, and the issuance of an order of the bankruptcy court on Monday, February 11, Yorke filed a motion, which is not in the record before me, with that court. On February 11, 1980, the bankruptcy court issued an "Order Authorizing Trustee to Curtail Operations of the Debtor," which stated, in part:

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[1] Gantz stated that he had believed until late 1979 or January 1980 that Seeburg Service was a subsidiary of Seeburg rather than, as it in fact was, a subsidiary of the same corporation which owned Seeburg. When the real corporate relationship was ascertained, separate bank accounts and payrolls were established. The Seeburg Service accounts were controlled by Seeburg Treasurer Dillon. The record fails to show what other role, if any, he played in managing Seeburg Service.

[2] They had been paid through February 2, 1980, but not for work performed thereafter. Dillon had control of a separate fund sufficient to meet the payroll of Seeburg Service (see *supra*, fn. 1).

> THIS CAUSE coming on to be heard on the application of Nathan Yorke, trustee in bankruptcy, for authority to curtail the debtor's operations; due written notice having been given to all parties entitled thereto and the court being fully advised in the premises, it appearing that continued operations of the debtor in a manner similar to that which has been followed since the initiation of these proceedings, would be unprofitable and counter-productive to the instant reorganization proceeding;
>
> IT IS ORDERED that Nathan Yorke, trustee in bankruptcy, be and he hereby is, authorized to curtail the debtor's operations by:
>
> > (a) Terminating all personnel save certain key individuals who will be retained for services the trustee deems necessary in furtherance of the instant reorganization.

C. *The Shutdown Without Notice to the Union*

Yorke received this order the day it was issued, February 11. That same day, he shut down the plant facility being used by both Seeburg and Seeburg Service, and released all the personnel, including about seven unit employees. Yorke did not, before taking this action, give any notice to the Union that such action was contemplated.[3] He credibly testified that, when he took this action, he did not know that a union represented Seeburg's employees: ". . . the only one I spoke to was Mr. Dillon, and he didn't advise me of it."

D. *Events After the February 11, 1980, Shutdown*

1. The February 1980 correspondence between the Union and Yorke

On February 15, 1980, Union Attorney Edwin H. Benn sent virtually identical letters to Yorke and to Seeburg which read in part as follows:

> The undersigned represents Local 743, I.B.T. The Union has a collective bargaining agreement covering the employees of Seeburg Corporation.
>
> . . . It has also come to our attention that the remaining employees of Seeburg Corp. have been locked out as of February 11, 1980.
>
> * * * *
>
> This is also to demand that an immediate meeting be set up so that we can discuss the decision and effects that your action has on our bargaining unit employees.

The letters went on to inquire the identity of the shareholders of Seeburg, X Cor International, Inc., and Choice Vend, Inc., and asked a number of other questions which answers would tend to show whether these three corporations were interrelated in a manner which might impose duties on X Cor and/or Choice Vend with respect to employees on Seeburg's payroll.[4] Further, the letters asked for the names and addresses of any prospective purchasers of Seeburg. The letters concluded:

> Please be advised that we expect our collective bargaining agreement to be abided by and we expect a response to this letter by close of business February 22, 1980. Failure to answer this letter by the time indicated will necessitate the institution of the proper proceeding.

Seeburg, as such, never answered this letter. Yorke's reply is dated February 25, 1980, and reads in its entirety:

> I am in receipt of your letter dated February 15, 1980. Please be advised that the undersigned was appointed Trustee on February 4, 1980. Be further advised that the Trustee discontinued the operation of the business and has no employees.
>
> In reply to your questions, Excor [sic] is a publicly owned company. Consolidated Entertainment owns all the stock of the Seeburg Corporation. I do not know who owns Choice Vend. I do not know if Choice Vend or Excor have any collective bargaining agreements with labor organizations.
>
> If there is any further information you desire, I will be happy to furnish same.

Benn filed the initial charges herein on February 28, 1980, and made no further attempt to get in touch with Yorke. Meanwhile, on February 19, Yorke received about $6,000, apparently constituting all of Seeburg's cash on hand, which moneys, pursuant to an order of the bankruptcy court, he used on February 25 to pay the Seeburg employees' wages for periods through Saturday, February 9, 2 days before the terminations.

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[3] One of the laid-off employees was the union steward. No contention is made that whatever notice he received of his own layoff constituted legally adequate notice to the Union that the operation had been shut down.

[4] The June 1980 initial complaint herein alleges, *inter alia*, that "Respondent X Cor, Respondent Seeburg, Respondent Choice [Vend], Respondent Yorke, . . . Respondent Seeburg Service" and other corporations were a single employer, a joint employer, or *alter egos*; and that Yorke was a successor in bankruptcy to Seeburg and/or the other corporations. The June 1980 complaint also includes allegations that all the respondents named therein had violated Sec. 8(a)(5) and (1) when Choice Vend transferred unit work to Windsor Locks, Connecticut, from the Chicago plant involved herein, and discharged Chicago employees, without prior notice to the Union and without affording the Union an opportunity to negotiate regarding the decision to transfer and its effects. Prior to the hearing before me, the case was apparently settled with respect to X Cor, Choice Vend, and the other corporations named in the June 1980 complaint but not in the November 1980 complaint before me.

2. Arrangements made between the Union and Yorke to recall a few employees

Thereafter, the bankruptcy court authorized Yorke to offer some parts for sale.[5] During an early April 1980 conference initiated by Yorke and Dillon, they discussed with Union Representative Harry Peters a plan to recall two or three unit employees to assist in the sale of the parts. Later, Peters telephoned Yorke that Peters would commit York and Dillon to recall certain individuals, and they were in fact recalled. Yorke and/or Dillon asked Peters for a letter authorizing this recall, and he sent that letter.

3. Yorke's efforts to reject the bargaining agreement

On an undisclosed date after February 15, Yorke filed with the bankruptcy court an application to reject the collective-bargaining agreement. This application was opposed by both the Union and the Board, and was subsequently withdrawn. However, the contract was eventually rejected under the specific terms of the plan of arrangement eventually approved by the bankruptcy court on July 28, 1980.

4. The July 22, 1980, settlement meeting

After the issuance of the original complaint herein, Gaynor, the attorney for the creditors' committee, telephoned Union Attorney Benn and requested a meeting. Benn told Gaynor that "we could discuss the charges, the complaint, and hopefully settlement." During this meeting, which was held on July 22, 1980, Gaynor made an unsuccessful effort to induce the Union to withdraw its unfair labor practice charges. At the hearing and in post-hearing briefs, the General Counsel and union counsel requested me to disregard the evidence about what was said during this July 22 meeting, on the ground that it constituted "compromise negotiations" within the meaning of Rule 408 of the Federal Rules of Evidence. I conclude that their position in this respect is well taken.[6]

5. Bankruptcy court proceedings

July 28, 1980, the bankruptcy court ruled that the backpay claimed by the Board as due in the instant proceedings was an administrative expense entitled to priority order under Section 507(a)(1) of the Bankruptcy Code. *Seeburg Corp.* v. *N.L.R.B.*, 105 LRRM 3050, 5 B.R. 364.[7] As of that date, the Board had modified its proof of claim so as to total $55,000. Also on July 28, the bankruptcy court approved a reorganization plan under which Seeburg and its purchaser-in-liquidation, Stern Electronics, Inc., agreed to set aside $49,000 of the estate's assets should a finding of backpay liability ultimately be made. Stern Electronics agreed to commit to cover the remaining $6,000 of the potential liability. *Seeburg, supra*, 105 LRRM at 3356.

The July 25, 1980, hearing on confirmation before the bankruptcy court was attended by, *inter alia*, Attorney William G. Kocol on behalf of the NLRB, Benn on the Union's behalf, Gaynor on behalf of the creditors' committee, Attorney Joseph Matz on Seeburg's behalf, and Yorke. Matz stated on the record that, following the bankruptcy court's order confirming the plan of arrangement, there would be a closing as provided for in the contract, and Seeburg's assets would be transferred in due course to Stern. Matz went on to say that as of that moment there would be no more need for Yorke to maintain any operation whatsoever, that he would be terminating the remaining employees, and that he had told Matz that three of these employees were union employees. Gaynor said that, if the Union wanted Yorke to bargain with respect to the effect of what he was doing pursuant to the plan and in the order of confirmation, "he is here and we would be glad to do such bargaining in open court. . . . I think we should do this first." The bankruptcy judge said that he would not attend bargaining, but his courtroom could be used for that purpose. Benn said that the Union would be more than happy to sit down with Yorke immediately, but might be unable to do so that day because the Union's bargaining representative, Business Agent Peters, was not there. Gaynor said that he wanted a stenographic record of the bargaining. Benn said that "the Labor Board has held repeatedly that is unlawful [cf., *infra*, fn. 10]. It takes away from the give and take of what happens at the bargaining table . . . I am happy [Gaynor] recognizes his right as of this point to let the bargainers do whatever they want to do." Gaynor said that there should be a stenographic record: "There is no give and take because there is nothing that Mr. Yorke has to give." The bankruptcy judge said, "Mr. Gaynor, we have the record here. You have made it very clear. This stenographic reporter is available. You have made your offer to negotiate, counsel has responded."

6. The late August discussions

By letter to Yorke dated July 31, 1980, Union Attorney Benn demanded that negotiations commence immediately "concerning the effects of the final phase out of the Seeburg operation which was accomplished July 28, 1980." In consequence of this letter, a late August 1980 meeting was held between Seeburg Attorney Gantz, the creditors' committee attorneys, Gaynor and Gettleman, Union Attorney Benn, Union Representative Peters, and Yorke. Benn asked how many employees had been on the Seeburg payroll as of February 1980. Gantz said seven. Benn asked for their names, wage rates, and classifications, and Gantz said he would get that information for Benn. There is no claim that Gantz failed to do so.

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[5] The record fails to show whether these parts were owned by Seeburg or by Seeburg Parts. See *supra*, part I.

[6] Rule 408 is applicable to compromise offers made by a party to the litigation to a nonparty. 2 Weinstein's *Evidence* para. 408[01], p. 408–413 (1980). Accordingly, I need not and do not consider whether Yorke's status as a party hereto rendered the creditors' committee a party also. Yorke Exh. 1, a July 23, 1980, letter from Benn to Gaynor purporting to summarize the July 22 meeting, was offered by the General Counsel, and received in evidence, solely for the purpose of showing that the July 22 meeting was a settlement discussion.

[7] The court also granted the request of Seeburg, Yorke, and the creditors' committee for an order enjoining the Board from processing the instant unfair labor practice case, which the court said would be disposed of by the court itself. On November 13, 1980, the United States District Court for the Northern District of Illinois vacated the bankruptcy judge's order, and directed him to refrain from hearing the unfair labor practice charges. (105 LRRM 3355.)

Benn said that 300 or 400 people had been on layoff status when Seeburg filed its October 1979 petition, and asked whether Yorke could obtain jobs for them with Stern Electronics, the purchaser in liquidation. Yorke replied that he had no control over Stern. He said that letters of reference would be furnished to these employees, but no such letters were ever furnished. Benn asked if payments to the pension plan were current. He was told that they were, and accepted this representation. Benn asked whether payments had been made to the hospitalization insurance carrier. Gantz said that a claim for the premiums had been filed by the carrier, there was going to be no objection, the bankruptcy court was going to allow it, and employees would thereby obtain coverage for that period of time.

Benn said that he would like to discuss severance pay. Gaynor and Yorke told him to show some authority where Yorke could give severance pay. Benn said that the bankruptcy court had set aside $55,000 and had determined that it would "come off the top" as a cost of administration; that the Labor Board settlement, if agreed to, would amount to $7,000 or $8,000; and that the remainder could be distributed among the 400 employees (aside from the 7 retained on the payroll) as severance pay. Gaynor and Yorke said that they did not know under what section of the Bankruptcy Act Yorke would be able to make such a distribution, that these 300 or 400 employees whose jobs had been terminated in October 1979 had filed no claims in the bankruptcy proceedings, and that the time had expired for them to file such claims. Benn said that he was not talking about the Bankruptcy Code, that he was talking about obligations under the National Labor Relations Act and the duty to bargain about effects. Yorke said that he did not operate under the labor laws, he operated under the Bankruptcy Act.

Gaynor said that, as to the Labor Board case, the Government had a "bullshit case," and that Benn and NLRB Attorney Kocol had conspired to file a fraudulent claim. Benn suggested that Gaynor tell this to the bankruptcy court judge. Benn said that he had heard from Kocol that there were discussions concerning settlement of the Labor Board case. Gaynor said that he would not settle the Labor Board case. Benn said that someone should tell that to Kocol, because Benn felt that Kocol was "being led down the path." Gaynor replied, "they only listened to the Labor Board's offer, they were not going to settle it." Gaynor then asked Benn whether "we had bargained." Benn replied, "I suppose that remains to be seen at a later date." Nobody suggested a future meeting.[8]

E. *Analysis and Conclusions*

When an employer decides to terminate or close its entire operation it must, once that decision is made, afford the employees' collective-bargaining representative the opportunity to bargain over the impact and effect of that decision on unit employees. *Burgmeyer Bros., Inc.*, 254 NLRB 1027 (1981); *Summit Tooling Co.*, 195 NLRB 479 (1972), enfd. 474 F.2d 1352 (7th Cir. 1973). This duty is not relieved by the employer's bankruptcy, and any consequent belief by it that it would be financially unable to meet any of the union's bargaining demands. *Burgmeyer, supra.* A trustee-in-bankruptcy is the *alter ego* of the bankrupt employer and, like that employer, is under a duty to comply with the National Labor Relations Act, including the requirement to engage in collective bargaining. *Jersey Juniors, Inc.*, 230 NLRB 329, 331–332 (1977); *Burgmeyer, supra.*

Immediately after the General Counsel and the Union had rested, counsel for Respondent Yorke admitted the truth of the complaint allegation that, about February 8, 1980, Respondents terminated operations, and discharged the employees, without prior notice to the Union and without having afforded the Union an opportunity to negotiate regarding the effect of such conduct. Moreover, the record as a whole establishes that on February 11, 1980, Respondents in fact did this. The foregoing establishes, at least *prima facie*, that Respondents thereby violated Section 8(a)(5) and (1) of the Act.

Respondent Yorke defends his own failure to give the Union such notice on the ground that, when he shut down the plant, he did not know that the employees had a collective-bargaining representative. Because Seeburg and Seeburg Parts obviously did know, I doubt the legal sufficiency of Yorke's defense in this respect. See *N.L.R.B.* v. *E.D.S. Service Co.*, 466 F.2d 157 (9th Cir. 1972); *Jersey Juniors, supra*, 230 NLRB at 331–332; *N.L.R.B.* v. *Albuquerque Phoenix Express*, 368 F.2d 451, 452–453 (10th Cir. 1966).

In any event, Yorke failed to bargain with the Union about the shutdown's effect on employees even after it found out about the shutdown and made a written "demand that an immediate meeting be set up so that we can discuss the . . . effects that your action has on our bargaining unit employees." Yorke's written response did not refer to the request for a meeting, but merely said that he had discontinued the operation of the business and had no employees, gave some of the information requested by the Union regarding corporations allegedly related to Seeburg, and said that he would be happy to furnish further information.[9] Furthermore, during the

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[8] My findings as to what was said during this late August meeting are based mostly on the testimony of Union Attorney Benn, who was called as a witness by Respondent Yorke. I perceive no basis in Benn's credible testimony for his statement, at the end of his direct testimony, that "the entire meeting was settlement." A finding that at least part of this meeting constituted a settlement discussion would be warranted were I to credit Yorke's testimony that Gaynor said "he wouldn't suggest settling with the National Labor Relations Board unless the Union was a party to it . . . because that would leave the Union as an open end to the agreement." However, such testimony is inconsistent with Benn's credible testimony regarding Gaynor's expressed position, Yorke's counsel makes no contention that Benn's testimony varied from his contemporaneous notes (which he supplied to Yorke's counsel), and Yorke's testimony as a whole shows that he had a poor memory. Accordingly, I do not accept the testimony of Yorke summarized in this footnote. Hence, I perceive no credible factual predicate for Benn's contention, not renewed in his brief, that evidence as to the late August meeting is inadmissible under Fed. R. Evid. 408 as "statements made in compromise negotiations."

[9] Yorke's counsel stated at the outset of the hearing that the Union's letter included a request that Yorke "bargain about the effects of" the closing. I agree, and do not accept counsel's contention, in his post-hearing brief, that this letter was "ambiguous." See *Hankamer Ready Mix Concrete Co.*, 234 NLRB 608, 615 (1978); *Richmond, Division of Pak-Well*, 206 NLRB 260, 261 (1973). Moreover, I find that Yorke's failure to

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July 25, 1980, bankruptcy court session, Yorke remained silent when the attorney for the creditors' committee stated that there could be no give and take in bargaining because Yorke had nothing to give, and when Gaynor adhered to his insistence on a stenographic transcript of any bargaining sessions, notwithstanding Benn's statement that the Union would exercise its right to commence negotiations without a stenographer.[10] Indeed, at the hearing before me, Yorke attributed to himself some of the remarks which the bankruptcy court transcript shows were in fact made by Gaynor. Finally, when in August 1980 the Union asked Yorke to discuss severance pay, Yorke said that he had no authority under the Bankruptcy Act to make such payments and that he operated under that Act and not the labor laws. Indeed, York did not even keep the promise which he gave during that meeting, after he was asked about obtaining jobs for the employees with Stern, to furnish the employees with letters of reference.

CONCLUSIONS OF LAW

1. At all material times until February 8, 1980, The Seeburg Corporation was engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. At all material times herein, Seeburg Service Parts Corporation was engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. At all material times herein, The Seeburg Corporation, Seeburg Service Parts Corporation, and Nathan Yorke, Trustee in Bankruptcy, collectively, were engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. At all material times herein, The Seeburg Corporation and Seeburg Service Parts Corporation have constituted a single integrated business enterprise and single and/or joint employer within the meaning of the Act.

5. At all material times on and after February 4, 1980, Yorke has been the trustee in bankruptcy for The Seeburg Corporation and Seeburg Service Parts Corporation, and an employer within the meaning of Section 2(1) and (2) of the Act.

6. At all material times on and after February 4, 1980, Yorke has occupied *alter ego* status with respect to The Seeburg Corporation and Seeburg Parts Corporation.

7. The following employees of The Seeburg Corporation, Seeburg Service Parts Corporation, and/or Yorke, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All plant clerical and all production and maintenance employees at the Chicago, Illinois, plant, excluding executive, supervisory employees, timekeepers, foremen with power to hire and fire or to effectively recommend such action, office clerical employees, guards and professional employees as defined in the Act.

8. The Union is a labor organization within the meaning of Section 2(5) of the Act.

9. By virtue of Section 9(a) of the Act, the Union has been at all material times and still is the exclusive representative of the unit described in Conclusion of Law 7.

On February 11, 1980, The Seeburg Corporation, Seeburg Service Parts, and Yorke terminated operations at the Chicago, Illinois, facility, and discharged the employees at that facility, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain concerning the effects of such conduct on unit employees.

11. By engaging in the conduct described in Conclusion of Law 10, The Seeburg Corporation, Seeburg Service Parts, and Yorke engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, which unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have violated the Act in certain respects, I shall recommend that Respondents be required to cease and desist therefrom. Affirmatively, Respondents will be required to bargain with the Union, upon request, with respect to the effects on employees of the decision to terminate operations, and to mail appropriate notices.

I agree with Respondent that under *National Terminal Baking Corp., a Subsidiary of Kosher Kitchens*, 190 NLRB 465 (1971), no backpay order should issue here. Although it is unclear just when Yorke reached his decision to ask the bankruptcy court for permission to shut down the plant, 97 percent of the unit employees had been laid off before he became trustee, Seeburg had lost $350,000 during the 4 months before he became trustee, and Yorke had been trustee for only a week before receiving and acting on permission to shut down the plant. Under these circumstances, as in *National Terminal*, Respondents' failure to bargain about effects did not occur at a time when the Union was in a position of economic strength. The backpay orders in the cases cited by the General Counsel and the Union constituted efforts to assure meaningful bargaining by restoring such strength in situations where, if the employer had timely complied with its duty to bargain about effects, the union could have imposed some economic pressure to compel the employer to accede to the union's demands.[11]

The Union requests an order affording it "bargaining expenses, attorneys' fees and other costs" on the ground that because "the Respondent [sic] has admittedly stated that it purposely refused to acknowledge its obligations under the Act, it is apparent that the defenses raised are

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answer that portion of the letter constituted a refusal to bargain. *First National Maintenance Corp.*, 242 NLRB 462, fn. 1 (1979), enfd. 627 F.2d 596 (2d Cir. 1980), 452 U.S. 666; *Summersville Industrial Equipment Co., Division of Marathon Coal Bit Co.*, 197 NLRB 731, 735 (1972).

[10] *Bartlett-Collins Co.*, 237 NLRB 770 (1978), enfd. 639 F.2d 652 (10th Cir. 1981).

[11] *Burgmeyer, supra; First National Maintenance, supra; Thompson Transport Co.*, 184 NLRB 38 (1970); *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). See also *Drapery Manufacturing Co., Inc.*, 170 NLRB 1706 (1968), enfd. 425 F.2d 1026 (8th Cir. 1970), where there was a possibility that the employees who lost their jobs could have been absorbed into one of the employer's other operations.

patently frivolous." In further support of this contention, the Union alleges that the unfair labor practices in this case are "flagrant" and that it was "required to participate" in "many forays . . . in Respondent's [sic] actions in the bankruptcy court seeking injunctive relief against the Board proceedings." To the extent that the Union is requesting its costs in the proceedings before the bankruptcy court and the district court, the Union's request should be directed to those courts and not to me. Further, Board precedent points to the denial of "costs" in connection with the instant litigation before the agency itself, because a major issue in this case is whether a backpay order should issue and, if so, to whom; and as to this issue, I have found Yorke's position not only nonfrivolous, but warranted. See *Heck's, Inc.*, 215 NLRB 765 (1974); *Wellman Industries, Inc.*, 248 NLRB 325 (1980). Indeed, I note that, although the General Counsel and the Union both seek a backpay order, they disagree between themselves as to whether the beneficiaries should include the employees on layoff before the shutdown.

Upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

Respondents Nathan Yorke, Trustee in Bankruptcy; The Seeburg Corporation; Seeburg Service Parts Corporation; their officers, agents, successors, and assigns, shall:

1. Cease and desist from failing to bargain with Local Union 743, Warehouse, Mail Order, Technical and Professional Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, about the effect, on employees in the following unit, of the decision to terminate operations on February 11, 1980:

> All plant clerical, and all production and maintenance employees on the payroll of The Seeburg Corporation and Seeburg Service Parts Corporation at the Chicago, Illinois, plant, excluding executive, supervisory employees, timekeepers, foremen with power to hire and fire or to effectively recommend such action, office clerical employees, guards and professional employees as defined in the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization with respect to the effect on employees in the above-described unit of the decision to terminate operations on February 11, 1980, and reduce to writing any agreement reached as a result of such bargaining.

(b) Mail a copy of the attached notice marked "Appendix"[13] to each employee in the appropriate unit (whether actively working or on layoff status) as of February 11, 1980. Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondents' authorized representatives, shall be mailed immediately upon receipt thereof.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

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[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Bally's Park Place, Inc. *and* United Food and Commercial Workers Union, Local 1358, Chartered by United Food and Commercial Workers Union, AFL-CIO, Petitioner. Case 4-RC-14513

December 28, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on various dates from January 16 to January 29, 1981, before Hearing Officer Bruce D. Bagley. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, and by direction of the Regional Director for Region 4, this case was transferred to the National Labor Relations Board for decision. Thereafter, the Employer and the Petitioner filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed.

Upon the entire record in this case, including the briefs of the parties, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act, for the following reasons:

Bally's Park Place, Inc., is a New Jersey corporation engaged in operating a hotel and casino in Atlantic City, New Jersey.

The Petitioner seeks to represent separate units of count room employees, one for "hard count" and one for "soft count," or, though not its primary choice, a single unit of hard and soft count team employees. The Employer contends that the only appropriate unit would consist of its casino accounting department. It urges the units sought by the Petitioner as patently inappropriate and requiring dismissal of the petition. There is no history of bargaining for these employees.

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The Employer opened its hotel-casino in December 1979. It employs approximately 800 dealers and 77 slot attendants and mechanics. The casino accounting department employs approximately 331 employees, of whom 40 are "soft count" and 25 are "hard count." Other classifications in this department include slot booth cashiers, runway cashiers, change persons, pit clerks, and income control clerks. Within the casino accounting department is an area designated as the "cage." Individuals who work in the cage are classified as casino cage cashiers, slot cage cashiers, CRT (cathode ray terminal) operators, credit and collection clerks, and the hard and soft count employees here sought. The casino accounting department handles and accounts for all coins and currency passing through the casino, whether through the numerous table games or the slot machines.

The *hard count operation* includes members, count leads, count mechanics, and count accountants. The hard count team is responsible for collecting the coins deposited each day in the casino's 1,600 slot machines. They are required by law to wear jump suits with no pockets, and they work a single shift each day, commencing at 6 a.m., and continuing until the coins are counted, which may be as early as 10 a.m., or as late as 4:30 p.m. Their average workweek is 30 to 35 hours. Each is required to be licensed by the New Jersey Casino Commission. Their work begins on the casino floor by emptying the coin buckets from the slot machines. The coin-laden buckets then move up a ramp, by tow motors, to the hard count room. There the coins are counted and wrapped, behind locked doors as prescribed by state law, in the presence of an inspector from the Control Commission. At the end of the count, before the hard count team leaves, a slot cage cashier comes to verify the total figures and to "buy off" the coins. Thereafter the coins are the responsibility of the slot cage until again distributed to the various slot booths and slot cashiers throughout the casino.

The hard count mechanics are literally mechanics. While the count is underway, they service the machines-the coin counters and the coin-wrapping machinery in hard count. They also service the coin-counting machines in soft count, and the bill-counting machines used in the casino cage and the soft count room.

The *soft count operation* occurs twice a day, at 9 a.m. and at 9 p.m., to count and total the currency from the game tables. Soft count employees are required by law to wear smocks. In the presence of a casino cage cashier, the currency is sorted by denomination, properly stacked with pictures facing the same direction, and totaled.

To *work on the hard and the soft count teams* requires no special training or education, and state licensing of casino employees is not limited to these two teams. All casino accounting department employees have a common payday, as well as the same holidays, vacations, work rules, seniority system, and life and health insurance benefits. All are hourly paid and entitled to use the cafeteria without cost. Each team has a supervisor who may recommend, but not give, wage increases, nor hire, discharge, or discipline without prior approval. Controller Manupelli is in direct charge of the casino accounting department, with the casino cage manager and the casino controller reporting to him. They in turn are superior to the team supervisors.

On the foregoing facts and the entire record here, we find no basis on which to conclude that the two units sought by the Petitioner, either separately or combined, constitute a unit appropriate for purposes of collective bargaining.[1] The duties of these hard and soft count employees require no specific skill. No formal training is provided and the work is clearly routine and repetitive. That these employees work on shifts that vary from those of other casino accounting department employees furnishes no basis for separate representation, nor does the fact that they are isolated for security reasons from most other employees in their department while carrying out their daily counting of coins and currency. When not working they are free to contact other employees on the premises, with whom they share the same employee benefits. Accordingly, we find that separate units of hard count and of soft count employees are not appropriate, nor is a combined unit of the two teams appropriate, for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Accordingly, we shall dismiss the petition.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

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[1] See *Horseshoe Club Operating Co. d/b/a Horseshoe Hotel and Fremont Hotel, Inc.*, 172 NLRB 1703, 1704 (1968), where the Board found units of change girls and booth cashiers inappropriate, partly because their duties were unskilled and they required little or no training.

Lifemark Hospitals of Texas, Inc. d/b/a Mid-Jefferson County Hospital *and* Service Employees International Union, Local 706, AFL-CIO, Petitioner. Cases 23-RC-4937 and 23-RC-4938

December 29, 1981

DECISION AND DIRECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 7, 1981, Hearing Officer Ruben R. Armendariz issued a report recommending disposition of challenges and objections to the elections held on December 23, 1980.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Hearing Officer's findings and recommendations, as modified below.[2]

As noted above, the tally of ballots reveals that 17 ballots were challenged during the election involving Service Employees International Union, Local 706, AFL-CIO. These challenges included challenges by the Employer to the ballots cast by Marilyn Kimmey, Susan Breaux, Carol Garcia, Glennie Bailey, Jill Benoit, and Nora Varando. In his Report and Recommendations on Objections and Challenges, the Hearing Officer, finding that these individuals were employed as casual employees, sustained the challenges to their ballots.[3] Petitioner filed timely exceptions to the Hearing Officer's report, contending that five of the individuals named above were regular employees and the challenges to their ballots should be overruled.[4] The Hearing Officer based the finding that the employees were casual employees on two facts: first, the employees are not required to work a specific schedule of hours but rather have the discretion to accept or reject assignments without discipline; and, second, the individuals in question do not accrue benefits by longevity as do the regular part-time employees.

We have held in the past that the ability to reject work when offered and the receipt of identical benefits are not determinative of an individual's employment status so as to exclude the individual from the unit as a casual employee. *Leaders-Nameoki, Inc.*, 237 NLRB 1269 (1978), and *F. P. Packaging, Inc.*, 236 NLRB 239 (1978). Rather, the individual's relationship to the job must be examined: whether the employee performs unit work and whether the employer has a sufficient regularity of work to demonstrate a community of interest with the remaining employees in the unit regarding wages, hours, and working conditions. *System Auto Park & Garages, Inc.*, 248 NLRB 948 (1980), and *F. P. Packaging, supra*. In the instant case, the record reveals that the employees in question worked a substantial number of hours on a regular basis and performed the same work under the same conditions and supervision as other unit employees. Thus, these individuals have a substantial community of interest with the other members of the unit regarding wages, hours, and working conditions. We conclude, therefore, that Kimmey, Breaux, Garcia, Bailey, and Varando were, at the time of the December 23, 1980, election, regular part-time employees eligible to vote in the election, and we shall overrule the challenges to their ballots. Accordingly, we shall order the Regional Director to open and count the ballots of Marilyn Kimmey, Susan Breaux, Carol Garcia, Glennie Bailey, and Nora Varando. In his report, the Hearing Officer also found that the Employer, through Supervisor Barbara Roberts, engaged in coercive interrogation

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[1] The elections were conducted pursuant to a Stipulation for Certification Upon Consent Election. The tallies of ballots show the following results:

> Unit "A"—Professional Employees (the Inclusion Question): 10 for and 8 votes against inclusion with non-professional employees; there was 1 challenged ballot, which is insufficient to affect the results on the inclusion question.
>
> Unit "B"—Professional and Non-Professional Employees: 82 for and 87 votes against the Petitioner; and there were 17 challenged ballots, a sufficient number to affect the results.

[2] The Employer and the Petitioner have excepted to various credibility findings of the Hearing Officer. It is the established policy of the Board not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961), and *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find insufficient basis for disturbing the credibility resolutions in this case.

[3] In support of the Hearing Officer's finding that six employees should be excluded from the unit, the Employer further contends that the employees in question are not covered by the stipulation, defining the appropriate unit, which was entered into by the parties and approved by the Regional Director. It is well-established Board law that, in stipulated unit cases, the Board's function is to ascertain the parties' intent with regard to the disputed employees and then to determine whether such intent is inconsistent with any statutory provision or established Board policy. *The Tribune Company*, 190 NLRB 398 (1971). In the instant case, the stipulation clearly enumerates that "regularly scheduled part-time employees" in various positions are to be included in the unit. On its face, the stipulation thus includes those part-time employees who work according to a regular schedule. The Employer contends that the employees in question do not fall within the terms of the stipulation because they are not required to work according to a regular schedule. Contrary to the Employer's contention, however, the record indicates that the employees in question regularly receive a schedule of when they are to work for at least some of their hours. The fact that they may refuse to work the scheduled hours or may be called in to work on days they are not scheduled does not outweight the fact that a portion of their hours are worked according to a schedule. We therefore conclude that the intent of the parties, as evidenced by the stipulation on its face, was to include the employees in question in the unit.

[4] In the absence of exceptions thereto, we adopt *pro forma* the Hearing Officer's recommendation that the challenge to the ballot of Jill Benoit be sustained.

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of employee Cheryl Shockey. The Employer excepted to the Hearing Officer's conclusion that these acts interfered with the conduct of the election and therefore the election should be set aside. We agree with the Hearing Officer. In so doing, however, we rely not only on the above-noted misconduct of Supervisor Roberts, but also on the fact that, based on the credited testimony of Shockey, Supervisor Roberts engaged in additional misconduct. This misconduct occurred at a meeting of the entire department, held by Roberts, during which she stated that, if the Union won the election, the employees would have to start punching a timeclock and take breaks at certain specified times during the day. These remarks—directed to the entire department—constituted a threatened loss of privileges and changes in working conditions in the event of a union victory. This conduct, together with the coercive interrogation of Shockey, clearly warrants setting aside the election and directing that a second election be held, if Petitioner fails to receive a majority of the valid ballots cast in the election conducted on December 23, 1980.

DIRECTION

It is hereby directed that the Regional Director for Region 23, pursuant to the Board's Rules and Regulations, Series 8, as amended, within 10 days from the date of this Decision and Direction, open and count the ballots of:

Terrance Barcus
Marilyn Kimmey
Susan Breaux
David Hodgson
Gail Landry
Betty Sedtal
Carol Garcia
Addie May Murphy
Mary Newton
Glennie Bailey
Timmy Williams
Nora Varnado

and, thereafter, prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots. In the event that the revised tally of ballots shows that Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue the appropriate certification of representative.

In the event that the revised tally of ballots shows that Petitioner has not received a majority of the valid ballots cast, a second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 23 shall direct and supervise the election, subject to the Board's rules. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have permanently replaced.[5] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Service Employees International Union, Local 706, AFL-CIO.

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[5] [*Excelsior* footnote omitted from publication.]

P. A. Incorporated *and* Oil, Chemical and Atomic Workers Union, Local 4-586, International Union, AFL-CIO. Case 16-CA-9248

December 29, 1982

DECISION AND ORDER

By Members Jenkins, Zimmerman, and Hunter

On July 15, 1981, Administrative Law Judge Almira A. Stevenson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dimissed in its entirety.

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[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

Statement of the Case

Almira Abbot Stevenson, Administrative Law Judge: This case was heard in Odessa, Texas, on April 14-16, 1981. The charge and amended charge were served on the Respondent on or about July 14 and August 11, 1980, respectively. The complaint was issued August 29, 1980, and was duly answered by the Respondent.

The issues are whether or not the Respondent violated Section 8(a)(1) of the National Labor Relations Act by promising an employee a promotion if he discontinued his activities on behalf of the Union and threatening employees for engaging in union activities; violated Section 8(a)(5) of the Act by unilaterally discontinuing the issuance of work gloves; and violated Section 8(a)(3) by discharging Joe Ross.[1] For the reasons given below I recommend that the complaint be dismissed.

Upon the entire record, my observation of the demeanor of the witnesses, and the briefs filed by the General Counsel and the Respondent,[2] I make the following:

Findings of Fact and Conclusions of Law[3]

I. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent is engaged, at its Odessa, Texas, plant involved in this proceeding, in coating pipe for the oil-drilling industry. Its operations consist of a tube shop which is more or less an assembly-line type procedure; a custom shop where pipe and joints are cleaned and coated by hand; and a yard used mainly for storage. The employee complement is approximately 50. At material times, John Lubke was vice president of the western zone; William Anderson was Odessa area manager; Gary Richardson was plant manager; Dan Chew was custom shop section manager (foreman of the custom shop); and Dan Rimmer was operations manager of the yard department (foreman of the yard). I find that these individuals were supervisors and agents of the Respondent.

In a previous case involving the same parties, the National Labor Relations Board issued a Decision and Order dated March 14, 1980,[4] finding that the Respondent and the Union were parties to a collective-bargaining agreement effective from November 15, 1975, through November 15, 1978, covering the following appropriate unit, for which the International Union was certified in 1966:

> All production and maintenance employees employed in the maintenance, yard, custom, and tube departments by the Company at its plant located at 300 W. 61st Street in Odessa, Texas, excluding all other employees including administrative, estimating, sales, engineering, purchasing, office, technical, payroll, quality control, inspection and reclamation employees, and all foremen, guards, watchmen and supervisors as defined in the Act.

In its Decision and Order, the Board concluded that the Respondent committed the following unfair labor practices:

(1) Violations of Section 8(a)(1) of the Act: Plant Manager Gary Richardson, in July or August 1978, promised Union Committeeman Keith Eddings that the Respondent would give employee bonuses if the Odessa plant went nonunion, in early October 1978 promised to give employee Lee Shearman a promotion and a pay raise if he would get out of the Union, on or about November

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[1] No issue is presented with respect to jurisdiction or labor organization status. Based on the allegations of the complaint and the admissions of the answer, I find that the Respondent is an employer engaged in commerce within Sec. 2(6) and (7), and that the Charging Party Union is a labor organization within Sec. 2(5) of the Act.

[2] Certain errors in the transcript are hereby noted and corrected.

[3] Except where credibility is specifically discussed, the facts are substantially undisputed.

[4] *P. A. Incorporated*, 248 NLRB 491 (1980).

259 NLRB No. 111

11, 1978, promulgated to Union Committeeman Eddings an overly broad no-solicitation rule, and, on November 21, 1978, threatened Eddings that the Respondent would withdraw announced wage increases if the employees continued to fight for the Union; (2) violations of Section 8(a)(5) of the Act: on and after November 9, 1978, refusing to recognize and bargain with the Union in the appropriate unit, and on November 21, 1978, announcing unilaterally determined wage increases to the bargaining unit employees. The Respondent has apparently taken no action to comply with the Board's Order in that case which is pending before the United States Court of Appeals for the Fifth Circuit.

B. *Alleged Violations of Section 8(a)(1)*

The complaint alleges in effect and the answer denies that, in February 1980, Plant Manager Gary Richardson promised employee L. B. Whiteside a promotion if he discontinued his activities on behalf of the Union; and on or about August 4, 1980, Yard Foreman Don Rimmer informed Whiteside that he could not be promoted because of the Union and that Rimmer had been assigned to the yard department "to get rid of all the niggers and old hands" and then the Company would be rid of the Union.

L. B. Whiteside, a black, has been employed by the Respondent 15 years. He operates a forklift in the yard where 12 employees are employed. An officer of the union, he was one of the union negotiators of the last collective-bargaining agreement, negotiated in 1975. He testified against the Respondent in the prior NLRB proceeding.

Whiteside testified in this case that on February 4 or 5, 1980, Richardson told him, in another employee's presence, "that if I got out of the Union, he would make me a boss of the Ralph Low[e] Yard . . . a new yard just acquired by the Company"; that Whiteside responded he would take the job "if the Union would come along with me"; but that Richardson told him, "I had to get out of the union, period, in order to get the job." Whiteside also testified that on August 4, 1980, he asked Yard Foreman Rimmer why he had never been promoted to general operator (one of the highest paid nonsupervisory classifications in the plant) and that Rimmer told him, on this and several other occasions before and afterwards, "that I couldn't make general operator because I was in the union," and that Rimmer had been assigned as foreman of the yard "to get rid of all the niggers and old union men [and] if he got rid of the niggers, he'd get rid of the union."

As the General Counsel points out, this testimony is unrebutted inasmuch as neither Richardson nor Rimmer was called to the witness stand, Richardson because he was hired by a Saudi Arabian company not affiliated with the Respondent and left this country in February 1981, and Rimmer because he has been discharged and, as the Respondent's counsel stated, is "no longer under [the Respondent's] control." The General Counsel's reliance doubtless is on the "missing witness rule" which the Board has defined as follows:[5]

> . . . where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally [serve] to produce it, and he fails to do so, without satisfactory explanation, the [the trier of fact] may draw an adverse inference that such evidence would have been unfavorable to him.

Here, the Respondent's explanation for its failure to produce Richardson and Rimmer seemed less than satisfactory, especially as to Rimmer.[6] But while it is perhaps the usual, it is not the invariable, practice to credit the General Counsel's witnesses in such a situation,[7] and other factors prevent me from crediting Whiteside.

Whiteside was prone to exaggeration; he was inconsistent at times; and his demeanor did not create enough confidence in his reliability to justify accepting his word without dependable corroboration. Thus, Richardson may have actually intended only to indicate that the Respondent's foremen were not allowed to be union members, rather than to promise him a reward for abandoning the Union. The only other testimony as to any such remark by Richardson was given by Joe Ross whom I find below to be an undependable witness. Further, it seems unlikely that Richardson would hold out the foreman's position described by Whiteside in view of Vice President Lubke's testimony, which I credit, that the Respondent acquired the Ralph Lowe Company on December 28, 1979; that Richardson had no authority over the newly acquired operation; and that there were no openings in the yard of the new operation, contrary to Whiteside's testimony that the Respondent hired a man off the street to fill the yard foreman's job there.

The remark Whiteside attributed to Rimmer about getting rid of the Union by "firing the niggers and the old union men" is corroborated only by testimony by Ross, and by testimony given by Darrell Taylor of similar remarks "continuously" made by Richardson, whom he alleged also referred specifically to Whiteside as a "prime problem causer for the union" he was going to fire. However, Taylor's credibility was undermined by his admission that he has served a prison term for felony, by his obvious exaggerations, and by the bias against the Respondent he revealed in a letter written after he quit the Respondent's employ.

Other factors which mitigate against Whiteside are the dubiousness of his qualifications for the job of general operator featured in his testimony, and his acknowledgement that other blacks and union supporters prospered at the Respondent's plant before the charge was filed in this case, such as Roy Brown, another member of the 1975 negotiating team, promoted in October 1979 and February 1980; Harrison Stewart, a black man who also testified against the Respondent in the prior unfair labor practice proceeding, promoted to general operator in April 1980; and Adam Hignojos, a union committeeman in 1978, promoted to general operator in the custom shop in 1978 and foreman of the custom shop in April 1980.

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[5] *Martin Luther King Sr. Nursing Center*, 231 NLRB 15, fn. 1 (1977).

[6] The fact that Rimmer was discharged does not establish, by itself, that he is no longer within the Respondent's control as meant by the rule. Thus, the Respondent does not assert that it does not know Rimmer's whereabouts or that it tried unsuccessfully to serve a subpena on him. As to Richardson, the Respondent appears to know his whereabouts but did not, as far as the record shows, apply for permission to take a deposition from him under Sec. 102.30 of the Board's Rules and Regulations, Series 8, as amended. On the other hand, I note that Richardson did not leave this country until February 1981, 6 months after the charge was served on the Respondent and 5 months after the complaint was issued. In these circumstances it is not clear that I would be justified in presuming that Richardson would not have been available and would not have been called as a witness had the hearing been scheduled during the 5-month period between the time the complaint was issued and the time he left the country.

[7] See, e.g., *Delta Metals, Inc.*, 236 NLRB 1665, 1669 (1978).

Accordingly, I find that these allegations are not supported by credible evidence, and I conclude that they must be dismissed.

C. *Alleged Violation of Section 8(a)(5)*

The complaint alleges, and the answer denies, that in July 1980 the Respondent refused to bargain with the Union by unilaterally discontinuing its prior practice of issuing work gloves to employees in the yard department.

The complaint alleges and the Board made a finding in its Decision and Order at 248 NLRB 491, which is binding on me, that the Union is the exclusive bargaining representative of an appropriate unit of all production and maintenance employees at this plant.

It has long been the Respondent's practice to issue rubber-like chemical-covered fabric gloves costing about $5 a pair to its employees, including its yard employees who received a pair a week. In late July 1980, Wayne Hale, who had become plant manager the preceding April, noticed gloves strewn about the premises including the yard, and issued instructions to all supervisors to "attempt to control the use of gloves and stop the waste." Hale did not intend to stop the distribution of gloves entirely but one of his supervisors, Dan Rimmer, foreman of the yard, informed the yard employees that Hale had forbidden him to issue any gloves because they were too expensive. The Union was not notified of or bargained with about Rimmer's action.

In early August, Vice President Lubke informed Hale that a complaint had been made to the NLRB (the pertinent charge was served on the Respondent August 12). Hale thereupon investigated and, upon discovering that Rimmer had quit issuing gloves altogether, ordered Rimmer "to start issuing gloves, like we had been doing before."[8]

In my opinion, Rimmer's conduct did not amount to "a material, substantial [or] significant" unilateral change in working conditions.[9] On the contrary, it was a simple mistake with minimal effect on only a few employees for a brief period of time, rectified immediately upon being brought to the plant manager's attention.[10] I therefore conclude that this allegation should be dismissed.

D. *Alleged Violation of Section 8(a)(3)*

The complaint alleges that the Respondent discharged Joe Ross on January 21, 1980, because he joined or assisted the Union or engaged in union or protected concerted activities. The Respondent contends Ross was discharged for cause.

1. Facts

Joe Ross was employed at this plant for 17 years. Around 1972 Ross was assigned to the custom shop as a sandblaster.[11] He progressed to operator and in 1975 or 1976 was appointed general operator.[12] At the time of Ross' discharge on January 21, 1980, the custom shop complement consisted of Dan Chew who had been foreman since 1978; Adam Hignojos employed 3 years and a general operator for 2 years; Arthur Gonzales, an operator; and Richard French and one other employee (Joe) who were sandblasters. Dan Chew was a member of the Union until appointed to his first supervisory position in 1974. Adam Hignojos was a union committee member in 1978 and as such participated in the contract negotiations of October and November that year; he attended the hearing held in the prior NLRB proceeding in April and June 1979 relating to those negotiations, sitting with the General Counsel and union officials. Richard French was a member of the Union in September and October 1978. Joe Ross resigned his union membership in September 1969 and has never rejoined, nor has he attended any meetings of the Union.[13]

Ross was considered by management and employees to be an experienced, skilled, and knowledgeable employee. Ross received no discipline or reprimands until the events involved in this case. During the summer of 1979, Ross received an award for 15 years' service with the company, and was told at that time by Foreman Chew that he "did a good job," and by Executive Vice President Ward that "we appreciate your work."

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[8] Based on Hale's credited testimony. I cannot credit Whiteside that no gloves were issued for a period of 3 months.

[9] See *Peerless Food Products, Inc.*, 236 NLRB 161 (1978).

[10] *Peerless Food Products, Inc., supra; Bureau of National Affairs, Inc.*, 235 NLRB 8 (1978). I find it unnecessary to rule on additional grounds advanced by the Respondent for dismissing this allegation.

[11] The function of the custom shop is to clean steel pipe used by the oil drilling industry and coat it with plastic to retard rust and corrosion. Whereas the tube shop deals only with straight pipe and pipe joints, the custom shop does more difficult work with fabrications, crooked joints, vessels, valves, and collars of various shapes and sizes. The pipe is blown out to remove sand and dirt and then burned to remove grease, oil, and parafin; it is then wheelabrated (thrown into a spinner and cleaned with steel grit), sandblasted with a hose, primed, and coated.

[12] A general operator is usually an experienced employee who is capable of doing any type of coating and is paid about 20 cents an hour more than an operator who is skilled in only one type.

[13] I cannot credit any of Ross' testimony regarding coercive remarks Plant Manager Richardson allegedly made to him during 1978 and 1979, that he was going to get rid of the old hands, old folks, the niggers, Ross, Whiteside, and anybody that was with the Union; that Richardson offered Ross a bonus and a foreman's job if he would help get a petition started to get rid of the Union; nor Ross' testimony about starting to talk about being interested in joining the Union. This testimony was vague and inconsistent as to what Richardson allegedly said, when he said it, and how it affected Ross' relationship with Richardson; and it conflicted with other testimony by Ross that Richardson was praising his work and telling him "not to let those damn Mexicans get the best of me," apparently during the same period. Ross did not say he told Richardson or any other member of management he was interested in joining the Union nor was there any statement to that effect in his pretrial affidavit. Nor can I credit Darrell Taylor that once in August 1979, and approximately 25 times after that during Taylor's last 2 months of employment, he recommended that Richardson promote Ross to foreman and Richardson replied, "Hell, no, he's not going to promote that union-loving son of a bitch; he'd get rid of him." In addition to other considerations relevant to Taylor's unreliability set forth above, this testimony is also inconsistent with testimony by Ross heretofore recited.

Ross was disappointed that Chew was designated foreman of the custom shop instead of him and he was "hurt" that Hignojos was promoted to the same level of general operator occupied by Ross when Hignojos had so much less experience than Ross. Although Chew designated Ross the ranking general operator, because, he said, Ross was the senior employee in the shop and Chew looked up to and respected him, conflict nevertheless developed between Ross and Hignojos. Hignojos said the conflict was caused by Ross' favoring short cuts in the work and refusing to do his share. Richard French confirmed that Ross "slacked off" during his last 2-1/2 or 3 years and particularly during his last 6 months when "you wouldn't be able to find him, when you needed him." Chew agreed, reciting an occasion in August 1979 when the shop was engaged in a special assignment and Ross refused to work overtime and left without telling Chew.

In late August or early September 1979 while Chew was on vacation, the conflict between Ross and Hignojos came to a head when Hignojos refused Ross' order to load some pipe because he felt Ross should load them himself and shortly thereafter Hignojos needed Ross to help shoot (coat) couplings and found Ross in the plant bathroom shaving. Hignojos took the matter to Richardson who talked with the two of them separately. In his interview, Hignojos complained that Ross did not do his share and encouraged the employees to do slipshod work. Richardson told him to continue doing his own work the way it was supposed to be done and not to worry about Ross. Ross testified that Richardson was only "trying to create trouble between us" by telling each of them he was a boss. When Chew returned from vacation, Richardson informed him that Hignojos had complained about Ross' not doing his share of the work, and Chew responded that something should be done about the conflict between them. Richardson promised to think about it. A few weeks later Chew complained again about the problem and Richardson sent for Ross and offered him the job of coupling coordinator in the tube shop and Ross accepted it. Ross testified that Richardson told him at this interview, "I was creating problems up there at the Custom Shop."[14]

Things went smoothly in the custom shop while Ross was in the tube shop, but after about 2 weeks Richardson told Chew he had to transfer Ross back because "he got to visiting the working hands down there [in the tube shop] too much and the supervisors were throwing a fit about it." Ross testified Richardson told him he was creating problems in the tube shop, but Ross denied it on the grounds that he could not even communicate with the employees in the tube shop, much less create problems, because he could not speak Spanish with them and they could not speak English with him.[15] Upon Ross' return, Chew posted a notice dated October 26, 1979, describing Ross' and Hignojos' duties in another attempt to resolve the conflict between them. The notice put Ross in charge of equipment maintenance and Hignojos in charge of coating operations.[16]

In December 1979 a large quantity of 10-inch pipe and pup joints which the Company had coated for Gulf Oil Company was returned to be checked for improper coating and for recoating if necessary. Chew assigned the testing, or sparking, job to Ross. On December 30, Ross borrowed a lift from the yard, carried the pipe to the airhose, and blew the sand and grit out of it. On December 31, Ross did the sparking and reported that some of the pipe had holidays (flaws in the coating) but the pups were holiday free. Chew and Richardson, in Ross' presence, checked Ross' work and found some of the pipe Ross had marked good had holidays and some of the pup joints were not holiday free. Chew wrote this incident up in a memo to Richardson on January 7, 1980. When Chew discussed the incident with Ross, Ross denied telling Chew that the pups were holiday free, so Chew wrote another memo to Richardson, with copies to Vice President Lubke and Area Manager Anderson, on January 8, affirming his January 7 report despite Ross' denial. Chew added that some of the pipe that Ross had marked bad had no holidays and some he had marked good were bad when he and Richardson resparked them. Chew's memo continued:

> He is irresponsible. This man interferes with production and the morale of the employees. He was transferred to the tube shop because he could not work with the employees at the custom shop. Within two weeks he had cuased [sic] the same friction in Tube Shop. He was put back in the custom shop. He has been a problem for a long time. I am requesting his transfer or termination.[17]

On January 15, Ross was summoned to Richardson's office where, in the presence of Chew and Area Manager William Anderson, Richardson confronted Ross with his poor performance, and asked if there was a reason for it as they were all there to help him. Ross replied he thought the pups were good and did not know why they were bad, that he might have forgotten to look at the other end of them and that his eyesight was not all that good. Anderson directed Richardson to check the equipment and the lighting to make sure they were in working order though other employees were having no problems with them.[18]

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[14] At another point, Ross testified that neither Richardson or Chew discussed his transfer to the tube shop with him.

[15] Ross testified at another point that he was transferred back to the custom shop because he turned out so many collars in the tube shop that the custom shop could not keep up. I find that this was not the reason for Ross' return to the custom shop.

[16] I cannot believe Ross' testimony that Richardson told him at that time he put him in charge of maintenance because it would give him a wage increase and Ross would "be above the other guy." Ross did not receive an increase.

[17] The facts with regard to this incident are based on the credited testimony of Chew supported by documentary evidence. I consider Chew, who is no longer employed by the Respondent and whose demeanor was very impressive, generally the most credible of the witnesses. Ross' account was too inconsistent and improbable to be believed. Thus, he said he reported some of the pup joints bad and some holiday free; that he also agreed with Chew that he reported all the pup joints holiday free and denied he ever told Chew he had not done so. Ross also testified that the pipe which sparked did so because it was full of sand and debris which he wanted to blow out but was refused a lift to carry it to the airhose; and that it did not spark when Chew and Richardson tested it because, although still full of sand and grit, they "had the ground off" so the test could not produce sparks. At another point, Ross indicated that the pipe he reported he had did not spark when Chew and Richardson tested it because they blew the sand and grit out of it before they sparked it, which they had not allowed him to do.

Meanwhile, Chew set up a second shift because of an overload of work in the custom shop and assigned Ross and Richard French to it. On January 16, the day after Ross' meeting with management, Chew directed them to coat some pups which Hignojos had sandblasted and primed, coat some couplings, and sandblast and prime some fabricated pieces for coating by the day shift. The day shift discovered, however, that all the pups had not been coated and those which were had to be reworked because the coating was blistered and had holidays in it, and a fab piece had been primed with sand in it and had to be burned out, reblasted, and reprimed before it could be recoated. Chew reported this to Richardson in a memo dated January 17, adding that he asked Ross if he forgot to blow the sand out of the pipe and Ross told him he did blow it out and did not know how the sand got in it. Chew ended his memo with a recommendation, "You need to have a talk with him."[19]

On January 17, Ross and French again failed to complete the work assigned to the night shift, and again did an unacceptable job coating the pups. In his memo to Richardson dated January 18, Chew recommended that Ross "needs to be talked to about his job."[20]

On January 18, Richard French told Foreman Chew that he did not want to work the second shift with Ross any longer because Ross did not do his share of the work, and Chew told them both to return to the day shift the next day.[21] Meanwhile, Chew left instructions for French to coat some couplings with 519 that night and for Ross to coat some other couplings which were a rush job. During the shift Ross telephoned Chew at home that he could not do the job assigned to him and that Chew should direct French to do it. Chew said no, French must do the job assigned to him as both jobs had to be completed by the end of the shift. Sixteen of the couplings coated by Ross had to be burned out and recoated.[22] Chew reported these events in a January 19 memo to Richardson, which he ended with, "Joe has a bad attitude which is hurting the attitude of the employees in the Custom Shop and their production."

On January 22, Chew was called into Vice President Lubke's office and, in the presence of Lubke, Chew, and Anderson, Richardson discharged him.[23] The discharge slip made out on Ross and signed by Vice President Lubke states:

> After several warnings by supervisor and managers of the Odessa Plant, this action had to be taken because of the following reasons: unable to work with his co-workers and supervisors, poor production, poor-quality, bad attitude and work habits.[24]

2. Conclusions

To establish the alleged discriminatory nature of Ross' discharge, the General Counsel relies on the union animus of the Respondent and of Plant Manager Richardson as revealed in the prior unfair labor practice proceeding; Ross' recognized status as the most experienced, skilled, and knowledgeable employee in the custom shop; the alleged abruptness of his discharge after 17 years' employment; and the absence of progressive discipline.

It might seem that the Respondent's management was inept in dealing with the failings of an old and theretofore valued employee. However, it was established by credible, corroborative testimony that Ross' performance began to deteriorate sometime after he missed out on the customshop foreman's job and Hignojos was promoted to his level, both of which incidents he admittedly resented. It was doubtless this resentment which was behind Ross' conflicts with Hignojos and his tendency during his last months of employment to do less than his share of the work. By the fall of 1979, Ross' conduct interfered with the work of the custom shop so much that Richardson and Chew felt required to transfer him to the tube shop and, then, when that failed even though he had been informed of the problems he was causing, to assign him and Hignojos to separate areas of responsibility in the custom shop. None of these steps had the desired effect, however, and then in late December 1979 Ross turned in such a poor performance on an important job that Chew recommended his transfer or termination, but instead he was counseled both by Foreman Chew individually and by Chew, Richardson, and Anderson together on January 15, 1980. Nonetheless, Ross turned in poor performances the rest of the week. It is clear, therefore, that Ross' discharge was not abrupt, but was based on his deteriorating performance over a considerable period of time, culminating in his disregard of management's efforts to turn him around at the beginning of his last week. Although no progressive discipline was handed out in the form of written warnings or suspension, it was not shown that it was the Respondent's practice to follow such a disciplinary procedure at this plant. In any event, as Ross was told that his transfers were made because of the problems he caused in both shops, and as he was counseled by his foreman and by management as a group, it cannot be said that he was not forewarned that his conduct had become unacceptable.

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[18] This account of the interview represents my best estimate of what most likely took place based chiefly on the testimony of Chew, supplemented by that of Anderson. Ross' testimony to the effect that, after he gave his version as set forth in the footnote above, he told the supervisors, "that I would like to know if I could get in the union . . . As long as [Richardson] was with P. A. that I wanted to be a union member . . . That I would love to be in it and be treated like everybody else," was credibly denied by Chew and Anderson and was inherently improbable. When asked to expain what he meant by wanting to be in the Union so he would be treated like everybody else, Ross said he was hurt because Hignojos was in the same classification as he even though Hignojos had less seniority; but he then said that was not the reason, as the reason was that Richardson was creating trouble between himself and Hignojos "so he could get a reason to kick me out."

[19] Based on Chew's credited testimony. Although Ross remembered little about this incident, he claimed he was not familiar with "519" coating which was designated for this job, as it had seldom been used by the Company. Chew credibly testified that 519 had been used in the custom shop since before he arrived there.

[20] Ross blamed his low production and his difficulties with the coating on the poor condition of these pipes and his unfamiliarity with 519.

[21] Based on the corroborative testimony of Chew and French. I do not credit Ross, who was not corroborated, that Chew told him they were being returned to the day shift because Chew said French was drinking on the job, although Ross protested that he himself did not say French was drinking.

[22] Based on Chew's credited testimony. Ross testified he was the one assigned to coat with 519, and in his telephone conversation with Chew he told Chew about his difficulties applying the 519 and he wanted French to help him, but Chew refused and told him to have the couplings coated with 519 by the end of the shift even if he had to paint it on with a brush. Ross was not suprised, he said, when many of the couplings were found to be defective. Chew credibly testified that in any event 519 is applied as a spray and he denied ever telling Ross to put it on with a brush.

[23] Based on Anderson's and Lubke's credited accounts, corroborated in the main by Chew. Ross testified that, when Richardson informed him he was discharged, he told Richardson he "didn't want to hear nothing about it" and Richardson gave him no reason for the discharge; that he thought he was being fired for "straightening up some of [Richardson's] messes there in LaMesa and Seminole," or for abuse of the Company's credit card for buying gasoline because, he said, "the gas was pouring out of my car," but then he said, "I was using [the] gasoline to clean the coating, so I could recoat his mess." On cross-examination, Ross testified that at the discharge interview he asked for his bonus, a reference to Richardson's alleged promise of a bonus if he would help get the Union out; although he had not signed the decertification petition or otherwise helped to get the Union out, he said, "I wanted them to know that I knew about it." Ross further testified, on cross-examination, that about the time he walked out of the interview, he told the management representatives, "Well, let's just wait a minute about my firing. I want to ask you about me joining the union. Before you fire me, I want you to know, I would love to be in the union." Ross' pretrial affidavit contains no reference to Ross' asking for a bonus or saying he wanted to join the Union and the three management witnesses credibly denied that he did.

[24] I accept as reasonable Foreman Chew's testimony that French was not disciplined for the unsatisfactory performance of the night shift because he did not bear the responsibility borne by Ross as a general operator.

With regard to the alleged antiunion motivation, the record shows that Ross had not been a member of the Union during the last 10 years of his employment, since long before the Respondent's unfair labor practices of 1978. Although the Respondent revealed hostility toward the Union at that time, it had no reason, except for the absence of Ross' signature on the decertification petition, to believe that he was one of the Union's advocates or supporters. Nothing that happened subsequently would reasonably lead management to suspect anything different. Ross' attempt to establish an expression of intent to cast his lot with the Union at his counseling session of January 15 was totally incredible. But even if he had expressed such an intent, it is impossible to believe that management would have fired him for it, when there were other employees known to be union leaders, officials, and advocates who were tolerated and even advanced. Moreover, Foreman Chew, who initially recommended termination and was responsible for the reports of unsatisfactory performance which eventually resulted in termination, had himself been a union member; and two of the employees who complained about the difficulties of working with Ross were Richard French who had also been a union member and Adam Hignojos who was a prominent and well-known union leader.

Accordingly, in all the circumstances, including the absence of credible evidence of current hostility toward the Union, the absence of credible evidence that Ross was an advocate or supporter of the Union or that the Respondent had reasonable grounds for suspecting that he was, Ross' job performance deterioration over a period of several months during which he was cautioned and counseled culminating in a week of less than satisfactory performance, all of which interfered with the efficiency of the Respondent's operations, and the absence of disparate treatment, I find that a preponderance of the credible evidence fails to establish that the reason advanced for Ross' discharge was a pretext or that his discharge was to any extent motivated by discriminatory considerations. I conclude that this allegation should be dismissed.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I hereby issue the following recommended:

ORDER[25]

The complaint is dismissed entirely.

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[25] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Ahrens Aircraft, Inc. *and* Asociacion Internacional de Maquinistas y Trabajadores Aerospaciales, AFL-CIO. Case 24-CA-4322

December 29, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 19, 1981, Administrative Law Judge Arline Pacht issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt her recommended Order,[4] as modified herein.

The Administrative Law Judge found, in the remedy section of her Decision, that Respondent should be ordered to offer discriminatees Mercado and Rivera reinstatement to the jobs of which they were unlawfully deprived or, if such jobs no longer exist, to substantially equivalent jobs, when Respondent resumes operations, and that Respondent should be ordered to make them whole for any losses they may have suffered from the date of their discharges, May 21, 1980, to such date as Respondent demonstrates during the compliance stage of this proceeding that they might have been laid off in the normal course of business.[5] She further specified, in her recommended Order, that Respondent be required to offer Mercado and Rivera reinstatement as soon as Respondent resumes its aircraft assembly operations or has appropriate jobs, whichever comes first. The recommended remedy and Order would thus appear to assume that Mercado and Rivera would have been laid off at some point prior to the hearing date. We note, however, that at the beginning of the hearing counsel for Respondent stated in arguing in support of a motion to dismiss that the issues are moot because Respondent had been forced to lay off over 80 percent of its employee work force, and that the plant had been temporarily shut down since late May 1980. Counsel stated at that time that there were "some 35 or 36 employees, which is just really a skeleton crew, at the plant to keep the plant somewhat functional for their tax exemption purposes and to receive mail." Because it is not clear whether or not Mercado and Rivera would have been retained by Respondent as part of this skeleton crew but for Respondent's discrimination against them, we shall clarify the Administrative Law Judge's recommended Order by deleting its reference to offering Mercado and Rivera reinstatement when Respondent resumes operations or has appropriate jobs, so as not to preclude a finding at the compliance stage of this proceeding that they would not have been laid off absent the discrimination practiced against them. We shall also order expunction of any reference in Respondent's files to Mercado's and Rivera's discharges.

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[1] Respondent's motion that the Board remand this case for rehearing so that Respondent may present the testimony of Peter Ahrens, president of Ahrens Aircraft, who was unavailable for the hearing because he was out of Puerto Rico and in Washington, D.C., on business, is hereby denied. Although Respondent contends that Peter Ahrens' testimony as to supervisory issues and the appropriateness of the bargaining unit is indispensable to its case, Respondent did present several witnesses who were intimately familiar with Respondent's operations and who testified relative to these matters. These witnesses included Respondent's vice president in charge of purchasing, production, and personnel, Edd Ahrens, as well as its production manager, Carlos Ruiz. Further, when afforded an opportunity by the Administrative Law Judge to make an offer of proof with regard to any testimony which counsel for Respondent might wish to elicit from witnesses who could not be present, Respondent declined to do so. In any event, the matters which Respondent urges would be established through the testimony of Peter Ahrens—specifically, on the supervisory issue, that a high ratio of supervisors is required in the aviation industry, and, on the unit issue, that the production of aircraft mandates a wide variety of diverse skills, training, and personnel—would not alter our conclusions herein.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[3] The Administrative Law Judge's Decision contains several apparently inadvertent errors which do not, however, affect the results herein. First, the Administrative Law Judge lists in fn. 5 of her Decision the individuals Respondent contends are supervisors, stating that there are 20 such persons whose status is in dispute. Only 19 names are listed therein, the 20th individual alleged by Respondent to be a supervisor, Juan Martir, having been agreed by both Respondent and the General Counsel to be a supervisor within the meaning of the Act. References in other portions of the Decision adverting to the 20 individuals whose status is in dispute are likewise in error. Second, the Administrative Law Judge refers in fn. 9 to Jt. Exh. 1(b) when it is apparent from the record that she in fact means Jt. Exh. 2. Finally, in the third paragraph of that section of the Decision entitled "Events in January 1980," the statement that several employees visited the ADT offices to complain that they had not received the contractually promised wage increase of $3.50 an hour should in fact state the contractually promised wage increase *to* $3.50 an hour.

[4] Member Fanning would make the bargaining order prospective in nature. See his separate opinion in *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977).

Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[5] The Administrative Law Judge apparently inadvertently failed to cite *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for the rationale on interest payments.

259 NLRB No. 112

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Ahrens Aircraft, Inc., Aguadilla, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Eduardo Mercado and Frederick Rivera immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the section of this Decision entitled 'The Remedy.'"

2. Insert the following as paragraph 2(b):

"(b) Expunge from its files any reference to the discharges of Eduardo Mercado and Frederick Rivera on May 21, 1980, and notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them."

3. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order."

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give employees these assurances:

WE WILL NOT discharge, terminate, lay off, or refuse or fail to reinstate, recall, or rehire employees for engaging in union activity or for exercising any right under the Act.

WE WILL NOT threaten employees with discharge, plant closure, or any other reprisals for engaging in union or other protected concerted activity.

WE WILL NOT create the impression that we are keeping employees' union activities under surveillance.

WE WILL NOT instruct employees they are ineligible to join a union.

WE WILL NOT question employees concerning their interest in or sympathies for the Union.

WE WILL NOT reprimand or otherwise discipline employees for engaging in union activities or any activity protected under the Act.

WE WILL NOT maintain in effect the rule in the Employee Handbook which prohibits the distribution of unauthorized material on company property during nonworking hours.

WE WILL NOT otherwise violate the Act directly or indirectly in order to destroy or dissipate the collective-bargaining status of the lawfully designated union representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of any of the rights set forth at the top of this notice.

WE WILL offer Eduardo Mercado and Frederick Rivera immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, and WE WILL make each of them whole, with interest, for all moneys lost as a result of their dismissal from work on May 21, 1980.

WE WILL expunge from our files any references to the discharges of Eduardo Mercado and Frederick Rivera on May 21, 1980, and WE WILL notify them both that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

WE WILL immediately recognize and, upon request, bargain with Asociacion Internacional de Maquinistas y Trabajadores Aerospaciales, AFL-CIO, as the exclusive representative of all the employees in the unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, WE WILL put such understanding into a written contract which we will sign. The appropriate unit is:

> All production and maintenance employees of Ahrens Aircraft, Inc., employed at its plant, exclusive of all other employees, office clerical employees, guards and supervisors as defined in Section 2(11) of the National Labor Relations Act, as amended.

AHRENS AIRCRAFT, INC.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge: This case was heard in Mayaguez, Puerto Rico, on October 14–16, 1980, pursuant to a charge filed on May 23, 1980, by Asociacion Internacional de Maguinistas y Trabajadores Aeroespaciales, AFL-CIO, and a complaint which issued on August 8, and was amended on August 18, 1980. A timely answer was filed on August 20, 1980. The questions presented are whether (a) Respondent, Ahrens Aircraft, Inc., violated Section 8(a)(1) of the National Labor Relations Act, as amended, by (1) threatening its employees with plant closure if they supported a union or engaged in concerted activities, (2) maintaining and enforcing an overly broad no-distribution rule, (3) threatening employees with discharge if they joined the Union, (4) improperly interrogating them about their concerted activities, and (5) creating the impression of surveillance; (b) violated Section 8(a)(3) and (1) by discharging Freddy Rivera and Eduardo Mercado; (c) Rivera and Mercado and 18 other employees were supervisors within the meaning of Section 2(11) of the Act, (d) whether the unit defined in the complaint is appropriate, and (e) in the circumstances of this case, a bargaining order is appropriate.

Upon the record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel and for Respondent, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, maintains an office and place of business (hereafter called the plant) in Aguadilla, Puerto Rico, where it is engaged in the design, manufacture, and sale of a prototype aircraft. During the 12 months preceding the issuance of the complaint, a representative period, Respondent purchased and received at its plant goods and materials valued in excess of $50,000 which were transported directly from points outside Puerto Rico.

I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.[1]

II. SUPERVISORY ISSUES

A. *The Evidence*

1. Plant structure

The parties stipulated that as of May 23, 1980, 118 employees comprised the Ahrens Aircraft work force, and that, of this number, 113 signed authorization cards, including 20 persons who Respondent contends and the General Counsel denies were supervisors within the meaning of Section 2(11) of the Act.

Respondent's organizational structure was multitiered, with members of the Ahrens family occupying the most senior positions. Peter Ahrens serves as the Company's president; his wife Magda Juame is comptroller; one son, Edd Ahrens, is vice president in charge of production, purchasing, and personnel; a second son, Kim Ahrens, is vice president of engineering. At the next lower rung of responsibility, with daily and immediate oversight over employees in three operating divisions, as of May 1980, was Carlos Ruiz who reported to Edd Ahrens. Jose Morales, project engineer, who reported to Kim Ahrens, occupied a similar position of authority with respect to the two other divisions. Each major division was headed by a senior supervisor. Three of these divisions, those under John Rodriguez, Anthony Acosta,[2] and Carlos Rivera, were divided into some five or six shops.[3] Each such shop was under the direction of a "junior supervisor," as Respondent referred to them, and several of the shops were subdivided into sections.[4] It is the status of the employees heading each of the shops and shop sections which is in dispute here.[5]

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[1] Respondent neither admitted nor denied that the Union is a labor organization within the meaning of the Act. Accordingly, pursuant to F.R.C.P. 8(b) and (d), the allegation will be deemed admitted.

[2] In April 1980, Rodriguez and Acosta became assistant plant managers to Ruiz. However, the record does not suggest that their duties changed with respect to the management of the shops within their divisions. At the same time that Rodriguez and Acosta received new titles, they and other division chiefs became salaried employees.

[3] The other two major divisions, drafting and quality control, had only eight employees each and, therefore, functioned as single units.

[4] The wing shop, under the direction of Senior Supervisor Robert McQue, had two sections: Wing I which was headed by Freddy Rivera and wing II by George Montalvo. Similarly, the fuselage shop was directed by Jose Christy with two sections led by Hiram Enchautegui and Juan Mendez.

[5] The 20 men who Respondent contends were supervisors, the shop to which each was assigned, and the number of employees working with them are as follows: Ariel Berrios—horizontal tail (2); Jose Christy—fuselage; Hiram Enchautegui—fuselage I (5); Juan Mendez—fuselage II (5); Adalberto Cuadrado— (2); Manuel Lopez—fluid systems (none); Melvin Martinez—engine instruments (2); Eduardo Mercado—experimental (1); Abraham Mora—sponson (2); Nicholas Ramirez—flight deck (2); George Montalvo—wing II (3); Freddy Rivera—wing I (5); Luis Rivera—control surfaces (8); Wilfredo Ramos—parts shop I (9); Neftali Rodriguez—parts shop II (7); Julio Lopez—parts shop III (7); Juan Salas—tailgate doors (5); Alfredo Sosa—drafting (7); Jose Valentin—hydraulics (6).

2. Responsibilities of junior supervisors

The record establishes that the authority to hire, fire, suspend, or impose other discipline on employees was vested in Edd Ahrens. He, with Ruiz, assigned employees to particular shops based on the work to be done, and determined when to transfer particular employees from one group to another. They also mapped out work assignments for each shop. Ruiz then transmitted the assignments to the shop supervisors on a daily basis. Thereafter, the junior supervisor distributed those assignments to each member of his crew taking into account the experience of the various employees. A record of jobs performed was maintained by each worker. At the end of the week, the shop and section leaders initialed the forms and submitted them to Ruiz.

Although the shop supervisors were responsible for instructing, guiding, and correcting their coworkers, they spent the greater portion of the day performing their own manual assignments side by side with their coworkers. Shop and section supervisors were paid at an hourly rate ranging from 50 cents to $1 to $2 more per hour than other members of the shop. They punched a timeclock and worked the same number of hours as other production employees. They had no responsibility for assigning or approving overtime; rather, at Ruiz' request, they themselves worked overtime at the standard double pay. Requests for excused absences also had to be approved by Ruiz. Although Edd Ahrens testified that the junior supervisors were empowered to reprimand other employees orally or in writing, there was no evidence that such power, if it existed, ever was exercised.[6] Ahrens also testified that the shop supervisors were authorized to recommend employee transfers. However, Abraham Mora, an alleged supervisor, testified that, when he requested two specific employees to be assigned to his shop, Ruiz assigned two others.

On a semiannual basis, the junior supervisors evaluated the employees in their groups using forms provided by the Company. Each form listed a number of areas such as attendance or cooperation for which the evaluator was to assign a number from 1 (unacceptable) to 5 (excellent). The evaluations then were submitted to Ruiz who reviewed them and added his own narrative comments as to the employee's abilities. Ruiz submitted the evaluations to Edd Ahrens who determined whether and how much of a pay raise within a 4- to 6-percent range the employee should receive.

At irregular intervals, generally every 1 or 2 months, junior and senior supervisors attended staff meetings called and conducted by Ruiz. The principal topics of discussion related to the production of the aircraft, but occasionally other matters such as attendance, tardiness, or observance of safety standards were raised.

3. Work histories of Mercado and Rivera

An examination of the work histories of Eduardo Mercado and Freddy Rivera provides added insight into the role and status of the junior supervisor in Respondent's plant.

Mercado (with 10 years) and Rivera (with 7 years' prior experience in aircraft assembly) were first employed by Respondent in 1978 and sent to the Northrop Institute of Technology for technical training. Shortly after returning to the Ahrens plant, Mercado was assigned to the tail cone boom section with four employees under his charge and then to the fuselage shop. In October 1979, he was transferred to the experimental shop where, as the sole employee, he reported directly to Ruiz and Kim Ahrens. After 4 months, he requested assistance with the manual installation of the heavy landing gear doors on which he was working. Three employees were selected by Ruiz to work with Mercado but, in the latter part of April or early May, Ruiz transferred two of the three assistants back to their original shops.

Rivera's entire career with Respondent was as a junior supervisor in the wing shop. Initially, when there was only one wing under construction, he served as Senior Supervisor Robert McQue's sole assistant. However, in April 1980, when the assembly of a second wing commenced, the shop was divided into two sections. Rivera remained a leader of wing I with five employees and George Montalvo took charge of wing II with three other employees. Rivera explained that Ruiz handed out work assignments to McQue who, in turn, relayed them to Rivera and Montalvo for distribution to their crews. Rivera estimated that 70 to 75 percent of his workday was spent performing his own assignments in contrast to McQue who was engaged in manual tasks about 30 percent of the time. The balance of McQue's workday, according to Rivera, was devoted to planning and coordinating work, reviewing or preparing written requests for changes in the blueprint designs for various parts of the aircraft, or checking on supplies.

Both Mercado and Rivera testified that they evaluated the employees in their shops in March 1980. However, Ruiz disregarded Rivera's evaluations believing he was not sufficiently objective in assessing his coworkers' abilities. Instead, McQue prepared the evaluations of the employees in the entire wing shop including one for Rivera. Mercado's evaluations apparently were afforded no greater weight than Rivera's for only one of the three evaluation forms completed by him turned up in Respondent's files.

In contrast to Edd Ahrens' assertions, neither Mercado nor Rivera believed they had any authority to reprimand or discipline other employees. Indeed, Mercado related that on one occasion, when he attempted to correct the work methods of a man in his shop, the employee ignored Mercado and obtained a transfer to another shop from Ruiz.

B. *Conclusions*

The burden of proving the supervisory status of employees rests on Respondent as the party asserting that status. *Tucson Gas & Electric Company*, 241 NLRB 181 (1979). After carefully reviewing the relevant evidence and considering the principal factors on which Respondent relies in support of its position that the shop supervisors are supervisors under the Act, I find that burden has not been met.

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[6] The only documentation of reprimands adduced by Respondent were several memos which Ruiz wrote concerning Mercado.

Respondent points out that the shop supervisors were responsible for assigning work to members of their respective groups. However, it is undisputed that the assignments which were planned by Edd Ahrens and Ruiz issued initially from Ruiz and were merely redistributed by junior supervisors to their fellow workers according to their level of experience. Thus, the degree of judgment exercised by the shop leaders in allocating jobs was very much limited by the direct involvement of their superiors. Put in proper perspective, the shop supervisor served as a conduit for management's instructions. The assignment of work was, therefore, routine in nature and did not depend on the exercise of independent discretion, which is a hallmark of the supervisor. See *B-P Custom Building Products, Inc.*, 241 NLRB 1118 (1980); *Cablevision Systems Development Co., a partnership*, 251 NLRB 1319 (1980); *Wirtz Manufacturing Company, Inc.*, 215 NLRB 252, 254 (1974).

Respondent further asserts that the shop supervisors exercised independent responsibility in directing the work of the shop employees. As the most experienced employees in each group, the shop leaders did train and guide their fellow workers in the performance of their jobs. However, they did not display any greater degree of authority than any senior, knowledgeable employee would in relation to less experienced juniors. See *High Performance Tube, Inc.*, 251 NLRB 554 (1980); *Hitchiner Manufacturing Company*, 243 NLRB 927 (1979); *Dependable Lists, Inc.*, 239 NLRB 1304, 1308 (1979); *Tom's Ford, Incorporated*, 233 NLRB 28 (1977). With two and even three senior supervisors above them who were engaged in direct daily review of the work in each shop, group leaders had little opportunity to exercise genuinely independent judgment. Although the shop leaders had the authority to correct the work of their fellow employees, there is no evidence that they could reprimand or otherwise discipline employees to an extent which might significantly affect the employee's job status or work to his detriment. Thus, the group leader exercised little meaningful control over his coworkers' performances. *Tucson Gas & Electric Company, supra.*

Respondent also suggests that because the shop supervisors performed evaluations of their fellow employees they were in a position to make effective recommendations leading to the reward of such employees. However, each evaluation was subject to Ruiz' scrutiny and he was at liberty to agree or disagree with the evaluator. In more than a dozen instances, Ruiz reduced the numerical score given by the shop supervisor and on most of the forms entered narrative comments which revealed a personal knowledge of that employee's work habits. What weight, if any, would be given to the initial evaluation was completely within Edd Ahrens' discretion. Since the evaluations were twice removed from the eventual bestowal of any benefit, and since the evaluation could be rejected by Respondent without explanation, as they were in Rivera's case, they cannot be regarded as having any decisive effect.[7] See *Hydro Conduit Corporation*, 254 NLRB 433 (1981).

Respondent submits that the attendance of shop supervisors at management meetings also indicates their supervisory status. Although under certain circumstances such attendance has identified an employee as a company representative, I am aware of no case in which such attendance, in the absence of other criteria, is sufficient to cloak an individual with supervisory status. It should also be noted that attendance at management meetings is not among the supervisory functions identified in Section 2(11).

Moreover, in no other area did the men who were alleged to be supervisors possess any characteristics of supervisory authority within the meaning of the Act. It is undisputed that they could not hire, fire, suspend, promote, transfer, reward, discipline, assign overtime, grant time off, or resolve the grievances of other employees. Nor does the evidence establish that they could effectively recommend such actions. Accordingly, I find that 19 of the 20 alleged supervisors were, in fact, nonsupervisory group leaders.[8]

The conclusions reached with respect to shop supervisors as a class apply with particular force to Freddy Rivera and Eduardo Mercado. Each was a seasoned employee, but expertise is not an exclusive property of a supervisor. Nor is it critical that they were called junior supervisors by management and group leaders by others; what is relevant is the actual authority they possessed, and not the conclusionary assertions of Respondent.

In this regard, it is significant that Rivera was at the lowest level in the chain of command, subordinate to McQue, Acosta, Ruiz, and Ahrens. Given the extent to which he was subjected to supervision, little room was left for Rivera to exercise independent judgment.

Mercado had only one employee working with him during the last month of his employment, and that was because it was physically difficult for him to perform the job alone. For a significant period of time he supervised no one. The Board frequently has suggested that a low ratio between the supervised and the supervisor, as was the case here, diminishes the degree of authority exercised by the person in charge.[9] See, e.g., *Wirtz Manufacturing Co., supra* at 253-254; *Spector Freight System, Inc.*, 216 NLRB 551, 554 (1975).

Both men testified without controversion that they spent the greatest portion of their workday in manual labor, worked the same number of hours, punched a timeclock, received hourly pay, and received no pay when absent due to illness, in precisely the same manner as any other employee. That their hourly rate of pay was higher than those of many other employees merely reflects their greater experience and seniority with Respondent. Although they had some responsibility for instructing and correcting employees in their group, their guidance appeared to be offered in an informal and cooperative spirit for they were without power to put any bite into a command. It was apparent that Mercado and Rivera identified completely with the employees' interests. They did not regard themselves nor were they viewed by others as an arm of management, particularly when they were selected by their coworkers to represent them in forwarding their grievances to Respondent. See *High Performance Tube, Inc.*, 251 NLRB 1362 (1980).

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[7] Respondent also was unable to produce any evaluations from alleged Shop Supervisor Cuadrado.

[8] The record established that, like Robert McQue, Jose Christy had two assistants working under him. Further, he made several recommendations for promotion and evaluated persons alleged to be supervisors. However, the record was barren of any evidence that other functions Christy performed may have distinguished him from or aligned him with the other shop supervisors. Accordingly, I draw no conclusions as to Christy's nonemployee status. However, as discussed, *infra*, whether or not he is included in the unit does not affect the Union's majority status.

[9] Respondent included Alfred Sosa and Manuel Lopez among the group of 20 alleged supervisors. However, Jt. Exh. 1(b) shows that neither had any subordinate and, therefore, cannot be deemed supervisors under the Act. Respondent may not, by the mere imposition of a title, convert workers into supervisors.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Events in January 1980*

Respondent commenced its operations in Puerto Rico in 1976, attracted by the Commonwealth's offer of tax incentives and grants to underwrite training for both skilled and unskilled labor.

According to contracts executed between Respondent and the Administracion de Derecho al Trabajo (Workers Rights Administration, hereinafter referred to as ADT), 14-week sheet metal training programs were given at the Aguadilla plant to groups of unskilled employees who were referred to Respondent by ADT. Trainees were promised $2.90 during the training period, $3.26 upon its completion, and $3.50 an hour when the ADT contract expired in December 1979.

In January 1980, several of the ADT employees visited the ADT offices to complain that they had not received the contractually promised wage increase of $3.50 an hour.[10] An official there advised them that ADT had no way of compelling Respondent to abide by the terms of the then-expired contract. Subsequently, Edd Ahrens met with a delegation representing the discontented employees and informed them that the terms of the contract with ADT had been revised and that no raise would be forthcoming until after the next biannual evaluation was completed. During the course of the meeting, he mentioned that the Company was cooperating with Puerto Rico, and that the only reason it would leave was if a union were brought in. He also suggested that the Company could sell the blueprints for the aircraft to another company thereby leaving everyone without jobs.[11]

B. *Events in May 1980*

Early in May 1980, in response to the wishes of employees in the wing and quality control shops, Freddy Rivera drafted a petition requesting that management issue paychecks on a weekly rather than bimonthly basis. On the morning of May 12, Rivera gave the petition to George Montalvo who then circulated it among all the workers. By early afternoon, over 100 employees had signed the petition. It was turned over to Eduardo Mercado for presentation to management during a staff meeting scheduled later that day.

At the staff meeting that afternoon, after certain production problems were discussed, Ruiz invited questions from the participants. Mercado took the opportunity to mention the petition and asked Ruiz for his opinion as to whether the employees could be paid weekly. Ruiz reacted with some irritation, stating that he hoped the petition had not been signed on company time since this would be against company rules. The rule to which Ruiz was referring, as set forth in the employee handbook, made it an offense subject first to a warning and then to discharge to distribute "written or printed material to employees (irregardless [sic] of nature) without prior company approval or authorization."

Mercado assured Ruiz that the petition had been signed during the lunch period and on breaks. Then, Kim Ahrens, who also was present at the meeting, commented that it would be too costly for the Company to convert to a weekly pay system and suggested that the problem lay in the employees' failure to better budget their wages. Viewing these statements as a denial of the employees' request, Mercado felt it would be futile to present the written petition and, instead, returned it to another employee.

On Friday morning of the same week, the petition turned up on Ruiz' desk who then submitted it to Edd Ahrens. This prompted Ahrens to call another supervisory meeting at which time he upbraided those who had signed the petition. Ahrens took the position that the junior supervisors owed their loyalties to management and had erred in failing to dissuade the employees from signing petitions. He further contended that some of the signatures had been obtained by coercion and intimidation and that the circulation of the petition was in violation of company rules. After Ahrens left the meeting, a number of those present questioned their status as supervisors. Others made reference to a Puerto Rican law which required weekly pay as well as sick pay.[12] Freddy Rivera suggested that the minimum wage and National Labor Relations Board laws should be posted on the company bulletin board.

Following Respondent's apparent rejection of the petition, the employees gathered at a community gym after work on May 16, and elected a committee which was charged with preparing a list of grievances for presentation to management.[13]

The following day, a Saturday, the committee members met at Mercado's home and drafted a letter outlining a number of employee complaints.[14]

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[10] The previous July, after completing the training program, several employees visited the ADT offices to inquire why they had not received the first wage increase provided in their ADT contracts. It is undisputed that, shortly thereafter, Edd Ahrens called these employees to his office and told them to direct their questions to him, not to ADT. A week later, the 16 affected employees received the requisite pay increases retroactive to the date on which their training concluded.

[11] My findings in this paragraph are based on a composite of the credited testimony of Peter Lugo and Ruben Ferrer whom I found, based on their demeanor, to be trustworthy witnesses. Their descriptions of the surprise they felt when Ahrens unexpectedly mentioned a union could not have been feigned and lends authenticity to their entire account of this meeting. Moreover, having given an uncontradicted account of the first meeting with Ahrens, it is far more likely that Ferrer's version of the second meeting, rather than Ahrens', also was accurate.

[12] The Company did not provide for paid sick leave.

[13] Those elected were Peter Lugo, Eduardo Mercado, Nicolas Ramirez, and Freddy Rivera.

[14] Generally, the complaints related to the matter of weekly pay, additional paid holidays, compensation for sick leave, the relationship be-

Continued

On Monday morning, May 19, Mercado hand-delivered the letter to Ruiz, telling him that the committee expected a response in 24 hours. During the course of the day, Johnny Rodriguez, an assistant plant manager, told Mercado that 24 hours was too short a time for management to respond. He also asked Rivera what would happen if the letter was not answered within 24 hours, to which Rivera replied that the employees would have to decide by majority vote, but that he doubted that a protest could be averted.[15] Later that day, Rodriguez told Mercado that the Company's response to the grievance letter was negative.

In reaction to the receipt of the grievance letter, Edd Ahrens and Ruiz embarked on a series of meetings with the employees in each shop throughout May 20 and 21. In describing the meeting which he attended with other employees in the wing shop, Rivera said that Ahrens discussed the various items in the grievance letter with the assembled group. When Mercado and 15 other employees met with Ahrens and Ruiz, Ahrens stated among other things that the Company might cease to exist if too much was asked of it.[16]

After work on May 20, Mercado arranged for another mass meeting of the employees at which time, Juan Maldanado, the Union's business representative, spoke about the procedures involved in organizing and described the rights which workers have.[17] Mercado then asked for a vote on whether the employees favored joining the Union. By a show of hands, a majority of those attending registered their approval. After the meeting ended, Mercado distributed authorization cards and obtained 37 signed cards immediately.

C. *The Discharges*

The following day, May 21, Mercado arrived at the plant parking lot at 6:30 a.m., one-half hour early, to distribute additional cards to employees before they entered the facility. He was joined shortly thereafter by employees Lugo, Rivera, and Enchautegui who also began to circulate union authorization cards and distribute union literature. As a large number of employees began to collect around them, they became aware that a number of Respondent's chief executives were watching the employees from the vantage point of a small platform outside the door which management used to enter the plant. Ruiz approached Mercado and warned him that he was violating company rules and could be fired for his activities. Mercado replied that he was acting lawfully as a union organizer. Rivera then handed Ruiz a copy of the union literature he had been distributing. Ruiz then warned him that he too could be fired for violating company rules by distributing union propaganda.

Later that morning, Ruiz told Mercado and Rivera they were fired as of noon that day for having violated the Company's rules. He further advised them that they would receive termination notices by mail. Ruiz prepared such notices and subsequently inserted them in each man's personnel file but never sent them to the men. Four of the six reasons cited for Mercado's dismissal had to do with his allegedly argumentative nature and inability to work well with others. In support of these conclusions, Ruiz alluded to several memos in Mercado's personnel folder documenting three arguments he had with employees in March, May, and June 1979. The last two reasons listed in Mercado's termination notice concerned his violating company rules by circulating the May 12 petition on company time and company premises.

In addition to his role in circulating the May 12 petition, three other reasons were outlined in the notice justifying Rivera's discharge, including an inability to work harmoniously with others and an unwillingness to encourage persons in his crew to engage in productive work. By this, Ruiz was referring to an incident in which an employee, Grace Peterson, allegedly accused Rivera of telling her to look busy when she needed a new assignment. In fact, Peterson testified that she told Ruiz it was Supervisor Robert McQue who made the statement which Ruiz attributed to Rivera. At the hearing, both Edd Ahrens and Ruiz testified that the decision to terminate Rivera and Mercado was made on either May 19 or 20 and was based on their belief that the two had originated the petition requesting weekly pay, thereby interfering with production.

D. *Other Alleged Independent Violations*

(a) On a day soon after employee Juan Mendez signed the first petition seeking weekly pay, he was told by Juan Martir that if he or anyone else became involved in union matters they could be fired.

(b) On May 21, in the parking lot prior to beginning work, Mendez handed a signed authorization card to a fellow employee under the scrutiny of the nearby company officials. Later that morning, Antonio Acosta approached Mendez at his work station and warned him that he or anyone else involved in issues such as strikes could be fired.[18]

(c) During the week of May 19, Martir called a special meeting of the quality control employees and advised them that they could not belong to the Union. Some of the employees reacted by laughing and several others suggested that Martir was incorrect. Martir responded by telling the employees he would check with William Black, a Federal Aviation Agency inspector working closely with Respondent.

(d) Later that day, Martir summoned the quality control employees to another meeting in Kim Ahrens' office. With Martir seated beside him, Inspector Black told the group that they should not join the Union for they were

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tween management and the workers, the inadequacy of medical services, and sanitary conditions at the plant.

[15] At one of the after-hours meetings of the employees, a vote was taken authorizing a strike. However, the exact date was not made known since there was some apprehension that reports of the workers' activities were being relayed to management.

[16] Respondent did not deny that Ahrens made this statement.

[17] Mercado contacted Maldanado the previous day because he was apprehensive that his prominent role in the employees' concerted activities might lead to management reprisals against him.

[18] For demeanor reasons, I credit Mendez' testimony in preference to Acosta's denial.

considered a part of management and that in his experience such employees were never represented by unions.

(e) Shortly after this meeting concluded, Martir told quality control employee Luis Muniz and Linda Santiago that they could be fired if they became involved with the Union.

(f) The day after these two meetings took place, Martir instructed employee Rey Mendez that quality control workers could not join the Union and would be discharged if they did so.

(g) Prior to the start of the workday on May 25, Peter Lugo was soliciting signatures on a union petition in the parking lot, when he was told he was being watched. At 7:30 a.m., he was summoned to Edd Ahrens' office where Ahrens questioned him about what he had been doing earlier that morning. When Lugo explained that he was soliciting signatures for the Union, Ahrens reprimanded him with a verbal warning for violating company rules. He also asked Lugo why the employees wanted to bring a union into the plant, and why they could not simply discuss their problems with Ruiz.

(h) On October 6, 1980, just 1 week before the instant hearing, Rey Mendez was called to an interview where, with Edd Ahrens present, one of Respondent's attorneys asked him whether Martir had held a meeting with the quality control staff, whether he had in fact threatened them about joining the Union, and whether FAA Inspector Black's remarks were perceived as threats by the employees.

IV. DISCUSSIONS AND CONCLUSIONS

A. *Independent 8(a)(1) Violations*

I find there is substantial and frequently uncontroverted evidence in the record which supports the General Counsel's allegations that Respondent engaged in an extensive series of unfair labor practices. Thus, in agreement with the General Counsel, I find that Respondent's comments in January 1980, to a delegation of employees who were pressing for higher wages, that the Company would abandon Puerto Rico if the plant was unionized and that it would sell its blueprints, leaving the employees jobless, were unequivocal threats of plant closure in violation of Section 8(a)(1). See *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828, 839 (1979); *American Spring Wire Corporation*, 237 NLRB 1551, 1553 (1978). This threat was conveyed months before the Ahrens employees actually began to organize. However, Edd Ahrens' similar remark to a group of employees on May 21, that the Company might close if too much pressure was placed on it by employees, came at the height of the Union's drive. An employer's allegation that employees' collective activity will lead to plant closure constitutes an unlawful threat rather than a lawful prediction unless the employer shows that its statement was based on objective facts which demonstrate probable consequences outside its control. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617-619 (1969). Here, Ahrens' comment was not an objective response to concrete costs attached to specific employee proposals. Rather, it was a threat clearly designed to discourage the employees from engaging in collective activity and is *per se* violative of Section 8(a)(1). *Chester Valley, Inc.*, 251 NLRB 1435 (1980); *Bacchus Wine Cooperative, Inc., and Bacchus Wine International*, 251 NLRB 1552 (1980).[19]

I also find that Respondent's overly broad rule prohibiting the distribution of any printed material to employees without prior company authorization is illegal on its face.

Respondent attempted to prove that the rule was not unlawfully applied by showing that, at a staff meeting on May 12, Ruiz had limited the invocation of the rule only to the distribution of unauthorized materials on company time and company premises. However, Respondent was unsuccessful in disguising the untempered application of the rule to the distribution of union authorization cards and union literature by Rivera and Mercado on May 21. Although their circulation of union materials took place on the parking lot before working hours, Ruiz announced in the presence of a large number of employees that Rivera and Mercado could be fired for disobeying the Company's rule. Similarly, Respondent held Peter Lugo liable for violating the rule although his activities, too, occurred prior to the start of the workday. Accordingly, both in its promulgation of and adherence to the overly broad rule, Respondent has violated Section 8(a)(1). *W. B. Johnson Properties, Inc., d/b/a Olympic Villas*, 241 NLRB 358 (1979); *Essex International, Inc.*, 211 NLRB 749 (1974).

Ruiz' threats to discharge Mercado and Rivera on May 21 were particularly pernicious since they were communicated in the presence of a large group of employees, and were made with the apparent endorsement of many of the Company's top management officials who were surveying the scene. Ruiz' testimony at the hearing in this case suggests that he knew the no-distribution rule should not have been applied to situations in which employees were circulating material during nonworking hours. Thus, his reliance on that rule to outlaw Mercado and Rivera's activities was merely a ruse to disguise a blatant effort to intimidate them and all the other employees present and to dissuade them from exercising their protected right to engage in collective activity.

Evidence that Juan Martir, manager of the quality control division, threatened employees with discharge and attempted to inhibit their union activity was abundant and uncontradicted. Respondent suggests, however, that Martir should be held blameless because of his honest conviction that quality control employees were not eligible for union membership. It is well settled that subjective motivation, even if innocent, is irrelevant to finding a respondent liable for the commission of unfair labor practices. That the employees laughed when Martir told them they could not join the Union is equally irrelevant for employees' subjective reactions to an alleged illegality may not be taken into account. (*El Rancho Market*, 235 NLRB 468, 471 (1978)). Thus, Martir's remarks to Rey Mendez, Juan Mendez, Luis Nunez, and Linda Santiago are blatant threats of reprisal against employees who may attempt to exercise their Section 7 rights. Moreover, in a plant the size of Respondent's where the work force is homogeneous, such statements were certain to receive widespread circulation. Martir's representations to all quality control employees that they could not join the Union are attributable to Respondent which acknowledged in its answer that he was a "part of the management team." As such, they constitute independent violations of Section 8(a)(1). Similarly, Respondent also is accountable for the remarks of third parties such as William Black when he in Martir's presence and with his apparent endorsement advised the employees they should not join the Union.

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[19] Although Ahrens' statement was not alleged as an unfair labor practice in the complaint, it was part and parcel of Respondent's antiunion campaign and was a matter about which Respondent had ample opportunity to offer evidence. Accordingly, I find Respondent's threat to be another instance of unlawful conduct in violation of Sec. 8(a)(1). *Justak Brothers and Company, Inc.*, 253 NLRB 1054 (1980); *Ultra-Sonic De-Burring, Inc. of Texas*, 233 NLRB 1060, 1068, fn. 12 (1977).

Based on my observations of the witnesses' demeanor, I further credit Juan Mendez' testimony that Supervisor Antonio Acosta warned him that employees who were involved with the Union would be fired, and I find this statement to be a threat also proscribed by Section 8(a)(1).

Peter Lugo's uncontradicted account of his May 25 interview with Edd Ahrens gives rise to additional findings of unlawful conduct. Less than an hour elapsed between the time that Lugo was engaged in union activities and the time he was paged to Ahrens' office thereby suggesting that his conduct was under observation. Creating the impression of surveillance is forbidden under the Act for it may tend to inhibit the employee's future union activities. *Ravenswood Electronics Corp.*, 232 NLRB 609, 614–615 (1977). Under the guise of determining whether Lugo was engaged in sabotage or espionage, Respondent then proceeded to question him about his activities earlier that morning and about his reasons for wanting to bring a union into the plant. Although Lugo explained that he was collecting signatures for a union petition and although Ahrens knew that this had occurred prior to the start of the workday, he nevertheless issued a verbal warning. In these circumstances, the interrogation and the issuance of the warning were unlawful intrusions into Lugo's right to engage in union activity. That the interview had the inhibiting effect which Ahrens' intended is made clear from Lugo's assurance that he would refrain from such conduct in the future.

Respondent engaged in another episode of unlawful interrogation when it questioned employee Rey Mendez about the meetings which Martir and Black held with the quality control employees. By failing to assure Mendez that he was not compelled to participate in the interview and that he would suffer no reprisals, Respondent thereby ignored the standards for permissible interrogation required by *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964), enforcement denied 344 F.2d 617 (8th Cir. 1965).

B. *Unlawful Discharges*

Having found that Mercado and Rivera were employees entitled to the protections of the Act, a question still remains as to whether they were terminated on May 21 because of their involvement in concerted activities. A review of the circumstances surrounding these discharges leaves not a shred of doubt that they were fired for reasons which are violative of Section 8(a)(1) and (3).

Respondent clearly had knowledge that Mercado and Rivera were profoundly involved in the employees' concerted activities and played an instrumental role in the Union's organizational campaign. Neither man took pains to conceal his activities. To the contrary, Rivera's signature headed the list of names on the first employee petition of May 12. Mercado forthrightly presented the employees' position concerning weekly pay at the May 12 supervisory meeting and just as forthrightly delivered the second petition to Ruiz on May 19. There was nothing covert about Mercado's role in organizing a meeting of employees after work at which the union business agent spoke, nor did Mercado or Rivera conceal their efforts to solicit union authorization cards on the company parking lot just before the start of the workday. Thus, Respondent had good reason to regard them as the staunchest advocates of the employees' collective interests and among the principal architects of the Union's organizational campaign. Given the timing of their discharges, only hours after they were observed distributing union materials by most of the Company's officials, an extremely compelling case is presented that Respondent terminated them for discriminatory reasons proscribed by the Act.

The rationalizations offered by Respondent in defense of its conduct are unconvincing. Respondent claims that the discharges were motivated by Mercado's and Rivera's misconduct in violating the Company's no-distribution rule. However, Edd Ahrens conceded at the hearing that he had no knowledge that Mercado and Rivera literally walked the petition from one employee to another on company time. Indeed, if they had wandered throughout the plant, they surely would have been observed by Ruiz or one of his assistants. Rather, Ahrens only harbored a belief that the two initiated the petition. The company rule does not prescribe penalties for those who merely originate petitions. Holding Mercado and Rivera accountable for this reason would, in itself, constitute an unfair labor practice. Moreover, if Respondent were concerned about the purported interruption of production, as it claimed, then all those who signed the petition were equally culpable. Yet, only Mercado and Rivera were singled out for discipline.

Further, the rule to which Respondent adverts makes the first breach punishable by a warning. Since neither Mercado nor Rivera had been involved with an alleged violation of the no-solicitation rule prior to May 12, and if this were, as Respondent contends, the reason for disciplining them, then they deserved nothing more than a warning. Respondent's failure to abide by the terms of its own rule by discharging employees for a first offense reveals that its invocation of the rule was a sham used to mask its true motives which were vindictive and discriminatory.

In an effort to divorce discharges which took place at noon on May 21 from the employees' organizational activities earlier that day, Edd Ahrens and Ruiz testified that the discharge decisions were made on either May 19 or 20. Their testimony is unbelievable. If the decision were made in advance, then Ruiz would have no reason to warn Mercado and Rivera conditionally that they *could* be fired for flouting company rules on the morning of May 21.

Other reasons for the discharges which were listed in Mercado's and Rivera's termination notices and placed in their personnel files were equally spurious. The notice which Ruiz prepared regarding Mercado's dismissal refers to three incidents which occurred in 1979. It is curious that Mercado's argumentative manner and inability to get along with others, as alleged in memos summarizing these incidents, surfaced as a cause for dismissal only when he became a union advocate. Ruiz reference to an incident allegedly involving a complaint made by Peterson about Rivera was exposed by Peterson's testimony as an offensive distortion of the truth. If Mercado and Rivera were as uncooperative in manner as Respondent suggests, it is difficult to explain why their fellow workers chose them as their representatives.

Respondent's attempt to build a case against these employees by resort to a rule which did not fit the deed, by resurrecting events long since past and by fabricating conduct, produces the reverse effect from the one intended for it raises the inference that the cited reasons for the discharges were not the real reasons. Rather, where, as here, the evidence shows that Respondent was strongly opposed to any collective activity among its employees and repeatedly threatened them with discharge if they persisted in such activity, the real reason for the dismissals of Mercado and Rivera was to purge the plant of its most active union proponents.

C. *A Bargaining Order Is Appropriate*

There is no dispute as to the authenticity of the employees' signatures on 113 authorization cards, including the cards of 19 employees who, as I found above, are not supervisors. Further, it is agreed that Respondent's work force numbered approximately 118 employees in the relevant time period immediately preceding May 21, the date on which the Union attained a majority. Thus, the record shows that the Union had more than majority support prior to the start of the workday on May 21, 1980.

Respondent contends that the General Counsel failed to prove that the unit described in the complaint is appropriate.[20] I find little merit in this contention.

"It is well established that a unit of production and maintenance employees is presumptively appropriate in the absence of cogent reasons to the contrary." *Ultra-Sonic De-Burring, supra* at 1067, quoting from *Rembrandt Lamp Corporation*, 128 NLRB 905, 906 (1960). Moreover, the Board frequently has asserted the validity of a single plant unit. *Id.*

Other earmarks of an appropriate unit are also evident here. The employees shared a community of interests in that they all were subject to the same terms and conditions of employment, worked under the same supervisory structure, were under the same centralized management, and were engaged in a unified enterprise—the production of a prototype aircraft. Thus, they were bonded by having a common technology and somewhat integrated tasks requiring related skills.

Moreover, although the extent to which the employees have organized may not be a controlling consideration in unit determinations under Section 9(c)(5) of the Act, some weight may be accorded to their expressed desires. See *N.L.R.B.* v. *Morganton Full Fashioned Hosiery Co. and Huffman Full Fashioned Hosiery Mills, Inc.*, 241 F.2d 913 (4th Cir. 1957). Here, all but five of Respondent's production force registered their interest in having the Union represent them.

Since Respondent has adduced no cogent reasons which would refute the presumption attached to a production and maintenance unit at its plant, I find that unit appropriate.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Supreme Court affirmed the Board's authority to issue bargaining orders not only in exceptional cases marked by outrageous and pervasive unfair labor practices, but also in less extraordinary cases where there are fewer "pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." In determining whether a bargaining order is appropriate in the second category of cases, it is necessary to consider whether the effects of the past unfair labor practices can be erased by the use of traditional remedies and whether there is a likelihood of their reoccurrence. *Id.* at 614–615 (1969).

Applying these principles to the present case, I conclude, in agreement with the General Counsel, that "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . ." *Id.* at 615.

Respondent argues that, if it committed any unfair labor practices, they were so insignificant as to have no deleterious effect on the election process. It further argues that, since any misconduct occurred the most part prior to the date the Union attained a majority, it could have no dissipating effect on that majority.

The Union was assured of majority support by the start of the workday on May 21. The discharges of Mercado and Rivera came several hours later and thus were a part of Respondent's swift response to the Union's organizational campaign.

The discharge of principal union activists is misconduct which the Board and the courts have long regarded as so serious and coercive as to justify a finding without extensive explication that they are likely to have a lasting inhibitive effect on a substantial percentage of the work force. See *N.L.R.B.* v. *Jamaica Towing Co.*, 632 F.2d 208 (2d Cir. 1980); *Faith Garment Company, Division of Dunhall Pharmaceutical, Inc.*, 246 NLRB 299 (1979), affd. 630 F.2d 630 (8th Cir. 1980).

The coercive impact of the discharges in this case was augmented by virtue of their timing, coming only several hours after the men had been threatened with discharge for distributing union authorization cards in the presence of a large number of other employees. Moreover, because they were the chosen leaders of the work force, their dismissals had to receive widespread attention. The lesson which Respondent meant to convey to the balance of the work force could not have been lost—the price of active support for the Union was punishment, immediate and severe. It was a lesson not easily forgotten. If Respondent's antipathy to union activity was so intense that it was willing to sacrifice two of its most experienced and highly trained employees, then certainly, less skilled workers would have even more reason to fear a similar fate if they too continued to support the Union. Thus, the unlawful termination of two key union proponents was calculated to quell the employees' prounion sympathies and thereby thwart the Union's drive.

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[20] The unit sought is for all production and maintenance employees of Respondent employed at its plant, exclusive of all other employees, office clerical employees, guards and supervisors as defined in Sec. 2(11) of the Act.

In addition to these discharges, Respondent engaged in a series of other unfair labor practices which are likely to have a lasting effect in the memories of the workers. Thus, Respondent threatened Juan Mendez, Rey Mendez, Luis Nunez, and Linda Santiago with discharge if they became involved in union activities. That such threats may have been made a day or two before the Union attained its majority does not diminish their chilling effect where, as here, the employees could observe that Respondent was willing to convert similar threats into action by discharging Mercado and Rivera. Moreover, the Board has posited that the commission of unfair labor practices before the union's attainment of a majority will not immunize an employer from the issuance of a bargaining order since, by its own actions, the employer has made it uncertain whether the employees can freely elect a bargaining representative. *Merritt Motor Company*, 181 NLRB 1099, 1106 (1970); *Brookland, Inc.*, 221 NLRB 35, 40 (1975).

Further, as found above, on May 21 Respondent threatened plant closure if employees imposed too many demands on the Company. It is difficult to conceive of a threat more calculated than this to undermine employees' support for a union and by itself is sufficient to vitiate a fair and free election. *Ultra-Sonic De-Burring, supra* at 1068.

On May 25, Respondent persisted in its unlawful behavior by creating the impression it was surveying the activities of Peter Lugo, by interrogating him about his and other employees' interest in the Union, and by issuing a warning to him supposedly for violating the Company's no-distribution rule but, in fact, because he was engaging in union activity. Just a week before the hearing was held in this case, Respondent again improperly interrogated an employee.

I do not believe that a make-whole remedy and order would suffice to erase from the employees' memories the indelible imprint of Mercado's and Rivera's discharges. Reinstatement and backpay, offered months and possibly years after discriminatory discharges, cannot eradicate the harm that has been done. See *N.L.R.B.* v. *Jamaica Towing Co., supra.*

Nor is it likely that a cease-and-desist order posted under Board and perhaps judicial compulsion would root out the coercive effects on employees of Respondent's threats to discharge them or close the plant if they persisted in their union activities. I also am doubtful that such an order would deter Respondent from continuing its unfair labor practices when they were committed not by low-level officers but by four of Respondent's chief officials and where Respondent has not taken even the simple curative step of rescinding its overly broad no-distribution rule. See *Justak Brothers and Company, Inc.*, 253 NLRB 1054 (1980).

The cases cited in Respondent's brief to support the argument that its conduct falls into the third category of *Gissel*-type cases where no bargaining order is warranted are factually distinguishable from those in the present case. Thus, in *White Pine, Inc.*, 213 NLRB 566 (1974), the union actually won a Board election. *Walgreen Company*, 221 NLRB 1096 (1975), involved interrogation by a low-level supervisor, a single unlawful reprimand based on an overly broad application of an otherwise valid no-solicitation rule, and an unlawful wage increase which was not specifically related to the employer's antiunion campaign. A bargaining order was denied in *Struthers-Dunn, Inc.* v. *N.L.R.B.*, 574 F.2d 796 (3d Cir. 1978), where a sufficient number of employees withdrew their union authorization cards thereby dissipating the union's majority before the employer's unfair labor practices began. The fourth case relied on by Respondent, *Pulley* v. *N.L.R.B.*, 395 F.2d 870 (1968), turned on a question of the employer's good faith, which under the Supreme Court's *Gissel* decision is no longer a relevant consideration, and involved unfair labor practices committed entirely before the union requested recognition. Accordingly, the cases cited by Respondent have no bearing on the facts in the instant case and, therefore, do not derogate from my conclusion that the cumulative effects of Respondent's unfair labor practices are so pervasive and severe as to undermine any expectation that a fair election could be held.

Respondent argues that a remedial order is unwarranted in this case and urges that the complaint should be dismissed in its entirety because, for legitimate economic reasons, operations at its plant have been at a standstill since the end of May 1980.

There is no dispute that a delay in receiving further financial assistance from the Government and other investment sources compelled Respondent to lay off 80 percent of its work force in June 1980 and, to date, it continues to function with only a skeletal staff. However, Respondent stressed in its pleadings that it is making ardent efforts to obtain a Federal loan and that its negotiations looked promising. Further, Respondent indicated that FAA approval of its aircraft was imminent and that, with this approval, final sales of planes on order could be culminated. Moreover, Respondent stated that it would fully reactivate its Aguadilla plant as soon as economically feasible and would then recall its former employees. Indeed, given the Company's need for skilled employees, it would be costly not to rehire them. Thus, although it appears at this juncture that Respondent is not in a position to predict precisely when the anticipated funding will materalize or when its doors will reopen, it also would be premature to suggest that it has shut down permanently so as to make a bargaining order futile.

In cases such as this, where the union has not made a bargaining demand, the Board has tied the effective date of the bargaining order to the date on which the employer initiated its campaign of unfair labor practices if, as of that date, the union obtained majority support. *Rodeway Inn of Las Vegas*, 252 NLRB 344 (1980); see also *Boatel Alaska, Inc.*, 236 NLRB 1458 (1978); *Ultra Sonic De-Burring, Inc., supra* at 165. Although some of the unfair labor practices which make a bargaining order appropriate here occurred prior to the date the Union attained its majority, in accordance with the Board's approach, I conclude that the bargaining order should be retroactive to May 21, 1980.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, Ariel Berrios, Adalberto Cuadrado, Hiram Enchautegui, Julio Lopez, Manuel Lopez, Melvin Martinez, Juan Mendez, Eduardo Mercado, George Montalvo, Abraham Mora, Nicolas Ramirez, Wilfredo Ramos, Freddy Rivera, Luis Rivera, Neftali Rodriguez, Ivan Salas, Alfredo Sosa, and Jose Valentino were employees within the meaning of the Act.

4. Commencing on May 21, 1980, and continuing thereafter, the Union was designated by a majority of Respondent's employees in the unit described above as their exclusive bargaining representative.

5. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by threatening employees with plant closure; by maintaining and applying an overly broad no-distribution rule; by threatening employees with discharge if they joined a union; by instructing employees they could not join a union; by creating the impression they were engaged in surveillance of an employee's union activity; by interrogating that employee about his and other employees' interest in the union and disciplining him because of his participation in union activity; and by interrogating an employee without proper assurances that his participation was voluntary and no reprisals would be imposed.

6. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act:

> All production and maintenance employees of Respondent employed at its plant, exclusive of all other employees, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

7. Respondent has violated Section 8(a)(3) and (1) of the Act by discharging employees Eduardo Mercado and Freddy Rivera on May 21, 1980.

8. The Union has been at all times since May 21, 1980, and still is, the exclusive bargaining representative of such employees within the meaning of Section 9(a) of the Act.

9. By its violations of Section 8(a)(1) and (3) of the Act, as reviewed above, Respondent has prevented a free and fair election. Therefore, to best serve the purposes of the Act, Respondent is required to recognize and bargain with the Union as of May 21, 1980, the date by which a majority of employees has signed authorization cards designating the Union as its exclusive bargaining agent, concerning the rates of pay, wages, hours, and working conditions of unit employees.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom. Because Respondent has committed a number of serious and pervasive violations of the Act through its vice president and other top-level supervisors, I conclude that, unless restrained, Respondent is likely to engage in continuing unlawful efforts in the future to prevent its employees from engaging in union and protected concerted activity. Accordingly, Respondent will be required to refrain from in any other manner infringing on employees' rights to engage in such activity. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Respondent has stated its intention to resume operations when and if it obtains sufficient funding. Therefore, when Respondent does resume such operations,[21] it will be required to offer Eduardo Mercado and Freddy Rivera reinstatement to the jobs of which they were unlawfully deprived or, if such jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges previously enjoyed. *Franklin Fouts, d/b/a B & F Cartage*, 251 NLRB 645 (1980). Further, Respondent will be ordered to make Rivera and Mercado whole forthwith for any loss of pay they may have suffered by reason of the discrimination against them, less net earnings, from the date of their discharges, May 21, 1980, to such date as Respondent demonstrates during the compliance stage of this proceeding that they might have been laid off in the normal course of its business, less net earnings, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as called for in *Florida Steel Corporation*, 231 NLRB 651 (1977). In addition, Respondent will be required to bargain with the Union on request, such bargaining to be retroactive to May 21, 1981, the date on which the Union attained a majority among Respondent's employees. *Rodeway Inn of Las Vegas*, 252 NLRB 344 (1980); *Beasley Energy, Inc. d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977).

Although most of the employees who testified at the hearing in this case were fluent in English, Spanish is nonetheless the native language of many Ahrens' employees. Therefore, Respondent will be required to mail to all those employees, including Rivera and Mercado, who were employed as of May 21, 1980, copies of the notice attached hereto in Spanish as well as English. Respondent also shall post said notice in appropriate places at its plant.

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[21] Respondent shall offer reinstatement to Mercado and Rivera as soon as appropriate positions become available whether or not there has been a full-scale resumption of its operations.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[22]

The Respondent, Ahrens Aircraft, Inc., Aquadilla, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge or plant closure in order to dissuade them from supporting a union or otherwise engaging in protected concerted activities.

(b) Discharging, warning, or otherwise discriminating against employees with regard to any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in any activity protected by Section 7 of the Act.

(c) Creating the impression of surveillance of employees' union activities, interrogating employees regarding their union activities, or instructing employees that they are ineligible to join a union.

(d) Interrogating employees without advising them that their responses are voluntary and that they will suffer no reprisals.

(e) Maintaining and applying an overly braod rule which unlawfully prohibits the distribution by employees of unauthorized materials on company property during nonworking hours.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) As soon as Respondent resumes its aircraft assembly operations or has appropriate jobs, whichever comes first, offer Eduardo Mercado and Frederick Rivera reinstatement to the jobs of which they were unlawfully deprived or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole forthwith for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in that part of this Decision entitled "The Remedy."

(b) Upon request, recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit and embody in a signed agreement any agreement reached.

(c) Post at its Aguadilla, Puerto Rico, plant copies of the attached notice marked "Appendix."[23] Copies of said notice in English and Spanish, on forms provided by the Regional Director for Region 24, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material. Copies of the attached notice in English and Spanish also shall be mailed to the home address of all employees, including Eduardo Mercado and Freddy Rivera, who were employed by Respondent as of May 21, 1980.

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become it findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

North Shore University Hospital *and* New York State Nurses Association. Cases 29–CA–6398 and 29–RC–3989

December 29, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 13, 1981, Administrative Law Judge Jesse Kleiman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] and the Charging Party filed cross-exceptions and a brief in support of its cross-exceptions and in opposition to Respondent's exceptions. Respondent also filed a brief in answer to the Charging Party's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, North Shore University Hospital, Manhasset, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

> WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with New York State Nurses Association, as the exclusive representative of the employees in the bargaining unit described below.

> WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

> WE WILL, upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time registered professional nurses regularly scheduled to work 22-1/2 hours or more per week, including all those authorized by permit to practice as registered nurses, employed by us at 300 Community Drive, Manhasset, New York; excluding all department heads, administrative directors, directors, associate directors, assistant directors, all supervisors, clinical supervisors, all clinicians, all instructors, all specialists, operating rooms nurse specialists, all coordinators, head nurses, assistant head nurses, all casual employees, temporary employees, confidential employees, managerial employees, all other employees, and guards and supervisors as defined in the Act.

NORTH SHORE UNIVERSITY HOSPITAL

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[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge: Upon a charge filed in Case 29–CA–6398 on May 8, 1978, by New York State Nurses Association, also referred to herein either as the Association or as NYSNA, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, Brooklyn, New York, duly issued a complaint and notice of hearing on June 15, 1978, against North Shore University Hospital, herein called the Respondent, alleging that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein referred to as the Act. On July 17, 1978,[1] the Respondent, by counsel, duly filed an answer denying the material allegations in the complaint and raising certain affirmative defenses.[2]

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[1] The Respondent's time to serve an answer was extended to this date by the Regional Director for Region 29 by order dated June 27, 1978.

[2] The Respondent contends that:

Continued

259 NLRB No. 121

Prior thereto, on September 26, 1977, the Association had filed a petition for certification of representative with the Board in Case 29-RC-3989 seeking an election among all the Respondent's full-time and regular part-time registered professional nurses and persons authorized by permit to practice as registered professional nurses excluding "managerial, confidential and supervisory employees as defined by the Act, guards, watchmen and all other employees." The parties executed a Stipulation for Certification Upon Consent Election on October 7, 1977. By order dated November 11, 1977, the Regional Director for Region 29 denied the Respondent's motion to reopen the hearing in Case 29-RC-3989 or in the alternative to withdraw from the Stipulation for Certification Upon Consent Election.[3]

An election by secret ballot was conducted on November 16, 1977, among all the Respondent's unit employees in which 368 votes were cast for the Association, 96 votes cast against the participating labor organization, and 15 ballots were challenged. On November 23, 1977, the Respondent filed timely objections to the election alleging, in substance, that the Association is not a labor organization within the meaning of the Act because its actions are controlled, directed, and/or influenced by persons who occupy supervisory positions within health care institutions including the Respondent and that the Board has no jurisdiction, therefore, and if the Association is a labor organization under the Act, it committed "objectionable pre-election conduct" by obtaining employee support under the "false pretense" that it is a "professional organization as distinguished from a union and/or labor organization." The Regional Director for Region 29 on January 23, 1978, issued a report on objections in which he recommended that each of the Respondent's objections be overruled and that a Certification of Representative issue to the Association.[4] The Respondent filed no exceptions to the report on objections.

The Board on February 21, 1978, certified the Association as the exclusive representative of all the employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.[5]

On July 17, 1978, the Respondent filed a motion to revoke certification in Case 29-RC-3989 alleging *inter alia* that the Association is "influenced, dominated and controlled by supervisors who serve as both officers and directors of the Association, which [the Association] has not delegated its bargaining authority to an autonomous local chapter" and therefore that the Association is not a bona fide labor organization. By order dated August 9, 1978, the Regional Director for Region 29, at the request of the parties, consolidated Cases 29-CA-6398 and 29-RC-3989 for the purposes of hearing.

A hearing in the consolidated cases was duly held before me in Brooklyn, New York, commencing on November 27, 1978, and concluding on March 23, 1979.[6] At the commencement of the hearing, during its course, and at the conclusion thereof, various motions were made by the parties.[7] In substance these motions were as follows: The Respondent moved that its motion to revoke certification in Case 29-RC-3989 be granted and for dismissal

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> (1) New York State Nurses Association "is not a bona fide labor organization qualified to be the unit employees' exclusive collective bargaining representative within the meaning of the Act because its actions are controlled, directed, dominated and/or influenced by persons who occupy supervisory positions within health care institutions, including Respondent."
>
> (2) By demanding that Respondent bargain and enter into a collective bargaining agreement with the Association, the Association has engaged and is engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Sections 2(6) and (7) of the Act.

The Respondent filed an amended answer herein on July 24, 1978.

[3] The Regional Director for Region 29 denied the motion for the following reasons: That it was not timely made since it was filed long after the election agreement was entered into and approved and there was no evidence that the issues raised then could not have been raised at the time the election agreement was signed, *Nebraska Methodist Hospital*, 218 NLRB 619 (1975); that no extraordinary circumstances were present to warrant a hearing at this time and that the Board had found the Association to be a labor organization in previous cases and the Respondent had not indicated that it had any evidence to refute this, albeit it was seeking to reopen the hearing on the basis that the Association was dominated by "management and/or supervisory personnel with respect to its representation activity and concerning the status of the [Association] as a labor organization," *Catholic Medical Center of Brooklyn and Queens, Inc., St. John's Hospital Division*, Case 29-RC-3738; *Maimonides Hospital Center*, Case 29-UC-89; *The New York State Nurses Association*, 232 NLRB 849 (1977); and that, in the event that the Association is certified by the Board, a motion to revoke the certification could be filed or the issue considered in an appropriate unfair labor practice proceeding. *Sierra Vista Hospital, Inc.*, 225 NLRB 1086 (1976); *Handy Andy, Inc.*, 228 NLRB 447 (1977).

[4] The Regional Director for Region 29 found that the Respondent's "objections" addressed to the Association's status as a bona fide labor organization "are not objections" as defined in Sec. 102.69 of the Board's Rules and Regulations, Series 8, as amended, and that "Under established Board policy, the Employer may revive the issue by a motion to revoke the labor organization's certification or in an appropriate unfair labor practice proceeding." *Sisters of Charity of Providence, St. Ignatius Province, d/b/a St. Patrick Hospital*, 225 NLRB 799 (1976), *Sierra Vista Hospital, supra; Handy Andy, Inc., supra.*

[5] The unit found appropriate by the Board for the purposes of collective bargaining was:

> All full-time and regular part-time registered professional nurses regularly scheduled to work 22-1/2 hours or more per week, including all those authorized by permit to practice as registered nurses, employed by the employer at 300 Community Drive, Manhasset, New York; excluding all department heads, administrative directors, directors, associate directors, assistant directors, all supervisors, clinical supervisors, all clinicians, all instructors, all specialists, operating rooms nurse specialists, all coordinators, head nurses, assistant head nurses, all casual employees, temporary employees, confidential employees, managerial employees, all other employees, and guards and supervisors as defined in the Act.

The complaint alleges, the Respondent's answer admits, and, as the Board previously found in Case 29-RC-3981, I find that the above-described unit is appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

[6] The hearing covered 29 days with a record of 3,733 pages and a substantial number of exhibits.

[7] It should be noted that the General Counsel maintained a somewhat unique position of "neutrality" concerning both the procedural aspects of the hearing and the substantive issues presented therein despite its burden of proof with regard to the allegations set forth in the complaint. However, counsel for the General Counsel did move at the beginning of the hearing to strike the second affirmative defense in the Respondent's answer which alleges that by demanding bargaining and the execution of a collective-bargaining agreement the Association engaged in unfair labor practices within the meaning of Secs. 8(b)(1)(A) and 2(6) and (7) of the Act. I reserved decision on this motion. As the reason therefor will become apparent from the subsequent discussion herein of the issues in this case, I find the Respondent's second affirmative defense to be without merit and grant the motion to strike this defense.

of the complaint in Case 29-CA-6398; the Association moved for a dismissal of the Respondent's motion to revoke certification and that the complaint herein be sustained, seeking a bargaining order and several extraordinary remedies in addition thereto. I initially denied these motions and upon the renewal thereof reserved decision thereon. The Respondent also moved to amend the first affirmative defense in its amended answer and its motion to revoke certification to include therein "managerial" as well as "supervisory" employees in alleging unlawful control, direction, domination, and/or influence of the Association by persons occupying such positions within health care institutions including the Respondent's hospital. I granted the Respondent's motion to amend.

All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. Thereafter, briefs were filed by the Respondent and the Association.[8] In its brief the Respondent seeks dismissal of the complaint and the granting of its motion to revoke the Association's certification. The Association in its brief asserts that

> . . . the Hospital's Motion to Revoke the Association's Certification should be denied and the Hospital should be ordered to bargain in good faith with the Association. In addition, as the Hospital's "domination" defense is plainly frivolous, the Association should be awarded the extraordinary relief specified at p. 78, *supra* or alternatively, the record should be reopened to receive the evidence of the Hospital's election interference and unfair labor practices specified in the Association's offer of proof, pp. 79-82, *supra*.[9]

For the reasons hereinafter set forth I deny the Respondent's motions both to revoke certification in Case 29-RC-3989 and to dismiss the complaint in Case 39-CA-6398 in their entirety, and grant the Association's motions concerning the above but only in part as to the remedy the Association seeks therein, as hereinafter set forth.

Upon the entire record and the briefs of the parties, and upon my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material herein, has been a corporation organized under and existing by virtue of the laws of the State of New York, maintaining its principal office and place of business at 300 Community Drive, in the town of Manhasset, county of Nassau, and State of New York, where it is, and has been at all times material herein, continuously engaged in the operation of a hospital and in providing hospital and health care services and related services. In the course and conduct of the Respondent's business operations during the preceding 12 months, these operations being representative of the operations at all times material herein, the Respondent derived gross revenues therefrom in excess of $250,000 and purchased and caused to be transported and delivered to its Manhasset hospital medical supplies, goods, and equipment valued in excess of $50,000 in interstate commerce directly from States of the United States other than the State of New York. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent alleges that the New York State Nurses Association,

> . . . is not a *bona fide* labor organization qualified to be the unit employees' exclusive collective bargaining representative within the meaning of the Act because its actions are controlled, directed, dominated and/or influenced by persons who occupy supervisory and/or management positions within health care institutions and/or other institutions.

The Respondent therefore maintains that since the Association is not a "bona fide" organization under the Act[10] it cannot "be forced to bargain" with the Association. The Respondent further asserts that the Association is not, albeit its certification by the Board as the bargaining representative of the Respondent's nurses in an appropriate unit, "qualified to remain the bargaining representative of a unit which is dominated, controlled and influenced by supervisors both at [North Shore University Hospital] and at other institutions through the [Association]." The Association contends that it is a labor organization within the meaning of the Act and as such is fully qualified to act as the collective-bargaining representative of the nurses' unit at the Respondent's hospital pursuant to the Board's certification thereof.

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[8] Robert H. Jones III, counsel for the Association, died on October 24, 1979, and in view of this and the length of the record in this proceeding, the Association's time to file briefs was extended to April 17, 1980.

[9] The following extraordinary remedies are sought by the Association:

(1) expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including reasonable counsel fees, witness fees, transcript and record costs, travel expenses and per diem, and other reasonable costs and expenses;

(2) the Hospital should be ordered to mail copies of the "Notice to Employees" to each of the employees in the bargaining unit at his or her home;

(3) the Hospital's Personnel Administrator should be ordered personally to read the "Notice to Employees" to the members of the bargaining unit of the Hospital, in the presence of representatives of the Association and the Board;

(4) the Association should be granted access to the Hospital's bulletin boards and premises during the entire period of contract negotiations;

(5) all terms of any contract agreed to in collective bargaining, including but not limited to wages and benefits, should be made retroactive to the date of the election;

(6) the Hospital should be ordered to reimburse the Association for lost dues and initiation fees since the election and to reimburse employee-members who have paid such dues and initiation fees to the Association while the Hospital was engaged in its unlawful refusal to bargain.

[10] Sec. 2(5) of the Act, as amended.

The question of statutory labor organization status is, however, distinct from the question of a statutory labor organization's qualifications to act as a bargaining representative in all instances and without regard to the circumstances under which bargaining takes place or will take place.[11] As the Board held in *Sierra Vista Hospital, Inc.*, 241 NLRB 631 (1979):

> [T]he mere presence of supervisors in a labor organization is virtually irrelevant to determining status under Section 2(5) of the Act. Indeed, we have, with court approval, uniformly construed Section 2(5) to reach all associations which exist for the purpose, in whole or in part, of collective bargaining and which admit employees to membership, despite the fact that supervisors, in addition to employees and even in substantial numbers, may likewise be admitted.[14]
>
> As long as nurse-employees participate in the association and one of its purposes is representing employees in collective bargaining, a nurses' association, like any other, meets the definition of "labor organization" in Section 2(5) of the Act.[[12]]

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[14] *International Organization of Masters, Mates and Pilots of America, Inc., AFL-CIO (Chicago Calumet Stevedoring Co., Inc.)*, 144 NLRB 1172, 1177 (1963).

The evidence herein clearly shows that the Association is an organization in which employees meaningfully participate and which exists in part for the purpose of dealing with employers concerning wages, hours, and terms and conditions of employment; and that it has, in fact, negotiated collective-bargaining agreements with employers.[13] Accordingly, I find that the New York State Nurses Association is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.[14]

II. THE UNFAIR LABOR PRACTICES[15]

The complaint alleges, in substance, that the Respondent violated Section 8(a)(5) and (1) of the Act[16] by refus-

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[11] The issue of the Association's qualifications to act as the bargaining representative of the Respondent's nurses in an appropriate unit will be considered in a different part of this Decision.

[12] *Abington Memorial Hospital*, 250 NLRB 682 (1980); *N. T. Enloe Memorial Hospital*, 250 NLRB 583 (1980); *Lodi Memorial Hospital Association, Inc.*, 249 NLRB 786 (1980); *Albert Einstein Medical Center*, 248 NLRB 63 (1980); *Lancaster Osteopathic Hospital Association, Inc.*, 246 NLRB 600 (1979); *Oak Ridge Hospital of the United Methodist Church*, 220 NLRB 49 (1975); *Carle Clinic Association*, 192 NLRB 512 (1971). Also see *Sav-On Drugs, Inc.*, 243 NLRB 859 (1979).

[13] Catheryne Welch, the Association's deputy director for programs, testified uncontradictedly that at the time of the hearing the Association had about 29,000 registered professional nurse members of whom approximately 25,000 are represented by it for purposes of collective bargaining in approximately 115 bargaining units at public and private health care and related facilities located throughout New York State. Further, the Association's certificate of incorporation was amended in or about 1950 to add, as an additional purpose, the power to act as the collective-bargaining representative of registered professional nurses with their employers concerning wages, hours, and terms and conditions of employment. Also see Welch's testimony regarding the participation of the nurses in the collective-bargaining process as will be more fully set forth hereinafter.

[14] Additionally, it should be noted that the Board has previously found The Association to be a labor organization within the meaning of the Act. *The New York State Nurses Association*, 232 NLRB 849 (1977). Also see *Lutheran Medical Center*, Case 29-RC-4543 (1979); *Jewish Hospital Medical Center of Brooklyn Nursing Home*, Case 29-RC-4528 (1979); *The Catholic Medical Center of Brooklyn and Queens, Inc., St. John's Queens Hospital Division*, Case 29-RC-3738 (1977).

[15] The Association in its brief asserts that:

> The Hospital in this proceeding is seeking to raise issues concerning the propriety of the Association's representation of its registered nurses long after those very issues were waived by the Hospital by its entering into the Stipulation for Certification Upon Consent Election. To even consider the merits of the Hospital's contention at this time would violate a long line of NLRB decisions forbidding the wasteful practice of litigating allegations which could have been asserted but which were waived by an employer. The fact is that the Hospital, with competent legal counsel advising it, stipulated to an election.
>
> A respondent in a Section 8(a)(5) proceeding is not entitled to relitigate issues which were or could have been litigated in the prior representation proceeding.

The Association cites a multitude of cases in support of its assertion which correctly stand for the proposition against relitigation, i.e., *R. W. Harmon & Sons, Inc.*, 246 NLRB 223 (1979); *H. M. Patterson & Son, Inc.*, 245 NLRB 1412 (1979); *The Standard Register Company*, 243 NLRB 300 (1979); *Colorflo Decorator Products, Inc.*, 240 NLRB 1134 (1979); *Gould, Inc., Electrical Components Division*, 237 NLRB 66 (1978).

However, the Board's Supplemental Decision and Order in *Sierra Vista Hospital, Inc., supra*, compels a rejection of the Association's above contention in this matter. A procedural account of what transpired in the various *Sierra Vista Hospital* cases is instructive:

After a hearing held in Cases 1-RC-3166 the Regional Director directed an election in a unit consisting of registered nurses. Sierra Vista Hospital, Inc., the employer therein, filed a request for review of the Regional Director's decision. The Board denied the employer's request for review "as it raised no substantial issues," and noted that "in the event the Petitioner is certified and does not delegate its bargaining authority to a local autonomous chapter controlled by nonsupervisory employees, a motion to revoke the certification will be entertained." The election was held, the California Nurses Association (CNA) won, and the Board certified it as the exclusive collective-bargaining representative of the employer's registered nurses in an appropriate unit. The employer then filed with the Board a motion to revoke certification alleging that the CNA had failed to delegate its bargaining authority to a local autonomous chapter controlled by nonsupervisory employees. The Board remanded the case to the Regional Director to adduce further evidence, particularly concerning the CNA's negotiating procedure and the degree of participation of supervisory nurses in the bargaining process. Thereafter the Board denied the employer's motion to revoke certification as being unmeritorious. (225 NLRB 1086 (1976).)

The employer refused to bargain with CNA, and the latter consequently filed a charge in Case 31-CA-5760, upon which the Regional Director issued a complaint alleging that the employer had violated Sec. 8(a)(5) and (1) of the Act. Thereafter, the General Counsel filed a Motion for Summary Judgment, which was granted by the Board (229 NLRB 232, 233 (1977)). The Board stated therein:

> It thus appears that Respondent is attempting to raise in the instant unfair labor practice proceeding matters which were raised and resolved in the underlying representation case.
>
> It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4] [None of the above circumstances were shown to be present or applicable.]

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[4] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Thereafter in view of the decision of the United States Court of Appeals for the Fourth Circuit in *N.L.R.B. v. Annapolis Emergency Hospital Association, Inc., d/b/a Anne Arundel General Hospital*, 561 F.2d 524 (1977), the Board requested the Court of Appeals for the Ninth Circuit, before which the *Sierra Vista Hospital, Inc.*, case (Case 31-CA-5750) was now pending *vis-a-vis*, petition and cross-petition for review and for enforcement, respectively, to remand the case to the Board for reconsider-

Continued

ing and continuing to refuse to recognize and bargain collectively with the Association as the Board-certified exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit. The Respondent denies these allegations and asserts as an affirmative defense that the Association is not qualified to act as the collective-bargaining representative of the nurses in the appropriate unit because the Association is dominated, controlled, directed, and/or influenced by persons who occupy supervisory and/or managment positions within the Respondent's hospital and/or other health care institutions.

A. *Background*

As set forth hereinbefore, the Board certified the Association as the exclusive collective-bargaining representative of the Respondent's registered professional nurses in an appropriate unit on February 21, 1978. On or about April 18, 1978, the Association requested the Respondent to recognize it as the bargaining representative of the Respondent's employees in the nurses' unit and to bargain collectively with it with respect to these employees' rates of pay, wages, hours of employment, and other terms and conditions of employment. The Respondent, on or about April 21, 1978, and continuing thereafter, refused and continues to refuse to recognize and bargain with the Association. As legal justification for its actions the Respondent maintains that the Association is disqualified from acting as the collective-bargaining representative of its registered professional nurse employees in the appropriate unit because the Association's "actions are controlled, directed, dominated and/or influenced by persons who occupy supervisory and/or managerial positions within health care institutions, including Respondent."

B. *The Evidence*[17]

The New York State Nurses Association is a professional membership corporation created and existing under the not-for-profit corporation law of the State of New York, admitting into membership any person "licensed or otherwise duly authorized to practice as a registered professional nurse."[18] The Association's primary objective is "to further the efficient care of the sick, disabled and others needing nursing care." As a secondary purpose and to assist in effectuating its primary objective the Association seeks "to advance the educational and professional standards of nursing" and as one of the means to this end "concerns itself with the economic and general welfare of nurses" through representation of licensed professional nurse units for purposes of collective bargaining.[19]

1. The organization of the Association

a. *The Association's board of directors*

The Association is governed by a 13-member elected board of directors which establishes the major administrative policies under which the Association's goals, through its programing, are accomplished. The members of the board of directors are elected by the voting body which consists of all member registered professional nurses in good standing (validly licensed as nurses and have paid Association dues).[20] The board of directors of

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ation. The court granted the Board's request and remanded the case to it. The Board then decided to reopen the representation proceeding (Case 31-RC-3166) and consolidate it with the unfair labor practice proceeding (Case 31-CA-5760) in order to reconsider the issues posed therein, disavowing and discarding its previous "conditional certification approach" to resolving the problems created by the participation of supervisors in nurses associations as labor organizations and setting forth the standards by which to thereafter resolve such issues as will be discussed more fully hereinafter. The Board's order therein rescinded its prior decisions and orders in Case 31-RC-3166 and Case 31-CA-5750 and directed that a hearing be held for the purpose of receiving evidence "to resolve issues raised by Respondent's motion to revoke certification in Case 31-RC-3166, namely, whether or not the presence of supervisors as officers in, on the board of directors of, or in other positions of authority to speak for or bargain on behalf of CNA disqualifies that association as the collective-bargaining representative of Respondent's nonsupervisory nurses." (241 NLRB 631, 635 (1979).)

The obvious similarity between what occurred therein and what occurred in the instant case, excepting the consent election stipulation herein, is clear. Since the decision in the *Sierra Vista Hospital, Inc.* case came after the hearing was concluded in the instant case and dictates a need for considering the effect, if any, that supervisors or managers, who are members, have upon the NYSNA's collective-bargaining functions, I do not find that the Respondent waived its right to present such evidence, especially in view of the necessity imposed by *Sierra Vista* upon the Respondent to meet a "heavy burden" of establishing the disqualification of the Association as a certified collective-bargaining representative because of a "danger of a conflict of interest interfering with the collective-bargaining process," by entering into a Stipulation for Certification Upon Consent Election in the representation case. It might well be argued that what procedurally occurred herein has created "special circumstances" warranting the holding of such a hearing.

Normally, pursuant to *Sierra Vista Hospital*, the hearing would have been held in the representation case upon remand to the Regional Director by the Board pursuant to the Respondent's motion to revoke certification. But in the instant case the parties themselves requested that the representation case and the unfair labor practice case, Cases 31-RC-3166 and 31-CA-5750, respectively, be consolidated and set for formal hearing before an administrative law judge, which was done.

In view of all of the above, consideration of the merits of the issues presented herein does not violate the Board's "relitigation prohibition." This is not to say that future cases involving challenges to the qualification of nurses associations on the basis of alleged supervisory or managerial nomination will not require employers to raise and litigate these very issues within the confines of the representation case now that *Sierra Vista Hospital* is applicable thereto. In fact, the Board's Second Supplemental Decision and Order in Case 31-RC-3166 (249 NLRB 602 (1980)), and its Notice To Show Cause in Case 31-CA-5750 (249 NLRB 603 (1980)), both involving the Sierra Vista Hospital, Inc., and CNA, strongly indicates that this will be so.

[16] Sec. 8(a)(5) of the Act prohibits an employer from refusing to bargain collectively with the collective-bargaining representative of its employees. Sec. 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Sec. 7 of the Act.

[17] It should be noted that most of the evidence presented herein, whether in the form of sworn testimony or documentary exhibits, was generally uncontradicted in the record.

[18] The parties herein stipulated that among the Association's membership are persons who would be supervisors as defined in the Act, having the same voting rights and privileges as members as do the nonsupervisory member nurses.

[19] See the testimony of the Association's executive director, Veronica Driscoll, and its deputy director for programs and main witness at the hearing, Catheryne Welch.

[20] The evidence shows that the regular employment positions held by various of the directors include "clinical nursing specialist, research associate, director of nursing, assistant professor of nursing, supervisor of a county health department, associate director for continuing education,

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the Association, besides establishing administrative policy, also determines membership qualifications, dues requirements, the Association's administrative and program budget, and appoints members to various standing committees.[21] The Association's programs cover the areas of nursing education, nursing practice and services, legislation, economic and general welfare, and organization services.[22]

b. *The Association's staff*

The administrative programing functions of the Association are performed by a staff of paid full-time employees, who are usually themselves licensed professional nurses,[23] and who are not employed by any hospital or health care facility or in fact by any other employer. The Association's chief executive administrative officer is its executive director, who is responsible for implementing all of the Association's program activities including the "Economic and General Welfare Program," also referred to herein as the EGWP, which we are particularly concerned with herein.[24] The executive director is assisted in her duties by a deputy director for programs and a deputy director for administration who are responsible, respectively, for coordinating the Association's program activities and administrative functions. The deputy directors are in turn assisted by the administrative and program staff of the Association. Activities in each of the Association's four major programs are coordinated by program directors, each of whom is immediately responsible to the deputy director for programs.[25]

C. *The Association's Economic and General Welfare Program*

The EGWP under which the Association's collective-bargaining functions are conducted is organized on the basis of four geographical regions within the State of New York. Each region is headed by a regional coordinator who reports to the EGWP director. These regions are additionally staffed by nursing and labor relations representatives who provide assistance to nurses in organizing bargaining units and in negotiating and administering collective-bargaining agreements. The Association's executive director hires all the above employees.[26] The Association also has a "Council on Economic and General Welfare," herein called the Council. The members thereto are appointed by the board of directors and staffing is provided by the director of the program. The Council makes recommendations to the board of directors in the areas covered by the Association's EGWP and serves as an advisory body to the Association's EGWP staff.

The Association's collective-bargaining process functions as follows:

> Nurses at a hospital or other health care related facility will contact the Association for preliminary advice and guidance concerning representation. If the Association determines that it is able to provide the requested representational services, it assigns staff members, "nursing representative" and a "labor relations representative," to assist the nurses in accomplishing their representational goal. The nursing and labor relations representatives will meet with the interested nurses, hold organizational meetings to advise the nurses as to the scope of the Association's program, the manner in which it is conducted and the potential outcome for certification and bargaining, and provide any necessary technical guidance and assistance required, i.e., the how and wherefore of obtaining signed authorization cards, etc.

Following Board certification of the Association as the collective-bargaining representative of the nurses in the appropriate unit,[27] the Association provides the nurses unit with technical assistance in the form of model

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department head for surgical nursing, etc." While the Association maintains, as a general proposition, that the definition of "supervisor" under the Act is not applicable to licensed professional nursing positions below the title of assistant director of nursing of hospital and health care related institutions, it admitted for purposes of this proceeding that "statutory supervisors" have in the past, are presently, and can in the future be elected to membership on its board of directors, and while no supervisory or managerial employee from the Respondent's hospital has ever been elected as a director it is conceivable that this could happen.

[21] The record shows that the Association's board of directors has never included as a member any supervisory or managerial employee employed by the Respondent. Additionally, albeit there have been in the past and now are presently on the board of directors supervisors and managerial employees employed by other hospitals and health care related institutions, the Respondent introduced no evidence which showed that any of these members interfered with, dominated, influenced, or controlled any of the Association's collective-bargaining activities, or that the board members who were supervisors at some competing hospital acted in any way so as to create any conflict of interest, nor that these board members had any motive to compromise the interests of employee-nurses.

Concerning the board of directors' input into the Association's bargaining process, Welch testified that she knew of no instance in which the board of directors vetoed, prohibited, or overrode any decision of any bargaining unit or even considered doing so nor any instance in which the board countermanded a staff decision.

The evidence herein does show however that, in 1977, the Association's board of directors established a special voluntary $12 "service fee" to be paid by nurses represented by the Association to "assist in providing additional financial resources for implementing the collective bargaining program." This voluntary "fee" was discontinued by the board of directors after 1 year when it was determined that a dues increase which it had approved for submission to the Association's voting body would provide any needed financial support of the program.

[22] The Association also has support services such as, library, research and publications, and public relations.

[23] However, there are exceptions such as the librarian, public relations personnel, and the labor relations representative.

[24] This program encompasses the Association's labor relations functions.

[25] See C.P. Exh. 8(b) in evidence (Association's organizational chart).

[26] The Association's "Organizational Chart—Economic and General Welfare Program" shows that the EGWP is headed by its director, followed by its regional coordinator (there is one regional coordinator for each of the 4 goegraphical regions in New York State), and then its nursing representative and labor relations representative (the number of nursing and labor relations representatives varies in each geographical area based on need and availability of trained personnel in these fields).

[27] The particular unit of nurses represented by the Association at a hospital or other health care related facility is referred to by the Association as a Council of Nursing Practitioners although at what stage of the collective-bargaining process this title becomes effective is not clear from the record. These nurses units or "councils" *always* exclude therefrom statutory supervisors and managerial employees in pursuance of the Act and Board policy.

"rules" suggesting guidelines designed to help them conceive a working structure, i.e., election of unit officers, establishing unit employee committees, and defining committee responsibilities, preparation of bylaws, etc.[28] The nominating committee is elected from among the nurses in the bargaining unit who then elect officers from a slate of candidates prepared by the committee also from among the unit nurses. The negotiating committee is usually constituted from the elected bargaining unit officers or from among the bargaining unit nurses.

In preparation for collective bargaining with the employer the unit nurses develop their own contract proposals through consultation with the Association's nursing and labor relations representatives and through solicitation thereof from the bargaining unit nurses themselves. The bargaining unit decides which of these proposals will be submitted to the employer as demands by the negotiating committee.[29] Contract negotiations themselves are conducted by the negotiating committee with the assistance of the Association's nursing and labor relations representatives as a collective-bargaining team with the labor relations representative often functioning as the "primary negotiator on behalf of the nurses unit."[30]

When negotiations are completed, unit members vote whether to accept or reject the agreement. If the nursing unit approves the contract, the Association generally takes responsibility for the technical aspects of reducing the agreement to written contract form. The agreement is typed, reproduced, and sent back to the unit for review by the nurses unit's representatives and the Association's labor relations representative for accuracy and completeness. If the agreement conforms to the nurses unit's understanding of what was agreed to in the negotiations, the contract is submitted to the employer and to the Association's executive director for execution. Although the executive director generally signs the collective-bargaining agreement on behalf of the Association, he does not have the authority to reject an agreement and her execution thereof "simply signifies that she is satisfied that the agreement conforms to what the bargaining unit has actually negotiated."[31] The record herein indicates that the above procedure was substantially followed in the Association's initial organizing of the nurses employed at the Respondent's hospital and up through the election and its certification by the Board.

d. *The Association's nominating committee*

Pursuant to the Association's bylaws, the duties of the nominating committee are to notify the Association's membership and its "constituent district nursing associations" of the offices to be filled, evaluate persons whose names have been submitted for office, prepare slates of candidates for such offices, and notify the Association's membership of the opportunity to vote as to their selections.[32] It is clear that the nominating committee is one of importance with its members having "great responsibility."[33] The five members of this committee are elected through secret mail ballot by the entire membership of the Association.

The evidence shows that in 1977 the nominating committee included Marilyn McClellan, admittedly a supervisory employee (assistant director, staff development, University of Rochester School of Nursing),[34] and Catherine Foster, whom the Respondent employs and alleges to be a supervisor under the Act.[35]

e. *Special committees*

Evidence was offered by the Respondent concerning particular "Special Committees" and "Task Forces." Members of the "Special Committees" and "Task Forces" of the Association are appointed by the board of directors. The "Special Committee to Consider Concerns of Directors of Nursing Practice and Services" was created to study the impact of the Association's collective-bargaining activities upon the right of directors of nursing services to full participation in the activities of the Association and whether the collective-bargaining program of the Association should be separate, in effect, whether there should be two associations. The committee recommended, in substance, that there be continued "full participation by Directors of Nursing Practices and Services" in the Association, that legal assistance be provided to any director of nursing forced or coerced to resign from membership in the Association, and that the Association develop a model employment contract for directors of nursing and assist them in securing such contracts. While there was some dispute among the parties as to just how many members of this committee were supervisory employees, it is clear that at least two of the six members were.[36]

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[28] According to the uncontradicted testimony of Catheryne Welch, each nurses unit makes the ultimate decisions as to what rules to adopt and the method for establishing nominating and negotiating committees. Further, Welch testified that the Association does not advise the unit as to who should be on these committees nor does it have a vote in the establishment thereof.

[29] Welch testified uncontravertedly that the proposals to be negotiated during collective bargaining with the employer are determined by the nurses units themselves, not the Association's nursing or labor relations representatives, and are not submitted to the Association for approval. Even when Association staff are conducting negotiations, their authority to bargain on behalf of the unit is always limited by the ultimate authority of the nurses unit to authorize the negotiation of all proposals and to accept or reject proposed modifications of unit proposals.

[30] According to the evidence, even though the labor relations representative may assume the function of primary negotiator because of his expertise in this area, the negotiating committee may preclude this if the nurses unit so desires.

[31] Both Catheryne Welch, the Association's deputy director for program, and Jeanette Coane, employed by the Association as a nursing representative, testified that they knew of no instance in which the Association's executive director, or anyone authorized to sign a collective-bargaining agreement on her behalf, had refused to execute a bargaining agreement submitted for such signature.

[32] See the testimony of Catheryne Welch.

[33] See the testimony of Ruth Harper, executive director of District 14, a constituent district nursing association of the NYSNA.

[34] Geographically, the school of nursing is located over 300 miles from the Respondent's hospital.

[35] While the Association does not concede Foster's supervisory status, it maintains that even if she were a statutory supervisor this would have no effect on its ability to represent the Respondent's nurses in an appropriate unit for purposes of collective bargaining. It should be noted that Foster was chairwoman of this committee and at the same time was also president of District 14.

[36] Louise Pam and Audrey Byrnes.

The "Task Force on Impediments to Quality Nursing Care" was created to prepare, for submission to the Association's voting body, a report concerning the Association's no-strike policy. The task force's final report contained recommendations expressly leaving to each bargaining unit the final decision as to whether to withhold its services in a particular case. The task force itself exercises no authority unilaterally to implement its proposals since the Association's membership, its voting body, would have final approval as to any collective-bargaining matters within the scope of its study and thereafter the individual bargaining units of employee-nurses would decide what to do if the recommendations were accepted. The evidence shows that while none of the members of this task force was a supervisory or managerial employee of the Respondent some members were supervisory employees at other public or private hospitals or institutions.[37]

Another task force, "On Organizational Implication of the 1985 Proposal," a six-member group, included no supervisory or managerial employees of the Respondent.[38] This task force was an advisory body charged with studying whether the Association should extend membership privileges to licensed practical nurses who do not hold baccalaureate degrees. The task force recommended against so extending Association membership.

f. *The Council on Economic and General Welfare*

This is a seven-member Council which serves, pursuant to the Association's bylaws, in an advisory capacity to the Association's board of directors who appoint its members. The EGW Council also advises the EGWP staff. According to the uncontradicted testimony of Catheryne Welch, the Council does not implement the collective-bargaining program of the Association, does not participate in organizing or negotiating on behalf of the Association, and has no authority for the conduct of any collective-bargaining activity. While there is some dispute as to the supervisory or managerial status of two of the seven members of the EGW Council, it is admitted that supervisory or managerial employees can be appointed to membership on the Council by the Association's board of directors.

2. The American Nurses Association,[39] the New York State Nurses Association, and the Nurses Association of the Counties of Long Island, Inc., District 14[40]

The New York State Nurses Association (ANA) is a "constituent" of the American Nurses Association and District 14 a "constituent" of the New York State Nurses Association.[41] Welch testified that a "constituent organization" is one whose "constitution and bylaws are in harmony" with each other and, in the case of District 14's "constituency" with the New York State Nurses Association, has "been approved by a majority vote of the board of directors of this Association." Welch continued that the ANA, the Association, and District 14 are autonomous and separate nonprofit membership organizations, each having its own constitution and bylaws, its own membership, its own staff and programing, and its own dues requirements, with "constituent" status obtained on a voluntary basis.[42] However, the New York State Nurses Association collects its own membership dues as well as those of the American Nurses Association and the district nurses associations, where applicable, in one payment and then forwards the respective dues amounts to the appropriate nurses association. The reason therefor appears to be that the NYSNA has its own computerized payroll equipment which readily lends itself to this arrangement.[43] It is clear from the record that a part of the dues paid to the association is used to further the association's EGW program.

Welch in describing the interaction between the ANA and the NYSNA testified that,

> Periodically and from time to time the two organizations work collaboratively on issues which fall within their similar statements of purpose and functions, but each is a separate organization and functions in that fashion.

The Association has an "advisory council" composed of its "president" and the president or executive director of each of the 18 constituent districts and which meets quarterly "for the sharing of information, for reacting to ideas, to bring concerns from local areas." While the "advisory council" does not "make or implement policy" it "may suggest to the board [of directors] or recommends." Ruth Harper, District 14's executive director, testified that its representatives to the "advisory council" had never made a suggestion concerning the Association's EGWP at any of these meetings.

Concerning the "constituency" relationship between the Association and District 14, Harper testified that it,

> . . . really is that we are all bound by the same ethical concept, the same general purpose for which we exist and that we don't vary and that is to elevate the standards of the profession so we may render the best care to the public.[44]

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[37] The evidence indicates that of 21 persons who have served as members of this task force at least 4 were or now are supervisory employees.

[38] The record does not establish whether any of the six members of this task force were supervisors or managers at other hospitals.

[39] The American Nurses Association is also referred to therein as ANA.

[40] The Nurses Association of the Counties of Long Island, Inc., District 14, is referred to hereinafter as District 14.

[41] NYSNA has 18 constituent districts throughout the State of New York. The Respondent's hospital is located within the geographical area encompassed by District 14.

[42] Welch testified that the Association "has no requirement to simultaneous or concurrent membership in any district association or the American Nurses Association." However, according to the testimony of Ruth Harper, the American Nurses Association does require "tri-level" membership, in the American Nurses Association, the New York or particular State Nurses Association, and the constituent district nurses association if applicable.

[43] Harper testified that the Association's collection of District 14 membership dues without charge to the District is one of the benefits it derives from its "constituency" status with the Association.

[44] Harper related that, while there is no direct relationship between District 14 and the American Nurses Association, District 14 does receive bulletins and newsletters about nursing or nursing practice from the

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She stated that, while District 14 has its own bylaws, any proposed changes thereof are submitted to the Association for approval.[45] Harper added:

> In essence we conform with the general statements of the purpose for these associates and of all these levels and I think they are in harmony and the membership categories must be uniform . . . registered nurse duly licensed, eligible to practice.

Harper continued that District 14 programs, pursuant to its bylaws, include promoting nursing standards as defined by the ANA (educational programs concerning statements of nursing standards and practice), participating in and supporting the NYSNA's legislative program (but not including lobbying which District 14 is not equipped financially or personnel-wise to do), and encouragement and recruitment of qualified persons to enter the nursing field (maintaining a speakers' bureau which provides speakers to nursing schools, high schools, and private or public groups, and as part of this program District 14 prepares and issues a directory of nursing schools). Harper stated that District 14 also maintains and publishes a "nurses' professional registry" which is a placement service for private duty nurses under standards set by the Association.[46]

District 14 also prepares an annual survey of personnel practices and policies at the various hospitals in its geographical area and makes the survey available to individual nurses as well as to hospitals and other health care institutions within its jurisdiction. Harper testified that the purposes of the survey are: To collect "current accurate statistical data about nurses employment in our geographic area," to "assist nurses and others to improve their employment situations," and to "update the information presently in our files." She added that this survey is prepared with the "excellent cooperation of the hospital directors of nursing and also some of the larger nursing homes." Information concerning nurses' salaries at the various hospitals is also set forth in an issue of District 14's membership newsletter.

Harper testified that District 14 during the implementation of its programs disseminates information about both the ANA and the NYSNA for membership promotional purposes and supplies trilevel membership application forms when requested. Her testimony indicates that, while District 14 encourages membership in both ANA and NYSNA, its membership promotions are primarily directed towards its own District 14 membership.

According to Harper while it is one of the purposes of District 14 to improve the working conditions of nurses in the context of "improving nurses conditions of practice," District 14 does not function as a labor organization, does not engage in any collective-bargaining activities itself, nor does it have any input into the NYSNA's collective-bargaining activities. She stated that District 14 does not engage in "any specific activities that are solely limited to improving working conditions of its members."[47] Catheryne Welch testified similarly.

Additionally and concerning District 14 and the NYSNA, the record shows: that Catherine Foster, a supervisory nurse employed by the Respondent, was president of District 14 from May 1976 to May 1978 and during this time she also was chairman of the NYSNA's nominating committee in 1977; that various other members of District 14 held or now hold positions on other NYSNA's committees, i.e., Sister Mary Louise Murray is chairman of the NYSNA's nominating committee, Patricia Barry belongs to the NYSNA council on legislation, Dr. Margaret McClure serves on the NYSNA's Special Committee on the Nurse Practice Act, and Esther Channis is District 14's designee to the NYSNA's Education Planning Committee. The Respondent also offered evidence to show that James Vanderveld and Dr. Margaret McClure, members of District 14, attended the Association's 1977 convention during which the issue of the Association's no-strike policy was discussed and voted upon.

C. *Analysis and Conclusions*

In *Sierra Vista Hospital, supra*, the Board noted (241 NLRB at 623, 633):

> But, while the presence of supervisors in an association does not bear upon its "labor organization" status, the identity and role of those supervisors in the labor organization may operate, nonetheless, to disqualify it from bargaining in certain instances.[48] Central factors involved in considering this issue are the employees' right to a collective-bargaining representative whose undivided concern is for their interests and the employer's right to expect loyalty from its supervisors. Active participation by the employer's own supervisors may, in a given case, contravene either or both of these legitimate interests.[49] Indeed, we have held that an employer has a duty to refuse to bargain where the presence of that employer's supervisors on the opposite side of the bargaining table poses a conflict between those interests.[18]

ANA, competes for special project moneys from the ANA, and can participate in special programs such as "a creative nursing award." Harper added that District 14's relationship with ANA is "informational, historical, friendly, cooperative, we subscribe . . . in all ways with the code of ethics which is adopted on the national level."

[45] This does not include, however, changes concerning the amount of dues charged to its membership.

[46] The NYSNA maintains its own registry for private duty nurses, publishes standards of review of nursing registries, and supplies information on private duty nurse rates throughout the State, although District 14 sets its own fee rates for private duty nurses in its geographical area.

[47] Harper testified about one of District 14's organizational subgroups, "the nurse service administrators conference group," which held a meeting on October 4, 1977. Attending this meeting were representatives of the NYSNA (executive director, deputy director for programs, and the EGWP director), various area hospitals' directors of nursing and conference group, and District 14 members. The meeting was chaired by Harper and was convened to explore some of the aspects of the NYSNA's EGWP and the role of the directors of nursing in such a program.

[48] The Board in *Sierra Vista Hospital, supra*, explained:

> This potential for disqualification stems from an inherent statutory concern that "[e]mployees have the right to be represented in collective-bargaining negotiations by individuals whohave a single-minded loyalty to their interests,"[16] and the identity and role of supervisors admitted to membership in a labor organization can, in certain circumstances, *compromise the statutory interest.* Thus, active participation in the affairs of a labor organization by supervisors employed by the employer with whom that labor organization seeks to bargain can give rise to question about the labor organization's ability to deal *with the employer at arm's length*. [Emphasis supplied.]
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> [16] *Nassau and Suffolk Contractors' Association, Inc., et al.*, 118 NLRB 174, 187 (1957).

> ests.[49] Indeed, we have held that an employer has a duty to refuse to bargain where the presence of that employer's supervisors on the opposite side of the bargaining table poses a conflict between those interests.[18]
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> The active, internal union participation of supervisors of a third-party employer (i.e., an employer other than the one with whom the labor organization seeks to bargain) does not present the danger that an employer may be "bargaining with itself." But it may operate, nonetheless, to disqualify a labor organization from acting as a bargaining representative for particular employees. Although, in such cases, the legitimate interest of an employer in the loyalty of its supervisors is not in issue (the active supervisors are not its own), the presence of supervisors of third-party employers may impinge upon the employees' right to a bargaining representative whose undivided concern is for their interests . . . because of the possible relation between the employer with whom bargaining is sought and the employer or employers of the supervisor participating in the bargaining process. Thus, we have held that an employer may lawfully refuse to bargain with a bargaining representative which itself was in a competing business.[20]
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> [18] *Nassau and Suffolk Contractors' Association, supra; Banner Yarn Dyeing Corporation*, 139 NLRB 1018 (1962); *Welsbach Electric Corporation*, 236 NLRB 503 (1978).
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> [20] *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954).[50]

While recognizing that an employer who establishes a disqualifying conflict of interest may lawfully refuse to bargain, the Board in *Sierra Vista Hospital, supra*, also held that "the burden on the employer to show such conflict is a heavy one." The Board stated:

> There is a strong public policy favoring the free choice of a bargaining agent by employees. The choice is not lightly to the frustrated. There is a considerable burden on a nonconsenting employer, in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present.[22]
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> [22] *N.L.R.B.* v. *David Buttrick Company*, 399 F.2d 505, 507 (1st Cir. 1968). There can be no question with regard to a conflict-of-interest defense that the Board agrees with the Court of Appeals for the First Circuit's formulation of a respondent's burden of showing a "clear and present danger" and that the Board will strike that defense when a respondent fails to carry its burden.

The Respondent contends that the New York State Nurses Association should be disqualified from acting as the collective-bargaining representative of the Respondent's licensed professional nurses in an appropriate unit because of a conflict of interest due to the Association's being "influenced, directed, dominated and/or controlled by persons who occupy supervisory and/or management positions" within the Respondent's own hospital or in other hospitals or health care institutions. I do not credit this contention. The Respondent has clearly failed to sustain its "considerable burden . . . in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present."[51]

Initially, it is clear from the record in this case that no supervisory or managerial employee of the Respondent has ever been an official or director of the NYSNA. Further, while it is true that statutory supervisors employed by third-party employers have been and are now members of the Association's board of directors the evidence herein shows that, as a practical matter, the board of directors has no input into the NYSNA's collective-bargaining process. Bargaining unit decisions are not brought to the board of directors' attention for review or action and Welch testified uncontradictedly that she knew of no instance when the board of directors had considered or actually vetoed or overridden any bargaining unit decision.

The uncontradicted evidence herein further shows that the "Councils of Nursing Practitioners," the bargaining units of nurses at the various hospitals and other health care facilities, control the bargaining process. The bargaining unit adopts its own rules for conducting bargaining unit business and elects a negotiating committee from among unit members. It should be particularly noted that these bargaining units are composed of licensed professional staff nurses excluding all statutory nurse supervisors and managers. The Association does not advise the unit concerning the composition of the negotiating committee, and does not have a vote in establishing the committee.[52] Proposals for bargaining are generated by the unit itself and are not submitted to the Association for approval. The Association's labor relations representatives, who generally act as chief negotiators on behalf of the individual bargaining units, are paid staff employees of the Association and are not supervisors or managerial employees of any hospital, including the Respondent's. However, as the evidence indicates, at times the bargaining unit will elect to have a member of the negotiating committee present a particular contract proposal to the employer at the bargaining session. Members of the bargaining unit retain authority to authorize the negotiation of all proposals and to accept or reject proposed modifications of unit proposals. When negotiations are completed, acceptance or rejection of the proposed agreement lies solely with the bargaining unit.

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[49] *Sierra Vista Hospital, Inc., supra* at 633, fn. 17:

> We emphasize that we are here concerned with supervisors who have an active role in and some authority with respect to directing the affairs of a labor organization. Cf. *International Organization of Masters, Mates and Pilots, supra; Allen B. Dumont Laboratories, Inc.*, 88 NLRB 1296 (1950).

[50] The Board continued:

> Under the foregoing analysis, it is conceivable that the presence of even one supervisor on CNA's [California Nurses Association] board of directors, if employed by Respondent, could present a danger that unit employees' interests might not be single-mindedly represented. *That would depend on the role, if any, of that supervisor in CNA's internal affairs.* It is also conceivable that the active involvement in CNA of supervisory nurses employed by other employers may, in some circumstances, present a conflict of interest requiring that CNA be disqualified from representing a particular unit for which it was certified. *That would depend on a demonstrated connection between the employer of those unit employees and the employer or employers of those supervisors*, and, with respect to this possibility, we stress that the participation of supervisors (of third-party employers), even if constituting a majority of a nurses' association's board of directors, would not in and of itself necessarily require disqualification, absent *some other demonstrated conflict of interest*, for we do not assume an "inherent" conflict between supervisors and employees in the bargaining process. [*Sierra Vista Hospital, Inc., supra* at 633 (emphasis supplied).]

[51] *Sierra Vista Hospital, Inc., supra.*

[52] At the Respondent's hospital the bargaining unit nurses elected their own negotiating committee consisting exclusively of members of the bargaining unit.

Additionally, the evidence clearly shows that the Association's role in the bargaining process is purely advisory and, to the extent that the Association's staff are involved in bargaining, no supervisory or managerial personnel affect the process. The Association's staff[53] who advise the unit regarding organizational aspects and bargaining are full-time employees of the Association and are not employed elsewhere. The executive director of the Association, who generally executes the collective-bargaining agreements on behalf of the Association, is also a full-time Association employee and is not a supervisor or manager of any hospital or health care related institution. Moreover, her authority with respect to collective bargaining is purely ministerial, as she does not have the authority to reject a collective-bargaining agreement submitted for execution.

Significantly, the Board has rejected employer's conflict-of-interest contentions in a number of cases in which bargaining units retain similar control over the collective-bargaining process as do the Association's bargaining units.[54]

As to the Respondent's own supervisory and managerial employees, the Respondent alleges that because Catherine Foster, a supervisor at its hospital, was "President of District 14, which compiles wage and area practice surveys, sets private duty nurse fees and otherwise assists in [NYSNA] EGW activities, and Chairman of the [NYSNA] Nominating Committee . . . these relationships forced an intolerable compromise of loyalties that is precisely the kind of conflict of interest both the Board and the Courts have condemned." I do not agree.

The evidence herein clearly shows that District 14 is not a labor organization, does not engage in collective bargaining itself, and does not influence the collective-bargaining process or programs of the NYSNA. The Board has expressly rejected employer's conflict of interest contentions based upon the activities of the employer's own alleged supervisors in constituent districts of state nurses' associations.[55]

Moreover, the mere fact that supervisory or managerial employees of the Respondent hold membership in the Association, attend voting sessions of the Association's conventions, or vote by secret ballot where provided for concerning Association policy and functioning in and of itself does not present the "clear and present danger" of conflict with employees' Section 7 bargaining rights envisioned by the Board's Decision in *Sierra Vista, supra.*[56]

The Respondent also argues that the Association is disqualified from bargaining as the representative of the appropriate nurses' bargaining unit because of the activities of supervisors or managers of other employers. The Respondent states that, at least from 1976 through 1978, a majority of the members of the Association's board of directors have been "statutory supervisors employed at hospitals and other health care institutions" and since, in addition, "important [Association] policy formation committees are laden with statutory supervisors" including the "Special Committee to Consider Concerns of Directors of Nursing Practice and Services," the "Task Force on Inpediments to Quality Nursing Care," and the NYSNA nominating committee, supervisors at all levels are thus involved "*without restriction*" in every important phase of the Association's operations, "including financial matters, the life blood of EGW and policy making directly affecting EGWP."

As indicated hereinbefore the Board in *Sierra Vista Hospital, Inc., supra*, stated:

> [W]e stress that the participation of supervisors (of third-party employers), even if constituting a majority of a nurses' association's board of directors, would not in and of itself necessarily require disqualification, absent some other demonstrated conflict of interest, for we do not assume an "inherent" conflict between supervisors and employees in the bargaining process.

Thus, it is clear that the employer must show some connection between the employer of those unit employees and the employer or employers of those supervisors.[57] It is also clear that it is insufficient to establish disqualification of the Association herein to bargain simply because one, a few, or even a majority of its board of directors are supervisors or managers of some other hospital or to suppose some conflict when in fact none exists or has ever occurred before. The record in this case is devoid of any evidence showing that any member of the Association's board of directors has ever interfered with, dominated, or controlled any of the Association's collective-bargaining activities. Further, the Respondent failed to show any evidence that a "supervisory" member of the

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[53] Usually the Association's nursing and labor relations representatives.

[54] See *Abington Memorial Hospital, supra; Lodi Memorial Hospital Association, Inc., supra; Rockford Memorial Association d/b/a Rockford Memorial Hospital*, 247 NLRB 319 (1980); *The Sidney Farber Cancer Institute*, 247 NLRB 1 (1980); *Lancaster Osteopathic Hospital Association, Inc.*, 246 NLRB 600 (1979); *Baptist Hospitals, Inc., d/b/a Western Baptist Hospital*, 246 NLRB 170 (1979).

[55] In *Baptist Hospitals, Inc., supra* at 171, the Board stated:

> While there are some supervisors of the Employer and of Lourdes Hospital who serve as officers and directors of [Kentucky Nurses Association]'s District 5, the record indicates that there is nothing in KNA's organizational structure which allows for district officers and directors to interfere with the collective-bargaining process of a local unit.

Also see *Lancaster Osteopathic Hospital Association, Inc., supra; St. Rose de Lima Hospital, Inc.*, 223 NLRB 1511 (1976).

[56] Also see *Lancaster Osteopathic Hospital, supra; Healdsburg General Hospital*, 247 NLRB 212 (1980).

[57] *Sierra Vista Hospital, Inc., supra.*

Association's board of directors employed at another hospital "has used or could use his or her position to influence that board to advance the competitive position of *any* hospital as against the Employer."[58]

Significantly, the Board has repeatedly rejected an employer's assertions of disqualifying conflicts of interests where "third-party" supervisors were or had been members of a nurses' association's board of directors absent a showing by an employer of proof of a connection between the hospital and the employers of such supervisors sufficient to evidence a conflict of interest that would compromise the integrity of the bargaining process.[59] In the instant matter the Respondent has failed to show either that its own supervisors serve on the Association's board of directors, or that there exists a connection between the Respondent's hospital and the employers of the supervisors who are now or have served previously on the Association's board of directors which could compromise bargaining.

Furthermore, in considering the Respondent's other contentions it should be noted that the Board in *The Sidney Farber Cancer Institute, supra*, stated:

> As to the Employer's assertions that the MNA board of directors' various powers, such as those of appointment, approval, and fiscal control, amount to supervisory domination, we find these functions of organizational oversight to be both remote end speculative in relation to the local chapters' bargaining activities. Something more than mere potential for influence must be shown to warrant disqualifying a labor organization. [247 NLRB at 4.]

Thus the Board has expressly rejected the Respondent's argument that the "power of the purse" as represented in the Association's board of directors' authority to adopt, approve, or modify the Association's annual operating budget creates a potential for interference with collective bargaining which requires disqualification of the Association.

The Respondent also points to the presence of supervisory or managerial employees of other hospitals or health care related institutions on the Association's "Special Committee to Consider Concerns of Directors of Nursing Practice and Services" as creating a clear and present danger of conflict with employee rights. This committee recommended, in substance, that the Association allow the continued full participation of the directors of nursing practice and services in the Association, provide legal and employment assistance to directors of nursing practice and services, and challenge and publicize any discriminatory action by employers against these directors of nursing and services because of their Association membership.

In *Healdsburg General Hospital, supra*, a case involving somewhat similar circumstances, the Board rejected the employer's contention that because the California Nurses Association (CNA) maintained a division devoted to the interests of supervisors (advising supervisory nurses of their rights and responsibilities as members of management and concerning their own contract negotiations with their hospital employers, and representing them in their employment relations with the hospitals, all at high cost) it is "influenced, dominated and controlled" by member supervisors. The employer therein asserted that the diversion of sorely needed funds from bargaining unit employees' needs to the promotion of supervisors' interests presents a "classic conflict of interest for, if CNA has allegiance to supervisors, that allegiance compromises its representation of bargaining unit employees at the bargaining table." The employer further asserted that supervisors, because they are represented by CNA and their interests are protected by CNA, owe allegiance to CNA as well as to their employer and that such a relationship, inevitably, has an adverse impact on management.

The Board stated in the *Healdsburg General Hospital* case:

> [T]he Employer claims that, because CNA is influenced by supervisors, it cannot give its undivided loyalty to the interests of employees. In this the Employer alleges that CNA is, in fact, influenced by supervisors; that CNA represents "all" nurses including supervisors; and that such representation is costly and controversial. Even assuming that to be the case, the Employer failed to establish that any of these factors creates a conflict of interest sufficient to prevent CNA from acting as bargaining representative. As emphasized, the Board in *Sierra Vista* stated that "there is no inherent conflict between supervisors and employees in the bargaining process." The Employer apparently takes the position that there is and offers the above evidence as proof. However, it is clear that the internal structure and problems of CNA, as presented by the Employer, are irrelevant to our inquiry absent some showing of a particular conflict. None has been shown by the Employer either in its offer of proof or in its brief. [247 NLRB at 214.]

Thus it is not enough for an employer to show that supervisors participate or even "influence" the Association. The respondent must show a "direct" conflict of interest, "that a danger of a conflict of interest interfering with the collective bargaining process is clear and present."[60] A nurses association's interest in supervisory nurses' problems does not evidence a "clear and present" danger of conflict of interest to disqualify it from representing rank-and-file nurses.

Additionally, as stated by the Board, in *The Sidney Farber Cancer Institute, supra* at 4:

> We likewise find the Employer's assertion that its supervisors may hold office or positions of authority in MNA at some future time entirely too speculative to warrant disqualification of MNA. Nor is that

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[58] *Healdsburg General Hospital, supra* at 214.

[59] See *Healdsburg General Hospital, supra; The Sidney Farber Cancer Institute, supra; Lancaster Osteopathic Hospital Association, Inc., supra; Baptist Hospitals, Inc., d/b/a Western Baptist Hospital, supra.*

[60] *Healdsburg General Hospital, supra.*

> assertion probative of establishing the existence of a clear and present danger of conflict.[61]

In support of its contentions the Respondent introduced evidence that the NYSNA submits the names of nominees to the New York State Education Department for appointment to that State's board of nursing. The Board in *St. Rose de Lima Hospital, Inc., supra*, involving a similar allegation concerning the Nevada Nurses Association's authority to nominate registered nurses for appointment to the Nevada State Board of Nursing, found "this contention entirely too speculative and, hence, lacking in merit."

Based upon all of the foregoing, I find that the New York State Nurses Association is not disqualified because of an alleged conflict of interest from representing the Respondent's employees in an appropriate unit for the purposes of collective bargaining. The Respondent has failed to sustain its burden of showing that danger of a conflict of interest interfering with the collective-bargaining process is clear and present.[62]

D. *The Request To Bargain and the Respondent's Refusal*

As noted hereinbefore, the Board certificated the Association as the collective-bargaining representative of the Respondent's licensed professional nurses in an appropriate unit on February 21, 1978. On or about April 18, 1978, the Association requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the unit. Commencing on or about April 21, 1978, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in the unit. As found above the Association is *not* disqualified because of any conflict of interest from acting as such certified bargaining representative.

Accordingly, I find that the Respondent has, since April 21, 1978, and at all times thereafter, refused to bargain collectively with the Association as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. CASE 29-RC-3989

Subsequent to the Board's certification of the Association, on February 21, 1978, as the bargaining representative of all the Respondent's licensed professional nurses in an appropriate unit in Case 29-RC-3989, the Respondent on July 17, 1978, filed a motion to revoke certification alleging *inter alia* that the Association is influenced, dominated, and controlled by supervisors and/or managers who serve as both officers and directors of the Association and therefore the Association is not a bona fide labor organization and is disqualified from acting as a bargaining representative. From all of the foregoing I deny the Respondent's motion to revoke certification in Case 29-RC-3989.

VI. THE REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom, and, upon request, bargain collectively with the Association as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, the initial period of certification shall be construed as beginning on the date the Respondent commences to bargain in good faith with the Association as the recognized bargaining representative in the appropriate unit.[63]

Additional Remedies Sought by the Association

The Association seeks additional remedial relief herein because "The Hospitals 'Domination' Defense was Plainly Frivolous." As noted hereinbefore the Association seeks the following additional remedies: (1) expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including reasonable counsel fees, witness fees, transcript and record costs, travel expenses and per diem, and other reasonable costs and expenses; (2) the hospital should be ordered to mail copies of the "Notice to Employees" to each of the employees in the bargaining unit at his or her home; (3) the hospital's personnel administrator should be ordered personally to read the "Notice to Employees" to the members of the bargaining unit at the hospital, in the presence of representatives of the Association and the Board; (4) the Association should be granted access to the hospital's bulletin boards and premises during the entire period of contract negotiations; (5) all terms of any contract agreed to in collective bargaining, including but not limited to wages and benefits, should be made retroactive to the date of the election; and (6) the hospital should be ordered to reimburse the Association for lost dues and initiation fees since the election and to reimburse employee-members who have paid such dues and initiation fees to the Association while the hospital was engaged in its unlawful refusal to bargain.

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[61] Also see *Baptist Hospitals, Inc., d/b/a Western Baptist Hospital, supra; American Arbitration Association, Inc.*, 225 NLRB 291 (1976).

[62] *Sierra Vista Hospital, supra.*

[63] *Brookside Manor, Inc. and Willowbrook, Inc.*, 255 NLRB 1134 (1981); *Burnett Construction Company*, 149 NLRB 1419 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962).

The Board in *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), held that where a respondent engaged in frivolous litigation that is clearly unwarranted and meritless on its face, it should be compelled to reimburse the Board and the charging party for all expenses incurred in the investigaton, preparation, and presentation of the case.[64] The Board's purpose therefore was to discourage frivolous litigation and to "prevent the employer from having a free ride during the period of litigation."[65] This remedy has also been imposed where an employer follows a pattern of unlawfully resisting union organizing or engages in "flagrant repetition of conduct previously found unlawful" and to that end unduly burdens the processes of the Board and the courts.[66]

However, in examining the propriety of awarding litigation and organizational expenses against a respondent, the Board has distinguished between "patently frivolous" defenses[67] to unfair labor practice charges and defenses which are "debatable." In the latter situation the Board has held that reimbursement of litigation and organizational expenses is inappropriate, even when the unfair labor practices are flagrant and repetitious.[68] Also the Board has consistently followed its rule that litigation and organizational expenses are not to be awarded against a respondent unless the defenses raised are patently frivolous.[69] An additional prerequisite to the awarding of organizational costs was set forth in *Winn-Dixie Stores, Inc.*, 224 NLRB 1418 (1976). The Board there held that it will not award organizational costs to a union unless the union proves that the employer's unfair labor practices were causally related to any extraordinary organizational expenses incurred by the union.

In view of the above, and the record herein as a whole, I do not find that the Respondent's actions nor its defenses were so "patently frivolous" as to warrant the additional and extraordinary remedies sought by the Association herein and therefore deny the Association's motions and applications for such relief. I also deny as unnecessary the Association's request to reopen the record "to receive evidence of Hospital unfair labor practices and election interference which were excluded at the hearing but directly revealed the hospital's improper motive throughout this proceeding."[70] Even assuming that the evidence to be produced would prove what the Association alleges it would show in its offer of proof, I do not believe that this would warrant the imposition of the above remedies nor change my findings thereon.

CONCLUSIONS OF LAW

1. North Shore University Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. New York State Nurses Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time registered professional nurses regularly scheduled to work 22-1/2 hours or more per week, including all those authorized by permit to practice as registered nurses, employed by the employer at 300 Community Drive, Manhasset, New York; excluding all department heads, administrative directors, directors, associate directors, assistant directors, all supervisors, clinical supervisors, all clinicians, all instructors, all specialists, operating rooms nurse specialists, all coordinators, head nurses, assistant head nurses, all casual employees, temporary employees, confidential employees, managerial employees, all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 21, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 21, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of the Respondent in the appropriate unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[64] These include reasonable counsel fees, witness fees, transcript and record costs, travel expenses, and other costs and expenses.

[65] *International Union of Electrical, Radio and Machine Workers, AFL-CIO* [*Tiidee Products, Inc.*] v. *N.L.R.B.*, 426 F.2d 1243, 1251 (D.C. Cir. 1970).

[66] *Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* v. *N.L.R.B.*, 476 F.2d 546, 551 (D.C. Cir. 1973).

[67] *Tiidee Products, Inc., supra.*

[68] *Heck's Inc.*, 215 NLRB 765 (1974); *Metco, Incorporated*, 205 NLRB 875 (1973), enfd. 496 F.2d 1342 (5th Cir. 1974); *Lang Towing, Inc.*, 201 NLRB 629 (1973).

[69] *Betra Manufacturing Company*, 233 NLRB 1126 (1977); *Schuck Component Systems, Inc.*, 230 NLRB 838 (1977); *The Hartz Mountain Corporation*, 228 NLRB 492 (1977); *Winn-Dixie Stores, Inc., supra; Royal Typewriter Company, etc.* v. *N.L.R.B.*, 533 F.2d 1030 (8th Cir. 1976). In *Sabine Towing & Transportation Co., Inc.*, 224 NLRB 941 (1976), this rule was followed even though the employer had committed similar unfair labor practices in the past.

[70] While such evidence was excluded by me at the hearing, I did allow the Association to make an offer of proof thereof.

ORDER[71]

The Respondent, North Shore University Hospital, Manhasset, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with New York State Nurses Association, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time registered professional nurses regularly scheduled to work 22-1/2 hours or more per week, including all those authorized by permit to practice as registered nurses, employed by the employer at 300 Community Drive, Manhasset, New York; excluding all department heads, administrative directors, directors, associate directors, assistant directors, all supervisors, clinical supervisors, all clinicians, all instructors, all specialists, operating rooms nurse specialists, all coordinators, head nurses, assistant head nurses, all casual employees, temporary employees, confidential employees, managerial employees, all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Manhasset, New York, hospital copies of the attached notice marked "Appendix."[72] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the motion to revoke certification in Case 29-RC-3989 be, and it hereby is, denied.

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[71] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections hereto shall be deemed waived for all purposes.

[72] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Stop and Shop Companies, Inc. Medi Mart Division *and* Richard Goodusky. Case 39-CA-337[1]

December 29, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 3, 1981, Administrative Law Judge Joel P. Biblowitz issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Union[2] filed exceptions and a supporting brief,[3] and the Respondent filed a brief in answer to the General Counsel's and the Union's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

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[1] The Administrative Law Judge erroneously cited this case as 1-CA-16673, which was its designation prior to the matter being transferred to the Board's recently established Subregion 39.

[2] The Union herein, Local 100, United Pharmacists Guild, chartered by United Food and Commercial Workers International Union, AFL-CIO, was the collective-bargaining representative for the Charging Party, Richard Goodusky, but was not a party to the instant proceeding.

[3] The Respondent also filed cross-exceptions to certain findings made by the Administrative Law Judge which it contends the Board should consider if any merit is found to either the General Counsel's or the Union's exceptions. In view of our findings herein, we deem it unnecessary to consider Respondent's cross-exceptions.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was heard before me in Hartford, Connecticut, on April 21, 1981. A complaint and notice of hearing issued on September 17, 1980, based on a charge filed on October 11, 1979, by Richard Goodusky, an individual. Basically, the complaint alleges that Stop and Shop Companies, Inc., Medi Mart Division, herein called Respondent, violated Section 8(a)(1), (3), and (4) of the Act by informing Goodusky in September 1979[1] that his employment with Respondent was in jeopardy because of his prior union activities and a prior charge filed on his behalf with the National Labor Relations Board, and by discharging Goodusky on September 24 for his union activities and for his having filed charges or given testimony under the National Labor Relations Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Massachusetts corporation with its principal office and place of business located at 1776 Heritage Drive, Quincy, Massachusetts, and with a place of business located at 1200 Park Street, Hartford, Connecticut, herein called the Park Street store, is engaged in the operation of a retail chain of supermarkets, drug stores, and other retail establishments in several States. In the course and conduct of its business operations Respondent's gross revenue exceeded $500,000 and, in the conduct of its business operations it annually purchased, transferred, and delivered to its Park Street store goods and materials valued in excess of $50,000 which were transported to said store from States other than the State of Massachusetts. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Local 100, United Pharmacists Guild, chartered by United Food and Commercial Workers International Union, AFL-CIO, herein called the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Pre-September 24, 1979, Events

Goodusky began working in Respondent's Park Street store in or about 1971 as a pharmacist. There are generally two pharmacists at that store; for almost the same period the other pharmacist has been Roger Blais, whose title is pharmacy manager; they work split shifts, one working early hours and the other late hours. Sometime in 1975 the Union began an organization drive among the 25 pharmacists at 16 of Respondent's stores—10 in Connecticut (including the Park Street store) and 6 in New Jersey. Goodusky testified that during this period he spoke to many of Respondent's pharmacists to convince them to vote in favor of the Union (at his or their homes, but not in the stores), but that there were no union buttons to wear, he never told anyone from management that he was attempting to unionize Respondent's stores and nobody from management ever informed him that they knew he was organizing for the Union, although he "assumed" that it was common knowledge. Although Goodusky did not personally give union cards to any other pharmacist, he was present at the meetings where this occurred. There were other pharmacists who were at least as active, if not more active, than he in getting the Union into Respondent's stores. As to his activi-

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[1] All dates herein refer to the year 1979, unless otherwise indicated.

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ties on behalf of the Union during that period, Goodusky testified:

> I contacted people constantly when there was talk about whether we would vote pro or con, I tried to sway as many of the con votes into pros as I could. At the meetings we discussed why we were going to vote this way, why a person who wasn't say, going to vote for the union, should vote for the union. I saw to it that those were going to be too busy to attend the meeting, possibly weren't to busy, so we always had excellent attendance from the north.

Respondent's witnesses denied any knowledge of Goodusky's union activities during this period, or any period.

The Union was certified on December 19, 1975. The first collective-bargaining agreement between Respondent and the Union was effective July 3, 1977, through July 5, 1980, the next collective-bargaining agreement between the parties was effective July 6, 1980, through July 2, 1983.

Goodusky was discharged by Respondent on November 30, 1976. He was informed by Respondent that the reason for the discharge was prescription errors he made. In one of these errors he issued a prescription for 50 milligrams of a drug, when the prescription called for 25 milligrams of the drug, and in the other incident the prescription called for a specific drug and he dispensed the drug generically instead (Goodusky testified that the prescription was scribbled and he misread it). In addition, there was testimony regarding another alleged prescription error involving prescribing Premarin instead of Aldomet. Goodusky testified that after his discharge it was discovered that he had not made this error, but that the clerk had given the wrong bag to the customer. The Union filed an unfair labor practice charge with the Board, a complaint issued on this charge including, *inter alia*, the allegation that Goodusky was discharged in violation of Section 8(a)(1) and (3) of the Act. He was reinstated by Respondent in March 1977 and in June 1977 the charge was withdrawn by the Union pursuant to a non-Board settlement where Goodusky accepted partial backpay for the period where he was absent from his employment.

Between that time and September 1979 there were several events that the General Counsel alleges establish the animus of Respondent toward Goodusky. He testified that his first paycheck upon returning was in the amount of $31 instead of the usual amount of approximately $550; this was because Respondent had used a wage rate that had been in effect 3 years earlier, it had made deductions for his medical insurance program for the entire period that he was out, although he testified that he did not have the coverage during the period, and it deducted union dues for the entire year and the union initiation fee[2] which Goodusky testified: ". . . is normally taken out of new employees." Goodusky phoned Respondent about this situation and he later received the proper amount. Goodusky also testified that on one of his first days after being reinstated, there was a roof leak at the Park Street store; when he arrived for work other employees were mopping the leaking water and Goodusky began moving boxes that were getting wet. The then store manager, Macielewicz, told one of the employees who was mopping the water that he should get back to his regular job and not bother himself with mopping, and told the other employees who were mopping that he should make him (Macielewicz) coffee. This left only Goodusky mopping in the pharmacy and he testified that Macielewicz made a joke about it, that it could not have happened to a better guy. Goodusky testified that in January 1979 he was given another employee handbook (which he was asked to sign for) even though he had been employed by Respondent for 9 years and had originally received one. Additionally, Goodusky, during the period between mid-1977 and September 1979 was issued a reprimand. He testified that he caught a cold and had a fever and called the store and said he would not be in because he was ill. When he later arrived for work "the store manager said in my particular case, should I ever get sick again, he would require 2 days' notice and that he was writing me up for failing to give such notice."

Sometime subsequent to June 1977, Goodusky was called to a meeting with Daniel Corcoran, Respondent's personnel director, and Clayton, of Respondent's labor relations department. They spoke with him about customer complaints regarding him in June 1977. They informed him that they expected everybody employed by Respondent to perform to the same standards, and they wished to set the record straight and that everyone would go forward from that point and there would be no more difficulties; no action was taken on the June 1977 customer complaints by Respondent.

In January 1979, a customer with a screaming child asked the clerk to prepare her prescription immediately because it was an emergency. When the clerk informed Goodusky of this, he told the clerk, "every case is an emergency." The customer overheard this remark and complained to Respondent about it. Additionally, during this period Respondent complained to Goodusky that he had not timely filled a prescription for one of its employees.

Goodusky testified that during the period between his reinstatement and September 24 he was involved in some activities in support of the Union. During this period he was on the Union's organizing committee which was attempting to organize some of the small pharmacy chains in the area; he was one of four of Respondent's pharmacists who were on the committee. In addition, he assisted the Union in contacting the members for the twice-a-year union meeting for Respondent's employees; on most of these occasions he would have supper for the members who met at his house; from there, they would drive together to the union meeting.

Sometime during the summer of 1979, Goodusky had a conversation with Blais (who was also a member of the Union). Blais informed him that because of their seniority Respondent would have a difficult time with both of them in the same store; with 4 weeks' vacation for each plus personal days, one of them would be away for 3 months out of the year. Because of this, Blais informed him that he thought one of them would have to go, one way or another. Goodusky then spoke to Fred Frazao, assistant store manager for the Park Street Store, and an admitted supervisor. Goodusky repeated Blais, conversation to him and asked him if it were correct. Goodusky testified that Frazao said it would be difficult having two men with 10 years' seniority in the same store, ". . . there's just no way that they're going to tolerate it, no way they can pull it off" and that he was thinking in terms of a transfer.[3] They spoke some more of the situation and, according to Goodusky's testimony, Frazao said that it was common knowledge that Goodusky was on the "shit list." Frazao testified that during this period Goodusky approached him and informed him of the above-mentioned conversation with Blais and asked how the store could handle the situation. He told Goodusky that the worst that could happen is that one of them would be transferred. Frazao also testified that about that time Goodusky asked him if he knew about his prior discharge[4] and Frazao indicated that he did not even know that Goodusky had previously been discharged. Goodusky then informed him of the previous discharge and that it was a setup. In answer to a question as to whether he made any comments to Goodusky as to how he was viewed by Respondent, Frazao testified: "I did, at one point, believe I said that the Company doesn't regard you very highly." As to what this statement was based on, Frazao testified that this was based mainly on conversations with Goodusky and "his paranoia and everything else."

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[2] The issue of the union dues and initiation fee is unclear in the record. For one thing it is unclear whether he had previously paid the initiation fee. Additionally the parties stipulated that the initial contract was effective July 3, 1977, shortly *after* Goodusky's reinstatement. Why then any dues obligation or initiation fee at an earlier time?

September 24, 1979, and Beyond

On September 24, Goodusky was scheduled to work from 2 to 10. On that day he appeared at work at 1:30 because he knew there was a problem with a prescription which he would try to resolve on his own time. He testified that the problem was as follows:

> I received a phone call that Sunday, the day before, from a doctor around five o'clock who told me that he had come across two bottles that had the labels swapped around and he said the patient was readmitted to the hospital because he wasn't responding properly and the doctor happened to notice that I had the labels on—switched containers. I explained to the doctor, you know, what the—doctor made an error in writing the prescription, in which he wrote—he indicated he wanted a liquid, but then in the instructions he said, "take one teaspoonful of the tablets," which it was ambiguous, you couldn't tell whether he wanted the liquid, well, anyways, so, I explained this to the doctors, I says, "doctor, you goofed on the prescription," and I explained it to him, you know, in order to save, you know, face, you might say, so at this point I asked the doctor, I says, "could I have the name and the address of the patient" because we should fill out an accident—we have to fill out an accident report, and the doctor told me "there's no problem," he says, "forget the whole thing," I said, well, can I at least have the prescription number so I can, you know, he says, "look, forget about the whole thing," once he discovered he had made the initial error, and he explained to me that he just happened to notice this when the patient was readmitted, there was absolutely no indication—He said there was no indication that the medicine was used incorrectly.

After he worked for approximately 15 minutes, Blais told him that he should speak to Milton Andrews, the manager of the Park Street store. Goodusky went upstairs to Andrews' office. (At or about 10:30 that morning Andrews had called the Park Street store and learned from Frazao of the prescription error described above. Frazao informed Andrews that a prescription error report had been prepared (by Blais) regarding the incident and Andrews said that he would review it when he arrived at work.) Goodusky entered Andrews' office and sat across the desk from Andrews; Andrews informed him of the prescription error report and Goodusky explained how it happened; Andrews then asked him what was on his breath that smelled like alcohol, whether he had a drink before coming to work. At first he denied having a drink before work, telling Andrews that it was Lavoris mouthwash that he smelled. Andrews replied that he used Lavoris, but that it did not smell like that. Goodusky then admitted to Andrews that he had a martini at lunch with his wife and that it was common knowledge that he has a drink with lunch. Andrews then told Goodusky to go back downstairs to work, which he did.

Andrews then called Daniel Corcoran, vice president of personnel for Respondent, and informed him of the prescription error involving Goodusky and that during a discussion with him about it he smelled liquor on Goodusky's breath. Corcoran informed Andrews that he wanted to discuss the issue with others in the office and he would call him back. A few moments later he called Andrews back and told him to ask Blais if he could also smell liquor on Goodusky's breath or observe any other movement or anything relating to alcohol. Andrews then asked Blais if he could smell alcohol on Goodusky's breath and Blais said that he could not. Corcoran testified that he then called Andrews back and said that he had discussed the issue with other of Respondent's personnel officials and they decided that Goodusky should be suspended, pending termination, for being under the influence.[5] Andrews however testified: "I was told by Mr. Corcoran to discharge him," and that the only reason given was: "For being under the influence." Goodusky was then called up to Andrews' office. Frazao was also present. Andrews showed Goodusky the prescription error report, discussed *supra*, and asked him to sign it. He began to read it and informed Andrews that he objected to item 11 in the report which states, "Did the prescription error result in a hospitalization or require medical attention?" With the answer: "Yes." Goodusky told Andrews that nobody had said anything about the patient being hospitalized because of his error, so Andrews crossed out "yes" and inserted "Info to follow."[6] Goodusky then signed the report and Andrews told him he was fired for being under the influence of alcohol. Andrews then gave Goodusky Respondent's "Report of Change Form (Form 191)" which states: "effective 9/24/79 termination for working under the influence of alcohol." Andrews asked him to sign this form and he refused. Andrews informed him that his theory was that if you have a drink the alcohol will be in your stomach and bloodstream and everything you do will be under its influence. Goodusky refused to sign, and left.

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[3] Goodusky testified that it was Blais, not Frazao, who was in charge of scheduling pharmacists.

[4] Frazao was not employed by Respondent at the time of Goodusky's discharge in 1976.

[5] During this conversation Andrews informed Corcoran that Blais said that he could not smell liquor on Goodusky's breath.

Corcoran then contacted Richard Moed, then Respondent's market manager for Connecticut, and informed him to contact Charles Bowen, the union president, and inform him of the situation involving Goodusky. The parties (including, *inter alia*, Goodusky, Corcoran, Andrews, Frazao, Blais, and Bowen) met at the "third step" meeting (the parties never had a "second step" meeting because Moed and Bowen had difficulty setting up such a meeting) on November 8. At this meeting all the parties had an opportunity to, and did, present their side of the story. Respondent, in the course of these discussions, discussed *inter alia*, Goodusky's prescription errors, and Goodusky likewise recited the events comprising the prescription error and the events of September 24. At the end of this meeting Respondent's representatives informed the Union's representatives that they would get back to them when they reached a decision regarding Goodusky. After the meeting Corcoran met with Clayton, Respondent's then director of labor relations. They decided that "Goodusky would be terminated and then the next move would be up to the Union." In arriving at that decision they considered Goodusky's being under the influence on September 24, the prescription error and the similarity to prescription errors he had previously made. Bowen was informed of the decision and the matter was taken to arbitration.

Andrews testified that he had not previously issued Goodusky a warning about having a drink before reporting to work and, to his knowledge, nobody else at Respondent had issued him such a warning. Andrews had never previously discharged any employee for reporting to work with the smell of alcohol on his breath.[7] Corcoran testified that while Respondent had prior situations involving prescription errors, this was the first incident of a pharmacist being under the influence of alcohol. Blais testified that on September 24 he did not smell alcohol on Goodusky's breath although on three or four occasions over the previous 4 or 5 years he did smell alcohol on Goodusky's breath and on those occasions he told him to be more careful because he considered it objectionable when dealing with customers and patients.

As regards the prescription error involved herein, the physician's prescription was unclear as to whether it was for a liquid (it called for tablets yet provided for a liquid dose—one teaspoonful). Goodusky called the doctor twice, but each time was put on hold and hung up before speaking to the doctor, and filled the prescription based on his own judgment. In addition, after filling the prescription with a liquid dose, he misplaced the labels, thus directing the patient to put the medication in his eyes, when it was intended to be taken orally, and vice versa. In addition to the testimony of Blais that the father of the child for whom the prescriptions were intended informed him that he had been hospitalized, Corcoran testified that sometime between September and November he was informed by Respondent's insurance carrier that the child had been hospitalized. The error was settled between Respondent and the customer by the payment to the customer of $200.

As regards actions taken against pharmacists and prescription errors, the parties stipulated to the following for the period January 1, 1978, to the date of the hearing.

1. Other than Goodusky, no other pharmacist was discharged by Respondent.

2. There have been five suspensions to pharmacist, including two to pharmacist Hausman.

3. There were 21 other form 191's representing oral warnings or reprimands. Six were issued to pharmacist Hausman.

4. In addition to the 12 prescription error reports in General Counsel's Exhibit 4, there were 11 additional reports. Of these 11, 2 involved hospitalization and 1 of these involved a 1-day suspension of the pharmacist. None of these 11 prescription errors resulted from substitution by a pharmacist for an unfillable prescription.[8]

As stated, *supra*, Respondent's handbook warns against "drinking or being under the influence of liquor on the job." Andrews' understanding of this rule is that if the employee had a drink, and he had the drink at a close enough time that he could smell it on his breath, he is under the influence of liquor. As regards Goodusky's condition that day, Andrews testified that he did not know if Goodusky was staggering, that his speech was not noticeably slurred, and that there was no indication that he was intoxicated. Blais testified that on that day Goodusky was not intoxicated and, although he did not smell liquor on his breath that day, he did on three or four occasions over the past 4 or 5 years, but on none of these occasions was Goodusky intoxicated.

Prior to September 24, Goodusky had never been warned by Respondent about having a drink before reporting to work, nor had he ever been warned about being intoxicated on the job. He testified that in or about

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[6] Goodusky never objected to item 9 in this report, which asks for the details of the error. The answer, prepared by Blais stated: "Labels swapped—father claims child was admitted to hospital 9/23/79."

[7] The employees' manual, given to Respondent's enployees is a six-page pamphlet. The last page states, *inter alia*: "the following inconsiderate actions are some of those which can affect a person's growth in the Company, and will result in disciplinary actions—even dismissal." Twenty-four actions are then listed, the seventh of which is: "Drinking or being under the influence of liquor on the job."

[8] Of the 12 prescription errors reports that comprise G.C. Exh. 4, only one pharmacist, Gary Zemek, who is named twice, is cited more than once for a prescription error.

1976 he had a conversation with Blais and Moed, then Respondent's district manager, who told him that if he must have his noontime drink, he should switch from gin to vodka because it has no odor to it. Blais testified that in a conversation at that time, Moed said that he had stopped having a drink at lunch because of the impression it gave; he also told them to use vodka instead of gin with mixed drinks so that there would be no odor. Moed testified that about that time he did have a conversation with Goodusky about drinking. It had come to his knowledge that Goodusky was drinking prior to coming to work and he told him: "you know, we don't do it, its against company policy." He denies suggesting that Goodusky switch from gin to vodka to avoid the odor.

Corcoran testified that, "Under the influence would mean to me would be that where you could smell alcohol on an individual's breath, their actions are impaired in some way or that they are making an impression to a customer that they're under the influence, when it affects the individual's work." Corcoran testified that this rule was not spelled out more specifically because this incident with Goodusky was the first incident where the question arose.

A day or two after the discharge Goodusky called Frazao at the store sometime after 10 p.m.[9] When Goodusky asked, "What happened?" Frazao answered: "I was more shocked than you were. I had no idea." Goodusky asked: "Was it set up or contrived or what?" and Frazao said: "I had no idea what had happened."

> Goodusky: . . . remember I mentioned to you that "they were out to get me," more or less?
>
> Frazao: Well, we've known that for years.
>
> Goodusky: What do you mean, "We have known it?" You have known it?
>
> Frazao: For years.
>
> Goodusky: Who has known it? You have known it?
>
> Frazao: Ever since the incident. Let's say you have not been highly regarded by the company ever since that incident. The last incident.
>
> Goodusky: What was that? I forget the incident now. What was that? The Union?
>
> Frazao: Yes, the Union.
>
> Goodusky: So, you say because of the Union bit, the company would pull stuff like this, axing me?
>
> Frazao: That is just my opinion. I don't have anything concrete.

At another point Goodusky asks Frazao for his opinion of why they terminated him. Frazao's answer: "I wish I had an answer. I don't know. Other than the fact that he said that he smelled liquor on your breath. He said that you were drinking before." Shortly thereafter Goodusky asks: "Why do you think he did it, actually?" and Frazao answers: "I wish I knew."

A later dialogue is as follows:

> Goodusky: Actually, don't you know the company is out to get me. You are aware of that right? You are the one who told me right?
>
> Frazao: It is the going rumor, let's put it that way.
>
> Goodusky: Why is the company out to get me?
>
> Frazao: Because of what happened a few years back.
>
> Goodusky: The union, right?
>
> Frazao: The union and the bit with Schumann and Moed.[10]
>
> Goodusky: So that is the reason why the company is out to get me right?
>
> Frazao: I don't know. Maybe it is and maybe it isn't.
>
> Goodusky: But as far as you know, that is what you heard over the grapevine, right?
>
> Frazao: All I heard over the grapevine is what everybody else heard. Goodusky's on the shit list.
>
> Goodusky: Just please tell me the reason so I know and can sleep tight tonight. I'm on the shit list because of what reason?
>
> Frazao: Remember that incident with Schumann? I never even knew that existed until you told me about it. Whether or not it is because of that or whether it was because of the union, I don't know.

Andrews testified that he was aware that Goodusky had been previously discharged by Respondent, but was not aware of the circumstances involved, and he did not know of Goodusky's involvement with the Union's organization of Respondent's pharmacists. Corcoran testified that he had no knowledge of any activities by Goodusky regarding any union and in his discussions with Clayton regarding what action to take, if any, against Goodusky, the subject of the 1976 unfair labor practice charges relating to Goodusky never came up, although he was aware of the charges and the settlement. Frazao testified that he was not aware of Goodusky's prior discharge until Goodusky informed him of it sometime during the summer of 1979; he also testified that he never heard any discussions amongst Respondent's management concerning Goodusky's union activity.

There is some disagreement between the parties as to when Goodusky was discharged; the General Counsel places the date at September 24 when Goodusky was informed that he was being terminated for being under the influence of alcohol. Respondent would place the time of termination at a later date alleging that terminations are not effective until they have "made their way up the grievance ladder," therefore all the subjects brought up therein (including the prescription errors as well as his being under the influence) can be considered in reviewing the termination. Respondent's position is that Goodusky was terminated after the third-step grievance meeting on November 8.

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[9] Goodusky tape recorded this conversation without Frazao's knowledge. It was properly authenticated and received into evidence. The description of this conversation, therefore, is based on the transcript of the tape recording, not the testimony at the hearing prior to the disclosure by counsel for the General Counsel that he had such a recording. It should be noted that a review of the transcript of the tape leaves little doubt that Goodusky was "baiting" Frazao into the answers he desired.

[10] There was no testimony explaining what was meant by "the bit with Schumann and Moed." Schumann had been the manager of the Park Street store.

The collective-bargaining agreement between the parties sets forth a three-step grievance procedure plus arbitration. The first step involves discussions among the grievant, union official, and the store manager. Step two provides that the union official meet with Respondent's "supervision" to attempt to settle the grievance. The third step provides:

> If the grievance is not settled, the grievance shall be referred within seven (7) days to the Employer's Labor Relations Division. The Labor Relations Division shall discuss the grievance with a Union official and endeavor to settle the grievance. In the event the grievance is not settled in the third step, it shall be submitted to arbitration in accordance with Section 3.

Corcoran testified: "As per our company policy, we are not authorized to terminate anyone without a union business agent or a union representative being present." He also testified that he had no authority to discharge an employee covered by a collective-bargaining agreement, only Respondent's director of labor relations (then Clayton) could do that, and he does not become involved in the proceedings until the third-step grievance. I am unable to find any provision in the collective-bargaining agreement supporting this testimony. Rather it appears that these agreements, like most, provide that if action is taken by Respondent against one of its employees, the Union has a right to grieve this action; there is no provision that indicates that action taken by Respondent against an employee is not effective until the third-step grievance.

On May 7 and June 11, 1980, an arbitration was conducted before Arbitrator Herbert L. Haber. The issue: "Was the discharge of Richard Goodusky for just cause? If not, what shall be the remedy?" Both sides were represented by counsel. At no point in the arbitrator's decision is there any indication that the prior unfair labor practice charge or Goodusky's union activities were ever raised as an alleged reason for his discharge. In addition, the arbitrator never discussed these issues, limiting his discussion to Goodusky's work record and attitude. The arbitrator found that the discharge was not for just cause and ordered Goodusky reinstated with half backpay, stating, *inter alia*," the Grievant is warned that any subsequent infractions similar to those referred to above for which discipline may be properly invoked may result in his discharge. The basis of the arbitrator's decision was, *inter alia*, the following:

> In the instant matter the Company has failed to establish a basis for justifying its discharge of Richard Goodusky. Whether one considers the discharge on the narrow grounds of "working under the influence of alcohol"—which is the proximate cause of the discharge and the specific reason advanced for it—or on the broader grounds of the Grievant's performance record of prescription errors, unauthorized prescription filling, poor customer relations *and* the drinking issue, one must conclude that discharge, at this time, is not substainable. In addition to its not following the procedures outlined in the contract with regard to discharge, the Company has failed to establish that it has any policy or practice calling for so severe a penalty being invoked against an employee with alcohol on his breath or against one who makes errors in the filling of prescriptions.

He also found: "I believe that the Grievant's overall record and his general attitude toward his work need changing and improving and I believe that some penalty in this instance will help toward achieving those changes."

IV. ANALYSIS AND CONCLUSIONS

Prior to a discussion of whether Goodusky's discharge violated Section 8(a)(1),(3), or (4) of the Act it is necessary to determine whether Respondent, by Frazao, violated Section 8(a)(1) of the Act in his conversation with Goodusky in about September. I find that it did not. Goodusky initiated the conversation by asking Frazao about Blais' comment that Respondent would have a difficult time operating the Park Street store with the leave time that Blais and Goodusky had earned. Whether I credit Goodusky or Frazao regarding this conversation, it is clear that Frazao's answer was in terms of a strictly business decision—Respondent might have to transfer one of them because of the difficulty of operating the store with two pharmacists, each of whom has accrued a large amount of leave time—rather than a threat within the proscription of Section 8(a)(1). Although Goodusky testified that later in this conversation Frazao told him that he was on Respondent's *shit list*, this appears to be an afterthought unconnected to the prior discussion. I will therefore dismiss this 8(a)(1) allegation.

As regards the allegation that Respondent discharged Goodusky in violation of Section 8(a)(1), (3), and (4) of the Act, the first issue to decide is whether deferral to the decision of the arbitrator is appropriate, as argued by Respondent. In *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), the Board decided that it would defer to an arbitrator's award where "the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." Beginning with *Raytheon Company*, 140 NLRB 883 (1968), the Board likewise has held that it will not defer to an arbitrator's award if the arbitrator failed to consider and rule on the unfair labor practice issue.[11] Although the proceedings herein appear to have been fair and regular, and all parties have agreed to be bound, there is no evidence that the arbitrator herein heard, considered, or ruled on the unfair labor practice issues involved herein. As the Board stated in *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980):

> . . . we will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in de-

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[11] See also *General Warehouse Corp.*, 247 NLRB 1073 (1980), enfd. 106 LRRM 2729 (3d Cir. 1981); *Oakland Scavenger Company*, 241 NLRB 1 (1979); *St. Lukes Memorial Hospital*, 240 NLRB 1180 (1979); *Montgomery Ward & Co., Incorporated*, 234 NLRB 588 (1978).

> termining the propriety of an employer's disciplinary actions . . . We shall impose on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator.

The Board was more specific in its discussion of this issue in *Atlantic Steel Company*, 245 NLRB 814 (1979):

> Must the arbitrator actually discuss the unfair labor practice, or is it sufficient that he or she considered all of the evidence relevant to the unfair labor practice in determining whether the discharge was lawful under the contract? A review of the decisions shows that, while it may be preferrable for the arbitrator to pass on the unfair labor practice directly, the Board generally has not required that he or she do so. Rather, it is necessary only that the arbitrator has considered all of the evidence relevant to the unfair labor practice in reaching his or her decision.

The Board in *Atlantic Steel* also stated that "the *Spielberg* doctrine could be satisfied where the arbitrator's decision *implicitly* resolved the unfair labor practice" (emphasis supplied); and for that reason the Board in *Atlantic Steel* deferred to the arbitration award. Additionally, in some situations, the issues are framed in such a manner that the unfair labor practice issue will be resolved, implicitly, even without any discussion of the alleged protected activity or the NLRA. For example, in *United Parcel Service, Inc.*, 232 NLRB 1114 (1977), enfd. 603 F.2d 1015 (D.C. Cir. 1979), the court in enforcing the Board's order deferring to the arbitrator's award, stated: "The basic question in both the contractual and statutory settings was the same: was Bloom justified under the contract to refuse to operate tractor No. 21624?"

In the situation herein, however, there was no overlap in the statutory and contractual issue; the question is whether Respondent discharged Goodusky due to his being under the influence of alcohol and his prior prescription errors or did they discharge him due to his prior activities on behalf of the Union or the prior unfair labor practice charge in which he was involved? The arbitrator only discussed the former questions. Respondent did not carry its burden under *Suburban Motor Freight* to establish that the unfair labor practice issue was litigated before the arbitrator. As the statutory issue was neither explicitly or implicitly decided, deferral is inappropriate herein.

Additionally, since this matter involves an alleged violation of Section 8(a)(4) as well as Section 8(a)(3), deferral is not appropriate. The Board stated in *Filmation Associates, Inc.*, 227 NLRB 1721 (1977): "Accordingly, as we conclude that issues involving Section 8(a)(4) of the Act are solely within the Board's province to decide we will not apply the *Spielberg* doctrine to such issues."

Lastly, deferral is not appropriate because of the nature of the award herein. The arbitrator found that the discharge was not for just cause, and yet only granted half backpay, together with a "warning" on Goodusky's future employment conduct; I would find that this award is repugnant to the purposes and policies of the Act. *Triple A Machine Shop, Inc.*, 245 NLRB 136 (1979), stated: "The Board has indicated that it will not defer to a compromise award where the relief granted is reinstatement without backpay."[12] As this award only grants partial backpay, together with a warning, it does not warrant deferral.

Prior to discussing the merits of the General Counsel's case herein, it is necessary to dispose of a matter raised by Respondent in its brief. The argument is that the 8(a)(4) allegation must fall for the following reasons: "Goodusky testified that he had not filed the previous charge in question . . . Goodusky indicated that he never testified in any proceeding concerning charges brought by the Union after his first charge in 1976 . . . there is no evidence on the record that Goodusky helped or participated in the processing of the previous charge . . . there is no evidence that Goodusky gave an affidavit in the 1976 Board case . . . there is no indication that Goodusky was affected by the 1976 Board charge." This argument clearly has no merit. Although Goodusky did not file the charge and never did testify (since the case was settled before the hearing), the charge was filed at least partially on his behalf. Additionally, Respondent is incorrect when it alleges that he did not help or participate in the processing of the charge; he agreed to accept less than full backpay and, on that basis, that portion of the charge was settled. Finally, although there is no record evidence on the subject, I believe that I can take official notice of the fact that an alleged discriminatee for whom an unfair labor practice charge has been filed would provide an affidavit to the Board in support of the charge. As the court stated in *N.L.R.B.* v. *Retail Store Employees Union, Local 876*, 570 F.2d 586 at 591 (6th Cir. 1978), enfg. 219 NLRB 1188 (1975):

> It would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time. This would be unequal and inconsistent protection and is not the protection needed to preserve the integrity of the Board process in its entirety.

Turning now to the merits of the case, it appears to me that the General Counsel's theory herein is that Respondent maintained a grudge against Goodusky for his past actions; his support for, and assistance to the Union in its organization of Respondent's pharmacists in 1975, and his participation in, and settlement of, the unfair labor practice complaint in 1977 regarding, *inter alia*, his discharge.

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board set forth the rule it will henceforth apply in cases such as the instant matter: "First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."

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[12] See also *Cessna Aircraft Co.*, 220 NLRB 873 (1975); *Sea-Land Service, Inc.*, 240 NLRB 1146 (1979).

Goodusky's activities on behalf of the Union after his return to Respondent's employ in 1977 were quite limited. He attended the union meetings twice a year and assisted other of Respondent's pharmacists in attending these meetings. This would not present any reason for animus on the part of Respondent toward Goodusky as there is no evidence that the existing relationship between Respondent and the Union is anything but amicable. In addition, he was a member of the Union's organizing committee, which was attempting to organize other pharmacy chains in the area; this also would not appear to engender animus on the part of Respondent; if anything, Respondent would appreciate the Union's organization of its competitor's pharmacists. It therefore appears to me that the General Counsel, in order to make its *prima facie* showing under *Wright Line*, must establish that Goodusky's pre-1977 activities on behalf of the Union were the cause of his discharge and that after his return to employment in 1977 Respondent was "laying in wait" for an opportunity to discharge him again. The General Counsel points to a number of incidents that occurred after Goodusky's return in 1977 as evidence of Respondent's animus toward him; the incident where the store's roof leaked and the then manager of the Park Street store left Goodusky mopping the floor saying that it could not happen to a better guy and the incident where the store manager told him that he would require 2 days' notice before Goodusky could take a sick day. However, both of these incidents are susceptible to several explanations; they may well have been caused by personal animosity of the managers toward Goodusky, unconnected to his activities on behalf of the Union. The fact that in about January 1979 he was given another employee handbook, which he was asked to sign for, is also not helpful to the General Counsel's case; it may be that the handbook had been changed and Goodusky, as well as the other employees, was given a new one.

What is clear is that during the Union's organizational campaign among the employees Respondent's pharmacist Goodusky was active in his support for the Union, although not the most active of Respondent's employees. Respondent's witnesses denied knowledge of the union activity by Goodusky. The General Counsel alleges that this knowledge is established through the testimony that "District Manager Moed reprimanded Goodusky and Blais about using the Company phones for union business." However, it should be noted that the record is not clear as to whether the reprimand was made by Moed or the former Park Street store manager, Schumann, and it was directed at Blais and the third pharmacist in the store at the time, as well as Goodusky. In addition, Blais places the time of this call as about 4 or 5 years prior to the hearing; it is possible that these telephone calls discussing union business occurred after the Union was certified. Lastly, the General Counsel alleges that the taped phone conversation establishes that Respondent knew of Goodusky's activities on behalf of the Union. In his brief he quotes the following dialogue:

> Frazao: Ever since the incident. Let's say you have not been highly regarded by the company ever since that incident. The last incident.
>
> Goodusky: What was that? I forget the incident now. What was that? The Union?
>
> Frazao: Yes, the Union.

What occurs next, however, is Goodusky summarizes: "So, you say because of the union bit, the company would pull stuff like this, axing me?" and Frazao answered: "that is just my opinion. I don't have anything concrete." In other places during this discussion, as well, Frazao expressed puzzlement over the discharge. Even if Frazao were more specific in his answers, they would be suspect because he was not employed by Respondent during the period that the Union was organizing Respondent's pharmacists and Goodusky was discharged, and Frazao's answers on the tape refer to "rumors" and what he "heard over the grapevine."

If this were the sole evidence of knowledge, I might find insufficient evidence of knowledge by Respondent of Goodusky's union activities. What convinces me of Respondent's knowledge is the prior unfair labor practice charge and complaint which alleged, *inter alia*, that he was discharged in violation of Section 8(a)(3) of the Act. This portion of the complaint was settled by the payment to Goodusky of partial backpay for the period that he was out of work. I believe it is reasonable for me to conclude that when Respondent became aware that the Union had filed an unfair labor practice charge against it, on behalf of Goodusky, and the Board later issued a complaint alleging that its discharge of Goodusky violated the Act, and Respondent later entered into a settlement of this case with Goodusky and the Union, it knew by then (if it did not know earlier) or, at least it assumed, that he had engaged in some activities on behalf of the Union.

The strength of the General Counsel's case herein lies mainly in the weakness of Respondent's defenses. In the midst of discussing a prescription error committed by Goodusky, Andrews smelled liquor on his breath. After an initial denial, Goodusky admitted that he had a drink at lunch with his wife (an hour or two earlier). Although he offered to stop this practice, he was fired,[13] nonetheless, without any prior warning about "being under the influence." Andrews admitted that Goodusky was not intoxicated and, although he did not specifically testify so, his answers indicate that the sole indication of Goodusky's being "under the influence" was the smell of liquor on his breath, and Blais (who also testified that Goodusky was not intoxicated) could not even smell liquor on his breath. Also relevant is the fact that Goodusky had been having a drink at lunch for a number of years and Blais had knowledge of this. Because I found Blais to be a very credible witness, I would credit his testimony, and that of Goodusky, that in or about 1976 Moed told them to drink vodka instead of gin because there would be no odor, although I am cognizant of the fact that Moed did not participate in the decision to discharge Goodusky on September 24. I must also consider the fact that from January 1, 1978, until the date of the hearing, no other pharmacist was discharged by Respondent although one pharmacist was issued six form 191's and was suspended twice; three others were also suspended.

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[13] I reject Respondent's argument (and Corcoran's testimony) that Goodusky was suspended pending termination and was not discharged until after the third-step grievance meeting held on November 8. Andrews testified that Corcoran told him to discharge Goodusky; the form 191 states "termination" and there is no contractual support for Respondent's argument that Corcoran had no authority to discharge employees and that Respondent was not authorized to discharge any employee included in the bergaining unit without a union representative being present.

The General Counsel points to Goodusky's telephone conversation with Frazao as evidence that his discharge was unlawfully motivated. At one point in this conversation Frazao did say that, in his opinion, Goodusky has not been highly regarded because of an incident involving the Union. However, that answer was the result of a leading question and, at other places in the conversation, Frazao said that he did not know why Goodusky was discharged other than Andrews' statement that he had been drinking. Later on during the telephone conversation, Frazao, in answer to another leading question from Goodusky, said that "maybe it is, and maybe it isn't . . . the Union and the bit with Schuman and Moed . . . ." why the Respondent was out to get him. But Frazao qualified this by saying that "It is the going rumor, let's put it that way." It should be noted that Frazao was not employed by Respondent at the time of Goodusky's earlier difficulties with Respondent and testified that his statements in this conversation regarding Respondent's negative feelings toward Goodusky derived from his conversations with Goodusky, not with anyone from management. In addition, Frazao had nothing to do with the decision to discharge Goodusky ("I was more shocked than you were."); therefore his opinion is dispositive of very little herein.

On the basis of all the above I would reluctantly find that the General Counsel has not sustained his burden of proof demanded by *Wright Line*. His post-1977 union activities were minimal and even worked to the benefit of Respondent. In 1975 he was not the most active supporter of the Union and, considering the degree of his union support at that time, I cannot connect his 1979 discharge with his 1975 activities, especially since there is no evidence that the relationship between Respondent and the Union is anything but amicable and during the intervening 4-year period there is a lack of proof that Respondent displayed animus toward him caused by his earlier activities on behalf of the Union. I would likewise, reluctantly, find that the General Counsel has not sustained his burden to establish that the discharge violated Section 8(a)(1) and (4) of the Act. There is no evidence herein to establish that Respondent harbored any resentment toward Goodusky because of the charge filed on his behalf or the money paid to him in settlement of the case. Two and a half years had passed since the prior matter was disposed of; more than that fact alone is needed to connect that to his 1979 discharge.

I say "reluctantly" because this case is not without doubt. It appears to me that Respondent's discharge of Goodusky was not an appropriate reaction to the events preceding the discharge. Without any prior warning he was discharged when his supervisor smelled liquor on his breath, the result of one drink at lunch, something he had been doing for a number of years; he was not intoxicated; nor did he exhibit any sign of being intoxicated. He was the first pharmacist to be discharged by Respondent, since at least January 1978, although other pharmacists appear to have had a worse work record than he (more prescription errors and form 191's). However, I cannot substitute my judgment for Respondent's as to what is fair; I must determine if the evidence is sufficient to establish that Respondent violated Section 8(1),(3), or (4) of the Act; I find that it is not.

CONCLUSIONS OF LAW

1. Respondent, Stop and Shop Companies, Inc., Medi Mart Division, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 100, United Pharmacist's Guild, chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any conduct in violation of the Act as alleged herein.

Based on the entire record in this proceeding, I therefore shall make the following recommended:

ORDER[14]

It hereby is ordered that the complaint be, and it hereby is, dismissed in its entirety.

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[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Mercury Marine Division of Brunswick Corporation *and* District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 30-CA-6456

December 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on April 24, 1981, by District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, herein the Union, and duly served on Mercury Marine Division of Brunswick Corporation, herein Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 30, issued a complaint and notice of hearing on May 27, 1981, and an amendment to the complaint on August 20, 1981, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge and amended complaint were duly served on the parties to this proceeding. On June 8, 1981, Respondent filed an answer, admitting in part and denying in part the allegations of the complaint, submitting affirmative defenses, and requesting that the complaint be dismissed in its entirety.

On August 27, 1981, counsel for the General Counsel filed directly with the Board a motion to transfer the proceeding to the Board and a Motion for Summary Judgment. The General Counsel submits, *inter alia*, that Respondent, in its answer, is merely attempting to relitigate matters which could or should have been litigated in the unit clarification proceeding, Case 30-UC-158. Subsequently, on September 1, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a brief letter response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

In its answer to the complaint and opposition to the General Counsel's Motion for Summary Judgment, Respondent admits the refusal to bargain as to employees classified as Process Coordinator I's but contends that it did not violate the Act because such employees are not properly part of the appropriate unit represented by the Union.[1] Respondent predicates its refusal to bargain on the following grounds. Respondent contends that during the term of the collective-bargaining agreement effective June 19, 1978, to June 15, 1980, it was determined through the grievance arbitration procedures that Process Coordinator I's were not within the collective-bargaining unit. Respondent also contends that during subsequent negotiations the Union unsuccessfully sought to have Process Coordinator I's included in the unit and that the current agreement effective June 16, 1980, to June 18, 1982, does not cover the Process Coordinator I's.

As to the allegations covering the Board Decision reported at 254 NLRB 1120 (1981), Respondent admits that the Board issued a decision on review but contends that the decision was erroneous, unsupported by substantial evidence on the record and violated due process. Respondent further contends that the case should have been remanded to the Regional Office for a hearing on the issues of fact concerning bargaining negotiations leading to the 1980-82 agreement and the impact of such negotiations on the contractual recognition articles.

In addition, Respondent contends that the Process Coordinator I's cannot be part of the production and maintenance unit because the duties of such persons make them supervisors within the meaning of Section 2(11) of the Act. Further, Respondent contends that subsequent to the submission of the record to the Regional Director and prior to the decision by the Board in Case 30-UC-158 numerous changes were made in the position of Process Coordinator I and that these changes compel a finding that Process Coordinator I's are statutory supervisors, and that, even assuming the validity of the Board's Decision, those employees should be excluded from the unit.

Finally, Respondent admits the factual allegations concerning the refusal to bargain with the Union as to the Process Coordinator I's on April 24, 1981, but it denies the conclusionary legal allegations regarding the refusal to bargain.

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[1] Respondent also admitted the factual and legal allegations pertaining to service of the charge and complaint, that it is an employer engaged in commerce within the meaning of the Act, and that the Union is a labor organization within the meaning of the Act. In addition to other allegations of the complaint that Respondent denied, which are described elsewhere in this Decision, Respondent also denied the complaint allegation in par. 4(a) regarding the scope of the unit, and claimed instead that the Union has been designated the exclusive bargaining representative for *certain* production and maintenance employees at Respondent's Fond du Lac facility. Thereafter, the General Counsel amended par. 4(a) of the complaint to describe the unit as *certain* production and maintenance employees, thereby accommodating Respondent's answer in this respect.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

In her Motion for Summary Judgment, counsel for the General Counsel urges that Respondent, by its answer and refusal to bargain, is merely attempting to relitigate matters which could or should have been litigated in the unit clarification proceeding, and that the issues raised by Respondent as a justification for a hearing are either irrelevant or insufficient as a matter of law to justify a hearing now. We agree.

Respondent's contention that the Board should defer to the arbitrator's decision was previously litigated before the Board in Case 30-UC-158, reported at 254 NLRB 1120 (1981). There the Board noted that issues concerning the appropriateness of bargaining units are particularly within the Board's expertise and the Board does not defer to such an award.

Respondent's reliance on the Union's failure to insist that Process Coordinator I's be included in the unit during contract negotiations that took place after the Union filed the petition in Case 30-UC-158 is similarly misplaced. The Board has long held that where, as here, the petition was filed before the negotiations the opposing party was on notice that the petitioner intended to resolve the unit issue through the Board's procedures rather than through negotiations.[3] We find it unnecessary, therefore, to resolve any disputed factual allegations concerning the post-petition contract negotiations.[4]

As to Respondent's contention that Process Coordinator I's are statutory supervisors and therefore must be excluded from the unit, we note that this issue was raised and litigated during the unit clarification proceeding (30-UC-158) *supra*. As such, this issue cannot be relitigated now, absent newly discovered evidence or special circumstances. In this connection, Respondent has sought to introduce evidence that the disputed employees' job duties have changed substantially since the Board's Decision issued. This assertion, if true, would not change the result here but would constitute additional evidence of Respondent's refusal to bargain with the Union since it would have made unilateral changes without bargaining.[5]

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a Delaware corporation, with an office and place of business in Fond Du Lac, Wisconsin. It is engaged in the manufacture and nonretail distribution of marine propulsion equipment. During the past calendar year, a representative period, Respondent, in the course and conduct of its business operations, sold and shipped from the Fond du Lac facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Wisconsin.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

For over 20 years, and at all times material herein, the Union has been the designated exclusive collective-bargaining representative of certain production and maintenance employees employed by Respondent at its Fond du Lac facility and has been recognized as such representative by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period June 16, 1980, through June 15, 1982.

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[2] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] *The Western Colorado Power Company*, 190 NLRB 564, fn. 1 (1971); *Peerless Publications, Inc.*, 190 NLRB 658 (1971); *Massey-Ferguson, Inc.*, 202 NLRB 193 (1973); and *WNYS-TV (WIXT)*, 239 NLRB 170 (1978).

[4] The Union denied that any acquiescience occurred regarding the Process Coordinator I's during the negotiations.

We note that Respondent claims the Union unsuccessfully sought inclusion of the Process Coordinator I's during recent negotiations but does not claim the Union withdrew its claim in exchange for other concessions during negotations. See *WNYS-(WIXT), supra* at 170.

[5] See *Highland Terrace Convalescent Center*, 233 NLRB 87 (1977).

In this connection, it is well settled that an employer has a duty to bargain when it changes the duties of bargaining unit employees' classification which result in the employees' removal from the bargaining unit to supervisory positions. See *Kendall College*, 228 NLRB 1083 (1977), enfd. 570 F.2d 216 (7th Cir. 1978); and *Fry Foods, Inc.*, 241 NLRB 76 (1979).

On March 5, 1981, the Board issued a Decision on Review and Order in Case 30-UC-158, reported at 254 NLRB 1120, clarifying the unit referred to above by including therein the employees classified as Process Coordinator I who are employed by Respondent at its Fond du Lac facility.

The unit of employees described in the Board's Decision, above, and set forth below, constitutes a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including all classifications in the Production Departments, the Production Tool Room, the Machine Shop, the Testing Department, the Maintenance Department, Buildings and Grounds, Oil Facility, the Foundry Facility, Die Cast Facility, including Process Coordinator I's, Customer Service and Repair Departments, Floor Inspectors, Final Inspectors, and Salvage Inspectors in the Inspection Department, Time Recording Clerks, Lead persons, Mechanic Specialists, Cycle Counters, Distribution Facility, Shipping and Receiving Department, Investment Castings Facility, and all other production and maintenance departments which may be added to the collective bargaining unit in the future covered by an agreement, but excluding all executives, office and clerical employees, laboratory employees, professional employees, sales representatives, product development and testing personnel, layout inspectors, paint inspectors, final line inspectors, watchpersons, guards and supervisory employees as defined in the Labor-Management Relations Act.

As indicated above, Respondent has admitted the factual allegations in the complaint to the effect that the Union requested, in March 1981, that Respondent bargain collectively with it concerning the wages, hours, and other terms and conditions of employment of Respondent's employees classified as Process Coordinator I's and that, thereafter, Respondent has failed and refused to bargain with the Union concerning such terms and conditions of employment of the employees classified as Process Coordinator I's.[6]

We find that by the aforesaid conduct Respondent has refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that such conduct violated Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Mercury Marine Division of Brunswick Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including all classifications in the Production Departments, the Production Tool Room, the Machine Shop, the Testing Department, the Maintenance Department, Buildings and Grounds, Oil Facility, the Foundry Facility, Die Cast Facility, including Process Coordinator I's, Customer Service and Repair Department, Floor Inspectors, Final Inspectors, and Salvage Inspectors in the Inspection Department, Time Recording Clerks, Lead persons, Mechanic Specialists, Cycle Counters, Distribution Facility, Shipping and Receiving Department, Investment Castings Facility, and all other production and maintenance departments which

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[6] In its motion to transfer the proceeding to the Board and Motion for Summary Judgment, the General Counsel presented certain exhibits that reveal the chronology of the refusal to bargain as follows. In or about the second week of March 1981, the Union, by its business representative, Joseph Develice, orally requested that Respondent bargain with it concerning the wages, hours, and terms and conditions of employment of the employees classified as Process Coordinator I pursuant to the Board's Decision. On or about March 27, 1981, the Union, by certified letter from Directing Business Representative Richard A. Presser to Respondent's Manager of Public Relations Ronald Hanson, again requested bargaining concerning the employees classified as Process Coordinator I. On or about April 15, 1981, Respondent by Hanson, orally refused to bargain regarding the Process Coordinator I's, and informed union business representative Develice that Respondent did not intend to abide by the Board's Decision.

may be added to the collective-bargaining unit in the future covered by an agreement, but excluding all executives, office and clerical employees, laboratory employees, professional employees, sales representatives, product development and testing personnel, layout inspectors, paint inspectors, final line inspectors, watchpersons, guards and supervisory employees as defined in the Labor-Management Relations Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to bargain with the Union concerning the wages, hours, and other terms and conditions of employment of the employees in the aforesaid appropriate unit classified as Process Coordinator I, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Mercury Marine Division of Brunswick Corporation, Fond du Lac, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively in good faith with District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of its employees in the appropriate unit set forth below concerning the wages, hours, and other terms and conditions of employment of the employees in the said appropriate unit classified as Process Coordinator I. The appropriate unit is:

> All production and maintenance employees, including all classifications in the Production Departments, the Production Tool Room, the Machine Shop, the Testing Department, the Maintenance Department, Buildings and Grounds, Oil Facility, the Foundry Facility, Die Cast Facility, including Process Coordinator I's, Customer Service and Repair Departments, Floor Inspectors, Final Inspectors, and Salvage Inspectors in the Inspection Department, Time Recording Clerks, Lead persons, Mechanic Specialists, Cycle Counters, Distribution Facility, Shipping and Receiving Department, Investment Castings Facility, and all other production and maintenance departments which may be added to the collective bargaining unit in the future covered by an agreement, but excluding all executives, office and clerical employees, laboratory employees, professional employees, sales representatives, product development and testing personnel, layout inspectors, paint inspectors, final line inspectors, watchpersons, guards and supervisory employees as defined in the Labor-Management Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the purposes of the Act:

(a) Upon request, bargain collectively with District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of all the employees in the appropriate unit set forth above concerning the wages, hours, and other terms and conditions of employment of employees in the said appropriate unit classified as Process Coordinator I. Any understanding reached shall be embodied in a signed agreement.

(b) Post at its facility in Fond du Lac, Wisconsin, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail and refuse to bargain collectively in good faith with District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of our employees in the appropriate unit described below concerning the wages, hours, and other terms and conditions of employment of employees in the said appropriate unit classified as Process Coordinator I. The appropriate unit is:

> All production and maintenance employees, including all classifications in the Production Departments, the Production Tool Room, the Machine Shop, the Testing Department, the Maintenance Department, Buildings and Grounds, Oil Facility, the Foundry Facility, Die Cast Facility, including Process Coordinator I's, Customer Service and Repair Department, Floor Inspectors, Final Inspectors, and Salvage Inspectors in the Inspection Department, Time Recording Clerks, Lead persons, Mechanic Specialists, Cycle Counters, Distribution Facility, Shipping and Receiving Department, Investment Castings Facility, and all other production and maintenance departments which may be added to the collective bargaining unit in the future covered by an agreement, but excluding all executives, office and clerical employees, laboratory employees, professional employees, sales representatives, product development and testing personnel, layout inspectors, paint inspectors, final line inspectors, watchpersons, guards and supervisory employees as defined in the Labor-Management Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, upon request, bargain in good faith with the Union as the exclusive bargaining representative of all employees in the appropriate unit described above concerning the wages, hours, and other terms and conditions of employment of the employees in said appropriate unit classified as Process Coordinator I.

MERCURY MARINE DIVISION OF BRUNSWICK CORPORATION

Leonard B. Hebert, Jr., & Co., Inc.;[1] Landis Construction, Inc.; Company Inc.; Pratt Farnsworth,; Boh Bros. Construction Co., Inc.; American Gulf Enterprises, Inc.; Gutler-Herbert & Co., Inc.; Pittman Construction Company, Inc.; Bartley, Incorporated; Binnings Construction Co., Inc.; Gervais Favrot Company, Inc. *and* Carpenters District Council of New Orleans & Vicinity and Local Union 1846. Case 15-CA-7622

December 30, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On May 4, 1981, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, counsel for the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

The Administrative Law Judge found, and we agree, that Respondents violated Section 8(a)(5) and (1) of the Act by refusing to provide the information requested by the Union concerning their alleged "double breasted" nonunion companies. In doing so, he stated that the Union never contended that the information sought was essential for bargaining. Regardless of whether the Union did or did not so contend, it is clear from the record that the Union needed and sought the said information to police the existing agreement and to prepare for bargaining negotiations. We further find that the Union bargained as best it could in light of Respondent's prior refusal to furnish the information and its disparaging remarks during negotiations concerning the Union's requests, and that during negotiations the Union informed Respondent's negotiating committee chairman that it "was waiting for an answer" to its request for said information.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Leonard B. Hebert, Jr., & Co., Inc.; Landis Construction Company, Inc.; Pratt Farnsworth, Inc.; Boh Bros. Construction Co., Inc.; American Gulf Enterprises, Inc.; Gutler-Herbert & Co., Inc.; Pittman Construction Company, Inc.; Bartley, Incorporated; Binnings Construction Co., Inc.; and Gervais Favrot Company, Inc., New Orleans, Louisiana, their officers, agents, successors, and assigns, shall take the actions set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Carpenters District Council of New Orleans & Vicinity and Local Union 1846, by failing and refusing to furnish the said labor organization with the information requested in the Union's letters to us of January 18, or February 19, 1980.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, furnish Carpenters District Council of New Orleans & Vicinity and Local Union 1846 with the information requested in the Union's letter to us at various

259 NLRB No. 126

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[1] We hereby correct the Administrative Law Judge's inadvertent mispelling of the name of Respondent, Leondard B. Hebert, Jr., & Co., Inc., in his Decision.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Contrary to the Administrative Law Judge, we find insufficient evidence to establish the existence of a multiemployer bargaining unit.

[3] The notice is modified by identifying the Union's individual letter requests for information from Respondents as having been dated "between January 18 and February 12, 1980."

dates between January 18 and February 12, 1980.

LEONARD B. HEBERT, JR., & CO., INC.; LANDIS CONSTRUCTION COMPANY, INC.; PRATT FARNSWORTH, INC.; BOH BROS. CONSTRUCTION CO., INC.; AMERICAN GULF ENTERPRISES, INC.; GUTLER-HERBERT & CO., INC.; PITTMAN CONSTRUCTION COMPANY, INC.; BARTLEY INCORPORATED; BINNINGS CONSTRUCTION CO., INC.; GERVAIS FAVROT COMPANY, INC.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: This case was heard on February 24, 1981, at New Orleans, Louisiana, pursuant to a complaint issued by the Regional Director for Region 15 on August 6, 1980, which alleges that the above-captioned Employers, herein referred to individually and collectively as the Respondents, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to bargain in good faith with the above-captioned labor organization, herein referred to as the Union, in that they refused to furnish the Union with certain information. The Respondents filed an answer denying the commission of any unfair labor practices.

Upon the entire record, my observation of witnesses, and consideration of the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. BUSINESS OF THE RESPONDENTS

With the exception of Pittman Construction Company, Inc., which is a Delaware corporation, the following named Respondents are Louisiana corporations which, in addition to Pittman Construction Company, Inc., maintain offices and facilities in the New Orleans, Louisiana, metropolitan area where they are engaged in the building and construction business: Leonard B. Herbert, Jr. & Co., Inc.; Landis Construction Company, Inc.; Pratt Farnsworth, Inc.; Boh Bros. Construction Co., Inc.; American Gulf Enterprises, Inc.; Gutler-Herbert & Co., Inc.; Bartley, Incorporated; Binnings Construction Co., Inc.; Gervais F. Favrot Company, Inc.

During the 12 months preceding the issuance of the complaint, a period representative of all times material herein, the foregoing named Respondents, each individually, in the course and conduct of their business, purchased and received goods and materials valued in excess of $50,000, which goods and materials were shipped directly to their respective operations located in the metropolitan area of New Orleans, Louisiana, from points located outside the State of Louisiana.

It is admitted and I find that the Respondents are, individually and collectively, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

The complaint alleges that since at least May 1, 1977, and at all times thereafter, and continuing to date, the Union has been, and is now, the representative for the purposes of collective bargaining of a majority of the employees in an appropriate unit and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment; and that the unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act is as follows:

> All carpenters employed by Respondents, individually and collectively, on their construction projects located within the geographical jurisdiction of the Union, excluding all other employees.

The Respondents admitted the foregoing allegations but amended the answer at the hearing to admit that the Union is the designated bargaining agent for employees in individual bargaining units but that the Respondents deny the existence of a multiemployer bargaining unit.

The record reveals that the Respondents and the Union have, since at least 1961, maintained a collective-bargaining relationship and have entered into successive collective-bargaining agreements which embody rates of pay, wages, hours of employment, and other terms and conditions of employment. The last two contracts in that series of contracts were in effect during the periods of May 1, 1977, to April 30, 1980, and May 1, 1980, to April 30, 1982, and reveal that the Respondents are signatory thereto and parties thereby as members of the New Orleans District, Associated General Contractors of Louisiana, Inc. (herein called AGC). Those contracts further indicate that the AGC "and such other Employers for whom the [AGC] has bargained" are parties thereto and referred to therein as "contractors" or "Employers." The recognition clause therein states:

> The Contractors, during the life of this agreement, recognize the Unions as the exclusive bargaining representatives for all of their employees coming under the respective jurisdiction of the Unions for the purpose of collective bargaining in respect to rates of pay, fringes, hours of employment and other conditions of employment.

There is uncontradicted record testimony to the effect that a committee of the AGC engaged in joint bargaining with the Union on behalf of the Respondents. Accordingly, I conclude that the General Counsel has sustained its burden of proof with respect to the aforesaid allegations concerning the individual and collective nature of the bargaining unit. In any event, it is clear that the Respondents had an obligation to bargain with the Union concerning wages, hours, and conditions of employment of carpenters located within the geographical jurisdiction of the Union, whether individually or collectively.

Davy P. Laborde, Sr., the business representative of the Union, testified that he has participated in negotiations with the Respondents since 1961. In response to cross-examination, Laborde testified that for several years he had received reports from agents of the Union and other persons engaged in the construction business to the effect that some of the Respondents had formed "double breasted" companies to perform unit work with nonunion employees. Laborde testified in further cross-examination that on one occasion he had made a fruitless investigation of citings of certain machinery owned by a respondent at a jobsite of a construction company whose employees were unrepresented by the Union and where unit work was performed. Employees of one of the Respondents had also informed Laborde on another occasion that they requested the withdrawal of their union cards upon commencement of employment at a reputed "double breasted" company.

In past negotiations with the Respondents on at least two occasions Laborde proposed the incorporation into the collective-bargaining agreement of a so-called subidiary clause, for the purpose of automatically extending the coverage of the collective-bargaining agreement to additional enterprises formed by the Respondents. These attempts failed. Laborde testified, without contradiction, that he ceased such efforts in that the Respondents had continually refused to answer his inquiries as to other related companies and adamantly insisted that they maintained no double-breasted operations.

On December 15, 1978, pursuant to a representation petition filed by the Union, and a hearing conducted on November 27, 1978, the Acting Regional Director for Region 15, in Case 15-RC-6380, directed an election in a carpenters' unit at Claiborne Builders, Inc., in or near New Orleans, Louisiana. An election was conducted on January 12, 1979. Laborde testified that he engaged in a conversation on the day of that election at the Claiborne place of business with Joe Lemoine who identified himself as the treasurer of Claiborne as well as the treasurer of Perrilliet-Rickey Construction Company, Inc., which Laborde discovered then to have occupied a common premises with Claiborne.[1] Laborde testified, without contradiction and with substantial corroboration by Union Agent James Paulino, Jr., who was present, that Lemoine explained to him that Perrilliet-Rickey had formed a secondary company, i.e., Claiborne, for the purpose of competing against other "double-breasted" companies that were formed by other parties to collective-bargaining agreement; i.e., the Respondents. Although Laborde had initially fixed the date of this conversation in November 1979, he retracted his testimony to place it in January, the date of the election, having explained his confusion as to the month of the hearing and month of the election. Despite his initial confusion, I credit his uncontradicted testimony as to the substance of the conversation and to the fact that it occurred on the date of the election at Claiborne.

Paulino in his uncontradicted testimony added that, during this conversation when Lemoine asked why the Union was seeking an election at Claiborne, he, Paulino, responded: ". . . that we were going to try to organize all the non-union companies that we felt were offsprings from union companies."

Laborde testified that thereafter he determined that it was necessary to obtain information from the Respondents concerning the existence of any double-breasted enterprises in order to discover whether the Respondents had violated the collective-bargaining agreement by failing to extend the terms and conditions of the collective-bargaining agreement to the employees of such companies. Additionally, he determined that such information would assist him in contract negotiations with the Respondents with regard to two areas; e.g., whether he would revive his request for the 25 subsidiary clause, and what positions the Union should take with respect to economic issues. With respect to possible economic positions he explained that such could have been affected by knowledge of what the Respondents were affording nonunion employees of affiliated companies. That is to say, for example, he might modify his 30 economic demands if a risk existed of losing unit work to the nonunion affiliated companies.

Between January 18 and February 12, 1980, prior to the April 30, 1980, expiration date of the collective-bargaining agreement, the Union, by individual letters, requested of the Respondents answers to 13 questions, which the Union in its letter explained were necessary because of information it had obtained to the effect that the individual respondent had by the operation of a specifically named enterprise performed work which otherwise would have been performed by the Respondents and by such conduct the Respondents might be in violation of the collective-bargaining agreement provisions; i.e. "wages, scope of agreement, referral clause, fringe benefit provisions and recognition and possibly other articles." The questions are set forth as follows with the exception that the name of each alleged double-breasted company is replaced herein by the designation "other company."

> 1. What positions in [other Company] are held by each officer, shareholder, director or other management representative of your company?
> 2. State the name of each person who has a function related to labor relations for your Company and for [other Company]?
> 3. What customers of [other Company] are now or were formerly customers for your Company?
> 4. State the difference, if any, in the type of business engaged in by your Company and [other Company].
> 5. What services, including clerical, administrative, bookkeeping, managerial, engineering, estimating, or other services are performed for [other Company] by or at your Company?

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[1] Perrilliet-Rickey Construction Company, Inc., was a member of the AGC and a party to the contract which expired on April 30, 1980. It was named in the instant unfair labor practice charge as was the AGC but, like the AGC, was not named in the complaint. The General Counsel stated in its brief that Perrilliet-Rickey timely withdrew from the AGC and accordingly was not named in the complaint.

6. What supervisory functions are performed by employees of your Company over employees of [other Company]?

7. What insurance or other benefits are shared in common by employees of your Company and the employees of [other Company]?

8. What skills do the employees of [other Company] possess that employees of your Company possess?

9. Please list all former employees of your Company that are now employed by [other Company] and their titles.

10. State whether [other Company] is a member of the Associated General Contractors of Louisiana, Inc.

11. Does [other Company] have separate contractor license, bank account, books, insurance policies, tax returns than your Company?

12. Was there any leasing of equipment between the two companies during the last year and was it done by written agreement?

13. Was there any interchange of employees in the field during the last year between the two companies?

The Respondents all declined to provide the requested information. Thereafter, negotiations for the most recent collective-bargaining agreement transpired and resulted in a new agreement prior to the expiration date of the old contract. The instant unfair labor practice charge had been filed on March 14, 1980.

I credit Laborde's more certain testimony that during the recent contract negotiations Robert Boh, president of Respondent Boh Bros. Construction Co., president of the AGC, and chairman of the contractors negotiation committee, referred disparagingly to the aforedescribed information request letters and to the instant unfair labor practice charge. However, Boh testified without contradiction that the Union sought no contractual modification concerning alleged double-breasted companies, nor did it state that it could not bargain effectively without the aforesaid requested information. Moreover, Laborde conceded that he said nothing more concerning the requested information other than, "Well, you received my letter, but that's it, I'm waiting for an answer." I credit his testimony.

Laborde testified that, although the collective-bargaining agreement provides for a grievance procedure, the Union chose rather to file the instant unfair labor practice charge in order to obtain the information necessary to support a grievance. Some testimony was adduced by the Respondents in cross- examination of Laborde to the effect that in June 1980 the Union filed a certain lawsuit against one of the Respondents, Pratt Farnsworth, Inc., and an alleged double-breasted company, wherein the Union alleged that the two companies constituted a single integrated employer. Laborde explained that at the time of the lawsuit he did have some information as to that individual respondent to support the suit, but that "as we go along we pick up information," and that he is continually "picking up information." Laborde testified that he consulted with an attorney as to the most efficacious manner in which to proceed.

Conclusion

The General Counsel contends that the Respondents violated Section 8(a)(5) and (1) of the Act by refusing to provide to the Union requested information concerning alleged double-breasted operations to which the Union was entitled in order properly to represent bargaining unit employees.

The Respondents take the position that the Union has failed to demonstrate a relevant need for the information requested, and that the actual purpose for which the information was sought—organizing—is irrelevant thereby excusing the Respondents of any obligation to provide same.

The Respondents argue that the information is not necessary for the administration of the contract because, despite a long history of contractual relations, such information was never previously requested. It argues that the information was not necessary to further the Union's duty of fair representation because the Union failed to prove that it needed the information for fair representation of employees and that there is no actual evidence adduced herein that the Union represents any employees of the alleged double-breasted companies.

With respect to negotiations, the Respondents assert that, in view of the Union's lack of persistence for the information during the bargaining process, it truly did not need that information; and that in any event it did not ask for other information that would have been necessary to support its economic position in bargaining.

The Respondents conclude, correctly, that the primary purpose advanced by the Union for the information was to discover whether any of the Respondents were acting as a single integrated employer with any other companies. The Respondents dismiss this objective because it concludes that the Union "already knew" that Perrilliet-Rickey and Claiborne, who are not respondents herein, were operating as separate employers having had "an official decision" of the Acting Regional Director in the representation case, and because the Union filed the lawsuit in June 1980 against another individual Respondent. The Respondents argue that the Union could have filed a unit clarification petition with the Regional Director to obtain the same information if it indeed really desired the information for the stated purpose. The Respondents further argue that if the Union believed that the contract was violated it could have filed a grievance. The Respondents conclude that the true reason for the Union's information request was a desire to engage in organizational activity, and that the Respondents are under no obligation to assist such effort. Finally, the Respondents contend that certain questions are unrelated to any proffered reason; i.e., identity of customers and membership in the AGC.

An employer is obliged by the Act to bargain in good faith with the employees' designated bargaining agent and a failure to furnish to the union requested information which is relevant to the negotiation of and administration of a collective-bargaining agreement may constitute a breach of that obligation. *Detroit Edison Company* v. *N.L.R.B.*, 440 U.S. 301, 303 (1979); *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *N.L.R.B.* v. *Truitt Mfg., Co.*, 351 U.S. 149, 152 (1956). Information concerning terms and conditions of employment within the bargaining unit is presumptively relevant and no specific showing of relevance is required, but as to areas outside the unit a more restrictive standard of relevance is applied. *Ohio Power Company*, 216 NLRB 987, 991 (1975).

In *Associated General Contractors of California*, 242 NLRB 891 (1979), enfd. 633 F.2d 766 (9th Cir. 1980), the Board considered the issue of whether a union was entitled to receive from a multiemployer bargaining association a list of "open shop" members. Prior to the information request, the union therein had become aware of the employer association's activities in encouraging and aiding the expansion of open shop and "double breasted" ventures by its employer-members and prospective members. The Board observed that, with respect to a "double breasted" operation, i.e., a contractor who operates a union company and a nonunion company may, depending upon the factual configuration, effectuate a single appropriate bargaining unit, or separate units. The Board noted that, where a single unit has been effectuated, the collective-bargaining unit may be held to cover the nonunion employees as well, or the employer may be obliged to bargain on behalf of both enterprises with the collective-bargaining agent of the unionized entity.[2] Accordingly, the Board concluded that the Union's principal purpose in seeking the data was to "facilitate inquiry" into whether or not some of the employer association's open-shop members were bound by the collective-bargaining agreements and included in the represented units. The Board stated:

> They [unions] are entitled to the requested information under the "discovery-type" standard enumerated in *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. at 437, to judge for themselves whether to press their claims in the contractual grievance procedure, or before the Board or courts, or through remedial provisions in the contracts under negotiation. *The Torrington Company* v. *N.L.R.B.*, 545 F.2d 840 (2d Cir. 1976). It is certainly well within the statutory responsibilities of the Unions to scrutinize closely all facets relating to the diversion or preservation of bargaining unit work and, therefore, they are fully warranted in any reasonable probing of data concerning the exclusion of the employees of certain AGC members from the bargaining units. [242 NLRB at 894, citing *N.L.R.B.* v. *Rockwell-Standard Corporation, Transmission and Axle Division, Forge Division*, 410 F.2d 953, 957 (6th Cir. 1969); *Curtiss-Wright Corporation* v. *N.L.R.B.*, 347 F.2d 61 (3d Cir. 1965).][3]

The Board also held that, even if the information was also sought by the Union for organizing purposes, it was nonetheless entitled to the information sought inasmuch as a request for information made for a proper and legitimate purpose is not vitiated by the coexistence of other purposes, or that other uses can be made of such information.[4]

In *Doubarn Sheet Metal, Inc.*, 243 NLRB 821 (1979), the Board considered issues similar, if not identical, to those raised in this case. Therein the labor organization had received "information" that a certain enterprise was performing with nonunit employees work which was of a type normally performed, and which previously had been performed by the employer with unit employees. The union thereafter by letter requested of the employer answers to seven questions concerning the business relationship of the employer with the other enterprise. Of those questions 6 are virtually the same as 6 of the 13 questions posed by the Union to the Respondents herein. The employer there, as in this case, contended that the information requested was irrelevant. The Board found that the data sought provided information as to whether a single-employer situation existed or whether the employer had assigned or contracted work to the other enterprise and therefore served the purpose of assisting the union by supporting its contention that the employer as a single employer with the other company was not meeting contractual obligations, e.g., wage scale and union security, or as a separate employer had violated contractual provisions concerning subcontracting or the industry protection clause of the collective-bargaining agreement. The Board held that the union had demonstrated the "reasonable and probable relevance" of such information in regard to its contentions of contract violations, and rejected the employer's argument that the union was obliged to demonstrate actual instances of contractual violations as a condition precedent to the employer's obligation to provide the information. The Board also rejected the argument that the union's contentions as to contract violations constituted "mere speculation or suspicion." The Board noted that the *bona fides* of the union's receipt of "information" was unchallenged.[5]

The Board's Decision in the *Doubarn* and *AGC of California* cases are dispositive of the issues in this case. The Union herein obtained "information" to the effect that the Respondents were forming double-breasted operations. It is not necessary that this "information" be shown to be accurate, nonhearsay, or otherwise admissible in a court of law, or even ultimately reliable. However, coming from several sources, including an employer party to the contract and at that time a member of the AGC, I conclude that the information was such as to warrant the inference that the Union, in consequence, entertained *bona fide* questions concerning the existence and nature of related operations of the Respondents. I conclude that the answers to these questions necessitated information that was of reasonable or probable relevance to the Union's effective performance as administrator and negotiator of the collective-bargaining agreement. Furthermore, as the Board observed, in the *AGC of California* case, the data which was sought, was sought for the primary purpose of ascertaining whether or not other specifically identified operations were so related to the Respondents' operations by a variety of factors such as to encompass the other employees within the unit. If, in fact, those employees were within the same unit, information as to them would be presumptively valid. Accordingly, I conclude that information necessary to resolve a bona fide question as to whether the collective-bargaining unit has expanded is presumptively relevant.

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[2] *Id.* at 892, fn. 5, citing therein: *Don Burgess Construction Corporation*, 227 NLRB 765 (1977); *R.L. Sweet Lumber Company*, 207 NLRB 529 (1973), enfd. 515 F.2d 785 (10th Cir. 1979), cert. denied 423 U.S. 986.

[3] The Board noted, however, that assuming *arguendo* that the information sought was not otherwise "presumptively relevant" under the discovery standard of the *Acme Industrial Co.* case, the relevance was established on the record before it. *Ibid.*

[4] *Ibid*, citing, *Utica Observer-Dispatch, Inc.* v. *N.L.R.B.*, 229 F.2d 575 (2d Cir. 1956).

[5] The parties therein had stipulated that the union had "received information" as set forth above. The stipulation did not specify the precise nature of that information, and the Board appears not to have considered the nature or source of the information.

The Respondents' arguments that the Union's sole purpose in seeking the information was for organizational purposes are unconvincing. The Union may very well have desired to organize these other operations, but such organizing effort would be unnecessary if the Union could ascertain that these other operations constituted mere extensions of the collective-bargaining units which it represents.

Furthermore, there is no basis on which to infer that the Union already possessed conclusive information that these other operations constituted separate and distinct employing entities with separate bargaining units, as suggested by the Respondents. The answer to the Respondents' questions as to why the Union did not press for the so-called subsidiary clause in negotiations, and why it did not adduce evidence herein that it represented employees in the other companies, is self-evident; i.e., it did not have sufficient information to support its position, *ergo* its request for same. The Respondents ask, if the Union needed the information to bargain effectively, why did it not insist on the requested information in the 1980 negotiations? The answer is that the Union had already made a formal written request and had filed an unfair labor practice charge upon the Respondents' refusal to supply the information. That the Union proceeded with negotiations without the information does not indicate that the information was irrelevant to its secondary purpose nor that it would not have assisted the Union in bargaining. The Union never contended that the information was essential for bargaining nor that it was the *sine qua non* for bargaining, but only claimed that it would have assisted it in bargaining. The Respondents' contention that the requested information was too incomplete to assist the Union in bargaining again does not render it unrelated to that purpose. Perhaps the Union could have asked for more complete information, but what it did ask for was not unrelated to the secondary purposes as stated by Union Agent Laborde. In any event the information was clearly related to the primary purpose stated by the Union.

The Respondents argue that the stated primary purpose of the requested data, i.e., the ascertainment of whether the Respondents were acting as a single integrated employer with other companies, must be rejected as not being the true purpose. The Respondents claim that the Acting Regional Director had made a finding in a representation case that Perrilliet-Rickey and Claiborne were separate employer and therefore the Union was already aware of that status when it requested the same information from Perrilliet-Rickey. However, Perrilliet-Rickey is not a respondent herein. In any event, Laborde's credible testimony reveals that his conversation with Lemoine occurred after the Acting Regional Director's decision and thus he did not have sufficient information to sustain a contrary position in the representation case.

Respondent suggests that the Union must have had sufficient information regarding Pratt Farnsworth in that the Union had filed a lawsuit in which it contended that a single integrated enterprise existed. However, the nature of the law suit, the issues involved, and the decision therein are unknown. Whatever information the Union may have had regarding Pratt Farnsworth for purposes of that lawsuit, it is not shown that such information was identical to that requested in this proceeding. With respect to the Respondents' suggestions that the Union could have proceeded with a unit clarification petition with the Board, or could have filed a grievance, such action would have been fruitless without information to sustain such action. As the Board has noted, a union is entitled to seek information under discovery-type standards by which it can judge for itself whether to press its claim before the Board, the courts, or in a grievance procedure.

Finally, contrary to the Respondents, I conclude that all the questions posed by the Union to the Respondents are manifestly related to the primary purposes for which the information was sought, in view of the totality of factors the Board considers in deciding whether or not an "arm's length relationship" exists between unintegrated companies. *Don Burgess Construction Co., supra*; see also *Erlichs' Inc.*, 231 NLRB 1237, 1242–44 (1977); *Great Chinese American Sewing Co.*, 227 NLRB 1670, 1678 (1977); *Altemose Construction Company*, 210 NLRB 138 (1974).

Accordingly, I conclude that the Union by its letters of January 18 and February 12, 1980, addressed to the Respondents requested information that was relevant and necessary to the performance of its obligations as bargaining agent for the Respondents' employees; i.e., the administration and negotiation of collective-bargaining agreements with the Respondents. I therefore find that the Respondents, by failing and refusing to provide the information requested by the Union, violated and is violating Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondents are, individually and collectively, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to provide the Union with the information it requested in its letters to the Respondents of January 18 and February 12, 1980, the Respondents have each engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that by the aforementioned conduct the Respondents have violated Section 8(a)(5) and (1) of the Act, I recommend that they be ordered to cease and desist from engaging in such conduct in the future and take certain affirmative action designed to effectuate the policies of the Act.

Accordingly, I recommend that the Respondents be ordered to furnish the Union with the requested information found above to be relevant and necessary to contract administration and contract negotiation as set forth in the Union's letters to the Respondents of January 18 and February 12, 1980.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondents, Leonard B. Hebert Jr. & Co., Inc.; Landis Construction Company, Inc.; Pratt Farnsworth, Inc.; Boh Bros. Construction Co., Inc.; American Gulf Enterprises, Inc.; Gutler-Herbert & Co., Inc.; Pittman Construction Company, Inc.; Bartley, Incorporated; Binnings Construction Co., Inc.; Gervais F. Favrot Company, Inc., New Orleans, Louisiana, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Carpenters District Council of New Orleans & Vicinity and Local Union 1846, by refusing to furnish it with the information requested by it in its letters to the Respondents of January 18 and February 12, 1980.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the abovenamed Union by furnishing it with the information requested by its letters of January 18 and February 12, 1980.

(b) Post at their places of business in New Orleans, Louisiana, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by the Respondents' representative, shall be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

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[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Idaho Falls Consolidated Hospital, Inc. *and* **Joint Council of Teamsters No. 2 and its affiliated Local 983, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent.** Cases 19-CA-11691 and 19-RC-9356

January 4, 1982

ORDER DENYING MOTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 28, 1981, the National Labor Relations Board issued a Decision, Order, and Direction of Second Election[1] in the above-entitled proceeding finding that Respondent violated Section 8(a)(1) of the Act by soliciting grievances from an employee and implying that such grievances would be remedied; by threatening employees with discharge for engaging in lawful union activity; by threatening employees with hospital closure in the event the employees select a union as their collective-bargaining agent; and by soliciting employees to form an independent, internal union. In light of Respondent's unfair labor practices, the Board further ordered that the election in Case 19-RC-9356 be set aside and directed the Regional Director for Region 19 to conduct a new election.

Thereafter, on September 8, 1981, Respondent filed a Motion for Reconsideration, and on September 25, 1981, Respondent submitted a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In its motion, Respondent argues that the Board erred in finding that Dr. David Shrader and Dr. Thomas Richtsmeier are managerial employees. Respondent also contends that the Board erred in concluding that the conversation between Acting Director of Nursing Garnet Brown and employee Betty Anderson constituted an unlawful solicitation of grievances carrying an implied promise to remedy the grievances.

It is hereby ordered that the Respondent's Motion for Reconsideration be, and it hereby is, denied as lacking in merit and as raising nothing not previously considered by the Board.

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[1] 257 NLRB 1045.

259 NLRB No. 114

Debolt Transfer Company *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters' Steel Haulers Local Union No. 800. Case 6-CA-13461

January 4, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 26, 1981, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

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[1] In dismissing the complaint, the Administrative Law Judge made an alternative finding that Flynn, assistant to the director of the Eastern Conference of Teamsters, waived any objection to the cancellation of the leases at the January 25, 1980, bargaining session. In adopting his finding, we do not rely on or find it necessary to reach his alternative finding.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: This matter was heard before me in Pittsburgh, Pennsylvania, on February 9, 1981, upon a complaint and notice of hearing dated July 17, 1980, and Respondent's duly filed answer.[1] The complaint alleges a violation of Section 8(a)(3), (5), and (1) of the Act, by virtue of Respondent DeBolt Transfer Company unlawfully bypassing the Union and dealing directly with unit employees; by unilaterally implementing changes in terms and conditions of employment without bargaining with or receiving the consent of the Union; and by unlawfully terminating the employment of six employees, in violation of Section 8(a)(3) of the Act. Respondent admits various allegations of the complaint but denies any violation of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.*, herein called the Act.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, to introduce and meet material evidence, to call and examine witnesses, and to present oral argument. At the conclusion of receipt of the evidence, the parties waived oral argument. Respondent and the General Counsel filed post-hearing briefs. Upon consideration of the entire record, including the briefs, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The complaint alleges, Respondent admits, and I find that at all material times, Respondent, a Pennsylvania corporation with terminal facilities located in Homestead and Ambridge, Pennsylvania, is a common carrier engaged in intrastate and interstate transportation of freight and steel commodities. In the 12-month period ending June 30, 1980, Respondent, in its business operations, derived gross revenues in excess of $50,000 for the transportation of freight from the Commonwealth of Pennsylvania directly to points outside that State. Respondent admits that, at all material times, it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters' Steel Haulers Local Union No. 800, is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The parties agree that for purposes of this proceeding, Respondent maintains two trucking terminals: Homestead and Ambridge, Pennsylvania. At both locations, Respondent's employees include not only drivers who operate Respondent's own tractors and trailers but also employees known as "owner-operators" who, while employees of Respondent, drive tractors and trailers which they lease to Respondent. Drivers, other than the owner-operators, operate, but do not own, equipment and do not lease the equipment to Respondent.

Aside from other company drivers at both of its locations, at all material times, Respondent employed four owner-operators at the Homestead terminal; two owner-operators at the Ambridge terminal. The owner-operators at both of the terminals are represented by Local 800 of the Teamsters; the other drivers at both terminals

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[1] The charge in this case was filed and served by the Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters' Steel Haulers Local Union No. 800, on May 15, 1980.

259 NLRB No. 116

are represented by other Teamsters locals: Teamsters Local 249, Homestead, and Teamsters Local 261, Ambridge.

Local 800, founded in the early 1970's, represents employees who are owner-operators of steel-hauling tractors and/or trailers for steel-hauling employers. At the Homestead terminal, Respondent maintained the practice of leasing tractors and trailers from owner-operators for a period of more than 5 years; at the Ambridge terminal for a period of 6 months, both periods occurring before, and ending with Local 800's strike against, *inter alia*, DeBolt in the period August 1979 through January 25, 1980. The ordinary leasing practice both at Ambridge and Homestead was for Respondent to lease from a single owner-operator both his tractor and trailer. Indeed, it was rare that Respondent leased only a trailer or a tractor.

Along with other employers in the eastern United States engaged in the iron and steel trucking business, Respondent, in the period April 1, 1976, through March 31, 1979, was a party to the National Master Freight Agreement (herein called NMFA) with the Eastern Conference of the Teamsters Union and the several local unions representing its employees. Although the record is not clear as to when Respondent (as an independent employer rather than as a member of any multiemployer group) executed this expired agreement (G.C. Exh. 4), there is no dispute that it was bound by that agreement. The record shows that there was no successor agreement executed upon the termination of this 1976-79 NMFA and this resulted in the above strike of August 1979. Thereafter, the employers in the industry, including Respondent, about January 1980, executed a further NMFA effective for the period April 1, 1979, through March 31, 1982. (G.C. Exh. 3; herein sometimes known in the record as "the Red Book.")[2]

The parties agree that the current NMFA provides, in detail, for the terms and conditions of employment of owner-operators including the applicability of grievance procedures (art. 8; art. 44-45) and the compensation of the owner-operators (arts. 22, 55, and 61).

It should be noted, in particular, that art. 55, section 18 (G.C. Exh. 3, the current NMFA) dealing with owner-operators, states, *inter alia*, that the employer is prohibited from putting into operation any "scheme" to defeat the terms of the agreement "wherein the [contract] provisions as to compensation for services on and for use of equipment owned by owner-operator shall be lessened, nor shall any owner-operators' lease be cancelled for the purpose of depriving employees of employment and any such complaint that should arise pertaining to such cancellation . . . shall be subject to Article 44 . . . ." Section 44 provides, *inter alia*, for the establishment of an employer-local union grievance committee which hears all grievances of owner-operators except (as provided in sec. 61) those relating to the *rates* of leases and compensation of the owner-operators under article 61. To review and adjust employer complaints on the wage *rates* and practices, because of competitive problems relating to owner-operators, a "Competitive Review Board" is established for that purpose under article 61, section 7.

At the hearing, Respondent amended its answer to admit that (1) on or about January 25, 1980, Respondent and the Union entered into the NMFA (G.C. Exh. 3) effective for the period April 1, 1979, through March 31, 1982; (2) the employees covered in the multiemployer bargaining unit set forth in articles 2 and 3 of the NMFA, including employees of Respondent, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act; (3) Local 800 and affiliated local unions of the International Brotherhood of Teamsters have been the designated as exclusive collective-bargaining representative of the employees in the multiemployer unit, and have been recognized as such representative by Respondent for its employees pursuant to successive collective-bargaining agreements; and (4) at all material times, the Union by virtue of Section 9(a) of the Act has been and is the exclusive representative of the employees in the multiemployer unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

As above noted, a strike among Respondent's and the industry employees started about August 22, 1979, after the expiration of the NMFA, March 31, 1979, and ended on or about January 20, 1980.

B. *Contract Execution of January 25, 1980*

On January 25, 1980, Respondent, as an individual employer, met with the Union at a motel in Greentree, Pennsylvania, for the purpose of negotiating and executing a successor collective-bargaining agreement for that which had expired on March 31, 1979. Present were Richard Wallace (General Counsel's sole witness; no other witness was called in support of the complaint) a business representative of Local 800 for 3 years and responsible for representation of the owner-operators at Respondent's two terminals; Robert Flynn, assistant to the director of the Eastern Conference of the International Brotherhood of Teamsters; Joseph Mazza, Steel Division Teamsters representative; Jerry Shulteis, an assistant to Flynn, present to take notes at the collective-bargaining session;[3] Ray Slogan and Bill Barber, steward and business representative, respectively, of Teamsters Local 249; and, for Respondent, John DeBolt and Stanley Wilmot, president and general manager, respectively, and Thomas MacMullan, attorney for Respondent.

It is undisputed that Respondent was meeting financial hardship in the operation of its business. At this meeting, DeBolt and attorney McMullan, demanded any and all forms of economic relief which were enjoyed by any other employer subject to the NMFA. DeBolt credibly testified that he told Flynn that he could not sign the "Red Book" because to do so would be to commit economic suicide; that it was futile to sign it because Respondent could not live under its terms. Wallace testified only that he could not recall DeBolt saying this. I credit DeBolt. Wallace was sitting 12 feet away from DeBolt and Flynn who faced each other across the table. Wallace recalled that DeBolt and McMullan mentioned that in respect to another employer, Spector Industries, they were entitled to cancel the lease arrangements with their owner-operators, and Respondent wanted that right; that Flynn told them that if Respondent wanted that relief it must abide by article 61, section 7, which would place the matter before the Competitive Review Board; and that Flynn said that Respondent could not get relief on an overall basis but that each of his claims would have to be reviewed. MacMullan insisted that he wanted the relief accorded to all carriers but Flynn insisted that he must use contract procedures and get relief from the Eastern Conference. In particular, Wallace recalls that Flynn made the same statement with regard to Respondent's demand for the right of trailer leasing cancellations.

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[2] I have maintained the identification of documents made at the hearing: thus the "Red Book," which is the current NMFA which binds Respondent. (G.C. Exh. 3.)

[3] Neither Shulteis nor the presumptively corroborative notes were produced, nor were there any other Teamsters witnesses to this bargaining session whose testimony might be deemed favorable to General Counsel's case. Cf. *District 65, Distributive Workers of America (Hartz Mountain Corporation)*, 593 F.2d 1155, fn. 21 (D.C. Cir. 1978).

Wallace testified that the Union told Respondent with regard to the cancellation of the trailer lease in the Spector case, that such a cancellation was an individualized case, and that Flynn said that, as in the Spector case, Respondent must utilize contract procedures to get relief from its trailer leases. In particular, Wallace denied that the Spector case was thrown in by the Union as an inducement for the Company to execute the contract.

There is no dispute that Respondent demanded, in the alternative, that it receive the benefit of the "Lakeshore Rider,"[4] and that the Union refused Respondent's request.

DeBolt's subsequent testimony contradicts Wallace's. Debolt testified that he then regarded the parties at impasse after the Lakeshore Rider was refused but told Flynn that, to sign the contract, he needed economic relief. According to DeBolt, Flynn then told him that the contract itself permits relief; that Respondent had the right under the existing contract (G.C. Exh. 3) to cancel the truck (trailer) leases and that the owner-operators would have to "pull company trailers."[5] Flynn, according to DeBolt, then asked whether this would help him out. DeBolt said that he asked Flynn whether Flynn was "sure" that Respondent had the right to cancel the trailer leases. Flynn said that they did; that it had been done successfully with another company and had been upheld by the Central States Teamsters Conference. DeBolt said that he then asked Flynn whether that would be effective with regard to him in their eastern states conference area. Flynn, according to DeBolt, said that since it was okay in the central states, there would be no doubt that it would be okay in the eastern conference area. With that assurance, DeBolt testified that he then signed the contract on behalf of Respondent and that was the only reason he signed.

While DeBolt agrees that there was a discussion between him and Flynn with regard to the presentation of matters before the competitive review board, DeBolt said that this had to do only with regard to Respondent's request for other economic relief such as reduction in the pension and health and welfare contributions. With regard to these other requests for relief, Flynn, according to DeBolt, said that there would be no general right to a reduction in these *rates* but that these requests for economic relief, i.e., changes in contract rates, would have to be submitted on an individual basis before the competitive review board.

After he signed the "Red Book," DeBolt testified that he was still "wary" of Flynn's assurance that Respondent had the right to cancel the trailer leases. He said that when this January 25, 1980, meeting ended, he asked Flynn to put in writing what the Union had agreed to at the meeting with regard to Respondent's right to cancel the trailer leases. Flynn agreed to do so as soon as he got back to Washington, D.C.[6] Respondent canceled the leases on the next working day, Monday, January 28.

On Monday, January 28, 1980, Respondent, by its general manager, Stanley Wilmot, sent certified mail letters (G.C. Exhs. 5(a)-5(f)) to each of the six owner-operators to the following effect:

> You are hereby notified that any and all lease agreement(s) between yourself and DeBolt Transfer, Inc., will be cancelled and become null and void as at 12:00 p.m. (midnight) Sunday, February 3, 1980, in accordance with the five (5) day notification provision contained in paragraph (1) of said lease(s).
>
> Please arrange to sign and obtain a new lease from this office which will become effective 12:01 a.m., Monday, February 4, 1980 for future use.
>
> Very truly yours,
>
> DeBolt Transfer, Inc.[7]

By letter (Resp. Exh. 1) dated January 29, 1980, Flynn wrote to Respondent as follows:

> Please be advised that equipment leases may be cancelled in accordance with the collective-bargaining agreement. As an example, you have the right to add Company equipment provided that there is

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[4] The ordinary method of compensation under Respondent's leases of owner-operator trailers and tractors was to pay 75 percent of the gross revenues as compensation for such leases, retaining 25 percent for itself out of which it paid the drivers' health and welfare, pension, and other fringe benefits. It is undisputed that such a ratio sometimes resulted in Respondent losing money because the retained 25 percent was exhausted by fringe benefits and other direct costs. The "Lakeshore Rider" while permitting Lakeshore to retain only 20 percent of the gross revenues, granting the driver 80 percent of the gross revenues, but required the employee to pay his own fringe benefits out of his 80-percent compensation.

[5] Again, the only limitation on cancellation is in art. 55, sec. 18: to prevent cancellation where the purpose is to deprive the owner-operator of employment. Since complaints regarding the employer's cancellation are heard, under that section, pursuant to the grievance procedure, the terms themselves assume a right of cancellation in the employer subject only to subsequent grievance. Nothing therein suggests an obligation to bargain before canceling.

[6] January 25, 1980, the day of execution of the present NMFA, fell on a Friday.

[7] These letters were sent to owner-operators William Leach, Ralph Johnson, Carlo DeSimone, Elmer Bates, Thomas Bates, Eugene McLamore. The complaint alleges that these six owner-operators (as a result of Respondent's unilateral action in canceling their leases) were thereafter unlawfully not scheduled for work upon their failure to execute new leases, in violation of Sec. 8(a)(3) of the Act.

no subterfuge to avoid the labor contract or to discriminate against the employees.

Article 22, Sections 5 and 6 both refer to the minimum 30-day cancellation clause for lease equipment. Article 55, Sections 5 and 6 also make reference to the minimum 30-day lease. Further, Section 15 provides for negotiation and arbitration of any disputes in this regard. Of course, Sections 16 through 20 of Article 55 are aimed at preventing subterfuges and violations of the agreement. Your attention is also directed to Article 43 (Seniority).

I trust that the above explanation in reference to the contract is satisfactory to you.

Sincerely,
s/s Robert T. Flynn
Robert T. Flynn

Lastly, DeBolt testified, with respect to his execution of the collective-bargaining agreement on January 25, that at the time of actually signing it, he told Flynn that, "I am only signing this 'Red Book' on your assurance that I have the right to cancel the truck leases." DeBolt testified that Flynn answered, "You have the right." DeBolt said that nothing was said regarding submission of these cancellations to the competitive review board or any other body. Thereafter, DeBolt said that Respondent was going to cancel the truck leases at its first opportunity and that someone the Respondent said, "Do what you want." Thereafter, after execution of the contract, DeBolt said that he spoke to Wallace and told him, "Your guys are not going to like this at all." DeBolt said that Wallace answered, "That's tough." DeBolt said that he rejoined, "If it is okay with you, it's okay with me." This testimony was received without objection and Wallace was not recalled to deny this testimony.

Wallace testified that although trailer leasing cancellation was mentioned, Flynn repeatedly stated that Respondent would have to go through contract procedures in order to gain such relief. He testified that at least two employers, J. F. Scott and CRST Company, had received relief although the relief did not relate to the leasing of equipment *but rather to rates of pay, pension and health and welfare contributions.*[8] One of them, CRST Company, was not a signer of the "Red Book"; with regard to the other, J. F. Scott, it was a "Red Book" signer, but the economic relief did not relate to the leasing of the equipment. Wallace, as above noted, did not testify with regard to DeBolt's testimony wherein, after the contract was signed, DeBolt told him that Respondent's employees would not like the lease cancellations and Wallace allegedly replied: "That's tough."

Wallace further testified that after the meeting on January 25, within 3 to 4 days, he received telephone calls from owner-operators inquiring why the trailer leases had been canceled. Wallace testified that he told them that he did not know but would find out. In subsequent telephone calls to Respondent from Wallace, he finally reached General Manager Wilmot who told him that Respondent felt that by virtue of the negotiations, Respondent was correct in canceling the truck leases. Without contradiction, Wallace testified that he told Wilmot that it was wrong to do so; was a definite breach of contract; that in order to cancel the leases Respondent had to go through the contract procedures to get relief; and that in two other trucking operations in which Respondent had an interest, Respondent had not terminated the trailer leases; and that Wallace believed that in doing so with regard to the two terminals in which the Union represented the owner-operators, Respondent was attempting to eliminate owner-operators at these two terminals and was using the trailer lease cancellations as a subterfuge to do so in violation of the contract.[9]

1. The two meetings between Wallace and Wilmot

Sometime in or about mid-February 1980, Wilmot and Wallace met at a restaurant in Pittsburgh wherein Wilmot repeated the request for economic relief and stated that Respondent wanted the Lakeshore Rider if the matter was to get off dead center concerning the cancellation of the leases. Wallace told him that the Lakeshore Rider provision was going to be withdrawn and could not be granted to Respondent. Wilmot placed this meeting as early March 1980. For purposes of this proceeding, the date placed by Wallace (he was unsure of the date) as some 2 weeks after receiving the first phone call would place the meeting sometime in mid or late February. The next meeting was held on April 1, 1980, notwithstanding Wallace's contrary recollection that it was held 2 weeks before April 1. It was held at the Howard Johnson's restaurant in Monroeville, Pennsylvania.

In any event, it would appear probable that this second meeting between Wilmot and Wallace (at which Wallace was accompanied by three owner-operator employees of Respondent) occurred after a letter (G.C. Exh. 6) from Flynn to DeBolt, dated March 7, 1980:

> I have been advised by the three Local Unions that you are blatantly violating the collective-bargaining agreement. [Your] conduct is not only a violation of the contract but is an unfair labor practice. Under the circumstances, the Local Unions reserve the right to take appropriate legal and economic action in protest of your unfair labor practices.
>
> We strongly object to your abuse of the rights of our members by taking unilateral action without regard to their rights or the collective-bargaining agreement. As far as we are concerned, you and your attorney have destroyed any credibility which you may have had and you may be assured that from this time on we will never again deal with you except at arm's length. You have abused the em-

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[8] This corroborates DeBolt's testimony concerning the matters on which Flynn insisted the competitive review board procedures were required, i.e., changes in contract *rates*, whether wages or fringe benefits.

[9] The General Counsel conceded that the operations at other trucking terminals in which Respondent had an interest where those operations included the use of owner-operators and the leasing of tractors and trailers had no bearing on the instant case. Further, Respondent's lease cancellations in this case related only to trailers. It did not eliminate owner-operators and sought to maintain the truck leases.

ployees and the Local Unions and we will not forget you.

Very truly yours,

s/s Robert T. Flynn
Robert T. Flynn

Copies of this letter to Respondent were sent to Locals 249, 261, and 800, as well as to Thomas D. MacMullan, attorney for Respondent. The letter, itself, fails to deny the substance of the alleged agreement regarding lease cancellations at the January 25, 1980, meeting. At the April 1, 1980, meeting, Wallace accused Respondent of canceling the leases to the owner-operators (in view of not canceling owner-operators leases at other terminals in which Respondent had an interest) to eliminate owner-operators at two of Respondent's terminals and to break the Union at DeBolt Transfer Company. Wilmot denied this. Elmer Bates and the other owner-operators said that they could not afford to pull company trailers, that they were not going to pull company trailers and questioned why other owner-operators at these other "divisions" at which Respondent had an interest were allowed to do it and they were not. When the owner-operators asked whether something could be worked out other than the cancellation of their trailer leases, Wilmot said that there was no alternative that he could think of. Elmer Bates then asked whether a Lakeshore Rider arrangement could be provided and asked Wilmot why that could not solve the problem. Wilmot replied that it was up to the Union and not to Respondent. Wallace then said that he was taking the matter to the National Labor Relations Board.

It is undisputed that DeBolt never filed a request for relief under contract procedures. It was also conceded that other independent carriers (not members of any multiemployer bargaining group) like DeBolt had filed requests for relief and some of them have been granted. Respondent's witnesses testified that, pursuant to the January 25 meeting, they did not file for relief under the contract procedures because they believed that they had an agreement with the Union making such request for relief unnecessary in terms of their alleged right to cancel the trailer leases unilaterally.

On the other hand, Wallace testified that the *Union* did not file a grievance under the contract because of Respondent's alleged breach of contract (in the unilateral act of canceling the leases) because the Union already had three to four grievances on file against Respondent; and because the Union considered the filing of grievances a waste of time since Respondent has refused to abide by agreements settling the grievances. Wilmot, on the contrary, testified that on January 29, 1980, the parties settled five to six grievances which were all the outstanding grievances at that time; that there had been no complaints from the Union regarding the settlement of these grievances; and that there had been no allegation that Respondent has been dragging its feet in executing the agreed-upon solutions to the grievances. Indeed, according to Wilmot, there had been no union request for further action under contract procedures notwithstanding that the Union has been conducting an audit of Respondent's overall compliance with contributions to the various fringe benefit funds. Wilmot testified without contradiction, however, that this audit was not the result of any filed grievance by Local 800. Respondent notes that no grievance had been filed over lease cancellation by any of the owner-operators.

The leases in question herein, according to the agreement of the parties, relate to tractors and trailers separately. As above noted, the practice is for Respondent to lease both a tractor and a trailer from the owner-operator. It is agreed that the lease provides for a lease term of 30 days, cancelable by either party, however, on a 5-day written notice.

The parties agreed that in practice, from time to time, owner-operators have canceled tractor and/or trailer leases on a 5-day notice for economic reasons, equipment failures and other reasons not particularly specified in the record; and that Respondent's January 28, 1980, letters of lease cancellation, although phrased in terms of canceling "all lease agreements" were directed solely at the cancellation of the trailer leases. Indeed, the parties agree that it was the Respondent's intent to have the owner-operators use their own leased tractors to haul trailers which were owned by Respondent.[10] The parties further agree that the cancellations themselves were in accordance with the terms of the leases and that motivation for the cancellation of the leases was solely economic and was due to the fact that Respondent could not afford the terms imposed by the collective-bargaining agreement (G.C. Exh. 3) regarding the cost of leasing trailers; and that it was cheaper for Respondent to operate by having the owner-operators haul company trailers rather than leased trailers.

As a result of the above cancellations, none of the six owner-operators at Respondent's two terminals has executed or agreed to execute a new lease for his *tractor* and none of them has therefore been scheduled to haul merchandise for Respondent since the cancellation. The result is that none of them have therefore worked for Respondent since the lease cancellations.

2. Contention of the parties

The General Counsel argues that under *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al.* v. *Oliver, et al.*, 358 U.S. 283 (1959), the wage rates involved in owner-operator leases are a mandatory subject of bargaining within the meaning of Sections 8(d) and 8(a)(5) of the Act; that there was an existing collective-bargaining agreement executed by Respondent and Local 800 (G.C. Exh. 3); that while individual cancellation of a lease may be a mere contract violation and not a violation of Section 8(a)(5), where, as here, there has been a change in the methods of payment (a mandatory subject) on a unitwide basis, a "blanket unilateral cancellation of trailer leases," there is an 8(a)(5) and 8(d) violation. Further, the General Counsel notes that Respondent took this unilateral action notwithstanding the existence of a contract mechanism (the General Counsel cites art. 2, sec. 5 or art. 61, sec. 7) to place its desired economic relief before the competitive review board by way of a grievance system.

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[10] Thus, the leased tractors would thereafter haul Respondent's trailers, not leased trailers.

Respondent has three arguments: (1) A contract waiver derived from the fact that the lease agreement itself permits, and the parties had in practice applied, cancellation on a 5-day notice which Respondent in fact gave; and therefore, the parties, including the Union (through its owner-operators and the lease) have agreed under the terms of the contract and the lease, and by practice, to the very procedure which Respondent followed in canceling all the owner-operator leases; and there is no difference between canceling one lease and all the leases especially where, as here, the contract provides for (and specifically defines the limits of) lease cancellation by Respondent, and where there has been no proof of subterfuge, and indeed where there has been a stipulation that Respondent's motivation has been solely economic. (2) Moreover, by virtue of the January 25, 1980, meeting, even if the collective-bargaining agreement and the lease do not provide express written waivers, then, in any case, Respondent notified, bargained, and received express consent of the Union to waive any contrary right in the Union not to grant Respondent the right to unilaterally cancel the trailer leases. (3) In any event, Respondent's conduct does not amount to an unfair labor practice but merely a breach of contract for which the Union's relief should be solely in the Federal courts under Section 301 of the Act for breach of contract or for arbitration under the terms of the agreement within the *Collyer* deferral doctrine. See *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971).

3. Discussion and conclusions

The parties stipulated that Respondent's motivation in canceling the six leases was wholly economic.

I will assume, *arguendo*, that lease cancellation and lease rates, as part of, or impacting on, wages, *Teamsters* v. *Oliver*, 358 U.S. 283, are mandatory subjects of bargaining, *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation*, 356 U.S. 342, 349-350 (1958).[11]

There is nothing, however, in *Teamsters* v. *Oliver, supra, Wooster Division of Borg-Warner, supra*, or the General Counsel's citation of *Brown & Connolly, Inc.*, 237 NLRB 271, 279 (1978), which controls this case.

While it is true that the bargaining on January 25, 1980, related to Respondent's several requests for economic relief, and while it is also true that the Union may have refused any change in owner-operator lease or pay rates, including the Lakeshore Rider, except via a special showing of economic need made before the competitive review board (art. 61, sec. 7) to change the contract rates, there is nothing in the current collective-bargaining agreement, which, *inter alia*, provides for 30-day leases and their cancellation (G.C. Exh. 3) to prohibit Respondent from unilaterally terminating the leases.

The dispositive element in this case is that Respondent, after being refused any adjustment or rate reduction on leased equipment, unilaterally canceled the underlying leases. There is no General Counsel contention that Respondent failed to abide by the notice, or other mechanical requirements of lease cancellation. Rather, the General Counsel argues that the cancellation of the leases themselves, while not a change in pay rates, results in a severe impact on owner-operator "wages" and that cancellation requires good-faith bargaining and not unilateral change. I disagree.

The contract (art. 22, sec. 5; art. 55, sec. 6) provides for and recognizes the use and termination of leased equipment with a 30-day cancellation clause.[12] The basic contract limitation on the use of owner-operators is the prohibition (art. 22, sec. 18) against using any device or "scheme" to ". . . defeat the terms of the Agreement . . . nor shall any owner-operator lease be cancelled for the purpose of depriving employees of employment . . . ." The parties herein stipulated to the contrary: that cancellation of the leases was purely economically motivated. There was no argument or even assertion that Respondent's action here would deprive the owner-operators of employment. At most, the drivers would haul company trailers behind trucks which continued subject to their beneficial leases. In any event, Respondent's leases cancellation can hardly be called a "scheme." More important, the terms of article 55, section 18, as above noted, forbid that a "lease be cancelled for the purpose of depriving employees of employment . . . ." and directs complaints thereof to the agreement's grievance procedure (art. 44). It is thus plain from this language that, whatever the Employer's motive, the effect of the cancellation or the Union's redress, the Employer has the right of cancellation. The grievance procedure is here invoked after cancellation. Thus the employer does the canceling and there is *no bargaining* as a condition precedent to canceling.

I therefore hold that, regardless of any January 25, 1980, agreement at the bargaining table or Flynn's January 29, 1980, confirmatory letter to DeBolt, Respondent had the right, here, unilaterally, to cancel the trailer leases (keeping the truck leases); that Respondent did not in any way change or attempt to change the contract lease rates thereby;[13] that the terms of the lease and its cancellation, if impacting on wages or other terms and conditions of employment within Section 8(d) of the Act, were matters already agreed on by the parties; and that

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[11] In view of the allegation that Respondent's conduct, in failing to schedule for work the owner-operators whose lease were canceled, whatever Respondent's benign motivation, violated Sec. 8(a)(3) of the Act, I reject Respondent's argument that the matter be deferred to arbitration under the collective-bargaining agreement pursuant to *Collyer Insulated Wire, supra*. See *General American Transportation Corporation*, 228 NLRB 808 (1977).

[12] There is no contention that the automatic 30-day renewal clause in Respondent's lease (G.C. Exh. 2) cancelable on merely 5 days' notice was inconsistent with the collective-bargaining agreement. If so, Respondent's lease form was a breach of that agreement. In any event, the matter was neither alleged, litigated, or argued. My right to interpret the terms of the agreement is limited, of course, to the presence or absence of an unfair labor practice. *N.L.R.B.* v. *C & C Plywood Corporation*, 385 U.S. 421, 428 (1967).

[13] There is no dispute that the "Red Book," the collective-bargaining agreement, requires the employer to pay 75 percent of the gross freight invoice as owner-operator wages and, of the retained 25 percent, pay the driver's health, welfare, and pension benefits.

Respondent's January 28 cancellation of the six leases herein was in accord with the Red Book where, as here, there is no assertion of an attempt to change the lease *rates* (clearly a matter for the competitive review board), a discriminatory purpose in the cancellations or an attempt at some sort of subterfuge.

The General Counsel's principal argument seems to derive from dictum in *Brown & Connolly Inc., supra*, 237 NLRB 271, 279, wherein it was asserted that while a unilateral, individual change from contract requirements in an employer's sick leave obligation is a mere breach contract, a mass unitwide unilateral change in the sick leave obligation would violate Section 8(a)(5). In the present case, Respondent is not unilaterally changing a contract term or the terms (rates) of the leasing; it is merely canceling the lease because of economic reasons; a contingency expressly provided for in the contract. The General Counsel, again, does not urge that the lease was inconsistent with contract provisions or cancelled other than under its terms. In the *Brown & Connolly*, dictum, the contract terms under which sick leave could be taken were at issue; here, Respondent was unilaterally terminating an agreement sponsored by and consistent with the collective agreement, but not changing any contract term. The contract, of course, does not require notice or bargaining on lease cancellation; it merely provides a minimum cancellation period. The fact that such cancellation has an impact on the owner-operator's income may be true. But that was part of the existing bargain agreed to by the Union.

Nothing in *Local 24, Teamsters Union* v. *Oliver, supra*, 358 U.S. 283, is to the contrary. As above, assuming, *arguendo*, that that case implies that the instant lease is a mandatory subject of bargaining, *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation*, the matter has been thoroughly bargained about and the fruit of such bargaining is the actual lease (G.C. Exh. 2). Thus, the result of the actual bargain permits Respondent to act under the terms of the lease which, I have noted, is not alleged to be inconsistent with the underlying collective-bargaining agreement, either by lease terms or motivation in the cancellation.

If, as the General Counsel urges (Br. p. 6):

> . . . the cancellation of trailer leases becomes a mandatory subject of bargaining under *Oliver* because the lease cancellation necessarily affects the amount of compensation received by the owner-operators . . . .

That result was bargained out by the parties by virtue of the Union recognizing—indeed, providing, in the contract for—the termination of the lease. Moreover, the evidence, undenied, shows that the actual practice is for either party to cancel the 30-day lease on a 5-day notice. To imply a lease cancellation bargaining obligation on Respondent[14] would be to change the bargain struck by the parties.

In any event, while the credibility issue legally thus need not be reached, yet in view of the evidence that Wallace, 10 feet from DeBolt and Flynn, may not have heard their entire conversation; the Union's failure to submit other witnesses to the January 25 bargaining session to support Wallace's testimony, especially the absence of Flynn and his notetaker; Wallace's failure to be called in rebuttal to deny DeBolt's testimony regarding a conversation with Wallace himself (" . . . your guys are not going to like this at all . . ." to which Wallace allegedly responded: "That's tough"); the presence of Flynn's unexplained January 29, 1980, letter which is consistent with DeBolt's testimony (that Flynn gave him permission to cancel the leases), I would credit DeBolt and discredit Wallace's contrary testimony regarding what Flynn authorized to DeBolt at the January 25 bargaining session.[15] I conclude, therefore, that Flynn, in the alternative, waived any union objection to unilateral cancellation.

It is recommended, therefore, that the complaint allegations of 8(a)(5) violations be dismissed.[16] Similarly, the refusal of Respondent to schedule for work the six owner-operators who refused to haul Respondent's trailers derives from neither an unlawful cancellation of their trailer leases nor any other alleged or proven discriminatory motive. It is their own refusal to haul company trailers that causes their idleness. I further recommend that the allegations alleging Respondent's discriminatory failure under Section 8(a)(3) of the Act to schedule the owner-operators be dismissed.

CONCLUSIONS OF LAW

1. DeBolt Transfer Company, Respondent herein, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. A preponderance of the credible evidence fails to establish that Respondent has violated Section 8(a)(5) or (3) of the Act, as alleged.

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[14] Query: If such an obligation devolves on Respondent here, would its owner-operators, contrary to current practice and mutual understanding, be barred hereafter from unilaterally canceling their leases with Respondent, even under the terms thereof, if Respondent objects, only if the Union first bargains to impasse with Respondent and then submits to the competitive review board (which apparently deals only with hardship rates under art. 61) or, more appropriately, the grievance committee under art. 44, 45?

[15] Since Respondent's lease cancellation is not inconsistent with the collective-bargaining agreement, there is no question of prohibiting recourse to DeBolt's and Flynn's testimony under the parole evidence rule. Even if it were inconsistent, however, I observe that Flynn's January 29, 1980, letter, written *after* the execution of the January 25 collective-bargaining agreement removes the bargaining conversations from the operation of the rule; and cf. *Richmond Homes, Inc.*, 245 NLRB 1205 (1979).

[16] Again, if Respondent sought to change contract rates of leased equipment, then, as the General Counsel argues, Respondent must come before the competitive review board (art. 6, sec. 7) to plead special circumstances. Here, since I hold the lease cancellation has been bargained over, resulting in a contract-approved lease and cancellation, the fact that cancellation has an impact on and adversely affects owner-operator wages (G.C. Br., p. 6) is a risk bargained over and resolved by the owner-operators' collective-bargaining representative. The economic result, foreseen in the collective-bargaining agreement, including unilateral risks of termination, must be borne by the parties.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

It is recommended that the complaint be dismissed in its entirety.

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[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Deauville Hotel *and* **Flores Demetrio Gonzales.** Case 12-CA-7776

January 4, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 6, 1981, Administrative Law Judge Julius Cohn issued the attached Supplemental Decision in this proceeding.[1] Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended amendments to paragraph 2(a) of the Board's Order and to the notice to the Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts the recommendation set forth in the Administrative Law Judge's Supplemental Decision, amends its Order of June 15, 1981, substituting the attached notice for its original notice, and hereby orders that the Respondent, Deauville Hotel, Miami Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said Order, as amended.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten employees with discharge should they continue to complain among themselves about their working conditions.

WE WILL NOT discharge or otherwise discriminate against any employees because of that employee's protected activities or union activities.

WE WILL NOT fail to reinstate employees, who are so entitled, to a substantially equivalent position, and further discriminate against them with regard to wages, hours, and working conditions because of the protected activities in which they had engaged.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make whole Flores Demetrio Gonzalez for any losses he may have sustained by reason of the discrimination practiced against him, plus interest.

WE WILL offer full reinstatement to Flores Demetrio Gonzalez and make him whole for any losses he may have sustained by reason of the discrimination practiced against him, plus interest.

DEAUVILLE HOTEL

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: On January 29, 1981, I issued my Decision in this proceeding finding, *inter alia*, that Flores Demetrio Gonzalez had been unlawfully discharged in January 1977 and had been further unlawfully reinstated in May 1977 to a position different from that which he had formerly held.

In May 1978, Respondent again discharged Gonzalez for allegedly refusing to obey the orders of head houseman, Augusto Feo, and threatening to kill him. After hearing evidence on the issue raised by Respondent that Gonzalez was not entitled to reinstatement after May 1978 because he had been discharged for cause, I found that discharge to be presumptively valid since it had not been alleged as a violation herein nor had a new charge been filed. Therefore, backpay and reinstatement were cut off as of the date of May 1978 discharge.

On June 15, 1981, the Board issued its Decision and Order (256 NLRB 561) affirming both the unlawful discharge of Gonzalez in January 1977 and improper reinstatement in May 1977, but it did not agree with the disposition of the case with regard to Gonzalez' right to reinstatement and further backpay. Therefore, the Board, having noted that the matter had been fully litigated, remanded the proceeding to me "for the limited purpose of

259 NLRB No. 117

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[1] The Supplemental Decision was issued pursuant to the Board's Decision and Order and remand in this case, published at 256 NLRB 561 (1981).

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

making credibility findings with respect to the May 1978 incidents and recommendations as to whether, under all of the circumstances, the conduct engaged in by Gonzalez was such as to require the forfeiture of his right to reinstatement and backpay after May 1978."

Upon the entire record and from my observation of the witnesses, I make the following:

Additional Findings of Fact and Conclusions

At the hearing Stephan Delmont, operations manager of Respondent, testified that Augusto Feo was appointed as head houseman sometime after the discharge of Gonzalez on January 17, 1977, and prior to Gonzalez's reinstatement in May 1977. He further stated that Gonzalez was dicharged in May 1978 for threatening the life of his "supervisor," Augusto Feo.[1]

Gonzalez testified that, on the date of his discharge in May 1978, he was on the 15th floor fixing and cleaning a room. Feo came in and gave him orders, telling him what he had to do and how he was to do it. Gonzalez asked Feo, "To do me the favor and leave me alone because I was already a year doing the work and I knew what I was doing . . . ." Feo then went downstairs and was directed by the housekeeper to get a man from another floor and bring him up to the floor where Gonzalez was working. He then told Gonzalez, in effect, that the other man was cleaning the room that he, Gonzalez, was supposed to clean. At that moment Gonzalez threatened him. Feo said Gonzalez offended his mother, and then said to let him alone, and if he did not, he would throw him out the window. Feo then reported this to his superiors and, as a result, told Gonzalez when he was going home that he was suspended from the job. Upon being asked whether he recalled anything else that happened in the room, Feo said that, when he was talking to Gonzalez, the latter tried to take a chair and lift it in his hand. At that, Feo said he left the room.

In evaluating the testimony as to this incident, it must be borne in mind that I have already credited the testimony of Gonzalez as to the other matters involved herein. On the other hand, Delmont's testimony is not probative because concededly he was merely repeating what Feo allegedly told him as to a threat on his life. Feo himself testified mainly in response to leading questions concerning the principal matter at issue. And, noting that Respondent has the burden of establishing that Gonzalez engaged in conduct which would foreclose his right to reinstatement, I find that Respondent has not sustained it by virtue of the uncorroborated testimony of Feo. In any event I credit Gonzalez to the effect that he did not threaten the life of Feo.

Having found that Gonzalez did not threaten the life of Feo, the head houseman, there remains, at most, an alleged failure on the part of Gonzalez to respond to an instruction to clean some rooms other than those in which he was currently working. The Board has already found that Gonzalez was entitled to reinstatement to the job he held previous to his initial discharge in January 1977 with backpay. His failure to respond immediately to an instruction of the sort alleged does not appear serious enough to warrant the loss of his right to reinstatement, established by reason of Respondent's unfair labor practices. In arriving at this determination, I have considered that Respondent had reinstated him to a lesser job than that to which he was entitled and had indeed given it to Feo. In addition, Respondent exhibited a continuing animus toward Gonzalez evidenced by the finding in my Decision that, sometime after the improper reinstatement, Delmont informed him he had done him a favor by giving him a job and, if he continued his protests about working conditions to other employees, he would be discharged. Moreover, it may also be observed that, had Respondent reinstated Gonzalez to his former position as head houseman, to which he had been entitled, he would never have had the difficulties which led to his discharge in May 1978.[2] Finally, even assuming that Gonzalez had uttered the words attributed to him by Feo, the conduct would not call for discharge in view of the antagonistic environment and provocative position in which he was placed,[3] particularly since epithets and the like do not constitute real threats in the everyday parlance of employees.

In conclusion, based on my credibility resolution regarding the Feo incident and in view of all the circumstances, I find that Gonzalez should not have been deprived of his continuing right to reinstatement and backpay after May 1978. Accordingly, I recommend that paragraph 2(a) of my recommended Order adopted by the Board be amended to read as follows:[4]

"(a) Offer Flores Demetrio Gonzalez immediate and full reinstatement to the position he held prior to his discharge in January 1977 or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings in the manner set forth in the section of the Decision entitled 'The Remedy,' including the period after May 1978."

I further recommend that the last paragraph of the notice attached to the Board's Order be amended to read as follows:

"WE WILL offer full reinstatement to Flores Demetrio Gonzalez and make him whole for any losses he may have sustained by reason of the discrimination practiced against him, plus interest."

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[1] The same finding made in fn. 2 of my Decision with respect to the supervisory status of Gonzalez is repeated here. There is insufficient evidence in the record that Feo, as in the case of Gonzalez, was a supervisor within the meaning of the Act.

[2] See *Seaport Manor, Inc. and Martin Rosenberg, Baruch Mappa, and Emil Klein, a Partnership, d/b/a Seaport Manor Home for Adults*, 248 NLRB 886, 892 (1980).

[3] See *N.L.R.B. v. M & B Headwear Co., Inc.*, 349 F.2d 170, 174 (4th Cir. 1965).

[4] It is noted that the Board has ordered that the provisions of Sec. 102.46 of the Board's Rules are applicable to this Supplemental Decision.

Local Union No. 2362, Lumber, Production and Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO *and* Phost Construction, Inc. Case 19-CC-1285

January 4, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 27, 1981, Administrative Law Judge Burton Litvack issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified herein and to adopt his recommended Order.

We agree with the Administrative Law Judge that, at the time of the October 16 meeting between Michael Draper, representative of Respondent Carpenters, and Jerome Rubin, attorney for Alaska Lumber and Pulp Company (ALP), Rubin was not an agent of Phost Construction, Inc., the Charging Party. More importantly, we think that the same circumstances that indicate lack of agency status also demonstrate that Draper's threat to picket was aimed at ALP, not at Phost.

In addition to the persuasive evidence with regard to agency cited by the Administrative Law Judge, we rely on the following facts. At the July 21 meeting where Rubin presented a proposed contract between Respondent and Phost, he did so in the presence of a Phost officer. When Respondent presented its counterproposal to Rubin on August 21, it does not appear that any negotiations occurred; rather, Rubin simply agreed to transmit the proposal to Phost. After that, there were apparently no further negotiations between Respondent and Phost, through Rubin or otherwise. Rather, Phost entered into a collective-bargaining agreement with another union. Draper testified that, at the meeting of October 16, he "assumed" that Rubin represented Phost as well as ALP, but it does not appear that Draper said so at the meeting. Moreover, his assumption should have been dispelled when Rubin was unable to answer questions on Phost's behalf. By Rubin's own testimony and that of Kurt Sachnitz, an officer of ALP, Rubin said only that he had heard "rumors" that Phost had signed an agreement with the Paperworkers and, when Draper asked if they had agreed to $21 an hour, Rubin said, "Not to my knowledge."

Even if Draper thought that Rubin continued to represent Phost in certain matters, it does not follow that he intended to threaten Phost on October 16. Rubin's principal role was as attorney for ALP, and Draper had dealt with him in the past in that capacity. The main focus of the negotiations, and especially of the October 16 meeting, was the proposed contract between Respondent and ALP. Draper's threat to picket was calculated to apply economic pressure on ALP—the only party that could meet Draper's demand—and in these circumstances we conclude that Draper was communicating that threat to ALP through its representative, Rubin. We therefore conclude that Draper's threat did not have as an object that Phost cease doing business with ALP, and thus we find that the General Counsel has failed to show that Respondent violated Section 8(b)(4)(ii)(B) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

BURTON LITVAK, Administrative Law Judge: This case was heard before me in Seattle, Washington, on December 18, 1980, based upon a charge filed by Phost Construction, Inc., herein called Phost, on October 27, 1980, and a complaint and notice of hearing, which was issued by the Regional Director for Region 19 of the National Labor Relations Board, herein called the Board, on November 28, 1980. The complaint, in substance, alleges that agents of Local Union No. 2362, Lumber, Production and Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called Respondent, engaged in acts and conduct violative of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, herein called the Act, by threatening a common representative of Alaska Lumber and Pulp Co., Inc., herein called ALP, and Phost that it would picket a Phost construction site in an attempt to shut down construction work, with objects thereof to force Phost and other persons engaged in commerce to cease doing business with ALP; or to force ALP to recognize or bargain with Respondent. Respondent filed an answer which, in substance, denied that it engaged in any conduct violative of the Act. At the hearing the General Counsel, the Charging Party (Phost), and Respondent were represented by counsel and were afforded full opportunity to present oral and written evidence and argument and to examine and cross-examine witnesses. Post-trial briefs have been filed on behalf of all parties and have been carefully considered. Upon the entire record, careful observation of the demeanor of the witnesses, and post-hearing briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated that Phost is an Alaska corporation, with an office and place of business near Wrangell, Alaska, where it is engaged in the business of constructing a sawmill, and that during the past 12-month period immediately preceding issuance of the complaint, which period is representative, in the course and conduct of its business operations, Phost provided services valued in excess of $50,000 to customers within the State of Alaska, which customers were engaged in interstate commerce by other than indirect means. Accordingly, Respondent admits, and I find, that Phost is now, and has been at all times material herein, an employer and person engaged in commerce and in industries affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all times material herein, it has been a labor organization within the meaning of Section 2(5) of the Act.

A. *Issue*

Did Respondent engage in acts and conduct violative of Section 8(b)(4)(ii)(B) of the Act by, on or about October 16, 1980,[1] through its agent Michael Draper, threatening a representative of both ALP and Phost that it would picket a Phost construction site in an attempt to shut down construction work, with objects thereof to force Phost and other persons to cease doing business with ALP; or to force or require ALP to recognize and bargain with Respondent?

B. *Facts*

ALP is a subsidiary of Alaska Pulp America, Inc., and is engaged in the production of dissolving pulp and lumber in the State of Alaska, with its products shipped primarily to Japan. In furtherance of its operations ALP maintains a dissolving pulp plant in Sitka and, until April 1, utilized two sawmills in a small town called Wrangell which is located on remote Wrangell Island. Regarding the two sawmills, one is located inside the town and employs approximately 65 to 70 workers who are represented for purposes of collective bargaining by a local of the United Paperworkers International Union, herein called the UPIU. The downtown sawmill, herein called the Wrangell mill, is used by ALP primarily for the cutting of larger spruce logs. The other sawmill was located 6 miles outside Wrangell on the Zimovia Highway and was known as the 6-mile mill or AWP mill.[2] This sawmill employed approximately 50 to 55 persons, who were represented for purposes of collective bargaining by Respondent, and cut primarily "baby squares" or four-by-four lumber pieces.

James Rynearson, a senior vice president of ALP, testified that, due to expected environmental problems caused by the proposed Alaska Lands Bill which, by its terms, restricted the quality and quantity of timber available for cutting in certain areas of the State, the decision was made by ALP in 1977 to study the feasibility of constructing a new type of sawmill, which would use a lesser type and quality log and which would continue to permit ALP to be operational in Wrangell. As a result, the company officials concluded that this new mill should have the same production capacity as the two existing sawmills combined and that, inasmuch as the AWP site encompassed a greater physical area and as there was no room for expansion of the Wrangell mill, it should be constructed on the AWP millsite. Accordingly, Rynearson testified, in early 1980 with passage of the new legislation imminent, ALP decided to implement its aforementioned plans. Both Respondent and the UPIU were receptive to the proposed consolidation of operations, agreeing that such was essential if ALP was to remain competitive.

As an initial step, ALP commenced negotiations with Phost regarding the latter becoming the general contractor for the anticipated construction operations. While said discussions were ongoing, ALP commissioned engineering plans for the project and, in view of weather problems, concluded that construction work on the project had to commence no later than July 15. Therefore—and to apparently have sufficient time to prepare the site for said work, production operations at the AWP mill were "closed down" on April 1, and a portion of the work force was given jobs on a new second shift at the Wrangell mill.[3] Also at approximately the same time, pursuant to the terms of the existing collective-bargaining agreement between ALP and Respondent, which was due to expire on May 31, Respondent sent a letter requesting that ALP enter into negotiations on a successor contract. However, no such negotiations ensued.

The record establishes that ALP's construction plans at the AWP site entailed initially increasing the physical area of the entire facility, then demolishing the existing sawmill, and, finally, constructing a new and significantly larger mill building. Left standing and untouched by the construction work were to be a planer shed and sorting area in which the lumber is surfaced, a dock area, a powerhouse building, and a maintenance shed. As to the first aspect of ALP's construction plans—increasing the available physical area, ALP contracted with Berg Construction Company for a landfill operation which would extend the AWP area into Zimovia Strait. Said work commenced shortly after April 1 and was concluded prior to July. ALP's planning did not escape the notice of the Alaskan construction unions, and shortly after production ceased at the AWP mill in April, representatives of the Alaska Building Trades Council, which comprises those unions engaged in representing employees in the building and construction industry, approached ALP, stating that they understood a new mill was to be constructed at the AWP location and demanding jurisdiction over all the work. Negotiations began with the construction unions and lasted until early June, with ALP insisting that a portion of the work be nonunion to ensure that Wrangell residents, former ALP employees, would be able to work on the project. Finally, agreement was reached that 65 percent of the work, including the actual construction, electrical, landfill, and ducting work, would be performed by employees of union-signatory subcontractors and that 35 percent of the work, including demolition and machine installation work, could be nonunion. Moreover, this latter portion of the work was to be undertaken by Phost, and ALP and the unions reached a further understanding that, while the Phost employees were to be local Wrangell residents and presumably nonunion, it (ALP) would attempt to persuade Phost to negotiate a labor contract, covering said employees, to ensure labor peace on the jobsite.

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[1] Unless otherwise stated herein, all dates are in 1980.

[2] ALP purchased the sawmill from another company, Alaska Wood Products, and apparently assumed the existing collective-bargaining agreement, covering the production and maintenance employees, with Respondent.

[3] Those employees who transferred to the Wrangell mill were required to become members of the UPIU.

Meanwhile, while engaging in the aforementioned negotiations, ALP was continuing construction contract discussions with Phost. According to ALP's attorney, Jerome L. Rubin, ALP officials notified Phost about the former's agreement with the Building Trades Council, and Phost consented to abide by it. More specifically, ALP requested that Phost negotiate a labor agreement, and Phost agreed to do so. Phost and ALP reached agreement on the construction contract in late June. Said agreement, which was not executed by the parties until October 22, provides that Phost supply all necessary labor, equipment, and services for completion of the project and perform all work in accordance with ALP's instructions.[4] As to the hiring of subcontractors, the agreement grants to ALP and Phost the right to do so; however, once on the project, subcontractors were to work under the direction of Phost. As to the work, Phost was to be responsible for the engineering work, demolition work, the installation of new machinery, and ensuring that the newly installed machinery was operational.[5]

Subsequent to the agreement between ALP and the Alaskan Building Trades Council and Phost's acceptance thereof, representatives of ALP, Phost, and Respondent met in Portland, Oregon, on July 21. There is some dispute as to which party requested the meeting—Rynearson testified that ALP called for the session, while Respondent's agent, Michael Draper, stated that Respondent requested the meeting to negotiate a new contract with ALP. In any event, Rubin and Rynearson represented ALP; Attorney Kenneth S. Klarquist represented Phost; and Draper and another official, Robert Westbrook, represented Respondent. While there is no dispute as to the subject matter discussed, there is a slight variance in the record as to what was specifically said at the meeting. According to Rynearson, Respondent, represented by Draper, demanded a 3-year collective-bargaining agreement with ALP to become effective immediately, while Rubin counteroffered to Respondent a 1-year agreement with Phost, covering the construction work. Specifically, Draper proposed a contract identical to the industrywide agreement. Rubin replied that "he thought [a 3-year contract] was highly illegal . . . when we had no production, no members working. . . ." Attorney Rubin corroborated Rynearson, adding that Draper said that a 3-year contract was essential to preserve a "contract bar" argument before the Board and that he could not deviate from such a contract term whatever the economics. Draper testified that two contract proposals were on the table—Rubin's proposal for a contract to cover the "remodernization of the sawmill," between Respondent and Phost, and Respondent's proposal for a new collective-bargaining agreement between ALP and Respondent. The meeting, according to Draper, ended after he set forth Respondent's economic conditions both for a Phost agreement and the successor ALP contract.

The parties next met on or about August 21. Draper and Westbrook again represented Respondent; Rubin, Rynearson, and two others represented ALP; no representatives from Phost were present.[6] The meeting lasted for just a few minutes. According to Rynearson, Draper stated that he did not want a 1-year contract with Phost; rather, he wanted a 3-year contract with ALP. Rubin answered that he did not think such a contract was legal—"that we had no production workers out there, we were not producing anything. . . ." Corroborating Rynearson, Rubin added that he asked Draper to consult with his lawyers concerning the legality of a 3-year contract with ALP in such circumstances. Draper testified that he made an economic counterproposal to the 1-year Phost proposal, and as to the 3-year ALP proposal, Rubin stated that there was not a problem regarding the economics but that he questioned the legality of the contract term. According to Draper, Rubin asked that the parties "enter into a voluntary submission" to the Board concerning the legality of a 3-year contract with ALP. Draper agreed to consult with his attorney, and the meeting ended.

While these negotiations continued, Phost commenced work on constructing the new sawmill building at the AWP site. Thus, site preparation work began on July 7, and demolition of the original mill was accomplished a few days later. Next, in early October work on erecting the new sawmill started, with such performed by employees of subcontractors, all of whom were union members. By early December, work on the buiding skeleton had been completed; all outside sheeting was affixed to the structure; and the roof was in place. Further, all concrete had been poured. The record discloses that, while all this work was done, other than supervisory personnel who may have observed the project from time to time, there have been—and will be—no ALP employees at all on the site during the construction work. Also, according to Rynearson, no ALP employees have visited the project to maintain equipment in the left-standing structures.

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[4] As to ALP's intentions, the signed contract states: "Whereas the Owner desires to renovate its sawmill which is approximately six (6) miles from Wrangell, Alaska. . . ."

[5] Other than as owner and general contractor, there is no evidence in the record of any sort of business or other financial relationship between ALP and Phost.

[6] While Rubin appears to have been the management spokesman at this and the earlier meeting, there is no evidence that such was ever communicated to Respondent or that Rubin ever represented himself as the agent of Phost. In fact, at the hearing, Rubin identified himself as the attorney for ALP. Despite this, because he spoke at the July 21 meeting, Rubin was considered, by Draper, to be the bargaining agent for Phost at the August meeting.

At some point after August 21, Phost and UPIU entered into a collective-bargaining agreement, covering construction work at the AWP site. On or about October 14, Agent Draper telephoned Rubin's office in Seattle, Washington, and requested a meeting. Such was scheduled for October 16 at Rubin's Seattle office, and Rubin asked Kurt Sacknitz, the vice president and treasurer of Alaska Pulp America, Inc., to be present. According to Sacknitz, he, Rubin, and another attorney from Rubin's law firm were present along with Draper and Westbrook.[7] Draper began by asking if Rubin was aware of the Phost-UPIU contract. Rubin acknowlegded that he knew about that agreement, and Draper asked if ALP was now willing to enter into a 3-year collective-bargaining agreement with Respondent. Rubin replied that such was a contract would be unlawful. "Mr. Draper responded that if we were unwilling to sign a contract, that the union would then file an unfair labor practice claim and that they would picket the construction site." Rubin asked time for a caucus and, after he and Sacknitz returned, Rubin asked if it was true that Respondent intended to picket the site. "Mr. Draper indicated that that's what would happen." Rubin replied that he would speak to ALP officials about Draper's comments; Draper gave Rubin until the following Friday to answer. The meeting ended at this point.

Rubin testified that Draper asked if he knew that Phost's employees had been organized by the UPIU and that Phost had signed a contract. Rubin said that he knew. Draper said that Respondent continued to insist on a 3-year contract with ALP, and Rubin reiterated his doubts as the legality of that approach to a production agreement. Draper replied "that we either signed a [3-] year extension of the labor contract . . . or they would picket the construction site." The management representatives then left in order to caucus and, after returning, Rubin asked Draper to repeat the last statement. "He said, yes, 'ALP either signs a [3-] year extension of the labor contract, or else we will picket the construction site.'" Rubin replied that he had to discuss the matter with ALP officials, and the meeting ended. Following this meeting Rubin telephoned Klarquist, and "we discussed the threat."

Draper testified that he began the meeting by asking Rubin if he knew that the UPIU had been organizing Phost's employees and that Phost had recognized and bargained to an agreement with that union. Rubin replied that he knew, and Draper then stated that he was not there for the purpose of bargaining about Phost but rather "for the specific purpose of renewing our existing labor agreement between 2362 and Alaska Wood Products." Rubin then stated that economics were not the issue; the major issue was the duration of the agreement. Draper replied that Respondent believed its demand was unlawul. Rubin responded that such was an area of controversy but that ALP would be willing to enter into a 1-year agreement. Draper replied that a 3-year contract was Respondent's final position inasmuch as the industry was structured in such a manner. Rubin asked where they could go from there, and Draper responded, "If we do not consummate an agreement of three years duration I would conclude that we are at impasse . . . I will picket the AWP mill with pickets if we do not get a [3-] year agreement." After this statement, Draper again volunteered the information that he was not there to negotiate for a Phost agreement. At that point, the ALP representatives left the room to caucus. Rubin returned after 15 minutes and said that there would be nothing further and that he had to confer with higher corporate officials. The meeting ended with Rubin saying he would contact Draper by the following Friday.[8]

Robert Westbrook gave rather sketchy testimony regarding this meeting. However, he did recall that Draper began by asking whether the ALP people knew that Phost had agreed on a collective-bargaining agreement with the UPIU and by stating that he was there to negotiate a 3-year agreement with ALP. Further, he recalled that Draper said, "[W]e'll picket AWP mill."

At the time of the hearing, work on the new sawmill had not been completed. Although unclear, it appears that, at least, some ducting and electrical work remain to be done as well as the installation and testing of the mill machinery. Draper admitted knowledge that portion of the remaining work was to be done by employees of subcontractors and that they were to be union-signatory subcontractors. To date, there has been no picketing at the AWP jobsite.

C. *Analysis*

Both counsel for the General Counsel and for Phost contend that Draper's statement to Attorney Rubin, that either ALP enter into a 3-year collective-bargaining agreement with Respondent or the latter would picket the construction site, constituted a threat to picket Phost to force it to cease doing business with ALP or to force ALP to enter into an agreement with Respondent. They further contend that such a threat is blatantly violative of Section 8(b)(4)(ii)(B) of the Act when, as herein involved, ALP has no presence at the AWP jobsite. Contrary to this position, Respondent argues that Draper's statement to Rubin, that Respondent would picket the AWP mill if ALP did not enter into a 3-year agreement,[9] does not constitute a threat within the meaning of Section 8(b)(4)(ii)(B) of the Act as such was "merely informative of a dispute which extended to the jobsite," that ALP has, indeed, maintained a presence on the jobsite during the construction work, and that rather than being an unoffending neutral party to the dispute, Phost and ALP are allies herein.

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[7] No Phost representatives appeared at this meeting. Nevertheless, Draper testified that Rubin was the spokesman for ALP "and, I assume, Phost Construction, at that time." There is no evidence that Rubin ever so represented his status at this meeting.

[8] As of the date of this meeting, according to Draper, he had no direct knowledge as to the state of the work being done at the AWP site.

[9] All parties concede that whether one credits the version of Respondent's witnesses or that of the General Counsel's witnesses, the legal effect would be the same.

Section 8(b)(4)(ii)(B), insofar as is relevant herein, prohibits a union or its agents from threatening, restraining, or coercing secondary employers, where objects of such conduct are to force or require a secondary employer to cease doing business with the primary (or disputing) employer; or to force or require the primary to recognize and/or bargain with the union. As stated by a United States circuit court of appeals, Section 8(b)(4) ". . . was not meant to prohibit primary activity. [It was] directed only at secondary boycotts whose 'core concept' is union pressure directed at a neutral employer." *Griffith Company, et al.* v. *N.L.R.B.*, 545 F.2d 1194, 1199 (9th Cir. 1976). In concluding that a union has engaged in conduct violative of Section 8(b)(4)(ii)(B), the Board considers two elements as crucial to the violation: A cease doing business objective and coercion of the secondary employer to achieve the proscribed object. *Local 399, International Brotherhood of Electrical Workers (Illinois Bell Telephone Company)*, 235 NLRB 555, 559 (1978); *International Brotherhood of Electrical Workers, AFL-CIO; Local 134, International Brotherhood of Electrical Workers, AFL-CIO; Local 165, International Brotherhood of Electrical Workers, AFL-CIO (Illinois Bell Telephone Company)*, 179 NLRB 202, 204 (1969). Regarding the latter point, the Act reaches only threats, restraints, or coercion of a *secondary* employer. *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, 55, fn. 12 (1964); *International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO (Gilmore Construction Company)*, 127 NLRB 541, 545, fn. 6 (1960).

Herein, as expostulated by counsel for the General Counsel, the major premise of the complaint—and, indeed, the basis for much, if not all, of the legal arguments in the post-hearing briefs—is the alleged unlawful and coercive effect of picketing by Respondent at the AWP jobsite, if such occurred as threatened by Respondent. What appears to have been overlooked by this approach are the circumstances of Draper's threat. Was it directed, as required for a violation of Section 8(b)(4)(ii)(B) of the Act, to an unoffending neutral party (Phost), to the dispute between ALP and Respondent or was said threat directed toward the primary or disputing party—ALP? In asserting that Draper's conduct was secondary and directed at Phost, without citing any record testimony or other supporting facts, counsel for the General Counsel alleges that Attorney Rubin's status was that of the "common representative" of both Phost and ALP at the October 16 meeting. I do not think that the record warrants such a conclusion.

At the outset, there exists not a scintilla of record evidence as to the specific authority of Attorney Rubin to act as an agent or spokesman for Phost or as to whether such authority was ever represented to Respondent. At most, the record reflects a mere "assumption" by Draper that Rubin was the bargaining agent for Phost. Indeed, Rubin identified himself at the hearing as a partner in the law firm which represents ALP and testified that he represented the interest of ALP in contract negotiations with Phost and labor negotiations with the Alaska Building Trades Council. Moreover, Rubin's conduct at the negotiating sessions with Respondent on July 21 and August 21 does not warrant a contrary conclusion as to his status. Thus, I believe that ALP desired these meetings in order to resolve its *own* lingering contractual problems with Respondent and, in the process, to assure that the construction work at the AWP site proceeded free of labor-related disputes. Viewed in this light, it seems clear that the real bargaining parties were ALP, represented by Rubin, and Respondent, with Phost as an interested observer, and that Rubin was representing the interests of ALP, and only peripherally those of Phost, when he offered to Respondent, as a counterproposal to the latter's demand for a 3-year production agreement with ALP, a 1-year construction contract with Phost. That Rubin spoke for ALP is also clear from his conduct at the August 21 session wherein he refused to accede to Draper's demand inasmuch as "we" have no production workers at the jobsite. Finally, my view of Rubin's status as only acting as an agent for ALP is supported by the entire circumstances herein—based on its own self-interests, ALP consented to attempt to persuade Phost to sign a labor agreement for work at the AWP site; ALP, in fact, persuaded Phost to do so; and in view of its desire to have the project completed expeditiously, ALP was in a position to gain the most by having the sawmill project completed free of labor strife.

However, assuming that Rubin was the "common representative" of Phost and ALP at the earlier bargaining sessions, a point about which I remain unconvinced, Rubin clearly represented *only* the interests of ALP during the October 16 meeting with Draper. Thus, prior to said date, Phost had, independently, recognized and bargained to an agreement with the UPIU covering the construction work, and at the meeting Draper, on at least two occasions, told Rubin that he (Draper) was not there to negotiate about Phost but only regarding a new collective-bargaining agreement with ALP. Further, the subject matter discussed pertained only to ALP and involved whether ALP would accept Draper's demand for a contract with a 3-year term and Rubin's counterproposal of an agreement with ALP for 1 year. Hence, while Draper again "assumed" that Rubin also represented Phost at this meeting, it is clear that the *only* parties to this meeting were ALP (Rubin) and Respondent. Accordingly, I believe that, when Draper uttered his threat to engage in picketing at the AWP jobsite, he did so to Attorney Rubin as the representative of ALP after Rubin, as the representative of ALP, refused Draper's demand for a 3-year contract. I believe that the foregoing, in the circumstances of this case, constituted nothing more than a threat of potentially unlawful picketing directed to a primary or disputing party—conduct which is *not* proscribed by Section 8(b)(4)(ii)(B) of the Act. Cf. *Local 399 (Illinois Bell Telephone Company), supra; Gilmore Construction Company, supra.* I do not believe that, in any sense of the meaning of that section of the Act, Draper's threat was made to the unoffending secondary employer (Phost) either directly or indirectly through a "common representative" of that party.[10] Accordingly, given the state of the record, and the factors upon which counsel for the General Counsel concentrated, he has not proven, by a preponderance of the evidence, that Respondent threatened, restrained, or coerced Phost in order to achieve the proscribed object or objects,[11] and I shall, therefore, recommend that the complaint herein be dismissed.

CONCLUSIONS OF LAW

1. Phost is an employer and a person engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(b)(4)(ii)(B) of the Act by threatening ALP with picketing of the AWP jobsite unless ALP agreed to enter into a 3-year collective-bargaining agreement.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I recommend the issuance of the following:

ORDER[12]

The complaint shall be, and is, dismissed in its entirety.

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[10] The fact that Rubin communicated Draper's threat to Klarquist immediately after Draper left the office is not determinative. Thus, unlike the situation in which a threat to an employee could reasonably be expected to be communicated to management officials, there is nothing in the record from which to draw the inference that Draper should have expected Rubin to communicate his threat to Klarquist. To the contrary, Rubin specifically stated that he would communicate Draper's ultimatum to ALP management officials and never mentioned Phost, which party, of course, was not involved at that time.

[11] I make no findings herein regarding the legality of Draper's threat had it been directed toward a neutral party to the dispute between ALP and Respondent or regarding the picketing itself, if such had occurred.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

District Council of Painters No. 8, of the International Brotherhood of Painters and Allied Trades, AFL–CIO, and Painters and Paper Hangers Local Union No. 4, AFL–CIO *and* Quad C Corporation and Operative Plasterers Local Union No. 66, Operative Plasterers and Cement Masons International Association. Case 20–CD–575

January 5, 1982

DECISION AND DETERMINATION OF DISPUTE

By Members Fanning, Jenkins, Zimmerman

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Quad C Corporation, herein called the Employer, alleging that District Council of Painters No. 8, of the International Brotherhood of Painters and Allied Trades, AFL–CIO, and Painters and Paper Hangers Local Union No. 4, AFL–CIO, herein called the Painters, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by Operative Plasterers Local Union No. 66, Operative Plasterers and Cement Masons International Association, herein called the Plasterers.

Pursuant to notice, a hearing was held before Hearing Officer Charles L. Posner on September 8 and 9, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer and the Painters filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a California corporation with its principal place of business in San Francisco, California, is engaged in the business of residential and commercial construction. During the past year, the Employer purchased and received goods and services from directly outside the State having a value in excess of $50,000. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

259 NLRB No. 115

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that the Painters and the Plasterers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer operates as a general contractor and subcontractor doing plastering, sheetrocking, fireproofing, taping, and related work. Dinwiddie Construction Company, a general contractor, subcontracted the fireproofing, lathing, plastering, and drywall work at its Crocker Building construction site to the Employer. Pursuant to its contract with the Plasterers, the Employer assigned the taping of drywall to its employees who are represented by the Plasterers. In the first week of June 1981,[1] William Lewis, Dinwiddie's senior vice president, received a phone call from John Davidson, business representative of Painters Local 4. Davidson told Lewis that the Painters had a problem with the Employer's use of plasterers rather than painters to perform the taping work on the Crocker Building construction project. Subsequently, when Davidson met with Lewis to discuss the assigment of the taping work, Davidson stated that the Painters had jurisdiction over the taping work and threatened to picket the jobsite if the Employer did not agree to use painters rather than plasterers. On June 16, Davidson informed Lewis that he had obtained a strike sanction and would picket the jobsite the following morning.

At 7:10 a.m. on June 17, Lewis observed four Painters pickets, including Davidson, at the Crocker Building jobsite. On this same morning, Lewis informed Antonio Gheno, the Employer's job superintendent, about the picketing activity and directed Gheno to remove from the jobsite the Employer's employees who were doing taping work. Gheno removed those plasterers and the picketing ceased.

Two days later, the Employer's plasterers resumed the taping work. Thereafter, on June 26, Davidson telephoned Lewis and again threatened to picket if the plasterers did not discontinue the performance of taping work.

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[1] All dates are in 1981 unless otherwise stated.

B. *The Work in Dispute*

The work in dispute involves the taping of drywall at the Crocker Building construction site in San Francisco, California. More specifically, the disputed work involves the application of paper tape and joint compound to cover and smooth out joints, nail holes, and nailheads in sheetrock walls and ceilings.

C. *Contentions of the Parties*

The Employer and the Plasterers contend that a jurisdictional dispute exists and that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. They further contend that the Employer's contract with the Plasterers and considerations of efficiency, economy, established practice, area and industry practice, and skills involved support the Employer's assignment of the disputed work to employees of the Employer represented by the Plasterers.

Before the Hearing Officer, but not in its brief, the Painters contended that there are insufficient facts to establish that a violation of Section 8(b)(4)(D) has occurred. As to the disputed work, the Painters argue that the following factors favor assignment to employees which it represents: Area practice; industry practice; International Jurisdictional Disputes Board awards; agreements between the respective International Unions; and the jurisdictional provision of the Painters constitution.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

It is clear from the record summarized above that the Painters agents claimed the work in dispute and threatened to picket and did picket the Crocker Building construction site with an object of forcing the work to be reassigned from employees represented by the Plasterers to employees represented by the Painters. In addition, the parties have stipulated that the Employer is not bound by any agreed-upon method for voluntary adjustment of the work in dispute.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[2] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[3]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

The Employer has no collective-bargaining relationship with the Painters. On the other hand, the Employer has since 1970 been a party to a collective-bargaining agreement with the Plasterers covering its employees classified as plasterers. In pertinent part, under the heading "Plasterers Jurisdiction," the agreement states, "All interior and exterior plastering . . . must be done by practical Plasterers of the O.P. and C.M.I.A. This includes . . . the taping and pointing of all joints, nailholes and bruises on wallboard, regardless of the type of materials or tools used. . . ." Thus, the Plasterers contract with the Employer specifically covers the work in dispute. We find that this factor favors assignment of the work to employees represented by the Plasterers.

2. The Employer's practice and preference

The Employer assigned the work in dispute to and prefers to have it performed by employees who are represented by the Plasterers. The Employer currently employs eight or nine plasterers who are members of the Plasterers to perform taping work. Although the Employer has never employed anyone other than plasterers to do the work in dispute, it has occasionally subcontracted this work to other employers who use "tapers" represented by the Painters. This has been done, however, only when the Employer itself has had insufficient manpower to perform the taping function, and thus does not contravene the Employer's own practice of using plasterers to perform the work in dispute.

Based on the foregoing, we find that the Employer's practice and preference favors assigning the work in dispute to employees represented by the Plasterers.

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[2] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[3] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

3. Relative skills

As noted above, the disputed work involves the taping of drywall surfaces. Although "tapers" is a job classification of painters, it is undisputed that the tools used in the process are those of plasterers. Both the Plasterers and the Painters have apprentice training programs where taping is taught. Each program has been accredited by the Division of Apprenticeship Standards of the State of California. The Employer, however, in addition to the union apprentice program, has its own training course wherein it teaches taping to employees who are apprentice plasterers.

Based on the foregoing, it appears that both plasterers and painters have the requisite job skills to perform the disputed work. Thus, this factor favors neither group of employees in this jurisdictional work dispute.

4. Union agreements and Joint Board determinations

In 1961, the Painters, Plasterers, and the Bricklayers Union entered into a memorandum of understanding which provides in relevant part that "painting and taping of drywall, regardless of material used, is painters' work, providing the drywall surfaces are not to receive plaster, accoustical or imitation accoustical finishes. The application of texturing to drywall surfaces is the work of painters where paint materials are used. . . ." Subsequent to the execution of the memorandum of understanding, disputes between the Painters and the Plasterers concerning the painting and taping of drywall surfaces produced eight separate 1973 Impartial Jurisdictional Disputes Board (IJDB) awards. Based on the 1961 memorandum, the IJDB awarded the work in each case to the Painters.

In 1978, a hearings panel convened by the Joint Administrative Committee of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry issued a national decision reaffirming the 1961 memorandum allocation of the work in dispute. The IJDB has subsequently relied on the 1978 decision in making 18 separate awards of the painting and taping of drywall in a construction project to the Painters rather than the Plasterers.

The Painters relies heavily on the 1961 memorandum, the 1978 hearings panel decision, and the IJDB awards as the basis for awarding the work in dispute to employees represented by the Painters. The Board has given weight to such factors in the absence of any other determinative criteria.[4] On the other hand, the Board has given little weight to an interunion agreement, or IJDB awards predicated thereon, where, as here, the Employer's past practice is contrary, there is no reference to the agreement in the Employer's contract with the Plasterers, there is no evidence that the Employer has otherwise agreed to be bound by the agreement, and the Plasterers continue to claim the work in dispute.[5] Accordingly, although the 1961 memorandum, the 1978 hearings panel decision, and the IJDB awards are factors favorable to the Painters and the employees it represents, we do not accord them great weight in determining this jurisdictional work dispute.

5. Area practice

John Moylan, the business representative of the Plasterers, testified that it is common practice for contractors in the San Francisco Bay area to use plasterers to tape walls that are to be painted. In support thereof, the Plasterers presented a list containing the names of 19 major projects in which plasterers allegedly performed taping on walls that were to be painted. The record indicates, however, that all of those major projects involved work by Marconi Plastering Company, a company that utilizes both painters and plasterers in taping work. In this context, Moylan testified that he did not know which trade's members did the majority of Marconi's taping work.

John Davidson, recorder and secretary of Painters Local 4, testified that the Joint Committee of Painters and Employers maintain records of taping jobs performed by painting contractors. Davidson stated that over 2,500 taping jobs were registered with the Painters Union in the San Francisco and surrounding bay area. In addition to Davidson's testimony, the Painters offered a document entitled "Bay Area Drywall Finishers Joint Agreement." This agreement, between the Painters and employer-members of the Northern California Drywall Contractors Association, covers "work or services pertaining to the preparation, spotting, painting, detailing, taping, flushing, sanding and finishing of interior and/or exterior gypsum, drywall, thinwall, concrete, steel, wood or plastered surfaces." Consequently, it appears from the foregoing that the area practice favors assignment of the disputed work to employees represented by the Painters.

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[4] See *Local Union No. 68, Wood, Wire and Metal Lathers International Union, AFL-CIO (Acoustics & Specialties Inc.)*, 142 NLRB 1073 (1963).

[5] See, e.g., *Local 542 International Union of Operating Engineers, AFL-CIO (Georgia Pacific Corporation)*, 253 NLRB 482, 484-485 (1980); *Local 965, International Union of Operating Engineers, AFL-CIO (Twin-State Gang Nail Structures, Inc.)*, 249 NLRB 894, 897 (1980).

6. Economy and efficiency of operation

In addition to taping work, the Employer utilizes its plasterers to do fireproofing and various other kinds of plastering. By employing the same group of plasterers at different tasks on a particular project the Employer can avoid having an idle work force while taping jobs are drying or setting for several days. In this context, the Employers' superintendent testified, "When they're [plasterers] working for us, we have more control over our job and we're able to take and move the people around as we need them. . . ." In addition, since the Employer performs no painting work, an assignment of the work in dispute to employees represented by the Painters would apparently require the Employer to incur the expense of hiring an additional complement of employees who could perform no work other than the taping work in dispute. We therefore find that the factor of economy and efficiency of operation favors awarding the work in dispute to employees represented by the Plasterers.

Conclusion

Upon the entire record as a whole, and after full consideration of all relevant factors involved, we conclude that the employees who are represented by the Plasterers are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's collective-bargaining agreement with the Plasterers, the Employer's practice and preference, and economy and efficiency of operation, which factors, on balance outweigh the factors of area practice, interunion agreement, and Joint Board determinations favoring the Painters claim to the work. In making this determination, we are awarding the work in question to employees who are represented by the Plasterers, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Quad C Corporation who are represented by Operative Plasterers Local Union No. 66, Operative Plasterers and Cement Masons International Association, are entitled to perform the taping of drywall surfaces at the Crocker Building construction site in San Francisco, California.

2. District Council of Painters No. 8, of the International Brotherhood of Painters and Allied Trades, AFL-CIO, and Painters and Paper Hangers Local Union No. 4, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Quad C Corporation to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, District Council of Painters No. 8, of the International Brotherhood of Painters and Allied Trades, AFL-CIO, and Painters and Paper Hangers Local Union No. 4, AFL-CIO, shall notify the Regional Director for Region 20, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

Hudson T. Marsden, a Sole Proprietorship, *and* Robert Strothers. Case 3-CA-9844

January 5, 1982

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On August 6, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Hudson T. Marsden, a Sole Proprietorship, Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

I WILL NOT discharge employees for engaging in concerted activities protected under Section 7 of the National Labor Relations Act.

259 NLRB No. 118

I WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

I WILL offer to Robert Strothers and Ronald Porter immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other privileges enjoyed, and I will make them whole for any loss of pay they suffered as a result of my having discharged them, with interest.

I WILL make Joseph Ruffin and John Cole whole for any loss of pay suffered as a result of my having discharged them, with interest.

Hudson T. Marsden, a Sole Proprietorship

DECISION

Statement of the Case

D. Barry Morris, Administrative Law Judge: This case was heard before me in Rochester, New York, on March 13, 30, and 31, 1981. The charge was filed on June 12, 1980, and amended on July 24, 1980. The complaint was issued on July 25, 1980, alleging that Hudson T. Marsden, a Sole Proprietorship (Respondent), violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, to produce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by the General Counsel and by Respondent.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent has maintained its principal office and place of business in Rochester, New York, and is in the business of performing pavement construction and related services. Respondent has admitted, and I so find, that during the 12 months preceding the issuance of the complaint, it had provided services valued in excess of $50,000 to the city of Rochester. The record contains evidence, and I so find, that during the 12 months preceding the issuance of the complaint the city of Rochester purchased goods and materials valued in excess of $50,000, which were shipped to Rochester, New York, directly from points outside New York State.

Respondent contends that there is no basis for jurisdiction in this case. In *Siemons Mailing Service*, 122 NLRB 81, 85 (1958), the Board defined indirect outflow as the "sales of goods or services to users meeting any of the Board's jurisdictional standards except the indirect outflow or indirect inflow standard." The Board also stated in *Siemons* (*id.* at 85, fn. 12) that "users" shall include an enterprise or organization which is itself exempted from the Board's jurisdiction if its operations are of the magnitude which would justify assertion of jurisdiction were it nonexempt. See *Hoover, Inc.*, 240 NLRB 593, 594 (1979).

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

I have found that Respondent provided services valued in excess of $50,000 to the city of Rochester and that the city of Rochester purchased goods and materials valued in excess of $50,000 which were shipped to Rochester directly from points outside New York State. Accordingly, I find that Respondent's operations satisfy the applicable jurisdictional standards, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act for the Board to assert jurisdiction herein. See *St. Francis Pie Shop, Inc.*, 172 NLRB 89, 90 (1968).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by terminating four employees, namely, Robert Strothers, Ronald Porter, Joseph Ruffin, and John Cole, for engaging in a concerted work stoppage due to inclement weather. The complaint also alleges that Hudson Marsden, the sole proprietor of Respondent, interrogated an employee by asking him who was the instigator of the work stoppage. Respondent denies that it violated the Act. The issues, accordingly, are:

1. Were the employees discharged for having engaged in a concerted work stoppage.
2. Were the discharges violations of the Act.
3. Did Marsden interrogate an employee as to who was the instigator of the work stoppage.

B. *The Facts*

1. Background

During May 1980 Respondent was replacing sidewalks under contract with the city of Rochester. On May 19[1] Respondent employed a crew of approximately eight employees, consisting of three cement finishers and five laborers. The normal work hours were 8 a.m. to 4 p.m.

2. Reporting for work on May 19

Strothers reported for work around 7:30 a.m. He testified that he had a conversation with Marsden at or around 7:45 a.m., at which time it was raining. Strothers credibly testified that Marsden "asked me about the weather; what did I think. Should we give it a try? And I answered him, yes, give it a try. But, you know if it rains hard we could just give it up." Porter corroborated this testimony. He credibly testified that he reported to work at 8 a.m., at which time it was raining. He stated that "Marsden came out and he asked us what we thought; give it a try or not. So we decided to give it a try."

3. Events occurring between 9:30 and 10:15 a.m.

Marsden left the jobsite around 9:30 a.m. and did not return until 10:15 a.m. The normal time for coffeebreak was around 10 a.m. Strothers testified that it was still "drizzling" when it came time for the break. He discussed the weather with the other employees and decided to leave the jobsite. Porter testified that he talked to his fellow employees, Strothers, Cole, Ruffin, and Young, about the weather. He credibly testified:

> After we went to the job site, we started working and I asked the guys; you know, it was beginning to rain a little harder and they were complaining about working in the rain. So I asked if they wanted to continue to work in the rain or go home.

Porter further testified that the employees continued to discuss the rain during their break, which took place around 10 a.m. He stated that it was still raining after the break and, accordingly, they decided to leave.

While Marsden denied that it was raining that morning, the other witnesses corroborated the testimony of Strothers and Porter. Thus, Cole, Respondent's own witness and still an employee of Respondent, testified that it was still "drizzling" at the time the employees left the jobsite. Eldred, an inspector employed by an unaffiliated consulting firm, testified that there was a "light, drizzling rain." Laine, another of Respondent's witnesses, and also still an employee of Respondent, testified that it was drizzling that morning. He further credibly testified "all of the guys got together and decided that it was time to go home because it was raining too hard." He credibly testified that the employees talked about the rain for 10-15 minutes before they decided to leave. In addition, he credibly testified that that afternoon he told Marsden that the employees left the job because it was raining.

I credit the testimony of Strothers, Porter, Cole, Eldred, and Laine and find that on May 19 there was a drizzle or light rain during the relevant period of 8 to 10:15 a.m.[2] I further credit Strothers' and Porter's testimony, corroborated by Laine's credited testimony, and find that the employees discussed the weather conditions at the time of break, for about 10-15 minutes. They then decided to leave the jobsite because of the rain.

4. Events of May 20 and 21

Strothers testified that he came to work the next morning at 7:40 a.m. He stated:

> I went to Mr. Marsden's house and I walked up and he asked me for my license. I asked him why and he just said that he wanted my license. I said that I wouldn't give him my license. I didn't have to show my license to anyone but the police. The conversation went on and he told me, "You will never drive any of my trucks again and, furthermore, you're fired." And that was it.

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[1] All dates refer to 1980 unless otherwise specified.

[2] In addition, Resp. Exh. 2, which is a report of the National Weather Service, shows weather conditions of fog and drizzle in Rochester on May 19.

Porter corroborated Strothers' testimony. Porter also testified that, after Marsden told Strothers that he was fired, he instructed Laine, Young, and Boston to go to work. However, he left Porter, Cole, and Ruffin "standing there."

Porter testified that he reported to work on May 21. When asked whether he had any conversation with Marsden at that time, Porter credibly testified:

> I tried to question him, but he wouldn't give me no answer. We got to work that morning and he gave us our checks, Joe Ruffin, John Cole and Strothers and told us that there was no work; Joe Ruffin, myself and Cole.

Marsden testified that he gave Porter a number of reasons for "letting him go." These included smoking marijuana, drinking, not "operating the truck right," having "three flat tires in two weeks" and "stopping at restaurants to have coffee breaks." With respect to Cole and Ruffin, Marsden testified:

> Q. What reason did you give Cole and Ruffin?
>
> A. Because I don't have any work for them.
>
> Q. When did you bring them back?
>
> A. The following Monday after I had my chance to have a preliminary investigation as to what happened.
>
> Q. As to what happened about what?
>
> A. Them walking off the job. A lot of them were under duress and influenced by other people. They had no choice of transportation back to my shop and they couldn't hold or conduct any work on their own. So they were coerced into leaving the job and returning to the shop.

Similarly, when asked why he discharged Strothers, Marsden testified that Strothers punched out the timecards of the other employees and drank on the job. When questioned as to why he had not discharged Strothers and Porter prior to May 19, Marsden replied, "I don't believe I had just cause at that particular time."

I credit Strothers' and Porter's testimony and conclude that they, Ruffin, and Cole were discharged because they walked off the job on May 19. Marsden admitted that prior to May 19 he did not have "just cause" to discharge Strothers and Porter. While Marsden testified that he did not have work for Ruffin and Cole, he conceded that he rehired them after a "preliminary investigation" as to the circumstances surrounding their walking off the job. Marsden thus admitted that their discharge was not, indeed, because of lack of work, but instead it related to their leaving the job on May 19. I conclude that the various reasons given by Marsden for the discharges, such as lack of work, drinking, improper driving, and, in the case of Strothers, failure to furnish his driver's license, were pretextual. I find that the actual reason for the discharges was the employees' leaving the jobsite on May 19.

5. Prior practices concerning working in the rain

Marsden testified that in the past, if it started to rain while the men were working, it was the practice for the men to take shelter in the doorway of a building, on someone's porch, or in the trucks. This was corroborated by Boston, who testified that, in the past, the men waited for up to an hour in the shanty or in the trucks to see if it would stop raining. If it did not stop, Marsden or his son would instruct the men to leave. Laine and Porter similarly testified. The testimony is uncontroverted that neither Marsden nor his son was at the jobsite on May 19, between 9:30 and 10:15 a.m.

Marsden also testified that raincoats and rain pants were available in the storage wagon. He conceded, however, that there were not "enough to go around." On the other hand, Strothers and Porter stated that rain gear was not provided. Cole testified that there were "some" ponchos available but that he had never used them.

Based on the above testimony, I find that in the past the men took shelter when it started raining and remained there for up to an hour, at which time either Marsden or his son would instruct them to leave. On May 19, from 9:30–10:15 a.m., neither Marsden nor his son was at the jobsite.

With respect to whether rain gear was available, Marsden conceded that there was not enough "to go around." I find that some rain gear was available but that the men were not accustomed to using it. It is questionable whether all the men indeed knew that the rain gear was available. In any event, the practice in the past was to take shelter and wait for the rain to stop, rather than use the rain gear.

6. Strothers' request for a loan

Marsden testified that Strothers requested a loan of $650 on May 16 as a security deposit for renting an apartment. Marsden did not refuse to grant the loan but said that "we would see." Marsden further testified that, on, May 19, Strothers asked for an additional loan of $500 to help a relative in Florida. Marsden stated that he refused this latter loan request, at which point Strothers "threw down his pick and walked away." Strothers testified that he requested a loan of $500 on May 16 for purposes of moving to another apartment. He denied, however, having any conversation with Marsden concerning a loan on May 19. In addition, Strothers denied having any relatives who live in Florida but testified that he and Marsden had a discussion on May 19 concerning the riots in Florida.

I credit Strothers' testimony and find that the only request for a loan was that made on May 16 for $500 to be used as a security deposit for the rental of an apartment. I find that Marsden did not refuse to grant the loan but told Strothers that he "would see" whether to grant it.

7. Interrogation

Paragraph IV of the complaint alleges that Marsden asked an employee who was the "agitator" and "instigator" of the May 19 decision to stop work. In this regard, Strothers testified that, after the men walked off the job, Strothers encountered Marsden, at which time Marsden "pulled up and asked me who the instigator was." Marsden denied asking who was the instigator. Laine, whom I regard as a particularly credible witness, testified that he worked with Marsden the afternoon of May 19. He testified that they discussed the reasons the employees left the job and that Laine told Marsden it was "because it was raining." He denied that Marsden asked him who was the "ringleader."

I find that the General Counsel has not sustained his burden of showing that Marsden asked who was the "agitator" or "instigator." If Marsden was interested in finding that out, it is unlikely that he would not have questioned Laine about it, when they worked together that afternoon. Accordingly, the allegation is dismissed.

C. *Discussion and Analysis*

In *N.L.R.B.* v. *Washington Aluminum Company*, 370 U.S. 9 (1962), the Supreme Court held that the employees were engaged in protected concerted activities when they participated in a work stoppage to protest lack of heat in the plant. The Court held that Section 7 of the Act protects employees' concerted activities to protest unsafe or uncomfortable working conditions. Additionally, the Court held that these Section 7 rights were not dependent on the reasonableness of the employees' protest nor on whether the employees had made a specific demand on the employer to remedy the condition, prior to engaging in the work stoppage. In subsequent cases the Board has reiterated that employees are not required to communicate the reason for their concerted activity to the employer prior to engaging in the activity. See *Audio Systems, Inc.*, 239 NLRB 1316, 1318 (1979). Furthermore, the underlying employee grievances do not have to be reasonable or meritorious in order for the concerted work stoppage to be protected under Section 7 of the Act.[3] See *Bay-Wood Industries, Inc.*, 249 NLRB 403, 406 (1980). The crucial element is that the employees have engaged in a concerted work stoppage to protest working conditions which they consider unacceptable.[4]

I have found that Respondent's employees, after discussion among themselves, decided to walk off the job because they were unwilling to work in the rain. They were thus engaged in a protected concerted work stoppage to protest uncomfortable working conditions. It is clear under *Washington Aluminum* and its progeny that, when an employer discharges its employees because they have engaged in a concerted work stoppage to protest uncomfortable working conditions, the employer violates Section 8(a)(1) of the Act.

Respondent adduced testimony to show that the employees had previously worked in the rain and that the past practice was to have employees wait in the trucks to see if the rain would clear. Respondent also contends that it was not raining hard on May 19 and that the employees had not complained to Marsden about the weather before embarking on their work stoppage.[5]

The crucial issue is not the reasonableness of the employees' complaint but whether the employees walked off the job because of working conditions which they found uncomfortable and objectionable. I have found that the employees left the job because it was raining. As discussed earlier, the cases hold that employees are not required to make prior demand on the employer, nor are their Section 7 rights dependent on the reasonableness of their protest. Accordingly, the fact that it may not have been raining hard or that in the past they may have worked in the rain does not detract from their Section 7 rights.

I have found Marsden was aware of the reason of the employees' work stoppage. He was told by Strothers as the employees were leaving the worksite and later on that afternoon he was told by Laine that the employees left work because of the rain. I have found that he discharged the four employees because of their work stoppage. I have further found that the various reasons given by Marsden for the discharges, including the failure of Strothers to produce a driver's license, were pretextual. The reason for the discharges was the work stoppage. Inasmuch as the work stoppage was protected by Section 7 of the Act, the discharges of the employees by Marsden constituted a violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By discharging Robert Strothers, Ronald Porter, Joseph Ruffin, and John Cole for engaging in a work stoppage because of rainy weather, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
3. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
4. Respondent did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Respondent having discharged several employees in violation of the Act, I find it necessary to order Respondent to offer them full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings that they may have suffered.[6]

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[3] Accordingly, the fact that the employees took shelter in the past to wait out the rain is irrelevant. Similarly irrelevant is the fact that employees of other construction jobs may have continued to do their work on May 19.

[4] Respondent argues that the work stoppage was engineered by Strothers who was disgruntled because his request for two loans was denied. To the contrary, I have found that Strothers' only request for a loan was on May 16 and that request was not refused. Instead, Marsden said that he would consider the matter. In addition, the fact that Strothers may have had an additional personal reason for leaving the jobsite does not deprive the work stoppage of its concerted character or protection under Sec. 7. See *Kendick Engineering, Inc.*, 244 NLRB 989 (1979).

[5] In this connection, it is uncontroverted that from 9:30 until 10:15 a.m. neither Marsden nor his son was at the jobsite. Accordingly, even had the employees desired to give advance notice of their intention to leave work, there was no one to whom they could have given such notice.

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Hudson T. Marsden, a Sole Proprietorship, Rochester, New York, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they have engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Robert Strothers and Ronald Porter immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, in the manner set forth in the section above entitled "The Remedy."

(b) Make whole Joseph Ruffin and John Cole for any loss of earnings, in the manner set forth in the section above entitled "The Remedy."

(c) Post at its facility in Rochester, New York, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are hereby dismissed.

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[6] Ruffin and Cole were reinstated on May 26, 1980.

[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Fieldcrest Mills, Inc. *and* **Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC.** Cases 10-CA-15300 and 10-RC-11929

January 7, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

By Members Fanning, Jenkins, and Zimmerman

On June 29, 1981, Administrative Law Judge Donald R. Holley issued the attached Decision in this proceeding. Thereafter, the Respondent, the Union, and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, to modify his remedy,[2] and to adopt his recommended Order,[3] as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Fieldcrest Mills, Inc., Scottsboro, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraphs accordingly:

"(d) Requesting employees to engage in surveillance of the union activities of others and report such activities to it."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files and records any references to the discharge of Ray Hughey on November 28, 1979, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future discipline against him."

3. Substitute the attached notice for that of the Administrative Law Judge.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not interrogate employees concerning their union activities and sentiments or concerning the union activities and sentiments of others.

We will not threaten employees with discharge or plant closure if they engage in union activity.

We will not intimidate employees because they engage in union activity.

We will not request employees to engage in surveillance of the union activities of others and report such activities to us.

We will not discourage membership in or activities on behalf of Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, or any other labor organization of our employees by discharging, transferring, or laying off employees because of their membership in or activities on behalf of the above-named Union or any other labor organization.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

We will offer Ray Hughey and William Dodson immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and we will make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, plus interest.

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

[3] We adopt the Administrative Law Judge's recommendation to issue a broad cease-and-desist order requiring the Respondent to cease and desist from violating the Act "in any other manner" on the basis that the Respondent had committed egregious and widespread unfair labor practices. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Member Zimmerman finds that the issuance of a broad order is inappropriate under the standards set forth in *Hickmott Foods, Inc., supra.*

[4] We have adopted the Administrative Law Judge's finding that the Respondent unlawfully discharged employee Ray Hughey for engaging in union activities. Consequently, we shall modify the recommended Order to provide that the Respondent expunge from its files and records any references to the unlawful discharge.

259 NLRB No. 98

WE WILL expunge from our files and records any references to the discharge of Ray Hughey on November 28, 1979, and **WE WILL** notify him that this has been done and that evidence of the unlawful discharge will not be used as a basis for future discipline against him.

FIELDCREST MILLS, INC.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge: Upon an original charge filed on December 17, 1979, and amended charges filed on January 10 and 31, 1980,[1] the Regional Director for Region 10 of the National Labor Relations Board (herein called the Board) issued a complaint on March 12 alleging that Fieldcrest Mills, Inc. (herein called Respondent), had, by specified conduct, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act). Respondent filed timely answer to the complaint denying that it had engaged in the unfair labor practices alleged.

On December 19, 1979, an election by secret ballot was conducted among employees of Respondent, and subsequently the petitioning Union, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC (herein called the Union), filed objections to the election. Thereafter, on March 26, 1980, the Regional Director issued his Report on Objections, order directing hearing, consolidating cases and notice of hearing, thereby consolidating Case 10-RC-11929 with the instant unfair labor practice case for hearing.

The hearing was conducted in Scottsboro, Alabama, on August 11, 12, 13, and 14, 1980. All parties appeared and were afforded full opportunity to participate. Upon the entire record, my observation of the demeanor of the witnesses during their testimony, and the post-hearing briefs of the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, maintains a place of business in Scottsboro, Alabama, where it is engaged in the manufacture of bath and carpet products. During the calendar year preceding issuance of the complaint, it purchased and received at its Scottsboro plant goods valued in excess of $50,000 directly from suppliers located outside the State of Alabama. Upon these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent utilizes approximately 200 employees at its Scottsboro plant, where it is engaged in the manufacture of bathroom accessories including commode tank covers, commode lid covers, and bathroom carpets. At all times material, such employees were supervised by: Joseph P. Foster, vice president and general manager; Ronald Blanton, personnel manager; Carl Cameron, superintendent; Charles Graves, superintendent; Kenneth Potter, manager of industrial engineering; and Line Supervisors Denton Layfield, Rufus Thompson, Tom Webb, Edward Chambers, and Tommy Womack.[2]

While the record fails to reveal the full extent of Respondent's operations at places other than Scottsboro, Alabama, its regional personnel manager, Osmond Raines, indicated during his testimony that he and another person holding a like title provide personnel direction at the corporate level. Raines is in charge of personnel matters at some 18 of Respondent's plants and service companies, and indicated that with exception of Respondent's Columbus towel mill complex, consisting of 3 plants, and its Salisbury, North Carolina, finishing plant, the plants are nonunion.

Commencing in April 1978, the Union sought to organize the employees who worked at the Scottsboro plant. It is undisputed that William Dodson and Wanda Willmon, alleged discriminatees in the instant case, were active on behalf of the Union during the campaign. During that campaign, Willmon served on the Union's in-plant organizing committee which consisted of some 25 employees and she wore a union committee badge and a prounion T-shirt in the plant on occasion. It is undisputed that Respondent's management officials were aware of her prounion sentiments during the 1978 campaign. It is likewise undisputed that Dodson was the chairman of the Union's in-plant organizing committee in 1978, and that his position was well known to supervisors of Respondent, including then Supervisor Homer Morris whom Dodson voluntarily told of his union activity. In addition to wearing a union committee button and a prounion T-shirt during the 1978 campaign, Dodson admittedly told Supervisor Morris at the outset of the campaign that he intended to do all he could to see that the plant was organized.

Around July 1978, after Dodson's widespread and open union activity, Morris called Dodson into his office and told Dodson that his job, raw materials handler, was being eliminated as a result of a timestudy. As a result of this job elimination, Dodson suffered a pay cut of 19 cents per hour and was given the job of service operator, which combined the duties of bundle handler and the serving duties of his old raw materials handler job (job no. 8258). A charge alleging that Dodson was transferred for discriminatory reasons was filed, but it was subsequently dismissed.

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[1] All dates herein are 1980 unless otherwise indicated.

[2] Respondent stipulated that Chambers and Womack have been supervisors since September 1, 1979. It is admitted, and I find, that the named individuals, as well as Osmond Raines, regional personnel manager, are, and have been, supervisors within the meaning of Sec. 2(11) of the Act.

A Board-supervised election was held at the Scottsboro plant at an undisclosed time in 1978. The Union lost the election.

In early September 1979, the Union once again sought to organize Respondent's Scottsboro plant employees. Employee Dodson was selected as the chairman of the in-plant organizing committee and it is undisputed that he immediately informed Personnel Manager Blanton and Superintendent Charles Graves that they had a union campaign going and he was going to do everything he could to see that the plant was organized.

Respondent admittedly informed its Scottsboro plant employees at the outset of the 1979 organizational campaign that it was opposed to the Union and intended to do what it could legally do to keep it out. Osmond (Ozzie) Raines, its regional personnel manager, was dispatched from Respondent's headquarters located in Eden, North Carolina, to plan and implement Respondent's efforts to oppose the Union.

As revealed by the complaint herein, the General Counsel contends that Respondent's managerial officials and its supervisors repeatedly engaged in conduct which interfered with, restrained, and coerced employees during the union campaign. Additionally, he claims that Respondent violated Section 8(a)(3) of the Act by suspending and then discharging employee Wanda Willmon, by transferring and then laying off William Dodson, and by discharging employee Ray Hughey.

B. *The Alleged 8(a)(1) Violations*

Paragraphs 7 through 16 of the complaint allege that at various times during the union campaign named Respondent supervisors engaged in conduct which independently violates Section 8(a)(1). The conduct attributed to each of the named supervisors is discussed below.

1. Conduct of Carl Cameron

Paragraph 7 of the complaint alleges that Respondent Superintendent Carl Cameron unlawfully interrogated employees on June 19, July 2, August 1, September 3, October 1, November 1, and December 19, 1979. Paragraph 8 of the cmmplaint alleges that Cameron, on or about September 24, 1979, solicited employees to attend union meetings and report to Respondent the identity and activities of employees attending those meetings. The General Counsel sought to prove the allegations through the testimony of employees George Smith and Thomas Goins.

George Smith, who was hired as a bundle boy or service handler on April 21, 1979, and who was still employed at the time of the hearing, testified that in June 1979, while he was in Cameron's office, Cameron told him they expected the Union to start campaigning pretty soon and that he, Cameron, would appreciate it if he would tell him if he saw or heard anyone talking about the Union or saw anyone signing union cards. Smith claims that in July and August Cameron repeated his request that the employee keep him informed of union activity. When the union campaign did begin in September, Smith asserts that Cameron informed him the Union had started up and he would appreciate it if he would tell him anything he knew about people passing out union cards, signing them, or saying anything to him about the Union. Smith testified that Cameron continued to ask him to inform on others in October and he indicated that on November 8 he was summoned to the personnel office where Blanton and Cameron indicated they had learned he had signed a union card and they were displeased with him. On that occasion, Smith recalled that Blanton started the conversation by stating: "Frankly, I'm pissed! Do you think I'm doing my job right?" When Smith said he thought Blanton was doing a pretty good job, Blanton replied: "Well you must not think so, you signed one of those damned union cards." According to Smith, Blanton then asked: "What do you think this damn son-of-a-bitching Union is going to do for you? I gave you a job, they didn't. How would you feel if I told you you didn't do your job right?" When Smith responded he would feel pretty bad about it, Blanton stated: "It makes me mad when someone tells me I can't do my job right. You must think so because you signed one of those union cards." At that point, Smith claims Cameron stated he felt the same way as Ron and commented that the Union could do nothing for him, and observed that he needed his job for his wife and baby. When Smith agreed, Cameron stated that all the Union "wants is your money." Finally, Smith asserted that Cameron asked him several days before the election, which was held on December 19, if he was still with them on the Union.[3]

Employee Goins testified that Cameron discussed the union situation with him on several occasions during 1979. On one occasion, Goins claims Cameron asked him if he was for the Union and he replied "yeah," 100 percent. On another occasion placed by Goins as being late in September, he claims Cameron asked him, while he was in the supervisor's office, if he would agree to go to union meetings and report who attended and what they said. Goins testified that he agreed to go to meetings and report who attended, but he told Cameron he did not know about reporting back what was said. According to Goins, Cameron told him at the conclusion of the latter conversation that he would check with Foster and Ron Blanton and get back to him to let him know whether he should go to the meetings.

While Goins testified on direct examination that he was asked to go to union meetings before he told Cameron he was 100 percent for the Union, Respondent's counsel directed the employee's attention to his pretrial affidavit during cross-examination, and the witness agreed he had truthfully indicated in the affidavit that he had told Cameron he was for the Union before he was asked to attend union meetings.

When he appeared as a witness, Cameron generally denied that he asked employee Smith to report union activity to him at any time. Significantly, Cameron did not deny Smith's version of the November 8 conversation in Blanton's office. Similarly, Cameron denied that he asked employee Goins to attend union meetings and report who attended and what was said. Cameron did not deny that he had asked Goins if he was for the Union. While Cameron admitted discussing the Union "casually" with Foster, he testified Foster did not tell him to do anything in particular; that Foster told him they were going to do everything they legally could to keep the Union out of the plant. Blanton was asked no questions concerning the November 8 incident described by Smith when he appeared as a witness.

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[3] Respondent placed Smith's pretrial affidavit in the record as Resp. Exh. 1. Smith's testimony during the hearing is in accord with the statements made in the affidavit.

While credibility resolutions pose problems at times, such is not the case here. Smith and Goins were impressive witnesses, but I was unimpressed by Cameron's general denial that he asked the employees in question to act as informers for the Company. I credit the testimony of Smith and Goins and find that Respondent through the described conduct of Cameron and Blanton violated Section 8(a)(1) of the Act by: (1) interrogating employees concerning their union activities; (2) requesting that employees engage in surveillance of the union activities of others and report such activities to Respondent; and (3) threatening and intimidating an employee because he engaged in union activities.

2. Conduct of Ronald Blanton

Paragraph 7 of the complaint alleges that Ron Blanton unlawfully interrogated employees on December 12, and paragraph 15 of the complaint alleges that Blanton unlawfully solicited grievances from employees on the same date. The General Counsel sought to prove the allegations through the testimony of employee Olivia Dabbs.

Employee Dabbs testified that she was told to report to the personnel office during the first week in December. When she reported, Blanton opened the conversation by saying they used to talk a lot, but did not seem to talk any more. Dabbs asserts she replied that they had tried to solve some problems with Blanton, but he did not seem interested. At that point, Blanton asked the employee if she thought the Union would help solve her problems, and she replied she thought it would help. Blanton then informed her that if the Union came in they would still have to come to Foster, Cameron, or himself with their problems. Dabbs claims she then commented that Blanton appeared to feel the Union was going to get in, and she asserts Blanton replied, "It is beat and they know it." Dabbs testified she then observed her machine was not working properly and claims Blanton asked her why she did not get one of her good mechanic friends that was for the Union to fix her machine. At the time of the hearing, Dabbs no longer worked for Respondent.

Blanton indirectly denied that he talked to Dabbs in December 1979 by testifying that he recalled talking to her about her problems in his office in 1978, and he recalled that in June 1979 she discussed the slowness of her machine with him and requested that Potter, the timestudy expert, time her machine. Dabbs appeared to be a straightforward individual while giving her testimony and the outcome of the case will not affect her as she now works elsewhere. I credit her testimony fully.

While an employer violates Section 8(a)(1) of the Act when its agents solicit grievances from employees during a union campaign and expressly or impliedly suggest that such grievances will be favorably received and acted upon, I am unconvinced in the present situation that the General Counsel has shown that Blanton engaged in such unlawful activity when he conversed with Dabbs in December. It is clear, however, that Blanton indirectly interrogated the employee concerning her union sentiments while she was in his office. Thus, I find that, in early December, Respondent, through Blanton's conduct, interrogated employee Dabbs in violation of Section 8(a)(1) of the Act as alleged.

3. Conduct of Tom Webb

Paragraph 7 of the complaint alleges that Tom Webb engaged in unlawful interrogation of employees on November 1. The General Counsel sought to prove the allegation through the testimony of employee Bill Mitchell.

Employee Mitchell, whose testimony is uncontroverted, testified that sometime in November, while he and Supervisor Webb were at the end of the tagging line, several women wearing union buttons passed by and Webb stated he did not see why they wanted the Union; that the pay was pretty good. Mitchell replied it was not the pay, it was the treatment. Apparently, the General Counsel contends that Webb sought indirectly to ascertain Mitchell's union sentiments by making the above-discussed comment about the women wearing the union buttons. As I view the incident, Webb simply made a statement indicating his opinion and Mitchell treated the statement as if it had been a question directed to him. I find that Webb's statement falls within the purview of Section 8(c) of the Act and that Respondent did not violate Section 8(a)(1) through Webb's conduct during the incident under consideration.

4. Conduct of Edward Chambers

Paragraph 7 of the complaint alleges that Supervisor Edward Chambers unlawfully interrogated employees on October 1. The General Counsel sought to prove the allegation through the testimony of employee Sam Sisk.

Employee Sisk testified, without contradiction, that Second-Shift Supervisor Edward Chambers asked him around the last of October why did he want a union. I find, as alleged, that Respondent violated Section 8(a)(1) through Chambers' described conduct.

5. Conduct of Denton Layfield

Paragraph 7 of the complaint alleges that Supervisor Denton Layfield unlawfully interrogated employees on November 7 and 16. The General Counsel sought to prove the allegations through the testimony of employees Walter Hicks and Ray Hughey.

Employee Hicks testified that he went to Supervisor Layfield's office around November 1 and Layfield asked him if he was still for the Union like he was in the other election. Hicks asserts he then asked Layfield if that was all he had to talk to him about and the supervisor replied, "Well, I am concerned that you are still for the Union." Layfield denies that he had the described conversation with Hicks. Hicks was an impressive witness who was still employed by Respondent at the time of the hearing. As indicated, *infra*, Layfield was admittedly interested in the union sentiments of employees. I credit Hicks.

Alleged discriminatee Hughey testified that when he was in Layfield's office in mid-November, Layfield asked him how he felt about the Union. He asserts he replied he was for it, and went on to tell Layfield he had worked at a union plant 7 or 8 years before. Hughey claims Layfield then remarked that his wife had worked at a union plant and it did not do her any good. According to Hughey, Layfield then asked him what was wrong between him and Ronald [Blanton] and that he replied Layfield knew what was wrong between him and Ron. Layfield allegedly replied, "Well, you've been wearing a union committee button," and Hughey testified he responded that Layfield knew he had because he had seen him wear it.[4]

Layfield testified that while standing outside his office in early November he remarked to Hughey that Ron had told him he had been seen in the vending room wearing a union button. Layfield claims the employee replied, "Yeah, I was playing with some women." Layfield denied that he had seen Hughey wear a union button, and he denied that he asked Hughey how he felt about the Union. When asked why he discussed the subject of the Union with Hughey on the occasion under discussion, Layfield replied, "Well, to feel him out, how he felt about it."

I credit Hughey's version of the mid-November conversation between him and Layfield. As the supervisor admitted, he was motivated to discuss the union situation with the employee to ascertain his feelings. I find his denial that he asked the employee how he felt about the Union to be unconvincing.

In sum, I find, as alleged, that Respondent, through Layfield's conduct, unlawfully interrogated employees concerning their union activities and sentiments in violation of Section 8(a)(1) of the Act in early and mid-November 1979.

6. Conduct of Rufus Thompson

Paragraph 9 of the complaint alleges that Supervisor Rufus Thompson threatened employees with reprisals on November 1 if they selected the Union as their bargaining representative. The General Counsel sought to prove the allegation through the testimony of employees J. B. Justice and Thomas Mitchell.

Employee Justice testified that 2 or 3 days before the December 19 election he and four or five employees, including employee Mitchell, were in the lunch area when Supervisor Thompson appeared and told them if the Company went union they would close it down.

Thomas Mitchell indicated during his testimony that Supervisor Thompson discussed the Union with him on two occasions. Thus, he claims he was in Thompson's office sometime in November and Thompson asked him his opinion of the Union. He claims he replied he had not really thought that much about it and Thompson told him it was something he should think about. According to Mitchell, Thompson then asked him how he intended to vote, and he replied he was going to vote for it. Thereupon, Thompson allegedly asked Mitchell why he wanted a union and stated that "a union is no good; all they do is cause problems; that we don't need no union." Corroborating Justice, Mitchell indicated Thompson came to the break area when Mitchell was there with three or four other employees, including Justice, and told them that the Union was no good; that it had already closed down a couple of plants and it would probably close down this plant; and asked them what they were going to do for a job when it [plant] is closed down.

Supervisor Thompson denied that he ever discussed the Union in employee Justice's presence in 1979. He admitted he discussed the Union with Mitchell in his office but claimed he merely asked Mitchell what he thought the Union could do for him if it came into the mill. According to Thompson, Mitchell indicated he was not strongly for the Union as he had been the other time, and he indicated he did not know how he would vote. While he denied discussing the Union with Justice, Thompson admitted he discussed possible plant closure with employee Mitchell, possibly in the break area. Thompson's version of the conversation was that he told Thomas (Mitchell) that "if the union came in there and they went out on strike, that it is possible the mill will close down because they have, we have to ship our orders out in from two to three weeks, you know, and if we can't sell our goods, we can't operate."

I gained the impression while hearing Thompson's testimony that he was reciting what he should have said, rather than what he actually said to employee Mitchell on the two occasions discussed above. I credit the testimony of employees Justice and Mitchell and find that Respondent, through Thompson's conduct, violated Section 8(a)(1) of the Act by unlawfully interrogating an employee concerning his union sentiments in November 1979, and unlawfully threatening employees in mid-December 1979 by informing them that if the Union got in the plant might be closed.

7. Conduct of Joseph Foster

Paragraph 10 of the complaint alleges that Plant Manager Joseph Foster informed employees on or about October 1, 1979, that if they selected the Union as their bargaining representative there would be a strike and the employees would lose their jobs. The General Counsel sought to prove the allegation through the testimony of employee Mark Shelton.

Shelton testified that, in late October at a first-shift employee meeting, Foster informed employees that they did not need the Union and, if it went union, the first thing that would happen would be that they would call a strike and everybody would be out of a job. Shelton claims Foster told them during the meeting that if they had any kind of a problem to bring it to him and he would take care of it. While Shelton indicated seven or eight employees attended the meeting, the only one he could remember attending was employee Walter Hicks.[5]

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[4] Hughey testified he wore the button every day commencing in late October.

[5] The General Counsel did not adduce any testimony through Hicks concerning the meeting.

When he appeared as a witness, Plant Manager Foster testified that he met with 8 to 10 different groups of employees in late September. While he admits he stated Respondent's position on the Union at the meetings, he claims he did so by reading a prepared speech to the employees which was placed in the record as Respondent's Exhibit 31. The written speech states, *inter alia*:

> I'm also opposed to this Union because of strikers. I'm sure everyone in this room remembers the strike this Union called at the Standard-Coosa-Thatcher plants in Chattanooga last year—the very same union that is trying to get in here. Over 600 employees called out on strike. There was violence on the picket line. People got hurt. Twenty-five (25) employees were fired. Over 100 new employees were hired to replace striking employees. Over $700,000 in wages were lost. For what? For nothing! When the strike was over, the employees went back to work for the same thing the company had offered before the strike.
>
> I don't want these things to happen here—to you or to our plant. And it's for these reasons that I will use every legal and proper means at our disposal to keep this Union out of our plant.

Respondent's personnel manager, Blanton, corroborated Foster's testimony by indicating that Foster read a prepared speech during the meetings in question.

I credit Foster's assertion that the comments made about the Union during the late September meetings were read from Respondent's Exhibit 31. While I found portions of Foster's testimony to be suspect, Shelton was not a particularly impressive witness. He indicated when testifying that he could not recall who, other than Hicks, attended the meeting he attended, and he stated he did not recall Foster referring to replacement of employees in event a strike occurred. Significantly, the General Counsel did not seek to corroborate his testimony through Hicks. In sum, I find that the General Counsel has failed to offer sufficient evidence to prove the allegation set forth at paragraph 10 of the complaint, and I recommend it be dismissed.

8. Conduct by Ozzie Raines

Paragraph 11 of the complaint alleges that on or about November 5 Respondent promised employees additional benefits if they refrained from joining or engaging in activities on behalf of the Union. The General Counsel sought to prove the allegation through the testimony of employee Leland McCutcheon.

McCutcheon testified that at an employee meeting held in early November Raines informed employees that at the beginning of the year they would receive a small raise and better insurance benefits.

Raines, whose testimony was corroborated to some extent by Respondent employee witnesses Edith Reed and Bonnie Jarell, indicated he spoke with Scottsboro plant employees about a raise and/or improved insurance coverage in June, November, and December.

Raines testified that all Fieldcrest employees were given a wage increase in May 1979. The amount of the increase was limited to 7 percent in accordance with the President's wage and price guidelines. According to Raines, Respondent was the first major company in the textile industry to give raises in 1979, and it was concluded that employee dissatisfaction might result if the average percentage of raise given in the textile industry exceeded 7 percent. Consequently, at his June meetings with Scottsboro plant employees, Raines told them why the May raise was limited to 7 percent and indicated to them that if other companies granted larger raises Fieldcrest would review its position at the end of the year and would make any necessary adjustments. During the June meetings, Raines also informed employees it was aware of employee dissatisfaction with their group insurance, was reviewing the policy, and there was a possibility improvements would be announced by the end of the year.

While McCutcheon recalled that Raines informed employees attending an early November meeting that they would receive a small raise and better insurance benefits the first of the year, Raines credibly testified he informed employees in early November that the Company was still prepared to review its position on the need for a "catch-up" raise at the end of the year and it was still working on the insurance plan.[6]

On December 11, the Union distributed a handbill which was placed in the record as Respondent's Exhibit 17. The document depicts a number of figures seated around a bargaining table and states, *inter alia*:

> ASK FIELDCREST WHAT'S NEW TODAY
>
> Fieldcrest, why didn't you tell us that other Fieldcrest workers under ACTWU contracts will begin negotiating today for better wages and fringes?
>
> Is it a secret that workers just like us, elicited by their fellow union members, will start bargaining today in Eden, N.C.?
>
> Don't you want us to know that union Fieldcrest workers have a voice in their wages and working conditions?

According to Raines, the above-described handbill caused him to meet with Scottsboro employees on December 13 to discuss what had occurred in bargaining at Eden, North Carolina. He asserts that he informed the employees that nothing was new; that Fieldcrest was meeting with the Union to negotiate a "catch-up" wage increase he had discussed with them in June; and that any increase given in one part of the Company would be given everywhere. Raines testified that his supervisor, who was privy to the negotiations in Eden, had informed him that an offer had been made to the Union and, as it had been favorably received and agreed upon in principle, he could announce to Scottsboro employees that they would receive a special wage adjustment and that the insurance changes would be effective the first of the year. Raines admittedly made such announcement to employees at the December 13 meeting. Subsequently, when final agreement was presumably reached with the

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[6] As revealed, *infra*, it is apparent that McCutcheon described what Raines told employees during meetings held on December 13.

Union several days later, Scottsboro Plant Manager Foster admittedly informed employees their special increase of 1-1/2 percent and the improved insurance benefits would become effective on January 6, 1980.

During cross-examination, Raines indicated that other companies in the textile industry reached wage settlements in late June, July, or August which were, on an average, greater than the 7 percent given by Respondent to its employees in May. Pointing to such testimony, the General Counsel contends in his brief that Respondent waited almost 4 months after learning of the higher settlements to give Scottsboro employees a "catch-up" raise because it desired to influence them in the exercise of their Section 7 rights. I am unable to agree.

In *American Sunroof Corporation; Automobile Specialty Corporation; American Sunroof Manufacturing Co.*, 248 NLRB 748 (1980), the Board recently stated:

> The Board has long held that the granting of benefits during an election campaign is not *per se* unlawful where the employer can show that its actions were governed by factors other than the pending election. And the Board has further held that an employer can meet this burden by showing that the benefits granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the Union.

In my view, Respondent has made such a showing with respect to the benefits under discussion.

Here, the record reveals that the Union represents employees at several of Respondent's plants, but the employees at most plants, including the Scottsboro plant, are unrepresented. In May, Respondent successfully caused the Union to agree to a 7-percent across-the-board increase for unionized employees. It then gave a companywide across-the-board wage increase of 7 percent. While Respondent's intention, as announced by Raines in both June and November, was apparently to reconsider wages and insurance the first of the year, the Union successfully caused Respondent to agree to a 1-1/2-percent "catch-up" wage increase and improved group insurance in mid-December. Thereupon, Raines announced employees would receive a raise and improved insurance at the end of the year and, within several days, Foster announced the amount of the raise. Again, the benefits were given companywide.

In sum, I conclude that Respondent has shown that, regardless of the presence or absence of union activity and/or a scheduled election, Scottsboro plant employees would have been informed in mid-December 1979 that at the end of the year they would receive a 1-1/2-percent pay raise and improved group insurance which were being given companywide. Consequently, I find that the General Counsel has failed to prove that Respondent promised the benefits in question to influence Scottsboro employees in the exercise of their Section 7 rights.

9. Conduct of Charles Graves

Paragraph 12 of the complaint alleges that on or about November 12 Supervisor Charles Graves informed employees it would be futile for them to select the Union as their bargaining agent. The General Counsel sought to prove the allegations through the testimony of employee Garland Morris.

Morris testified that Charles Graves approached him while he was with employees Wilkes and Brown in mid-November and informed them "that the union wouldn't be any good for us." and that "we were just talking and wasting our money as far as paying union dues."

I find that Graves' noncoercive remarks were statements of opinion which are permissible by virtue of Section 8(c) of the Act.

10. Conduct of Tommy Womack

Paragraph 13 of the complaint alleges that Supervisor Tommy Womack threatened on or about November 10 to discharge employees if they joined or engaged in activities on behalf of the Union. The General Counsel sought to prove the allegation through the testimony of employee Garland Morris.

Morris testified that Womack approached him while he was at a creel rack in mid-November and asked him if he knew who was behind the Union, who was working for it. When Morris told the supervisor he had no idea, he claims Womack stated if he found out who they were he would see that they were terminated.

While Womack admitted discussing the Union with Morris in mid-November, his version of the conversation is entirely different. He testified that initially the conversation was about work and Morris turned it to a discussion of the Union by telling him someone in the warehouse had given him a union button and he wore it one day and then took it off and threw it away. Womack asserts he then "just stated some facts to him about the union."[7] Womack categorically denied that he asked the employee if he knew who was for the Union and he denied he told him if he found out who was for the Union he would see that they were fired. He claims Morris asked him on one occasion if a person could be discharged if they were for the Union, and that he replied no.

At the time of the hearing, Morris, who was an impressive witness, no longer worked for Respondent. I credit his assertion that Womack asked him if he knew who was behind the Union and threatened to see that such person was fired if he discovered their identity. I find that Respondent, through Womack's described conduct, violated Section 8(a)(1) of the Act as alleged.

C. *The Alleged 8(a)(3) Violations*

As indicated, *supra*, the General Counsel claims that Respondent violated Section 8(a)(3) of the Act during the 1979 union organizational campaign by suspending and then discharging Wanda Willmon, transferring and then laying off William Dodson, and by discharging Ray Hughey. Such contentions are discussed individually below.

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[7] Womack did not elaborate.

1. The Wanda Willmon situation

Wanda Willmon was hired by Respondent to work as an elastic binder in June 1973.

During both the 1978 and the 1979 union organizational campaigns Willmon actively supported the Union. Thus, she testified that, in addition to signing an authorization card during the 1978 campaign, she wore a union button and T-shirt in the plant and passed out union literature. Similarly, when the 1979 campaign began, she signed a card, became a member of the in-plant organizing committee, and, from the third week in September on, wore a union button in the plant.[8] Respondent concedes management officials were aware of Willmon's prounion sentiments during the 1978 and 1979 campaigns.

Until July 1979, elastic binders accomplished their assigned task of sewing elastic binders completely around toilet lid covers by using a single needle sewing machine which guided and secured the elastic binder completely around the outside edge of the lid covers. In July, Respondent changed the procedure by cutting the lid covers in such a manner as to make approximately three-fourths of the cover round and the remaining one-fourth a straight cut which extended from the two points where the circle and/or arc stopped. The sewing technique was then changed and the elastic was sewn on the outside edge of the circular portion of the lid cover only. When sewing the newly designed lid cover, the elastic binders continued to use a single needle machine to sew the binder from the starting point (beginning of the arc) to the stopping point (end of the arc). However, when the stopping point was reached, the operator was required to remove the lid cover from the single needle machine and use a so-called bar tack machine to place a securing stitch across the elastic at the stopping point or corner.

After the above-described lid change was made, Respondent conducted a timestudy of the operation while Kerri Wilkins, one of its more proficient elastic binders, was performing the new job. The timestudy led to establishment of a new piecework rate and a new expected earnings rate for the job. The new expected earnings rate was $4.54 per hour.

During the 10-week period extending from mid-July to the end of the third week in September, the employees working in the elastic binder job classification were Martha Hambrick, Betty Murphy, Kerri Wilkins, and Wanda Willmon. According to Willmon, all the girls complained about the new piecework rate set for the job but nothing was done about it. Thus, during the 10-week period under discussion, Murphy and Wilkins regularly made expected earnings of $4.54 per hour, but Hambrick and Willmon, who each worked 9 of the 10 weeks, made expected earnings of $4.54 per hour only during the week ending August 10.[9]

Respondent Superintendent Cameron testified that he followed the work of the elastic binders carefully subsequent to the change in the job. After the change, he indicated he informed the operators of their earnings on a daily basis for 4–5 weeks. At the end of that period, Murphy and Wilkins were making expected earnings, but Hambrick and Willmon were not. Cameron testified he discussed the situation with both Hambrick and Willmon, but neither was able to improve her performance sufficiently to meet the $4.54 expected earnings rate set for the job.

Apparently both Hambrick and Willmon realized by late September that they were not going to be able consistently to make expected earnings of $4.54 in the elastic binding job. Thus, Hambrick transferred to another job at the end of the payroll period ending September 30.[10] At or about the same time, Willmon, on October 3, filled out two requests for transfer—one for a goods- handler position in the laundry and one for a forklift operator's job in the shipping department.[11] Willmon was offered the goods-handler position in the laundry on October 4 and she refused it.[12]

During the payroll period ending September 30, 1979, employee Sue Stephens, who had previously worked as an elastic binder employee, returned to the job classification from layoff. From that time until Willmon was terminated during the payroll period ending November 25, 1979, both Stephens and Willmon failed during each week to make expected earnings of $4.54 per hour.[13] Cameron testified that he gave employee Stephens an oral warning for poor production on October 15, but did not warn or discipline her further because she thereafter improved her performance every week.

Willmon received the first of several warnings for poor production on October 10. On that date she was orally warned by Superintendent Cameron for failing to make expected earnings.[14] A second verbal warning was issued on October 15.[15] The oral warnings were followed by a written warning on October 19.[16] She was then warned verbally on November 12,[17] and received a second written warning on November 14.[18] Upon receiv-

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[8] The same type of union button was worn during both organizational campaigns. See G.C. Exh. 7.

[9] See G.C. Exhs. 3(a)–(j).

[10] See G.C. Exhs. 3(k)–(l).

[11] See Resp. Exhs. 6 and 7.

[12] Willmon stated during her testimony that she did not recall being offered the job. Personnel Manager Blanton testified that he offered the employee the job and she refused it. I credit Blanton.

[13] Their actual average hourly earnings during the weeks mentioned are revealed by G.C. Exhs. 3(k)–(s). Their average hourly earnings for weeks ending September 9 through November 25 were:

Willmon	Stephens
$3.517	$3.261
3.6281	3.521
3.646	3.801
4.026	3.989
4.261	4.052
4.377	4.112
4.189	4.254
4.262	4.199
4.321	4.484

[14] See G.C. Exh. 4(a).

[15] See G.C. Exh. 4(c).

[16] See G.C. Exh. 4(e).

[17] On November 12, Willmon refused an offer of a forklift job in the shipping department. See Resp. Exh. 7.

[18] See G.C. Exhs. 4(b) and (d), respectively.

ing the second written warning, Willmon was suspended for 1 day.[19]

Willmon took her 1-day suspension on November 15. She returned to work on Friday, November 16, and worked that day and the next, Saturday. On Tuesday, November 20, Cameron called her to his office and informed her, in the presence of Personnel Manager Blanton, that he was suspending her pending discharge for bad work and poor production. He produced a toilet lid cover which had the elastic sewn past the corner and informed her she had sewn 115 lids in such a fashion.[20] In addition, he showed her a ticket indicating the number of menders, and she stated she did not think she had that many. Willmon testified she did not intentionally sew elastic improperly on toilet lids under discussion.[21]

Discussion

While the General Counsel has adequately shown that Willmon was an active union adherent and Respondent was aware of her prounion sentiments, he has failed to prove that she was suspended or discharged because she engaged in protected conduct.

Lacking direct evidence which would prove that Respondent suspended and discharged Willmon because she was active on behalf of the Union, the General Counsel claims disparate treatment and contends that the employee was falsely accused of producing 115 bad toilet lid covers. I conclude that the evidence fails to establish either contention.

With respect to the claim of disparate treatment, the General Counsel specifically contends that Stephens and Willmon both failed to make expected earnings during October and November, but only Willmon was punished for it. In making such a contention, the General Counsel ignores some relevant record facts. Thus, as indicated above, Willmon and Hambrick were working in the elastic binder job classification in mid-July when the expected earnings rate for the job was changed from $4.25 per hour to $4.54. During the following 10-week period Willmon and Hambrick made expected earnings on only one occasion. At that point, Hambrick sensibly transferred to another job and Willmon applied for transfer to two other positions. It was in the described context that Stephens entered the job classification during the last week in September. After working in the job classification for 3 weeks, Stephens was orally warned for poor production.[22] Cameron testified that, although Stephens did not immediately make expected earnings after the October 15 oral warning, he did not warn her further because she responded to the warning and her performance improved each week. His assertion is statistically verified.[23] On the other hand, Willmon did not receive her first oral warning for poor production until October 10, at which point she had failed to make expected earnings 10 out of 12 weeks.[24] Further, after she was warned for poor production on October 10, Willmon's average hourly earnings per hour the next week dropped to 3.646 and they thereafter remained under $4.54 through the payroll period ending November 25.[25]

In sum, Stephens worked 3 weeks as an elastic binder and was reprimanded for low production. She improved her production and was not further warned or disciplined. Or the other hand, Willmon actually worked in the job classification for 11 weeks before she was given a warning for poor production. She was offered jobs in other classifications on October 4 and November 12 but refused them. It is clear, and I find, that Respondent did not treat Willmon disparately.

Similarly, I find that I am unable to credit Willmon's assertion that she did not deliberately sew the elastic on 115 toilet lids incorrectly. Respondent had approximately 115 such lids at the hearing and Cameron testified that when they arrived at the inspection department they had dye tickets on them which contained Willmon's initials. When she was terminated, Willmon was shown the dye tickets and admittedly commented she did not think she had that many menders. Moreover, the General Counsel offered no evidence which would show that one of the other elastic binders produced the imperfect lids. In the circumstances, I find that Respondent justifiably decided that Willmon had deliberately sewed the elastic on approximately 115 toilet lid covers in an improper manner.

In sum, I find that the General Counsel has failed to establish, *prima facie*, that Respondent suspended or discharged Willmon for discriminatory reasons. I find instead that the record reveals she was suspended and discharged for cause.

2. The Ray Hughey situation

Ray Hughey was hired by Respondent as a janitor in July 1978. In September 1979, he was promoted to the position of tub operator. The record reveals that tub operators are the employees that dye the rugs and fabrics utilized at the Scottsboro plant. During the short period he worked as a tub operator, Hughey indicated he received a raise which was given to him in two steps. He further claims that both Supervisor Chambers and his immediate supervisor, Denton Layfield, told him he was doing a "damned" good job; that they had not seen anyone do a job like that before in 4 weeks.

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[19] A copy of Respondent's work rules, which are posted on bulletin boards in the plant and which appear on the back of the disciplinary action form used by Respondent, was placed in the record as Resp. Exh. 23. The rules are divided into four groups, groups A, B, C, and D. Violation of group A, B, and C rules leads to immediate suspension and possible discharge. In this case, Respondent contends that employees Willmon and Hughey violated group D rules. The applicable rules and the penalties for violation are:

> GROUP D—WRITTEN WARNING (In case of a second violation of a Group D rule within six months, the employee will be suspended for from one to ten days without pay. In case of a third violation within six months, the employee will be discharged. A Group C violation within six months of a suspension under Group D will result in discharge. A Group D offense within six months of suspension under Group C will result in suspension.)
>
> 19. Irregular attendance; absence without permission; repeated tardiness.
> 20. Inefficiency or negligence in the performance of duties.
> 21. Permitting avoidable waste of material or supplies.

[20] Willmon recalled the number as 150. She incorrectlv recalled the date of the occasion as being Monday, November 19. Cameron claimed there were 115 bad lid covers and they were made available for inspection by the General Counsel. I credit Cameron.

[21] As the General Counsel failed to show that some other elastic binder may have sewn the lids improperly and the batch of lids was accompanied by Willmon's dye ticket which was initialed by her, I do not credit her denial that she sewed the defective lids.

[22] She received such oral warning on October 15. See G.C. Exh. 4(*t*).

[23] See fn. 13.

[24] She made expected earnings only during the week ending August 10, but she was absent a week.

[25] See G.C. Exhs. 3(1)-3(s), and see fn. 13.

In mid-November, Hughey claims Chambers instructed him to go to Layfield's office. According to Hughey, when he got to the office Layfield asked, "How do you feel about the Union?" Hughey claims he told Layfield he was for the Union and had worked for 7 or 8 years at a unionized plant. He testified that Layfield commented that his wife worked at a union plant and it did not do her any good. At that point in the conversation, Hughey claims Layfield asked him what was wrong between him and Ronald (Blanton). Hughey stated he replied, "You know what is wrong between me and Ron," and Layfield responded, "Well, you've been wearing a union committee button." Hughey testified the conversation ended with him saying, "You know I have, because you've seen me wear it."

On November 28, Hughey arrived at the plant at approximately 2:30 p.m. He testified that he accepted some union literature from an organizer who was standing some 30 to 40 feet from the guard shack and talked to the organizer for about 5 minutes before he entered the plant. Hughey indicated that Superintendent Chambers was at the guard shack looking directly at him at the time. When he punched in to go to work at 3 p.m., Chambers told him that Denton wanted to see him in his office.

Hughey described what happened when he went to Layfield's office as follows:

> A. He said he was going to have to give me four days off and I said, for what? He said for spotting a load of rugs, and I said, where is the rugs? He says right there is one of them and I said, where is the rest of them and he never did say and I asked him for the ticket they was run on and he said "I don't have to show you the ticket," he said, "There's one rug, that's good enough for me" and then I said, "You mean you are giving me four days off for that" and he says, "Yeah." I says, "You are not giving me four days off, you are firing me, ain't you?" He said, "It looks that way."
>
> Q. Okay, did Mr. Layfield tell you how many rugs you had spotted?
>
> A. He said seventeen.
>
> Q. Did you spot seventeen rugs?
>
> A. I didn't, no, because he didn't show me the ticket on them, or show me the rest of the rugs.

Hughey admitted on cross-examination that he told Layfield at the time he was terminated that if he were not such an old man he would "haul his ass across the desk and whip him."

According to Hughey, a fellow tub operator, Leland McCutcheon, had spotted four to five loads of rugs (140 to 150 per load) several nights before November 28, and Layfield simply told him the next day to strip them and redye them.

When he appeared as a witness, Layfield described the tub operator's job in detail and indicated he felt that Hughey's negligence caused the spotting of 17 rugs. Thus, Layfield testified the tub operator begins the dying operation by filling a large tub with water. He then puts certain chemicals in the water and goes to the dye room to get the dye(s) needed to obtain the color desired. The dye is then placed in a 3-gallon bucket, water is added, and the mixture is placed under a nozzle which heats the water to a boil. The operator then stirs the mixture and pours it through a strainer into a second bucket. The tub operator then uses two dippers to put the dye mixture in the tub, which has the carpets to be dyed in it. According to Layfield, the operator half fills one dipper with water and the second with the dye mixture. Then, he adds dye mixture to the dipper holding water and simultaneously spills the diluted dye mixture into the tub as he moves the dipper across it.

Respondent produced the rug shown to Hughey on November 28. It was a dark brown rug which measured approximately 6-1/2 by 5 feet and had a large red spot approximately 7 inches long in the center and several smaller red spots. Layfield testified that such spots were caused when the operator failed to properly mix and strain the dye in the bucket before putting it in the tub.[26] He indicated there was no doubt in his mind that Hughey's negligence was the cause of the spotting.

Layfield denied that he refused to show Hughey the other 16 rugs which had been spotted. He indicated he took the one rug shown to the employee on November 28 to the office for safekeeping and directed that the remaining 16 be stripped and redyed, but claims the spots could not be removed and they were sold for 10 cents a pound as seconds.[27] Layfield testified the dye ticket which accompanied the load of rugs which had been spotted had been lost prior to the hearing.

Layfield indicated during his testimony that he had been on sick leave for 3 weeks prior to returning to work on November 5. He claims that when he returned to work Ron Blanton told him he had seen Hughey wearing a union button in the vending room. According to Layfield, he later spoke to Hughey outside his office and informed him, "Ray, Ron told me that you was seen wearing a union button." He claims the employee replied, "Yeah, I was playing around with some women—joking with some women." Asked why he made the comment, Layfield stated, "Well, to feel him out, how he felt about it."[28]

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[26] Employee John Anderson, who had been a tub operator for 2-1/2 years, was shown the rug in question and testified he was of the opinion that undissolved dye caused the spots in the rug.

[27] The rugs under discussion are made exclusively for Sears and are sold to them for $40 apiece. Layfield denied that Hughey asked to see the rest of the rugs and claims they were in a buggy outside his office at the time. I credit his denial.

[28] Layfield neither admitted nor denied that his wife's experience working under union conditions was discussed. I am convinced Layfield did not fully describe the mid-November conversation with Hughey. As indicated, *supra*, Layfield denied he asked employee Hicks if he was still for the Union like he was the last time and I have credited Hicks. I credit Hughey's version of the mid-November conversation.

Layfield's version of the discharge conversation was to the effect that he told Hughey he had two previous warnings and this—spotting of goods came up—and he would have to suspend him pending discharge. Layfield recalled Hughey replied, "You know G— d— well that ain't the reason I am being fired"; that Hughey then called him foul names; and then said "if he wasn't such an old man he'd snatch him over the desk and beat his ass."

Layfield denied knowing anything about McCutcheon spotting 500 to 600 rugs and denied he ever told McCutcheon, who worked the third shift while he worked the second shift, to strip down that number of rugs and redye them.

According to Layfield, Hughey's union activities had nothing to do with his decision to discharge the employee. Respondent placed in the record as Respondent's Exhibits 19, 20, and 21 two forms entitled "Disciplinary Warning Form" and a copy of a memorandum to Hughey from Layfield dated August 6, 1979. The disciplinary forms reveal Hughey received an oral warning for being absent without permission on May 18, 1979, and written warnings for the same rule violation on June 26, 1979, and August 6, 1979. The August 6 memorandum states, *inter alia*:

> Having reviewed your attendance with your supervisor, it is my responsibility to advise you of the seriousness of your absentee problem. Your supervisor has talked with you about your attendance record, given you a written warning and has suspended you without pay for your failure to improve your attendance.
>
> As you are aware, a third violation of our rules for absenteeism within six months is cause for your termination. It is the hope of the management of this company and my personal hope that you will improve your attendance so that you can continue your employment in this mill.
>
> Thank you,
> /s/ D. E. Layfield

Layfield claims the sole reason for Hughey's termination was the fact that he had three violations of group D rules within a 6-month period and termination was automatic under the rules. He denied that the employee's union activity had anything to do with the decision to discharge him.

Discussion

The Hughey discharge presents a situation in which an employee who was apparently progressing well in a new job was discharged within a short time after Plant Personnel Manager Blanton discovered he supported the Union and shortly after his immediate supervisor interrogated him concerning his union sentiments, indicating at the time that something was wrong between Blanton and him. Moreover, the employee was apparently terminated the first time he erred in the performance of his assigned duties. I find that these factors compel an inference that the employee's participation in protected activities as a motivating factor in his discharge. Consequently, pursuant to the causation test spelled out in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), I turn to an examination of the evidence offered by Respondent to demonstrate that it would have terminated the employee even in the absence of the protected conduct.

Respondent's principal defense to the allegation that it discharged Hughey because he supported the Union is that it has a company policy which dictates that an employee be terminated if he or she violates its group D rules three times within a 6-month period. To support its contention that Hughey had violated group D rules three times within a 6-month period, Respondent placed in evidence as Respondent's Exhibits 19 and 20 disciplinary action forms revealing that Hughey received written warnings on June 26, 1979, and August 7, 1979, for absence without permission which violated Rule 19. Inspection of the form dated June 26 reveals that that infraction of the rules occurred on June 25. Having placed the above-described disciplinary forms in evidence, Respondent caused Layfield to testify that Hughey's negligent failure to completely dissolve dye before putting it in the tub on November 27 caused the spotting of 17 of 20 rugs and this action amounted to "[i]nefficiency or negligence in the performance of duties" within the meaning of group D Rule 20.[20] Viewing the documents discussed and considering Layfield's testimony, I note that Hughey did not violate group D rules three times in a 6-month period. Instead, accepting Respondent's contention that the rules were violated at the time indicated, it appears Hughey's last violation occurred 6 months and 2 days after the June 25 violation. In the circumstances, I find that Respondent's defense that it discharged the employee pursuant to normal company policy because he violated group D rules three times in a 6-month period does not withstand scrutiny. Accordingly, as I view the situation, Hughey was terminated when, viewing the evidence in a light most favorable to Respondent, he had violated Respondent's rules only twice in a 6-month period. I find he was not terminated in accordance with normal company policy, and conclude that Respondent has failed to rebut the *prima facie* case of discriminatory discharge established by the General Counsel. It follows, and I find, that Respondent terminated Hughey in violation of Section 8(a)(3) and (1) as alleged.

3. The William Dodson situation

William Dodson was hired by Respondent as a materials handler in July 1969. He was in layoff status at the time of the hearing. When he was laid off on January 7, 1980, Dodson had more plantwide seniority than all but some 15 of Respondent's approximately 200 Scottsboro plant employees.

When the Union conducted its 1978 organizational campaign at the Scottsboro plant, Dodson was the chairman of the in-plant organizing committee. At the outset of the campaign, he informed his supervisor, Homer Morris, about the second week in April that they had a union campaign going and he was going to do everything he possibly could to see that the plant was organized. During that campaign, he wore a union committee button and a union T-shirt in the plant.

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[20] See also G.C. Exh. 5(c). I note that such exhibit contains a notation that Hughey "Put Wrong Dye in a dye Run—11/16/79." Layfield gave no testimony concerning an alleged violation of the rules by Hughey on November 16, 1979, and the record fails to reveal he was warned orally or in writing at that time. As Respondent failed to offer proof that he violated the rules on that date, I attach no importance to the notation.

At the time the 1978 union campaign started, Dodson was one of two raw materials handlers in the recently relocated Scottsboro plant. In July of that year Plant Manager Foster requested that the industrial engineering department conduct a timestudy of the raw materials handler job classification. The manager of the department, Kenneth Potter, conducted the study and recommended that the department head operate with one raw materials handler and reassign some of the duties to others. Subsequently, Dodson was called to Morris' office where the supervisor informed him that his job as raw materials handler was being deleted. Prior to that time, Dodson testified he and the other raw materials handler unloaded raw materials from trucks, stored the materials in a warehouse, took raw materials to the area where they were to be used, kept a record of all materials used each day, and performed other miscellaneous tasks. When Dodson's raw materials handler position was deleted, he was told he could work as a bundle handler or as a materials handler. He chose the bundle handler position which paid 19 cents less per hour than his prior job. As a bundle handler, he did not participate in unloading trucks or perform work in the warehouse. He moved bundles to and from machines in the tufting area. While Dodson was senior to the second raw materials handler at the time, one Steve Bynum, he was not informed why Bynum was retained to perform the raw materials handling work that remained after the one position was deleted. Charges were filed with the Board alleging that Dodson was transferred for discriminatory reasons, but they were dismissed. The Union lost the Board-conducted election held at the plant in 1978.

In June 1978, Dodson filed a request for transfer back to the raw materials handler job classification. In early 1979, Steve Bynum was promoted to supervisor and Dodson was transferred back to the raw materials handler job at his old rate.

The Union commenced its 1979 organization campaign at the Scottsboro plant the first week of September 1979. At that time, Dodson was again selected as the chairman of the in-plant organizing committee. He testified without contradiction that he immediately spoke to Plant Personnel Manager Blanton and Superintendent Charles Graves and informed them they had a union campaign going and he was going to do everything he could to see the plant was organized. During the 1979 campaign, Dodson again wore a union committee button and a union T-shirt in the plant. He was the Union's observer at a Board supervised election held on December 19.

On December 3, Graves informed Dodson his job was being deleted and the main tasks would be reassigned to others.[30] Graves further informed the employee he had three options: (1) he could take a layoff; (2) he could bid other jobs that would hopefully become open; and (3) he could bump the youngest creeler mender on the yardage machine on the second shift. Dodson was given 2 days to make up his mind. According to Graves, he called Dodson to his office 2 days later and Dodson, in the presence of Graves, Blanton, and Supervisor Womack, indicated he would take the creeler mender's job on the second shift. The job was in a new department and was open because the employee who had previously occupied the position, James Scott, had moved to the number two tufting machine when the regular operator, Leonard Robinson, went to the hospital for a back operation on October 8. The creeler mender's job paid 19 cents less per hour than the raw materials handler's job which had been deleted.

On January 7, 1980, the number two tufting machine operator, Robinson, returned to work. As Dodson had only approximately 1 month on the creeler mender's job, he had no seniority rights in the department and Scott bumped back into his old job.[31] Dodson was laid off and was still in layoff status at the time of the hearing.

Robinson testified that Plant Manager Foster telephoned him at the hospital on October 9, the day after his operation, and told him when he returned to work they would have someone do lifting that might be necessary in his job. Robinson indicated Graves also telephoned him while he was in the hospital to see how he was getting along. He told neither when he intended to return to work. On December 19, Robinson appeared at the plant to vote in the election. He then told Graves and Supervisor Tommy Womack he would return to work on January 7, 1980.

Since the raw materials handler job classification was deleted on December 3, a probationary employee, Pete Bates, has unloaded trucks and stored raw materials in the warehouse. When asked to describe other work which Bates now performs, Potter indicated he did not know what else he did since his job was a sales job.

Superintendent Graves testified that in August or September he observed that Dodson was idle a considerable portion of the time while performing the raw materials handler job functions and this caused him to bring the matter to Foster's attention. Potter testified that Foster handed the job description for the raw materials handler position to him on October 22 and asked that he look it over, indicating he would get back to him. The job description in question was placed in the record as General Counsel's Exhibit 6. It is a two-page document dated June 12, 1978, which superseded an earlier job description dated November 13, 1972.[32] The job description sets forth some 22 numbered job tasks to be performed by the raw materials handler. Asterisks appear before job tasks numbered 8, 9, 12, 13, 16, 17, and 21 and lines are drawn over the words spelling out the job tasks. The following notation appears at the bottom of page 2 of the document: "These are the duties that we could remove with ease":[33] The notation was initialed by Charles Graves on October 22, the date Foster gave the document to Potter.

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[30] The record reveals no other jobs were abolished at the Scottsboro plant during the 1979 organizational campaign.

[31] Respondent utilizes a system of departmental seniority. After 3 months in a job, an employee is accorded his full plantwide seniority in the department. If an employee transfers to a new department, he or she has no seniority until they have worked in the new department 3 months. When transferring to a new job in a new department, an employee has the right to transfer back to his or her former job during the 3-month probation period.

[32] As the record reveals the 1978 timestudy of the job classification was performed in June 1978, it is apparent the job description was updated at that time.

The record reveals that Foster directed Potter to conduct a timestudy of the raw materials handler job on November 7. According to Potter, the purpose of the timestudy was to ascertain whether the raw materials handler job was a full job. Potter, in turn, assigned the task to his assistant, Carolyn Williams. The basic study she conducted was placed in the record as Respondent's Exhibit 11. That document contains a description of the tasks performed by Dodson on the day of the timestudy, indicating the amount of time spent at each task. Utilizing the basic timestudy as a source document, Williams prepared a summary of the job study which was placed in the record as Respondent's Exhibit 13. According to both Potter and Graves, they got together after the preparation of the summary, which lists some 34 different job tasks performed by Dodson on the day of the study and the time it took him to perform them, and reviewed it. During that review, Graves indicated that 24 of the tasks performed on the day of the study were either unnecessary or were tasks that could more appropriately be performed by supervision, quality control personnel, creeler menders, or others.[34] Thus, while the raw timestudy showed that on the day of the study Dodson had 420.69 minutes of working time with 36.18 minutes personal, idle and fatigue time, after Potter deleted the 24 job tasks which Graves felt should be deleted from the study, the time required to accomplish the remaining 10 tasks was computed to be about 2-1/2 hours. According to Potter, it appeared to him, at that stage, that the raw materials handler job was not a full job and he recommended to Foster that the classification be abolished and that the duties be assigned to others.

When he appeared as a witness, Potter described the jobs which had been deleted for various reasons in recent years. Going back to 1975, Potter testified that during that year four job classifications were deleted. First, a fixer job and a fixer helper job were eliminated because machinery the employees fixed was moved to a different department and Respondent had fixers in the new department who could perform the duties involved. A third job designated as a grading inspector job and a fourth designated as a service operator's job were abolished in 1975, but Potter gave no reason for the action. Asked if other jobs had been eliminated before 1978,

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[33] The job functions lined out by Graves and his reasons for deleting them are:

"5. . . . sign bill as acceptance for shipment." Graves testified Dodson was not an authorized agent of the Company.

"8. Obtain sample covers on each new 'lot' and then send to Quality Control." Graves testified the samples should be obtained by quality control personnel but failed to explain why.

"9. Keep supervisor informed of inventory on different types of raw materials." Graves testified Respondent has some kind of weekly report which keeps them advised. The report was not described. Additionally, he testified the creeler menders were close to the situation and would be aware of any deficiencies.

"10. . . . assist to thread up tufting machines as instructed." Graves testified the raw materials handler has never performed the job, that yardage machine operators and creeler menders do it.

"12. Cut square yard of material from each machine to insure correct weight. Inform supervisor of weight from each machine daily." Graves testified the work could be performed by creeler menders who were right at the machine, while the raw materials handler's work area was 100-125 feet away (the location of the storage area). He claimed creeler menders make other cuts and they could make one more.

"13. Cut piece of goods from each machine daily to be dyed for quality check." Graves testified the job could be done by the creeler mender.

"16. Transport barrels of spray latex to assigned storage area in Laundry." Graves testified the truckdriver delivering the product takes it to the storage area.

"17. Make up barrel of aluminum sulfate to be put in latex pit." Graves testified the function has long since been discontinued.

"21. Spot check vendors weights of raw materials." Graves testified the task should be performed by a supervisor and that Tommy Womack was performing it at the time of the hearing.

[34] The items deleted by Graves from Resp. Exh. 13 and the reasons he gave for deleting them are (items "D" and "E" appear on p. 1. The numbered items appear on p. 2 and 3):

"D. Yarn to tufting machine." Graves testified creeler menders should move yarn from the storage area to the machines as they were at the machines and knew when they needed yarn.

"E. Duck roll to tufting machine." Graves testified creeler menders should obtain it for the same reason they should obtain yarn.

"5. Transfer skids to yardage area and skids aside and stocks side by side." Graves testified the creeler menders should perform the function.

"6. Aside skids in storage area." Graves testified the work should be performed by the man who moved the yarn and the creeler mender should do it.

"7. Clear yardage area—Pick up boxes etc." Graves testified creeler menders should perform the work.

"9. Transport yarn in storage." Graves testified the work was unnecessary—it was "make-up" work.

"12. Weight check—fringe." Graves testified he felt the job should be performed by someone in supervision or responsible for quality. He then testified Bryan Wright, a supply room clerk, was performing the function at the time of the hearing.

"13. Take fringe to be checked—Sample area." Graves simply testified the supply room clerk, who also unloaded trucks and stored raw materials in the storage area, performed the functions at the time of the hearing.

"14. Put unused cones of yarn in carton." Graves said it was creeler menders' work.

"15. Get key from truck." Graves said there was no reason to take the key from the truck.

"16. Get empty box to put cones of yarn in." Graves testified the creeler menders took the yarn out and should put the cones in boxes.

"17. Help get yarn for yardage machine." Graves testified creeler menders are responsible for getting the yard for the tufting machines.

"18. Put sodium Pertonate on greasy floor." Graves testified it is the janitor's job.

"19. Transfer Yarn—Place on skid in yardage area." Graves testified it is part of the creeler menders' job.

"20. Pick up yarn off floor-storage area." Graves testified creeler menders are responsible for getting yarn from the storage area and if they drop some it is their responsibility to pick it up.

"21. Straighten boxes of yarn—Storage." Graves testified once yarn is placed in the storage area it need not be moved until used.

"23. Clear area near tufting machine." Graves testified it was work which should be performed by men at each tufting machine.

"27. Stock duck rolls in storage." Graves testified that once duck rolls are placed in storage area further handling was not necessary until it was used.

"30. Write on Box—Note." No reason for deletion given.

"31. Stock skids in storage area." Graves testified creeler menders should do the work.

"32. Aside waste, boxes, cones." No reason for deletion given.

"33. Get truck and return to stock boards." No reason for deletion given.

"34. Help work on fork-lift truck." Graves testified it was mechanics' work.

Potter replied that he recalled that a yard handler classification and a dust handler classification had been abolished. He did not provide the reason they were abolished or the date on which they were abolished. Asked what jobs other than the raw materials handler position held by Dodson were abolished in 1978, Potter indicated that four truckdriver jobs were eliminated after Respondent completed its move from its old plant to the present plant. Additionally, he recalled that a ticket printer classification in the packaging department was deleted at some unspecified time. He gave no reason for the deletion of that job. Asked what job classifications other than the raw materials handler classification were deleted in 1979, he stated a beveling operator job classification which involved three employees was eliminated as a result of an operational change. Finally, Potter testified that in 1980 a service operator classification in the packaging department was eliminated. No reason for the deletion of the job was given.

Discussion

Clearly, the pivotal issue presented by the Dodson situation is whether the raw materials handler job classification was abolished for valid reasons or whether the reasons advanced are mere pretext as contended by the General Counsel. A secondary issue, which need not necessarily be resolved if the pivotal issue is resolved in the General Counsel's favor, is whether Respondent caused Dodson to transfer to a creeler mender job knowing Robinson would return, Scott would bump back into the job, and Dodson would be laid off. For the reasons set forth below, I conclude that Dodson's union activities and his known prounion sentiments rather than valid business considerations motivated Respondent to abolish the raw materials handler job classification.

According to the scenario advanced by Respondent, Graves noticed that Dodson had idle time on his job in August or September and that caused him to recommend to Foster around October 22 that they prepare a timestudy on the job to see if it was a full 8-hour-a-day job. Graves failed to indicate how often or exactly when he observed Dodson when he was idle and he failed to indicate why, if he first observed an inactive Dodson in August or even September, he waited until October to discuss the matter with Foster. As Dodson testified without contradiction that he informed both Graves and Blanton in early September that they had a union campaign underway and he intended to do everything he could to see that the plant was organized, I strongly suspect the employee's candid discussion with Graves and Blanton triggered the decision to abolish his job. That suspicion is bolstered by the fact that General Counsel's Exhibit 6, the job description for the raw materials handler job, reveals that, before Graves gave it to Foster, who gave it to Potter, Graves lined out a number of job tasks indicating on the bottom of the document, "These are the duties that we could remove with ease." If Graves wanted the job studied to ascertain whether it was a full-time job, why the notation. The conclusion I reach is that Graves, and presumably Foster as well, since he had successfully utilized a timestudy to eliminate Dodson's raw materials handler job in 1978, decided before the job study was conducted to abolish Dodson's job.

Moving to the timestudy itself, I note that the job description indicates a major duty of the raw materials handler was to unload trucks and store the raw materials in a storage area. Or the day the study was conducted, Dodson did not perform those functions. He apparently was simply occupied, in main, in moving needed raw materials from the storage area to the machines and keeping both areas clean and uncluttered. When the raw timestudy revealed that Dodson did not have a particularly large amount of idle time the day of the study, Graves got together with Potter and told him supervision should perform some of the tasks, quality control employees should perform others, and creeler menders should perform others. Significantly, the raw materials handler job description had caused the incumbent in that job classification to perform most of the listed functions since at least June 1978, when the latest job description was issued. I attach little weight to the job study, and less weight to Graves' self-serving subjective testimony to the effect that many of the jobs deleted by him should properly be performed by others.

Finally, I note that Graves, Potter, and Foster decided to eliminate Dodson's job and cause him to take a demotion at the height of the Union's organization campaign and at the height of Respondent's own antiunion campaign which was marked by the commission of numerous instances of conduct which were violative of Section 8(a)(1) of the Act. While Respondent sought to show that other jobs were eliminated as a result of timestudies during 1979, the only other job classification eliminated during that year was a beveling operation, and it was eliminated because the work was no longer necessary rather than as a result of a timestudy. Thus, Dodson's job was the only job eliminated after a timestudy in 1979.

In sum, the above factors cause me to conclude and find that the reasons assigned by Respondent for the elimination of the raw materials handler job classification on December 3, 1979, are pretextual. As elimination of his job classification led to Dodson's transfer to the creeler mender job and subsequently to his layoff, I find, as alleged, that the transfer and the subsequent layoff were accomplished in violation of Section 8(a)(3) and (1) of the Act as alleged.[35]

IV. THE REPRESENTATION CASE

Or October 19, 1979, the Union filed the petition in Case 10-RC-11929. Pursuant to a Stipulation for Certification Upon Consent Election, an election was held among employees of Respondent in an appropriate unit on December 19. The Union failed to win the election and filed timely objections to the election. Or March 26, 1980, the Acting Regional Director issued a Report on

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[35] While the job classification was eliminated, I note that the new employee classified as a supply clerk now apparently unloads trucks, stores raw materials in a storage area, and takes samples of materials to quality control personnel. Potter's unfamiliarity with the other funcions performed by the supply clerk, as they are supposedly sales related, suggests the possibility that the supply clerk is employed full time in the performance of tasks previously performed by the raw materials handler.

Objections, in which he recommended that Objections 5, 6, 7, 8, 9, 12, and 13 be overruled and ordered that Objections 1, 2, 3, 4, 10, 11, and 14 be resolved by an administrative law judge after hearing. The objections before me are:

OBJECTION 1:

Interrogation of its employees about their union sympathies and/or activities as well as the union sympathies and/or activities of their fellow employees;

OBJECTION 2:

Solicitation of employee grievances;

OBJECTION 3:

Threats of plant closure;

OBJECTION 4:

Threats of loss of jobs;

OBJECTION 10:

Discriminatory treatment of pro-union employee Wanda Williams [sic];

(1) By suspending her for one day on November 14, 1979.

(2) By suspending her for four days on November 19, 1979; and

(3) By discharging her on November 23, 1979.

OBJECTION 11:

Discriminatory discharge on November 28, 1979 of prounion employee Ray Hughey;

OBJECTION 14:

Interference with and destruction of the laboratory conditions required for the conduct of a representation election.

The section of this Decision entitled "The Alleged 8(a)(1) Violations" sets forth the evidence relating to Objections 1, 2, 3, and 4. As indicated there, I have found that during the period October 19–December 19, 1979, Supervisors Cameron, Blanton, Chambers, Layfield, Thompson, and Womack interrogated employees in violation of Section 8(a)(1) of the Act. Accordingly, I recommend that Objection 1 be sustained. In the same section of this Decision, I have found that Respondent did not, through the conduct of Blanton, unlawfully solicit employee grievances. As no other evidence was offered in support of Objection 2, I find it to be without merit and recommend it be overruled. With respect to Objection 3, I have found that Supervisor Rufus Thompson unlawfully threatened employees with plant closure 2–3 days before the election. Accordingly, I recommend that Objection 3 be sustained. In section III,B,10, *supra*, I have found that Supervisor Tommy Womack unlawfully threatened in mid-November to fire the person behind the Union. Accordingly, I find Objection 4 is meritorious and recommend that it be sustained.

The section of this Decision entitled "The Alleged 8(a)(3) Violations" treats the unfair labor practice allegations which are coextensive with Objections 10 and 11. As there revealed, I have found that Ray Hughey was discharged by Respondent on November 28, 1979, in violation of Section 8(a)(3) and (1) of the Act. I further found that employee Wanda Willmon was not suspended or discharged by Respondent in violation of the Act. Accordingly, I conclude Objection 10 is without merit and recommend it be overruled. I conclude that Objection 11 is meritorious and recommend that it be sustained.

Remaining is Objection 14. Consideration of the evidence offered in support of Objections 1, 3, 4, and 11 causes me to find that such conduct interfered with the employees' exercise of a free and untrammeled choice in the election. Accordingly, I find that Obection 14 is meritorious and recommend that it be sustained.

Having concluded that Respondent engaged in conduct during the period October 19–December 19, 1979, which interfered with the employees' exercise of a free and untrammeled choice in the election, I recommend that the results of the election held on December 19, 1979, be set aside and that a second election be conducted.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by: Interrogating employees concerning their union activities and/or the union activities and sentiments of others; requesting that employees report to it the union activities of other employees; threatening plant closure if employees selected the Union as their bargaining agent; threatening to discharge the person responsible for the Union; and intimidating an employee because he engaged in union activity.
4. Respondent violated Section 8(a)(3) of the Act by discharging employee Ray Hughey and by transferring and subsequently laying off William Dodson because such employees joined and supported the Union.
5. Respondent has not engaged in any unfair labor practices not specifically found.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondent will be required to offer Ray Hughey and William Dodson reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, anyone who may have been hired to perform the work which they had been performing. Additionally, Respondent will be ordered to make these employees whole for any loss of earnings they may have suffered by reason of the unlawful terminations, with backpay to be computed on a quarterly basis, making deductions for interim earnings, and with interest to be paid in accordance with the Board's Decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

As the unfair labor practices committed by Respondent, particularly the acts of discrimination, strike at the heart of the Act, a broad cease-and-desist order shall be recommended, precluding Respondent from "in any other manner" interfering with, coercing, or restraining employees in the exercise of the rights guaranteed by Section 7 of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[36]

The Respondent, Fieldcrest Mills, Inc., Scottsboro, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union activities and sentiments or concerning the union activities and sentiments of others.

(b) Threatening employees with discharge or plant closure if they engage in union activity.

(c) Intimidating employees because they engage in union activity.

(d) Discouraging membership in or activities on behalf of Amalgamated Clothing and Textile Workers Union, AFL-CIO, or any other labor organization of its employees, by discharging, transferring, or laying off employees because of their membership in or activities on behalf of the above-named or any other union.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Ray Hughey and William Dodson immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay due to the violation against them in accordance with the manner set forth in "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Scottsboro, Alabama, copies of the attached notice marked "Appendix."[37] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.

IT IS FURTHER ORDERED that the election held in Case 10-RC-11929 be set aside and that a second election be directed.

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[36] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[37] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Unique Handicraft Corp. *and* Local 1814, International Longshoremen's Association, AFL-CIO.

Case 29-CA-8998

January 7, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on July 6, 1981, by Local 1814, International Longshoremen's Association, AFL-CIO, herein called the Union, and duly served on Unique Handicraft Corp., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint on August 11, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 27, 1981, following a Board election in Case 29-RC-5202, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on various dates since May 27, 1981, including particularly June 2 and 15 and July 8, 1981, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On August 20 and September 23, 1981, Respondent filed its answer and amended answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Specifically Respondent admits that it refused to bargain collectively with the Union commencing on the various dates alleged in the complaint. In addition, Respondent stated by letter dated June 11, 1981, that it declined the Union's request to begin collective-bargaining negotiations on the basis of its belief that the certification of the Union is invalid.

On October 1, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 7, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a brief in opposition to the General Counsel's Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint Respondent affirmatively pleads that it is under no duty to recognize and bargain with the Union because the Union's certification is based upon an election which should have been set aside due to a misrepresentation by the Union and the Union's designation of an ineligible person to act as its election observer.

Respondent reiterates these contentions in its brief in opposition to the General Counsel's Motion for Summary Judgment and essentially repeats the arguments made in its exceptions to the Regional Director's Report on Objections in the underlying representation case. The General Counsel contends that Respondent admits the material allegations of the complaint and is merely attempting to relitigate issues which were or could have been disposed of in the underlying representation case. We agree with the General Counsel.

Our review of the record, including the record in the underlying representation case (Case 29-RC-5202), reveals that pursuant to a Stipulation for Certification an election was conducted on December 5, 1980, in a unit of all warehousemen employed by Respondent at its premises located at 37-11 48th Avenue, Long Island City, New York, including packers, pickers and shipping clerks, and excluding all office clerical employees, guards and supervisors as defined in the Act. The tally of ballots indicated nine votes for the Union and eight votes against; there were no challenged ballots. Respondent filed timely objections alleging (1) the Union improperly designated Robert Evans as an observer since he was not an employee at the time of the election; (2) the Union distributed a letter which misrepresented the nature of a Board settlement in Case 29-CA-7986; and (3) the list of eligible employees failed to include the name of employee Robert Limehouse, an eligible employee, and Limehouse therefore was deprived of his right to vote. On January 16, 1981, the Regional Direc-

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[1] Official notice is taken of the record in the representation proceeding, Case 29-RC-5202, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

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tor for Region 29 issued his Report on Objections in which he overruled the Employer's objections in their entirety and recommended that a certification of representative issue. On January 23, 1981, Respondent filed with the Board exceptions to the Regional Director's report arguing that the Regional Director erred in overruling Employer's Objections 1 and 2 above because, *inter alia*, he failed to acknowledge that a copy of the Board's settlement notice was attached to the Union's letter. On May 27, 1981, the Board issued a Decision and Certification of Representative (not published in bound volumes) in which it adopted the Regional Director's report overruling the Employer's Objections 1, 2, and 3 above. Therein the Board specifically found no merit to the Employer's contention that the Regional Director erred by failing to refer to a Board settlement notice attached to the Union's campaign letter at issue in the Employer's Objection 2 because, if anything, the attachment reinforced the Regional Director's finding that there had been no substantial misrepresentation of the Board document. It thus appears that Respondent is attempting to relitigate matters which were or could have been heard and determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a corporation organized under the laws of the State of New York, operates a facility located at 47-09 30th Street in the Borough of Queens, New York, where it is engaged in the warehousing, sale, and distribution of decorative housewares and related products. During the past year, a representative period, Respondent in the course and conduct of its business operations purchased and caused to be transported and delivered to its Queens warehouse brass ornaments and related products and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its Queens warehouse in interstate commerce directly from States of the United States other than the State of New York, and from foreign countries.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 1814, International Longshoremen's Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All warehousemen employed by the Respondent at its premises located at 37-11 48th Avenue, Long Island City, New York, including packers, pickers and shipping clerks, excluding all office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On December 5, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 29, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 27, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

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[2] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

B. *The Request To Bargain and Respondent's Refusal*

Commencing on various dates since May 27, 1981, including particularly June 2 and 15 and July 8, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit.

Commencing on various dates since May 27, 1981, including particularly June 2 and 15 and July 8, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 27, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Unique Handicraft Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 1814, International Longshoremen's Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehousemen employed by Respondent at its premises located at 37-11 48th Avenue, Long Island City, New York, including packers, pickers and shipping clerks, excluding all office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 27, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about May 27, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Unique Handicraft Corp., Long Island City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 1814, International Longshoremen's Association, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All warehousemen employed by Respondent at its premises located at 37-11 48th Avenue, Long Island City, New York, including packers, pickers and shipping clerks, excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at Respondent's Queens, New York, facility copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 1814, International Longshoremen's Association, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All warehousemen employed by us at our premises located at 37-11 48th Avenue, Long Island City, New York, including packers, pickers and shipping clerks, excluding all office clerical employees, guards and supervisors as defined in the Act.

UNIQUE HANDICRAFT CORP.

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Turnbull Enterprises, Inc. *and* **Sheet Metal Workers International Association, Local No. 11.** Case 15-CA-7489

January 7, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 18, 1980, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] the Charging Party filed cross-exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision. The Intervenor[2] also filed an answering brief to the exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order, which is modified to reflect the amended remedy.

AMENDED REMEDY

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing payment of contributions to the New Orleans Sheet Metal Workers Health and Welfare Fund (hereinafter referred to as the Health and Welfare Fund or the Fund) on behalf of the unit employees. To remedy this violation, the Administrative Law Judge recommended that Respondent be ordered, *inter alia*, to make all Health and Welfare Fund contributions, as provided in the predecessor's collective-bargaining agreement, for the period beginning on July 10, 1979, and extending until agreement on a contract encompassing a substitute insurance plan was reached by the parties on December 12, 1979;[4] to make whole employees for loss of benefits after the expiration of the coverage provided by these retroactive contributions or, at Respondent's discretion, by continuing contributions to the Fund beyond December 12 in lieu of compensating employees for loss of benefits under the Fund; and to rescind the insurance plan in effect under its collective-bargaining agreement with the Union and reinstate the New Orleans Sheet Metal Workers Health and Welfare Fund plan for unit employees upon written request by the Union. The Administrative Law Judge left to the compliance stage the question whether Respondent must pay any additional amounts into the Health and Welfare Fund in order to satisfy the make-whole remedy, but specifically provided that Respondent be required to notify bargaining unit employees, as well as former employees, qualifying for benefits under this remedial scheme of their entitlement to such benefits. We agree with certain portions of the Administrative Law Judge's recommended Order, but shall modify it in other respects to best effectuate an appropriate remedy under the existing circumstances.

In cases, like the one here, involving a violation of Section 8(a)(5) based on a respondent's unilaterally altering existing benefits, it is the Board's established policy to order restoration of the *status quo ante* to the extent feasible where there is no evidence that to do so would impose an undue or unfair burden on the respondent.[5] Because the Fund's health and welfare plan provided for 6 months' future benefits on the basis of coverage earned during the previous 6 months, and contributions had been made by Respondent's predecessor on the unit employees' behalf, the employees had accrued 6 months of advance coverage at the time that Respondent acceded to its successorship obligations and unilaterally discontinued payments to the Fund.[6] We find, therefore, that Respondent's unfair labor practice can be most appropriately remedied by placing the parties in the position in which they would have been but for Respondent's unlawful discontinuance of Fund contributions.

The remedy recommended by the Administrative Law Judge generally accomplishes this remedial objective. Thus, we agree with his recommendations regarding making employees whole for loss of benefits to the extent that costs which would have been paid by the Fund were not actually paid by

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[1] Respondent's request for oral argument is hereby denied inasmuch as the record and briefs adequately state the positions of the parties.

[2] The New Orleans Sheet Metal Workers Health and Welfare Fund appeared at the hearing as the Intervenor.

[3] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] Unless otherwise indicated, all dates hereinafter are 1979.

[5] See, for example, *Allied Products Corp., Richard Brothers Division*, 218 NLRB 1246 (1975), enfd. in relevant part 548 F.2d 644 (6th Cir. 1977); *Southland Paper Mills, Inc.*, 161 NLRB 1077, 1078 (1975).

[6] Under the terms of the plan, unit employees of the predecessor who worked at least 350 hours between January 1, 1979, and June 30, 1979, were qualified for benefits under the Fund from July 1, 1979, through December 31, 1979, regardless of whether Respondent made contributions.

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the insurer under the contract, notification to all qualifying employees and former employees of their entitlement to such amounts, and reinstatement of the Health and Welfare Fund upon the Union's written request. We find, however, that the Union is most efficaciously restored to the bargaining position which it would have enjoyed but for Respondent's discontinuation of Fund contributions, not by requiring that Fund contributions be made for the period beginning July 10, 1979, and extending until December 12, 1979, as recommended by the Administrative Law Judge, but rather by the payment of retroactive contributions which will purchase 6 months of future coverage for the employees commencing from the day following receipt of the Union's request that the Health and Welfare Fund plan be reinstituted.[7] Respondent will then be required to continue payment of the currently applicable contribution rate of the New Orleans Sheet Metal Workers Health and Welfare Fund sufficient to provide continuing coverage for the unit employees until it fulfills its bargaining obligation.

In order to allow the Union an opportunity to consider whether to request the reinstatement of the Health and Welfare Fund, while not leaving the matter open indefinitely, the Union shall be required to request reinstatement within 20 days of the date of our Order herein, and if the Union does not request such reinstatement then the insurance plan in effect under the parties' current collective-bargaining agreement shall remain in effect. Once all unit employees employed by Respondent on the effective date of the reinstatement of coverage under the Health and Welfare Fund are covered by that plan, Respondent may discontinue the payment of premiums on their behalf to the insurer providing coverage under the parties' collective-bargaining agreement.[8]

In agreement with the Administrative Law Judge, we are not requiring Respondent to pay double insurance premiums by making all Health and Welfare Fund contributions for the entire period since July 10, 1979. Requiring full Fund contributions would impose an undue burden on Respondent. Further, such payments would constitute a windfall to the Health and Welfare Fund inasmuch as the insurer under the parties' collective-bargaining agreement has presumably already paid a substantial portion of the benefits to which employees would be entitled during this period.

We shall, however, order Respondent to compensate the Fund for administration costs and other expenses and loss of interest incurred by the Fund as a result of its acceptance of retroactive payments. Like the Administrative Law Judge, we shall leave the determination of these amounts to further compliance proceedings, should the Union request reinstatement of the Fund. *Clerks and Checkers Local No. 1593, International Longshoremen's Association, AFL-CIO (Caldwell Shipping Company, et al.)*, 243 NLRB 8 (1979).[9]

Irrespective of whether the Union requests reinstatement of the Health and Welfare Fund plan, we shall adopt the Administrative Law Judge's recommendation that specific unit employees who suffered actual damage in loss of benefits be made whole by recovering those damages. In measuring actual damages, employees should be reimbursed for actual cost to the extent those costs would have been paid by the Fund minus costs which were actually paid by Respondent's insurer. However, we do not adopt those aspects of the Administrative Law Judge's recommended make-whole provision which permit Respondent to elect to make contributions to the Health and Welfare Fund in lieu of compensating employess for loss of benefits under the Fund. Rather, we shall require that employees be made whole for loss of benefits after December 31, 1979, the point at which their Health and Welfare Fund coverage ceased, and continuing to the date upon which Respondent fully complies with the terms of our Order. The amounts due shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Further, since this remedy has the effect of qualifying all persons employed in the bargaining unit after July 10, 1979,[10] for benefits under the Health and Welfare Fund, we, in accordance with the recommendation of the Administrative Law Judge, shall require that Respondent take appropriate action to notify, in writing, all employees and former employees that so qualified of their entitlement to those benefits.

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[7] Since the Respondent made no payments for its unit employees' insurance coverage from July 10 to December 12, erroneously assuming that it had a "six-month free ride," these amounts represent a substitution for contributions which should have been made at that time.

[8] In order to establish initial eligibility for Fund benefits, an employee must work 6 consecutive months with 700 hours of contributions to the Fund. Once the initial eligibility requirement is satisfied, employees who have 350 hours of contributions in each 6-month period remain eligible for benefits. Should any employee have been hired shortly prior to the date Fund coverage becomes effective pursuant to this remedy, such individuals might not qualify for Fund benefits until up to 6 months later. Therefore, to avoid the possibility of individuals hired under the current collective-bargaining agreement being left with no insurance coverage during this interim period, we shall require Respondent to continue to make premium payments on such individuals' behalf until such time as each qualifies for coverage under the Fund plan.

[9] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We therefore leave to further proceedings the question of how much interest Respondent must pay into the benefit fund in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213, fn. 7 (1979).

The above-described remedial provisions, in our view, best eradicate the effects of Respondent's unlawful conduct by making whole employees for their resulting losses, and best restore the *status quo ante* by placing the Union in the bargaining position which would have obtained but for Respondent's unlawful action, without imposing an undue or unfair burden upon Respondent.[11] We shall modify the Administrative Law Judge's recommended Order accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Turnbull Enterprises, Inc., Gulfport, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following paragraphs for paragraphs 2(a) and (b):

"(a) Make whole the employees in the appropriate unit in the manner set forth in the section of the Board's Decision and Order entitled 'Amended Remedy.'

"(b) Upon written request from the Union, and in the manner set forth in the section of the Board's Decision and Order entitled 'Amended Remedy,' rescind the current insurance plan under its collective-bargaining agreement with the Union, and immediately reestablish the plan under the New Orleans Sheet Metal Workers Health and Welfare Fund by making retroactive contributions on behalf of unit employees entitling them to 6 months of future coverage commencing from the day following receipt of the Union's request, and continue such payments until such time as Respondent negotiates in good faith with the Union to a new agreement or impasse."

2. Insert the following as paragraph 2(c):

"(c) Notify, in writing, all persons employed in the bargaining unit after July 10, 1979, of their entitlement to damages for loss of benefits."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT, without prior consultation and bargaining with the Union, effect any changes in established terms and conditions of employment of the employees in the appropriate unit described below by unilaterally discontinuing payments to the Health and Welfare Fund as set forth in the collective-bargaining agreement between our predecessor and the Union.

> All production and maintenance employees, including leadpersons, electrician, janitor, plant clerical employees, tool room clerk, warehouse employees and wood fabrication employees, employed by the Employer at its Gulfport, Mississippi facility; excluding office clerical employees, draftsmen, computer operators, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by the Act.

WE WILL make employees in the above-described bargaining unit whole for losses suffered because of our unlawful action in withholding contributions on their behalf to the New Orleans Sheet Metal Workers Health and Welfare Fund.

WE WILL, upon written request from Sheet Metal Workers International Association, Local No. 11, rescind the insurance plan in effect under our collective-bargaining agreement with that Union, and will immediately reestablish the plan under the New Orleans Sheet Metal Workers Health and Welfare Fund by making retroactive contributions entitling unit employees to 6 months of future coverage commencing from the day following receipt of the Union's request, and will continue making such payments until we either bargain to a new agreement on this subject with the Union or reach a bargaining impasse.

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[10] Although employees qualify by working at least 350 hours during each preceding 6-month period, the plan provides a means whereby employees may be qualified even though they did not work the full 350 hours. Therefore, all employees and former employees should receive the above-mentioned notice. Former employees qualifying for benefits under the Fund may, of course, be entitled to damages for losses incurred as much as 6 months after termination of their employment with Respondent, as the Fund plan provides for future coverage regardless of whether the individual remains employed by the contributing employer on the basis of contributions made during his employment.

[11] We agree with the Administrative Law Judge that this is not an appropriate case for the granting of attorney's fees or litigation expenses.

WE WILL notify, in writing, all persons employed in the bargaining unit after July 10, 1979, of their entitlement to damages for loss of benefits.

Turnbull Enterprises, Inc.

DECISION

Statement of the Case

J. Pargen Robertson, Administrative Law Judge: This case was heard on September 22 and 23, 1980, in Gulfport, Mississippi. The charge was filed on November 14, 1979. The complaint, which issued on February 20, 1980, alleges that Turnbull Enterprises, Inc. (Respondent), as successor to a Gulfport employer whose production and maintenance employees were represented by the Sheet Metal Workers International Association, Local No. 11, Charging Party (Union), unilaterally discontinued payment of unit employee contributions to the New Orleans Sheet Metal Workers Health and Welfare Fund (Intervenor).

Upon the entire record, my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Charging Party, the Intervenor, and Respondent, I hereby make the following:

Findings of Fact

I. THE EVIDENCE[1]

The alleged violations arise out of a successorship situation.

During May 1975 the Union was certified as exclusive bargaining agent for unit employees[2] of Frigitemp. Subsequently, the Union and Frigitemp entered into successive collective-bargaining agreements effective from July 1, 1975, through June 30, 1978, and from July 1, 1978, through June 30, 1981. However, in 1978 Frigitemp filed a petition in bankruptcy. Thereafter, Frigitemp continued to operate its Gulfport facility as a "debtor in possession" until it was adjudicated bankrupt in May 1979. From May until July 10, 1979, a trustee appointed by the bankruptcy court operated the Gulfport facility.

The collective-bargaining agreement in effect among the above-mentioned employees of Frigitemp during 1979 provided, among other things, for Frigitemp to make contributions in accordance with an established formula to the Intervenor herein in order to provide medical, hospital, and disability benefits to unit employees.[3]

Pursuant to a bill of sale dated July 10, 1979, Respondent purchased the Gulfport facility formerly held by Frigitemp and, on or about July 17, 1979, proceeded to operate the plant with substantially the same work force. In that regard, Respondent admitted in its answer that it has since on or about July 17, 1979, operated the Gulfport facility as a successor employer within the meaning of *N.L.R.B.* v. *Burns International Security Services, Inc., et al.*, 406 U.S. 272 (1972).

Several employees testified that while they were working at the plant on July 10, 1979, the employees were called into an assembly area where they were addressed by Joe Sanchez. Sanchez was employed as plant superintendent by the predecessor employer and continued in that position following the takeover by Respondent. According to the testimony, Sanchez informed the employees that the Company had been sold and that all employees were being terminated. However, Sanchez told them that the employees would be rehired.[4] Subsequently, on

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[1] Respondent, which is engaged in the business of manufacturing maritime furniture at its Gulfport, Mississippi, facility, admitted the commerce allegations in the complaint. On the basis of that admission, I find that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

[2] The complaint alleges, Respondent admits, and I find that the below-described unit constitutes an appropriate bargaining unit and is the unit for which the Union was certified:

> All production and maintenance employees, including leadpersons, electrician, janitor, plant clerical employees, tool room clerk, warehouse employees and wood fabrication employees, employed by the Employer at its Gulfport, Mississippi facility; excluding office clerical employees, draftsmen, computer operators, guards and supervisors as defined in the Act.

[3] The collective-bargaining provision concerning the Health and Welfare Fund appears at art. XXX and reads as follows:

> ARTICLE XXX—Health and Welfare
>
> Section 1. Effective July 1, 1978, the employer shall pay monthly into the New Orleans Sheet Metal Workers' Health and Welfare Fund for the purpose of providing for the benefit of employees, their families and dependents, medical and hospital care, unemployment benefits or life insurance, disability and sickness insurance or accident insurance, under the terms and conditions of the declaration of trust of the said Fund dated January 1, 1963, a sum equal to fifty-five cents ($.55) per hour for each hour of work performed by employees covered under this Agreement, and as provided in Article VIII-A of the Standard Form of Union Agreement between Sheet Metal Workers Local Union No. 11 and Sheet Metal Contractors Association of New Orleans, Inc. and Individual Contractors who are signatory hereto effective August 1, 1977, terminating July 31, 1980.

Effective on August 1, 1978, 60 cents, effective on August 1, 1979, 65 cents, and effective on August 1, 1980, 70 cents (if applicable).

> Section 2. The failure of an individual employer to pay the above amounts or to pay to the Union monthly the dues check-off provided for in this Agreement shall constitute a breach of this Agreement, and this Agreement may, at the option of the Union, be cancelled as to any employer who is fifteen (15) days or more delinquent in making of any said payments. For the faithful performance of his obligation to make said payment, each employer hereunder within fifteen (15) days after signing of this Agreement shall post with the Union a Bond in the amount of twenty-five thousand dollars (25,000.00) for the benefit of any fund, trust or person in interest, to guarantee and secure payment of said amounts.
>
> Section 3. Any employer delinquent more than fifteen (15) days in the making of the above provided payment shall be charged liquidated damages of ten percent (10%) of the said payments due which shall be collectable by the party to whom the payment is due plus attorneys' fees incurred in connection with such collection in addition to the above stated sum and the payment of which shall likewise be secured by the bond provided for hereinabove.

[4] Four employees testified regarding Sanchez' remarks on July 10. Testimony of employee Frazier was that Sanchez told them that most of the employees would be called back by the new employer to do the same jobs. Employee Ladner recalled that Sanchez said that he hoped there would be more work and all the employees would be rehired. Employee Waltman recalled that Sanchez said some of the employees would be coming back—"eventually, all of us would be coming back." Employee Hickman testified that Sanchez said that all the employees would be called back in just a few days. Sanchez did not testify.

July 10, according to unrebutted testimony of employees, they were told, by supervision, to leave their toolboxes at the plant because they would be called back to work.

During the week of July 17, 1979, 68 bargaining unit employees were hired back. All 68 of those employees had previously worked for the predecessor employer. Respondent continued to reemploy former employees of the predecessor employer during the month of July. All those employees rehired during July, with the exception of four, were reemployed at the same wage rate which they had received at the time of their termination by the predecessor employer.

By telegram dated July 10, 1979, the Union made a demand upon Respondent that Respondent recognize and bargain with it concerning wages, hours, and working conditions as representative of the unit employees. The telegram was received by Respondent on July 10. By letter dated July 16, 1979, Respondent agreed to meet with the Union.

On July 16, 1979, the Union's president and business manager, Stanley Gaudet, had a telephone conversation with Respondent's president, Louis Esposito. During that conversation Esposito informed Gaudet that he was willing to sit down and discuss the contract with the Union. According to the testimony of Stanley Gaudet, he asked Esposito about the health and welfare program. According to Gaudet, Esposito replied, "I understand we have a six-month free ride." Esposito asked, "Aren't the employees covered under your health and welfare plan for the next six months?" Gaudet testified that he told Esposito, "They are covered through the end of the year, but they earn that coverage in the first six months of the year. They are earning the coverage for the first part of the next six months in this six-month period. They are always covered like six months in advance." According to Gaudet, Esposito replied, "Well, when we sit down and negotiate, if we owe you something, we will pay you at that time."[5]

Subsequently, Respondent continued to refuse to make contributions to the Health and Welfare Fund. However, Respondent met and negotiated with the Union. Although a strike occurred between November 1 and December 12, 1979, among unit employees, Respondent and the Union reached a collective-bargaining agreement on December 12, 1979. That agreement provided an insurance program for unit employees through a private carrier in replacement of the Health and Welfare Fund. The program incorporated in the parties' December 12 agreement was called "The Innovator."

The General Counsel alleges that, by unilaterally ceasing to make health and welfare contributions, Respondent violated Section 8(a)(5).

II. CONCLUSIONS

Respondent admittedly was the successor employer to Frigitemp (or, more precisely, to the trustee in bankruptcy). The General Counsel contends that Respondent was obligated to negotiate with the Union as exclusive bargaining representative of unit employees before making unilateral changes in terms and conditions of employment. The General Counsel argues, therefore, that Respondent, by discontinuing Health and Welfare Fund contributions for unit employees, without first negotiating with the Union, unilaterally changed a condition of employment. That argument is not founded in the predecessor's collective-bargaining agreement,[6] but in the allegation that the health and welfare provision of that agreement had become an established condition of employment. (See *N.L.R.B.* v. *Burns International Security Services, supra.*)[7]

A. *The Threshold Question*

Although the General Counsel finds support in *Burns, supra*, the *Burns* decision also presents the basis on which the threshold issue in this case is rooted. In *Burns* the successor hired a majority of its unit employees in June 1967, at wages and terms of employment which were different from those established by the predecessor employer. In fact, the successor in that case specifically told its employees when they were hired that it "could not live with" the predecessor's collective-bargaining agreement. Subsequently, on July 12, 1967, the majority union made a bargaining demand on Burns (the successor employer). The Supreme Court found that under the facts of that case the successor was free to set initial terms and conditions of employment. However, the Court went on to state:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor em-

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[5] I credit Gaudet's testimony. Gaudet impressed me by his demeanor. His testimony in most respects, including his testimony regarding the July 16 phone conversation with Esposito, was not denied.

[6] In addition to the above argument, the General Counsel also argues that Respondent adopted the predecessor employer's collective-bargaining agreement. I find that the evidence is insufficient to support the General Counsel in that regard.

[7] In that regard, the Supreme Court explained the Board's position in *Burns*, 406 U.S. at 293, 294:

> [T]he Board's opinion stated that "[t]he obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement had expired. In this respect, the successor-employer's obligations are the same as those imposed upon employers generally during the period between collective-bargaining agreements." App. 8–9. This statement by the Board is consistent with its prior and subsequent cases that hold that whether or not a successor employer is bound by its predecessor's contract, it must not institute terms and conditions of employment different from those provided in its predecessor's contract, at least without first bargaining with the employees' representative. . . . Thus, if Burns, without bargaining to impasse with the union, had paid its employees on and after July 1 at a rate lower than Wackenhut had paid under its contract, or otherwise provided terms and conditions of employment different from those provided in the Wackenhut collective-bargaining agreement, under the Board's view, Burns would have committed a § 8(a)(5) unfair labor practice and would have been subject to an order to restore to employees what they had lost by this so-called unilateral change.

> ployer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a). Here, for example, Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June. The Board quite properly found that Burns refused to bargain on July 12 when it rejected the overtures of the union. It is true that the wages it paid when it began protecting the Lockheed plant on July 1 differed from those specified in the Wackenhut collective-bargaining agreement, but there is no evidence that Burns ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent. If the union had made a request to bargain after Burns had completed its hiring and if Burns had negotiated in good faith and had made offers to the union which the union rejected, Burns could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 without committing an unfair labor practice. Cf. *N.L.R.B.* v. *Katz*, 369 U.S. 736, 745 n. 12 (1962); *N.L.R.B.* v. *Fitzgerald Mills Corp.*, 313 F.2d 260, 272-273, 52 LRRM 2174 (C.A. 2) cert. denied 375 U.S. 834 (1963); *N.L.R.B.* v. *Southern Coach & Body Co.*, 336 F.2d 214, 217 (C.A. 5, 1964). The Board's order requiring Burns to make whole its employees for any losses suffered by reason of Burns' refusal to honor and enforce the contract, cannot therefore be sustained on the ground that Burns unilaterally changed existing terms and conditions of employment, thereby committing an unfair labor practice which required monetary restitution in these circumstances. [406 U.S. at 294, 295-296.]

In the instant case unit employees were told on July 10, 1979, that the employees would be rehired. The certificates of termination of employment of unit employees stated, among other things:

> Frigitemp Marine Div. Plant #3 will cease all operations under the bankruptcy trustee effective July 10, at 3:15 p.m. (plant sold to others). Present employees may be eligible for rehire with the new company (contact personnel department).

Several employees testified that there was no mention that their terms and conditions of employment would be different under Respondent. Moreover, those employees testified that, when they started work again on July 17, they were employed at their old jobs with the same wages.[8] On July 10 employees were told that they could submit their applications for employment with Respondent when they returned on Friday, July 13, to pick up their paychecks. The employees were furnished application forms attached to the termination notices which they were given by their supervisor on July 10. Employee Ronald Ladner testified that he was assisted in completing his employment application by his supervisor (also named Ronald Ladner) and that the supervisor, in response to the employee's question as to what wage rate he should indicate that he desired on his application form, told the employee to put down what he was making with Frigitemp. Ladner also testified that when he returned to work on July 17, the employees took up theirjobs where they had left off on July 10.

The evidence regarding the size of either the predecessor's or Respondent's unit work force is incomplete. However, it is clear that there were no more than 92 unit employees employed by the predecessor employer on July 10. It is also clear that Respondent hired 68 employees during the week of July 17,[9] and all 68 of those employees were employed by the predecessor employer. The record does not show how many more employees of the predecessor employer were hired during July or, subsequently, by Respondent.

Under the circumstances, I find that the unrebutted evidence reflects that Respondent did not take action to set initial terms and conditions of employment which were different from those under the predecessor employer, before incurring an obligation to recognize and bargain with the Union. In that regard, I note, that although some of Plant Superintendent Sanchez' July 10 remarks demonstrated a question as to if, or when, all of the unit employees would be rehired, the evidence shows that Respondent's bargaining unit jobs included only former unit employees of the predecessor. Therefore, there was no question on July 10 as to the continued majority status of the Union. Moreover, the Union's demand for recognition was made by the Union and received by Respondent on July 10. Remarks by Supervisor Sanchez and Ladner during the July 10 through July 13 period led employees to believe that working conditions would not be changed. Ladner told employee Ladner that he should indicate on his employment application that he would accept the same wages he received under the predecessor employer.

Moreover, I do not view as significant Respondent's failure immediately to employ the entire bargaining unit work force of the predecessor, in view of the unrebutted evidence that Plant Superintendent Sanchez told the employees on July 10 that eventually all of the predecessor's employees would be coming back to work.

On July 11, 1979, Stanley Gaudet talked with Superintendent Sanchez. According to Gaudet's unrebutted testimony, Sanchez told him that "hopefully, all of the people would be hired back within the week or 10 days." Sanchez told Gaudet that the employees would be paid the same pay scale. Gaudet asked if the employees would be hired in seniority, and Sanchez replied that as close as he could, but that Gaudet knew that Sanchez did not like the seniority part of the contract.

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[8] As indicated above, the parties stipulated that of all former employees rehired during the entire month of July 1979 only four were employed at wages different from the wages they had received under the predecessor employer. However, the evidence does not reflect that those four, or any other employees, were told on or before July 17 that the wages of the four employees would be different. The record does not reflect how many employees were hired in July. However, 68 were hired during the week of July 17. The evidence does not show that any of those 68 employees received wages different from what they had been paid by the predecessor employer.

[9] There was a 1-week hiatus in production from July 10, when the trustee ceased production, until July 17, when production was commenced by Respondent. In view of the evidence herein which demonstrates that Respondent resumed substantially the same operation with substantially the same work force and supervision, in the same plant, I do not find that the short hiatus affected Respondent's successorship role.

Gaudet testified that he had a similar conversation with Sanchez on July 13.

Therefore, the evidence reflects that all communications with the employees and their representative during the week of their termination demonstrated that the bargaining unit employees would be rehired under the same working conditions. Moreover, nothing was said to the employees which would indicate an intent by Respondent to change the terms and conditions of employment. The Board, in a similar case, held:

> In other words, there is nothing to indicate that the employees were aware of any proposed changes in employment benefits at the time Respondent expressed its intent to retain them. Accordingly, as Respondent "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment," (*Spruce Up*, 209 NLRB at 195), we conclude that this case falls within the *Burns* exception. Consequently, Respondent was obligated to bargain with the Union before making any changes in existing terms and conditions of employment. [*Charles Starbuck and Diane Starbuck d/b/a Starco Farmers Market*, 237 NLRB 373, 374 (1978).]

I am convinced that the instant case falls squarely within the "perfectly clear" test outlined in *Burns, supra*. By its language, "[i]n other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he had a duty to bargain with a union,"[10] the Supreme Court demonstrates that the underlying question in applying the "perfectly clear" test is when does the obligation to bargain arise? The evidence herein demonstrates that Respondent's bargaining obligation commenced on July 10, 1979, when the Union made its demand at a time when Respondent fully realized that its anticipated work force was represented by the Union.

Therefore, I find that from July 10, 1979, Respondent had an obligation to bargain with the Union before making unilateral changes in working conditions.

B. *Respondent's Motions*

During the hearing, and again in its brief, counsel for Respondent moved for dismissal. Respondent argues that the hearing should be barred by the doctrine of laches.

The allegations herein allegedly commenced during July 1979. The charges were filed on November 14, 1979. The complaint issued on February 20, 1980. Respondent argues that the hearing, which was originally scheduled for June 11, 1980, was postponed. That postponement, according to Respondent's brief, resulted from the General Counsel's staff considering an appeal by the Charging Party of the refusal of Region 15 to incorporate certain allegations of the charge into the complaint. The hearing was held on September 22 and 23, 1980. Under those circumstances, I hereby deny Respondent's motion to dismiss on the ground of laches. See *Preston H. Haskell Company*, 238 NLRB 943 (1978).

Respondent also argues that the complaint should be dismissed because of the provisions of the Bankruptcy Act. Respondent purchased its Gulfport facility from the trustee in bankruptcy free and clear of all liens and other interests. However, despite the bankruptcy petition of Frigitemp, the trustee continued to make payments to the Health and Welfare Fund in accordance with the practice established by Frigitemp's collective-bargaining agreement with the Union. I find no merit in Respondent's contention. See *Makaha Valley, Inc.*, 241 NLRB 300 (1979).

Respondent also contends a variance exists between the charge and the complaint, in that the charge does not allege "refusal to contribute to the [Health and Welfare] fund." The charge alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act. The 8(a)(5) allegation contained in the charge broadly alleges that "on or about July 1, 1979, and at all times since that date, it, by its officers, agents and representatives, refused to bargain collectively with Sheet Metal Workers International Association, Local No. 11, a labor organization chosen by a majority of its employees in an appropriate unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment." The Board has continually held that such a charge justifies more specific allegations similar to those made by the General Counsel herein. Therefore, Respondent's motion is denied. See *Griffin Inns, Owner and Operator of Sheraton Motor Inn (Woodhaven, Michigan)*, 229 NLRB 199, fn. 3 (1977).

Respondent also argues that it was prohibited by Section 302(c)(5) from making contributions to the Health and Welfare Fund because it was not party to a collective-bargaining agreement requiring such contributions. In *Wayne's Olive Knoll Farms, Inc., d/b/a Wayne's Dairy*, 223 NLRB 260, 264 (1976), the Board agreed with Administrative Law Judge Boyce's holding that Section 302(c)(5) "was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process. . . . Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers," and that amendment was not intended to preclude an employer's payment into a fund for the benefit of its employees, even though the collective-bargaining agreement had expired. I find the situation herein is similar to that in *Wayne's Dairy*. Respondent's contention in this regard is hereby rejected. See *Starco Farmers Market, supra.*

C. *The Alleged Unilateral Change*

The evidence is undisputed that Respondent failed to make contributions on behalf of its unit employees to the Health and Welfare Fund. The collective-bargaining agreement of Frigitemp required such contributions and both Frigitemp and, subsequently, the trustee made contributions in accordance with the collective-bargaining agreement until the Frigitemp operations ceased on July 10, 1979.

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[10] *N.L.R.B. v. Burns International Security Services, supra.*

However, Respondent contends that the mere failure to make contributions to the Health and Welfare Fund does not qualify as a unilateral change in terms and conditions of employment. Respondent argues that the only true measure of whether its actions constitute a unilateral change is to determine what, if any, effect its actions had on employees. In that regard, Respondent contends that the employees suffered no detriment by Respondent withholding health and welfare contributions.

Respondent bases its argument on the unique character of the Health and Welfare Fund. In accordance with the Fund's plan, employees qualified for coverage under the plan during the last 6 months of 1979 by working for the predecessor employer during the first 6 months of 1979. Unit employees of Frigitemp, or the trustee, who worked at least 350 hours between January 1 and June 30, 1979, were qualified for benefits under the Fund from July 1 through December 31, 1979, regardless of whether Respondent made contributions to the plan.

Therefore, Respondent argues, since its failure to contribute would not have affected any of the employees covered until January 1, 1980, there was no change in working conditions because another plan, The Innovator, was substituted on December 12, 1979, pursuant to its collective-bargaining agreement with the Union. From December 12, employees were covered under The Innovator.

However, the other parties argue that Respondent's unilateral refusal to make contributions had an impact on employees' working conditions. The Intervenor, in its brief, points to several differences between the Health and Welfare Fund's plan and The Innovator which, according to the Intervenor, unlawfully affect unit employees' working conditions.

I am persuaded that Respondent's actions unilaterally affected unit employees' working conditions. Regardless of whether The Innovator or the Health and Welfare Fund appeared to Respondent to offer more to employees, it remains the employees', not Respondent's, right to make that determination. If the employees, or their representative, determine that the Health and Welfare Fund is better suited to their needs, then the employees should have an opportunity to bargain before the Health and Welfare Fund is abandoned.

When Union President Gaudet talked to Respondent President Esposito on July 16, Esposito admitted that Respondent would not make contributions to the Health and Welfare Fund. Esposito told Gaudet, "When we sit down and negotiate, if we owe you something, we will pay you at that time."

Subsequently, the parties met and negotiated on various occasions from August through December 12, 1979. Eventually, a collective-bargaining agreement was reached on December 12.

However, Respondent refused to incorporate the Health and Welfare Fund's plan into the contract. As time wore on, during those negotiations, the total amount of contributions which Respondent had failed to make to the Health and Welfare Fund increased. That fact added to the overall cost of a potential collective-bargaining agreement and thereby placed the Union in an increasingly difficult position regarding reinstitution of the Fund's plan.

Moreover, many of the differences between the Fund's plan and The Innovator present substantive grounds for concern by employees. The evidence demonstrated that, once employees qualified under the Fund during any 6-month period by working 350 hours, that particular employee retained coverage through the following 6-month period regardless of whether his employment continued. Under The Innovator, coverage ceases if employment is terminated.

Under the Fund, appeals are considered by the Fund which includes representatives of employees. The Innovator would involve only employees of insurance companies. Additionally, the evidence showed that there are other differences between the Fund and The Innovator which could reasonably cause concern among employees.

Therefore, I find that Respondent's unilateral withholding of Fund contributions impacted unit employees' working conditions[11] and violates Section 8(a)(5).[12]

CONCLUSIONS OF LAW

1. Respondent, Turnbull Enterprises, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers International Association, Local No. 11, is a labor organization within the meaning of Section 2(5) of the Act.

3. On July 10, 1979, the Union was, and has been at all times since, the exclusive bargaining representative of Respondent's employees in the bargaining unit described below within the meaning of Section 9(a) of the Act. The appropriate bargaining unit is:

> All production and maintenance employees, including leadpersons, electrician, janitor, plant clerical employees, tool room clerk, warehouse employees and wood fabrication employees, employed by the Employer at its Gulfport, Mississippi facility; excluding office clerical employees, draftsmen, com-

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[11] *Starco Farmers Market, supra; Joe Costa Trucking Company d/b/a Joe Costa Trucking*, 238 NLRB 1516 (1978); *Bellingham Frozen Foods, a Division of San Juan Packers*, 237 NLRB 1450 (1978).

[12] Respondent argues in its brief that the Union acquiesced in Respondent's actions and its violations were cured by it and the Union's overall conduct. On several occasions during July, Union President Gaudet asked Respondent's representatives, Sanchez and Esposito, about making contributions to the Health and Welfare Fund. During the August 22 negotiation session, Gaudet asked Esposito to start making contributions to the Fund. During negotiations, the Union continued to negotiate toward restoration of the Fund through its November 1 strike until they finally capitulated to Respondent's demand that the Fund be replaced with an insurance company plan on December 12, 1979. Under those circumstances, I find that the Union did not acquiesce in Respondent's withholding Fund contributions. Moreover, I see nothing in either the Union's or Respondent's conduct which cured the violation. In that regard, even though Esposito told Gaudet on July 16, "If we owe you something, we will pay you," I note that Fund contributions were never made.

puter operators, guards and supervisors as defined in the Act.

4. Respondent, by unilaterally withholding contributions on behalf of unit employees to the Health and Welfare Fund, violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(l) and (5) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Since the appropriate remedy for Respondent's unilateral action in discontinuing contributions to the Health and Welfare Fund is to reinstate the *status quo ante*, I recommend that Respondent make whole the employees in the unit by making all Health and Welfare Fund contributions, as provided in the predecessor's collective-bargaining agreement, which have not been paid for the period beginning on July 10, 1979, and extending until agreement was reached on December 12, 1979.[13] *Starco Farmers Market, supra; Joe Costa Trucking, supra.* Backpay shall be computed in accordance with *Ogle Protection Service, Inc. and James L. Ogle, an Individual*, 183 NLRB 682 (1970).[14]

Additionally, I shall recommend that Respondent be ordered to reinstate the Health and Welfare Fund plan for unit employees, upon written request by the Union. I am convinced that reinstatement of the plan is warranted in view of testimony from Gaudet and Hernandez, which I credit, that they were told during negotiations, by Plant Manager Kolkmeyer, that he (Kolkmeyer) did not want the Fund because the Fund tied the employees too close to the Union. On direct, Kolkmeyer denied that he told the Union that he did not want the Fund because it tied the employees to the Union, but he did testify that he objected to the Fund because it was controlled by the Union. Later, on direct, Kolkmeyer admitted that he could have used the phrase "tied in" in referring to the Union having control. Moreover, on cross by the General Counsel, Kolkmeyer was asked to explain precisely what it was about union control that bothered him. Kolkmeyer's response to the General Counsel's questions revealed that the source of his concern was the Union's, rather than Respondent's, contact with employees during the Fund's administration. In view of Kolkmeyer's testimony and the testimony of Gaudet and Hernandez and employee Eugene Frazier, I am convinced that Respondent found the Fund objectionable because of the opportunities it presented for the employees to maintain close contact with their Union. I am also persuaded that Kolkmeyer told the Union and employees on the union negotiating committee that he did not want the Fund because the Fund tied the employees too close to the Union. In view of the above evidence regarding Respondent's motivation in rejecting the Fund, and in view of the obvious harmful effect Respondent's illegal discontinuation of the Fund contributions had on reinstitution of the Fund during negotiations, I am persuaded that the Fund must be instituted by Respondent in order fully to restore the *status quo ante. Bastian-Blessing, Division of Golconda Corporation*, 194 NLRB 609, 614 (1971).

Since this remedy would have the effect of qualifying all persons employed in the bargaining unit during the period beginning July 10, 1979,[15] for benefits under the Health and Welfare Fund, I shall recommend that Respondent be required to take appropriate action to notify, in writing, all employees, and former employees that so qualified, of their entitlement to those benefits.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to

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[13] Even though I have recommended below that Respondent be required to reinstate the Fund plan for unit employees, I have limited direct reimbursement to the date the parties agreed to a collective-bargaining agreement (December 12, 1979). Since the employees were covered both under The Innovator and, in accordance with my recommendations herein, the Fund, until July 1, 1980, and subsequently, by The Innovator alone, I find no justification for a broad order requiring what would constitute double premiums and coverage from December 12, 1979. However, if compliance proceedings are necessitated, the General Counsel may, upon showing that specific unit employees suffered actual damage in loss of benefits at some point after June 30, 1980, recover those damages in the form of backpay to the particular employee involved; provided, however, that Respondent may, at its discretion, elect to continue contributions to the Fund beyond December 12, 1979, in lieu of compensating employees for loss of benefits under the Fund. See *Merryweather Optical Company*, 240 NLRB 1213 (1979). However, Respondent's election to contribute to the Fund or reimburse employee losses shall not affect the Fund's right to additional amounts. See fn. 14 below. In measuring actual damages, employees should be reimbursed for actual cost to the extent those costs would have been paid by the Fund minus costs which were actually paid by Respondent's insurance.

Although unit employees struck Respondent on November 1, 1979, the evidence does not establish a basis for terminating Respondent's obligation to make Health and Welfare Fund contributions at that time. Even if an impasse existed on November 1, Respondent took no action at that time which was consistent with its rejected offers to the Union. The record failed to prove that Respondent instituted The Innovator plan for unit employees until December 12, 1979, when it reached agreement with the Union. *Falcon Tank Corp.*, 194 NLRB 333 (1971).

I find no basis to grant litigation expenses herein. I do not view Respondent's defenses to be "patently frivolous." Although a case may be made that the issues herein are not "dependent upon resolutions of credibility" (*Heck's Inc.*, 215 NLRB 765 (1974)), the Board in *Heck's* did not imply that the "credibility" test was the exclusive measure in determining whether to award litigation expenses. Other questions are present here, including especially those arising because of the unique nature of the Fund's 6-mouth provisions, which give rise to "debatable" issues.

[14] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accord with *Merryweather Optical Company, supra*, I recommend against the addition of interest at a flat rate, at this, the adjudicatory stage, on these unlawfully withheld fund payments. It should be left "to the compliance [stage] the question whether Respondent must pay any additional amounts into the [Health and Welfare Fund] in order to satisfy [this] 'make-whole' remedy. These additional amounts may be determined . . . by reference to provisions in the documents governing the [F]unds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of the funds withheld, additional administrative costs, etc., but not collateral losses." *Merryweather Optical Company, supra*, 240 at 1216, fn. 7. In computing such amounts, the basis for computation would run from July 10, 1979, to the date upon which Respondent fully complies with the terms of this recommended Order.

[15] Although employees qualify by working at least 350 hours during each preceding 6-month period, the plan provides a means whereby employees may qualify even though they do not work the full 350 hours. Therefore, all employees and former employees should receive the above-mentioned notice.

Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[16]

The Respondent, Turnbull Enterprises, Inc., Gulfport, Mississippi, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally changing established terms and conditions of employment of the employees in the bargaining unit for failing to contribute to the Health and Welfare Fund established by the predecessor employer's collective-bargaining agreement with the Union in derogation of the bargaining obligation imposed by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole the employees in the appropriate unit in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Upon written request from the Union, and in the manner set forth in the section of this Decision entitled "The Remedy," rescind the current plan under its collective-bargaining agreement with the Union, and immediately reestablish the plan under the New Orleans Sheet Metal Workers Health and Welfare Fund.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant or necessary to facilitate the determination of the amounts due to employees under the terms of this Order.

(d) Post at its Gulfport, Mississippi, place of business copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuos places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local Union No. 741 *and* The Ashton Company, Inc. and Laborers' International Union of North America, Local No. 479. Case 28-CD-195

January 7, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on June 25, 1980, by The Ashton Company, Inc., herein called the Employer, and duly served on United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local Union No. 741, herein called Respondent or the Plumbers, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on August 6, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(D) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that Respondent violated the Act by picketing the Employer's American Smelting and Refining Company (ASARCO) Mission Mine Unit jobsite from about May to about August 7, 1980, with an object of forcing or requiring the Employer to assign the work of installing all process piping, including water, air, slurry, mill water, reagent, and line slurry piping, at the ASARCO Mission Mine Unit project to employees represented by it rather than to employees represented by Laborers' International Union of North America, Local No 479, AFL-CIO, herein called called the Laborers. The complaint further alleges that Respondent has failed and refused to abide by the Board's July 1, 1981, Decision and Determination of Dispute,[1] which awarded the disputed work to employees represented by the Laborers, by failing and refusing to notify the Regional Director for Region 28, in writing within 10 days, whether it would comply with the award, as required thereby. On August 17, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint and asserting as an affirmative defense that at all times its picketing was merely for the purpose of seeking compliance with an award issued by the Impartial Jurisdictional Disputes Board of the Building and Construction Trades Council of the AFL-CIO, herein called the IJDB, awarding employees represented by Respondent the disputed work, and that the Board's refusal to apply that award and quash the 10(k) notice of hearing was erroneous as a matter of fact and law.

On September 21, 1981, counsel for the General Counsel filed directly with the Board a motion to transfer and continue the matter before the Board, for summary judgment, and to strike denials in Respondent's answer. The General Counsel submits, in substance, that Respondent is not entitled to a hearing *de novo* on issues which where raised and litigated in the underlying 10(k) proceeding, that Respondent's answer admits that Respondent is failing and refusing to accede to and abide by the Board's Decision and Determination of Dispute in that proceeding, and that Respondent is seeking to relitigate those issues. The General Counsel further submits that the Board should strike Respondent's answer to the extent that it seeks to deny the alleged object of its picketing activities. Subsequently, on September 28, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's motions should not be granted. Respondent thereafter filed a response to the Notice To Show Cause and a Motion for Summary Judgment in favor of Respondent and memorandum in support of that motion. In its response, Respondent essentially reiterates its contention that the Board erroneously refused to quash the 10(k) notice of hearing, and urges that the Board should reconsider and overturn the underlying 10(k) award. Respondent further asserts that the General Counsel's motion to strike should be denied, as the parties stipulated that the purpose of the picketing was to protest the Employer's refusal to implement the IJDB award, and therefore its denial of the complaint's allegation that an object of the picketing was to force or require the Employer to assign work to employees represented by it is correct and appropriate.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, including the record in the underlying 10(k) proceeding,[2] the Board makes the following:

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[1] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local Union No. 741 (The Ashton Company, Inc.)*, 256 NLRB 1022.

[2] The Board's taking official notice of the record in the 10(k) proceeding, and reliance thereon, is well settled. *Local Union No. 3, International*

Continued

259 NLRB No. 123

Ruling on the Motions To Strike and for Summary Judgment

Review of the record in this proceeding, and of the record in the underlying 10(k) proceeding, indicates that a hearing was held pursuant to Section 10(k) of the Act, at which all parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. On July 1, 1981, the Board issued its Decision and Determination of Dispute, finding, *inter alia*, the existence of a jurisdictional dispute involving Respondent and the Laborers, that an object of Respondent's picketing was to force or require the Employer to assign the work in dispute to employees represented by Respondent, and that reasonable cause existed to believe that Section 8(b)(4)(D) of the Act had been violated. The Board also found that the result of the proceeding before the IJDB was not controlling, as Respondent had contended.[3] After due consideration of the relevant factors, the Board awarded the disputed work to employees represented by the Laborers, and determined that Respondent was not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employer to assign the disputed work to employees represented by it. The Board further ordered Respondent to notify the Regional Director for Region 28, in writing within 10 days from the date of the award, whether it would refrain from engaging in proscribed conduct.

By its denials in its answer to the complaint and by its response to the Notice To Show Cause and Motion for Summary Judgment in favor of Respondent, Respondent seeks to place in issue the Board's finding in the 10(k) proceeding that an object of its picketing was to force or require the Employer to assign the disputed work to employees represented by it. In support of its position, Respondent argues that the sole purpose of the picketing was to obtain compliance with the IJDB decision awarding the work to employees represented by it,[4] and therefore its denial that the picketing was for an object proscribed by Section 8(b)(4)(D) of the Act is not an attempt to relitigate matters previously decided. To picket to force the Employer to comply with an IJDB award assigning employees represented by Respondent the work, however, is in fact picketing to force the Employer to assign the work to employees represented by Respondent. Thus, we conclude that Respondent is in effect seeking to relitigate issues settled in the 10(k) proceeding. This it cannot do, as it is well settled that issues raised and litigated in a 10(k) proceeding may not be relitigated in a subsequent unfair labor practice proceeding alleging violations of Section 8(b)(4)(D) which are based in part on factual determinations made in the 10(k) proceeding.[5] Accordingly, we grant the General Counsel's motion to strike the denials in Respondent's answer relating to this issue.

We found in the 10(k) proceeding, on the basis of undisputed evidence, that the Plumbers picketed at the Employer's ASARCO Mission Mine jobsite from May 5 until approximately August 7, 1980, with signs stating that the Employer was refusing to comply with the IJDB's work assignment award, that the Plumbers had previously sent a telegram to the Employer demanding that it implement the IJDB award, and that at various times, as a result of the picketing, craft employees of the Employer stopped working and there were interruptions in deliveries to the Employer by third-party suppliers not involved in the dispute. We further found that an object of the Plumbers' picketing was to force or require the Employer to assign the disputed work to employees represented by the Plumbers. On this basis we found reasonable cause to believe that Respondent had violated Section 8(b)(4)(D) of the Act. Since this undisputed evidence is neither supplemented nor controverted in this proceeding, we here find that the preponderance of evidence establishes that Respondent picketed the ASARCO Mission Mine jobsite with an object of forcing or requiring the Employer to assign the work in dispute to employees represented by Respondent, and that by such conduct it violated Section 8(b)(4)(i) and (ii)(D) of the Act.

Respondent's answer admits the allegation that it has failed and refused to accede to and abide by the work assignment and order of the Board by failing and refusing to notify the Regional Director for Region 28, in writing, whether it will refrain from forcing and requiring the Employer, by means proscribed by Section 8(B)(4)(D) of the Act, to assign the work in a manner inconsistent with the Board's determination. Compliance with a 10(k) award requires a good-faith intent by the particular

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Brotherhood of Electrical Workers, AFL-CIO (Mansfield Contracting Corporation), 206 NLRB 423 (1973); *International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433 (Plaza Glass Company)*, 218 NLRB 848 (1975).

[3] The Board specifically found that there was no voluntary method for the adjustment of this dispute, since all parties were not bound to the IJDB procedure.

[4] As noted, the Board found that all parties were not bound to the IJDB procedure.

[5] *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (Mansfield Contracting Corporation), supra; Bricklayers, Masons and Plasterers International Union of America* v. *N.L.R.B.*, 475 F.2d 1316 (D.C. Cir. 1973), enfg. *Bricklayers, Stone Masons, Marble Masons, Tile Setters and Terrazzo Workers Local Union No. 1 of Tennessee and Bricklayers, Masons and Plasterers International Union of America (Shelby Marble & Tile Co.)*, 195 NLRB 123 (1972).

respondent to accept and abide thereby, including a timely and unequivocal written statement to the Regional Director indicating such an intent, as is required by the 10(k) award.[6] Respondent has completely failed to notify the Regional Director of its intent to abide, or not to abide, by the 10(k) award, a lack of expression which clearly does not manifest the required good-faith intent to abide by the Board's determination. In these circumstances, having found on the basis of undisputed evidence that Respondent had demanded the disputed work, and that it has not expressed a good-faith intent to abide by the Board's resolution of the dispute in the 10(k) proceeding, we infer that Respondent has not abided thereby and has continued to demand the disputed work. Thus, there being no issues properly litigable in this proceeding, we grant the General Counsel's Motion for Summary Judgment. Respondent's Motion for Summary Judgment in its favor is accordingly denied.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. THE BUSINESS OF THE EMPLOYER

The Employer, an Arizona corporation with its principal place of business in Tucson, Arizona, is engaged in business as a construction contractor. During the past year, the Employer purchased goods from directly outside the State of Arizona having a value in excess of $50,000.

We find, on the basis of the foregoing, that the Employer is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local Union No. 741, and Laborers' International Union of North America, Local No. 479, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background and Facts of the Dispute*

At all times material hereto, Respondent and the Laborers have had a jurisdictional dispute concerning the work of installing all process piping, including water, air, slurry, mill water, reagent, and line slurry piping, at the Employer's ASARCO Mission Mine Unit jobsite in Sahuarita, Arizona. From about May 5 to about August 7, 1980, Respondent picketed the ASARCO Mission Mine Unit jobsite with an object of forcing or requiring the Employer to assign the disputed work to employees represented by it. In so doing, Respondent induced or encouraged employees of Ashton and its suppliers to engage in a strike or a refusal in the course of their employment to use, manufacture, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform services, and has threatened, coerced, and restrained the Employer and other persons engaged in commerce or in industries affecting commerce, with an object of forcing or requiring the Employer to assign the disputed work to employees represented by Respondent, rather than to employees represented by the Laborers.

B. *The Determination of the Dispute*

On July 1, 1981, the Board issued a Decision and Determination of Dispute (256 NLRB 1022) finding that employees represented by the Laborers are entitled to perform the disputed work, and that Respondent was not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employer to assigned the work to employees represented by it.

C. *Respondent's Refusal To Comply*

By failing and refusing to notify the Regional Director for Region 28, in writing, of its intent to comply with the above-mentioned Decision and Determination of Dispute, Respondent has not complied with the award and has continued to demand the disputed work.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of the Employer described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(D)(i) and (ii) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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[6] *International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433 (Plaza Glass Company), supra.*

Upon the basis of the foregoing facts and the entire record, the Board makes the following:

CONCLUSIONS OF LAW

1. The Ashton Company, Inc., is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local Union No. 741, and Laborers' International Union of North America, Local No. 479, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By inducing or encouraging employees of The Ashton Company, Inc., and its suppliers to engage in a strike or a refusal in the course of their employment to use, manufacture, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform services, and by threatening, coercing, and restraining Ashton and other persons engaged in commerce or in industries affecting commerce, with an object of forcing or requiring Ashton to assign the disputed work to employees represented by it, and by failing and refusing to comply with the Board's Decision and Determination of Dispute and continuing to demand the disputed work, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(D) of the Act.

4. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local Union No. 741, Sahuarita, Arizona, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging individuals employed by The Ashton Company, Inc., or any other person engaged in commerce or an industry affecting commerce, to engage in (1) a strike or refusal in the course of their employment to use, manufacute, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform services, or (2) threatening, coercing, or restraining The Ashton Company, Inc., or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to force or require The Ashton Company, Inc., to assign the work of installing all process piping, including water, air, slurry, mill water, reagent, and line slurry piping, at Ashton's American Smelting and Refining Company Mission Mine jobsite in Sahuarita, Arizona, to employees represented by it rather than to employees represented by Laborers' International Union of North America, Local No. 479, AFL-CIO.

(b) Refusing to comply with the Board's Decision and Determination of Dispute as set forth at 256 NLRB No. 149.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its business and meeting halls copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish the Regional Director for Region 28 signed copies of such notice for posting by the Employer, if willing, in places where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT induce or encourage individuals employed by The Ashton Company, Inc., or any other person engaged in commerce or an industry affecting commerce, to engage in (1) a strike or refusal in the course of their employment to use, manufacture, transport, or otherwise handle or work on any goods, arti-

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[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cles, materials, or commodities, or to perform services, or (2) threaten, coerce, or restrain The Ashton Company, Inc., or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to force or require The Ashton Company, Inc., to assign the work of installing all process piping, at Ashton's American Smelting and Refining Company Mission Mine jobsite in Sahuarita, Arizona, to employees represented by us rather than to employees represented by Laborers' International Union of North America, Local No. 479, AFL-CIO.

WE WILL NOT refuse to comply with the Board's Decision and Determination of Dispute as set forth at 256 NLRB 1022 (1981).

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, LOCAL UNION NO. 741

Tera Advanced Services Corporation *and* Daniel J. Malloy. Case 5-CA-11973

January 7, 1980

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 31, 1981, Administrative Law Judge Arthur Leff issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge that the General Counsel has made a *prima facie* showing sufficient to support the inference that protected activity was a motivating factor in Respondent's decision to discharge employee Daniel Malloy. Contrary to the Administrative Law Judge, however, we do not find that Respondent has met its burden of establishing that it would have taken the same action even in the absence of Malloy's protected activity. We find, in agreement with the General Counsel, that Malloy's protected activity was the sole motivating factor in the decision, and that Respondent's other asserted reasons for the discharge were pretexts.

The record discloses that during his tenure of employment Malloy unquestionably had an inconsistent performance record, marked by several warnings concerning below-average attitude and productivity. In January 1980,[1] Supervisor George Petrov placed Malloy on probation after finding him to be the least accurate employee of his five-member coding team. Malloy was given a final warning after an evaluation on January 25 rated his performance below average. On Friday, February 1, however, Petrov found Malloy's most recent work acceptable, and concluded that a previous warning about socializing on the job had made an impression on him. Operations Manager Michael Seville approved Petrov's recommendation that Malloy's probationary period be extended and that no further action be taken against him at that time.

The Administrative Law Judge found that the "paycheck incident" also occurred on February 1, when employee Linda Robb, an assistant to Administrative Manager Dee Denton, handed Malloy his paycheck and W-2 form. Upset that the form did not contain his correct address, Malloy exclaimed, "Those dumb fuckers up front, they never do anything right. I ought to go up and kick Dee's ass." Although Robb immediately informed Denton of the incident, it is undisputed that Project Manager James Long, Respondent's top management official, did not learn of it until February 4.

On Monday, February 4, Respondent held a "brown bag" lunch at which Long addressed approximately 25 employees concerning Respondent's operations. During a question-and-answer session following the address, Malloy asked what management's attitude would be toward the formation of a company union. Long was visibly upset by the question and indicated that he did not think a union was necessary. Malloy then stated that a union would enable employees to bargain for wage increases, and, after another employee noted the advantages of unionization, Malloy related his understanding of how collective bargaining operated at another location.

Immediately after the brown bag lunch, Long met with Denton and Seville and said, "[w]ho the hell does he think he is, asking to form a union at TERA." With Denton urging that Malloy be fired, Long then stated, "[g]ive me his file, his personnel file, give me Dan Malloy's personnel file. I have had it. I have had it." The Administrative Law Judge found that at some point during this conversation Denton informed Long about the paycheck incident. The Administrative Law Judge also found that Long decided to discharge Malloy sometime during the afternoon of February 4. On February 5, Long informed Data Manager Barbara Murray that he was discharging Malloy, and he instructed her to prepare a memorandum on Malloy's employment history. Long also instructed Supervisor Petrov to submit his recommendation, but in a memorandum Petrov observed that Malloy "has a point in maintaining that dismissal at this time is not justified," since his current work was sufficiently accurate and since he had not recently been a disruptive influence. Nonetheless, Long discharged Malloy at the close of business on February 5.

In finding that Respondent met its burden of demonstrating that it would have discharged Malloy even in the absence of his protected activity, the Administrative Law Judge relied, to a large extent, on Malloy's behavior during the paycheck incident. Contrary to the Administrative Law Judge, we find that Respondent has failed to dem-

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[1] Unless otherwise specified, all dates herein refer to 1980.

259 NLRB No. 125

onstrate that it relied on this incident as a basis for the decision.

We note initially that the Administrative Law Judge did not pinpoint the precise time at which the discharge decision was made, finding only that Long arrived at his decision sometime "on the afternoon of February 4." We find merit to the General Counsel's contention that Long decided to discharge Malloy at the precise moment that he demanded Malloy's personnel file and declared that he had "had it," during the conversation with Denton and Seville following the brown bag lunch. Our finding in this regard is grounded in the circumstances in which the remarks were made. Thus, Malloy's comments had caused Long to be visibly upset both during and after the brown bag lunch. Long's remarks were made immediately after Malloy had engaged in protected conduct, and the decisive manner in which they were uttered indicated that a final disposition of the issue was forthcoming. In these circumstances, Long's demand for the file and his declaration that he had "had it" cannot be interpreted as manifesting anything other than a firm resolve to discharge Malloy.

The Administrative Law Judge also found that Denton informed Long of the paycheck incident for the first time during the course of this same conversation, but again he did not specify the precise time at which Denton did so. He found only that Long "may" have been informed prior to demanding Malloy's personnel file and declaring that he had "had it." After a careful review of the record, we find no evidence that Long had been apprised of the paycheck incident prior to that moment, which, as we have found, was the moment at which the discharge decision was made. Therefore, since Respondent has not established that Long was aware of the paycheck incident at that time, it has not demonstrated that the incident was a motivating factor in the decision to discharge Malloy.[2]

The Administrative Law Judge also found that, in deciding to discharge Malloy, Respondent relied on Malloy's "probationary status, failure to sustain an acceptable level of performance, and other problems Respondent had had with him as an employee."[3] For the reasons below, we also find that Long did not consider these factors at the time he made his decision.

While it is undisputed that Malloy had an inconsistent performance record, it is also established that on Friday, February 1, Respondent had decided to extend Malloy's probationary period after his supervisor, Petrov, had judged his most recent work acceptable and had noted that a previous warning about socializing had made an impression on him.[4] In these circumstances, we cannot find that Malloy's performance, which had been found sufficiently acceptable to warrant an indefinite extension of his probationary period on February 1, suddenly formed a part of the basis for the decision to discharge him only 3 days later. The recent extension of the probationary period also precludes a finding that Respondent relied on Malloy's continuing probationary status in making its decision. Moreover, the record discloses no evidence that Long considered Malloy's performance problems or probationary status at the time he stated that he had "had it" during his conversation with Seville and Denton. On the contrary, the evidence indicates only that Malloy's comments about unionization were discussed at the moment that Long made his decision.

Consideration must also be given to the fact that much of the evidence used to justify the discharge was not gathered until the day after the decision was made. As the Administrative Law Judge found, Long informed Murray of his decision on the morning of February 5 and instructed her to prepare a memorandum setting forth everything she knew about Malloy. It was this memorandum which labeled Malloy's performance record as "generally unacceptable," noted his "sloppy handwriting," asserted that he had abused compensatory time and other privileges, and observed that he had engaged in excessive socializing. We do not suggest that Long was completely unaware of Malloy's performance and other miscellaneous problems until February 5. However, the fact that Long ordered the preparation of the memorandum after the decision had been made, when coupled with the absence of evidence that these problems were considered at the time of the decision, indicates that Respondent offered the problems listed in the memorandum as mere afterthoughts.

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[2] The Administrative Law Judge credited Long's testimony that he would have discharged Malloy upon learning of the paycheck incident, even in the absence of the protected activity. We find that the Administrative Law Judge's credibility resolution in this regard is of no consequence, since it has not been established that Long knew of the paycheck incident at the time he decided to discharge Malloy. In discerning an employer's motive for a disciplinary action, we analyze only those factors which the employer considered at the time the action was taken. Whether an employee would have been discharged for conduct occurring after the disciplinary decision, or for conduct of which the employer was not apprised until after the decision, is speculative and is not relevant to our inquiry.

[3] In using the phrase "other problems," the Administrative Law Judge was apparently referring to the items listed in Supervisor Murray's memo of February 5, discussed *infra*.

[4] In this connection we also note Long's testimony that in the absence of the paycheck incident, which has not been shown to be a motivating factor, he would not have disturbed the decision of February 1 to extend Malloy's probationary period.

Finally, the Board has traditionally viewed the timing of a discharge as one element to be weighed in discerning an employer's motivation.[5] Here the decision to discharge Malloy was made immediately after he had raised the issue of unionization at the brown bag lunch. Long's decisive response to Malloy's comments, when viewed in conjunction with the preceding onsiderations, suggests that Respondent would not have discharged Malloy in the absence of his protected activity.

In view of the foregoing, we find that Respondent's asserted reasons for discharging Malloy were pretexts, and that it discharged him solely because he spoke out in favor of unionization. Accordingly, we find that by discharging Malloy Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent TERA Advanced Services Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Daniel J. Malloy because of his union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act, we shall order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Accordingly, we shall order Respondent to offer Daniel J. Malloy immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered as a result of the discrimination practiced against him by paying to him a sum equal to what he would have earned, less any net interim earnings, plus interest. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner described in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6] In accordance with our decision in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we shall also provide for a narrow cease-and-desist order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, TERA Advanced Services Corporation, Bethesda, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they engage in union activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Daniel J. Malloy immediate and full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any losses incurred by reason of the discrimination practiced against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Bethesda, Maryland, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[5] *W. H. Scott d/b/a Scott's Wood Products*, 242 NLRB 1193, 1197 (1979); *Jeffrey P. Jenks d/b/a Jenks Cartage Company*, 219 NLRB 368 (1975).

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER FANNING, dissenting:

I think the Administrative Law Judge has fairly and reasonably analyzed the facts in this case and has arrived at the proper conclusion. I agree with him in his analysis and conclusion. Accordingly, I dissent from my colleagues' reversal of his decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against our employees because they engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Daniel J. Malloy immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed and WE WILL make him whole, with interest, for any losses incurred by reason of the discrimination practiced against him.

TERA ADVANCED SERVICES CORPORATION

DECISION

STATEMENT OF THE CASE

ARTHUR LEFF, Administrative Law Judge: Upon a charge filed by Daniel J. Malloy on February 27, 1980, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint, dated April 18, 1980, against TERA Advanced Services Corporation, Respondent herein, alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act by terminating the employment of the Charging Party on February 5, 1980. Respondent filed an answer denying the commission of the alleged unfair labor practices. A hearing on the complaint was held before me at Washington, D.C., on October 9 and 10, 1980. Briefs were filed by the General Counsel, Respondent, and the Charging Party on December 1, 1980.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation, is engaged at its Bethesda, Maryland, facility—its only facility involved herein—in providing techinical services to government agencies. During the 12-month period preceding the issuance of the complaint, Respondent received in excess of $50,000 for services provided by its Bethesda facility for customers located outside the State of Maryland. Respondent admits that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it is so found.

II. THE UNFAIR LABOR PRACTICES

A. *Introduction; the Issues*

As indicated above, the central issue in this case is whether Respondent violated Section 8(a)(1) and (3) of the Act by its discharge on February 5, 1980, of Daniel J. Malloy, an employee at its Bethesda, Maryland, facility. The complaint alleges more specifically that Respondent discharged Malloy because he engaged in protected concerted activity by attempting to interest fellow employees in union representation.

Respondent employs approximately 100 employees at its Bethesda facility. The employees have never been represented by any union and, so far as appears, no union effort has ever been made to organize them. The General Counsel makes no claim that Malloy at any time engaged in any activity to interest employees to seek union representation other than by his conduct at the meeting described below.

As will hereinafter be more fully detailed, on Monday, Feburary 4, 1980, Project Manager James A. Long, Respondent's top management official at its Bethesda facility, had a "brown bag" lunch meeting with some 25 employees of the facility to give them an overview of Respondent's national operations. At the conclusion of his address, Long invited questions from the employees about anything they wanted to talk about. Malloy asked Long how management would react to the formation of an employee union at the facility and also made certain comments indicating the desirability of having differences between management and employees relating to terms and conditions of employment resolved through the collective-bargaining process. Respondent discharged Malloy on Tuesday, Feburary 5, the day following the meeting. The General Counsel's basic position in this case is that Respondent's discharge action was motivated by Malloy's question and comments at the meeting; that

Malloy's conduct in that respect constituted protected concerted activity; and that, consequently, Respondent's discharge action must be ruled violative of Section 8(a)(1) and (3) of the Act.

Respondent does not dispute that Malloy asked the question and made the comments referred to above, but otherwise takes issue with the General Counsel's position in all respects. According to Respondent, Malloy's question and comments at the "brown bag" lunch played no role whatsoever in the discharge decision which was implemented on February 5. Respondent asserts that its discharge determination was based exclusively upon the following in combination: (1) Malloy's failure to sustain an acceptable level of performance (along with related considerations such as his poor attitude and excessive socializing) during the period of his employment, and (2) his profane outburst before a female employee on the Friday before his discharge when given a paycheck and a W-2 form containing a wrong addreess, the details of which will be reported below. Respondent further asserts that its determination to fire Malloy at the time it did was sparked, not by Malloy's conduct at the "brown bag" lunch, but by the paycheck incident which, according to Respondent, was first brought to the attention of Long, who made that determination, shortly after the conclusion of the "brown bag" lunch. Respondent insists that it would have taken the action it did, at the time it did, and for the reasons it did, whether or not Malloy had asked the question and made the comments claimed by the General Counsel to have been the cause of the discharge.

With the respective positions of the parties thus clarified, I now turn to a more detailed consideration of the relevant facts as reflected by the evidence in this record that I find credible.

B. *The Relevant Facts*

1. Malloy's work history

Malloy was employed by Respondent from September 25, 1978, until his discharge on February 4, 1980, at its Bethesda, Maryland, facility, where Respondent is engaged in processing documents and performing related work for the Nuclear Regulatory Commission. Except for a brief period when he was assigned to quality control work, Malloy's job throughout his employment was that of a coder; his function as such was to review documents, extract certain data elements therefrom, and report them on a coding form. Malloy's immediate supervisor during the last 3 months of his employment was George Petrov. Above Petrov in the supervisory chain of command over Malloy were Barbara Murray, the data manager, and Michael Seville, the operations manager, in that order. As earlier noted, James A. Long, now also a vice president of Respondent, was the project manager and top management official at the Bethesda facility.

Respondent's evaluation records of Malloy, which are in evidence, support Respondent's contention that Malloy had a history of inconsistent and at times substandard performance during the period of his employment. On his first evaluation in late January 1979, he was rated below average in productivity, average in attitude, and given a warning. About a week later, he was told he was being terminated because of low productivity, but that action was later rescinded when it was determined that the statistics relating to his productivity had been inaccurately compiled. Several weeks later, his work was reevaluated and his performance was found to be acceptable. On May 15, 1979, he was rated average in all respects and given a salary increase of $1,000 per annum. The May evaluation report notes that he had been moved to a quality control position because of the high quality of encoding work he had demonstrated, and that he performed well in quality control. It appears that Malloy worked in quality control until September and then was transferred back to his previous position as a coder because due to an injury he was working only a 25-hour week at that time and Respondent wanted a full-time employee in his quality control position. On July 10, 1979, Malloy was rated below average in productivity and attitude, and it was noted that his inconsistent performance was again a problem; that he seemed to respond to corrective counseling, but only for short periods, and that he occasionally demonstrated a negative attitude. A followup review was scheduled for August, but apparently was not conducted. So far as appears, no further review or evaluation of Malloy's work was thereafter made until January 1980. Malloy testified without contradiction that during the intervening period no management representative criticized the quality of his work.

In early or mid-January of 1980, Petrov reviewed the work of his five-member coding team and found Malloy to be the least accurate member of the team. At that time, Petrov directed Malloy's attention to the fact that he was making too many mistakes. At about that time, Petrov also discussed Malloy's situation with his supervisors, Murray and Seville. A consensus was reached to give him a warning and put him on probation for a 2-or 3-week period to see whether there was any improvement in his work. Toward that end, a formal review and evaluation of Malloy's work was conducted on January 25, 1980. Malloy's performance was rated below average. Petrov and Seville were instructed to give Malloy a "final warning." A followup was scheduled for February 1.[1]

On Friday, February 1, Petrov again reviewed Malloy's work. Petrov, as appears from his testimony, found that the coding forms which Malloy had most recently produced, but which he had not theretofore seen, were acceptable. Petrov also had a conversation with Malloy that day about Malloy's socializing on the job and Malloy assured him that he would "maintain a more professional attitude in the future." Petrov concluded that the warning and "stern talk" given Malloy had made an impression on Malloy, and that Malloy should be given a further chance before any adverse action was taken against him. Accordingly, Petrov recommended to Seville, the facility's operations manager, that Malloy's probationary period be extended and that no further action be taken against him at that time. Seville concurred, and approved Petrov's recommendation.[2]

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[1] The January 25, 1980, evaluation report, in addition to referring to the "poor quality" of Malloy's work, also states that his "attitude" was presenting a "serious problem." The only specific evidence presented by Respondent to support that assertion was Petrov's testimony that during that period he was also concerned about Malloy's excessive socializing on the job and the disruptive effect that this was having on the work of other employees.

2. The paycheck incident

On Friday, February 1, Linda Robb distributed to the facility's employees their paychecks, along with their W-2 forms. Robb was then an assistant to Delores Denton (Dee), the administrative manager of the facility's records office where payroll and like personnel records are prepared and maintained. Robb delivered to Malloy his check and W-2 form shortly before noon that day. Malloy's W-2 form contained an address no longer applicable to him. About 2 months before, Malloy had moved to a new address. He had twice requested Denton to have his address changed on Respondent's records, but this had not been done.

Malloy's back was to Robb when she laid his check and W-2 form on his desk. As Robb was turning to leave, Malloy picked up the envelope containing the W-2 form, observed the wrong address, and blurted out in a loud voice: "Those dumb fuckers up front, they never do anything right. I ought to go up and kick Dee's ass."[3] Robb testified that Malloy was looking down at the W-2 form and not at her when he made that exclamation. According to Malloy, his exclamation was simply a spontaneous outburst of irritation and was not addressed to Robb or anyone else. Respondent offered no evidence that any employee other than Robb heard or reacted in any way to Malloy's outburst. There is no indication in the record that Malloy was given to cursing on the job. Malloy's testimony that, except on this one occasion, he had never cursed in the office was not challenged by Respondent at the hearing.

Robb testified that she was "shocked" by the language Malloy had used as well as the tone of his voice. After completing her distribution of paychecks, Robb reported the incident to Denton. Shortly thereafter, Denton came to Malloy's desk and angrily told him that she did not appreciate what he had said in Robb's presence and that she felt his language and behavior were uncalled for. Shortly thereafter, Denton informed Barbara Murray about the paycheck episode, stating that if Malloy were under her supervision she would fire him. Murray, in turn, reported the incident to Operations Manager Seville who earlier that day had discussed Malloy's situation with Petrov and had approved Petrov's recommendation that no further action be taken against Malloy at that time and that his probationary period be extended. As appears from Murray's testimony, Seville, who had the authority to fire Malloy, simply expressed surprise that Malloy had given vent to an outburst of that kind. Apparently, he did not then consider the incident serious enough to warrant overturning his earlier approval of Petrov's recommendation.

Respondent introduced into evidence a memorandum from Denton to Long calling the latter's attention to the paycheck incident. The memorandum is dated February 1, 1980. Long testified, however, that he did not actually see this memorandum or learn of the paycheck incident until the afternoon of the following Monday, shortly after the "brown bag" lunch. By way of explanation, he testified that he was busy and behind closed doors all Friday afternoon and might not have been in his office during most of Monday morning. Denton, although still in the employ of Respondent at the time of the hearing, was not called as a witness by Respondent to corroborate Long's testimony in this respect. There is no specific evidence in the record, however, to impeach Long's testimony about when he learned of the paycheck incident. I accept his testimony that he was not made aware of the paycheck incident until after the "brown bag" lunch.

3. The "brown bag" lunch

On Monday, February 4, 1980, Malloy, along with approximately 25 other employees, attended a "brown bag" lunch called by management at which Long spoke to the employees about Respondent's nationwide operations. Long completed his address in about half an hour and then invited questions from the assembled employees about anything they wanted to talk about. About 10 minutes into the question period, Malloy asked, "What would the management attitude be toward the formation of an employee union?" Long was visibly upset by the question. He responded in substance that he saw no need for a union at TERA as the Company had always had an open door policy. Long indicated that he was curious about why the employees would want a union. Malloy pointed out that when annual salary reviews came up the employees would be in a position to bargain for increases. Another employee, John Milligan, then raised a question concerning the Company's policies about compensatory time, and mentioned that this was another area where "union type" bargaining by the employees might be desirable. Malloy also commented further about the desirability and advantages to employees of collective bargaining by describing how it operated at the Bricklayers' Union where a friend of his worked.[4]

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[2] Petrov testified that this was the first conversation he had with Seville that morning. He further testified that no actual decision had earlier been reached to fire Malloy. His testimony in these respects varied from that of Murray who testified that at a meeting that morning, which she, Seville, and Petrov attended, a decision was actually reached to fire Malloy that day, that Petrov had been directed to implement that decision; but that Petrov later that morning had "backed down" and decided to give Malloy a further chance. On cross-examination Murray agreed, however, that the "decision" asserted by her to have been made on Friday morning was canceled out later that morning with the approval of Seville who had the final say. Seville was not called by Respondent as a witness. To the extent that Murray's testimony differs from that of Petrov, I credit the latter who impressed me by his overall testimony as a more reliable witness. For like reasons, I do not credit Long's testimony that on Friday, February 1, he was informed by Seville that a decision, to be implemented by Petrov, had been made to fire Malloy that day, and that he had approved that decision.

[3] The quoted language is from Robb's testimony which I accept in that regard. Malloy's recollection of the words he used is somewhat different, but not significantly so. His version: "Jesus Christ. Those dumb fuckers in California. I told Dee to put the right address on this."

[4] This finding is based on a synthesis of the testimony I find credible given by Malloy, as a witness for the General Counsel, and by Long, Linda Hillegas, and Olivia Nevins, as witnesses for Respondent. I do not credit that portion of Long's testimony which states that he responded, in part, that he would be happy to have the employees form a union if they wanted to. Long's testimony to that effect is not supported by the testimony of any of the other witnesses.

4. Subsequent events

To support his claim that there was a causal relationship between Malloy's question and comments at the lunch meeting and his discharge the following day, the General Counsel called Valda Wisdom as a witness. Wisdom, at the time material herein, was employed by Respondent as a supervisor but was no longer with Respondent when the hearing was held, having several months earlier voluntarily and on good terms quit Respondent's employ to take a better job. Wisdom's desk at Respondent's office was located about 5 to 10 feet from Delores Denton's. Wisdom testified that when she returned to her desk after the conclusion of the "brown bag" lunch, she found Long, Seville, and Denton at Denton's desk engaged in a conversation about what had occurred at the meeting. That conversation, she testified, lasted about 10 minutes. This is her account of what she heard said:

> Mr. Long was upset about what was asked about the unionizing at TERA and he said who the hell does he think he is, asking to form a union at TERA. Then I heard Mike Seville say that, let them go ahead and have their union. They are too small to unionize anyway. At that point I heard Jim Long say, give me his file, his personnel file, give me Dan Malloy's personnel file. I have had it. I have had it. And Delores Denton said, fire him, fire him, fire him.

Wisdom's aforesaid testimony stands on this record uncontradicted. Seville and Denton were not called by Respondent as witnesses, although at the time of the hearing they were still in Respondent's employ and not shown to have been unavailable. In his testimony Long did not specifically advert to Wisdom's testimony or deny making the statements she attributed to him.[5] Long did testify, however, that he had a conversation with Seville and Denton after the "brown bag" lunch meeting in which he expressed his resentment of the "hostility" Malloy had shown at that meeting. It was during the course of that conversation, according to Long, that Denton asked him whether he had seen her memo or heard about the Friday paycheck incident, and, when he said he had not, had apprised him for the first time of that incident. Although Long fixed the time of his conversation with Denton and Seville as "sometime in the first hour or maybe a little bit longer" after the conclusion of the lunch meeting, I am satisfied that it was the same conversation as the one to which Wisdom made reference.[6]

Wisdom was a disinterested witness and her testimony did not impress me as contrived. Other testimony given by Long also serves to lend credence to Wisdom's testimony that Long made the statement she attributed to him, reflecting his animosity toward Malloy for having raised the subject of a union at the lunch meeting. Thus, Long conceded that he was "upset" by Malloy's question and comments at the meeting. And at various points in his testimony he stated that he regarded Malloy's conduct at the meeting as "disruptive," as "very aggressive," and as having demonstrated a "poor attitude" and "hostility" on Malloy's part toward Respondent.

For the reasons indicated above, I credit Wisdom's aforesaid account of what she heard Long say. In doing so, however, I bear in mind that Wisdom's account is on its face an abbreviated and condensed summary of a 10-minute conversation and may not detail everything that was said. My finding, therefore, is not to be read as rejecting Long's testimony that in the course of the conversation Denton directed his attention for the first time to the paycheck incident, and it may well be that this was done before Long said, "I have had it."

The decision to discharge Malloy, although not effected until the following day, was made by Long on the afternoon of February 4. On that afternoon, Long, according to his testimony, told Seville that he had been informed of the paycheck incident; that he intended to discharge Malloy; and that he wanted the "final recommendations" from Malloy's supervisors that had been due Friday by the following morning.

On Tuesday morning, February 5, Long summoned Murray to his office. Long told Murray that he had decided to discharge Malloy and that he needed a memorandum from her. He asked her to write out everything she knew about Malloy. Later that day Murray prepared and submitted to Long a memorandum detailing the problems which she asserted supervisors had had with Malloy, covering the full 15-month tenure of his employment, including the period prior to May 1979 when, the record shows, Murray first became his supervisor. In her memo, Murray stated that Malloy's work performance had been inconsistent and "generally unacceptable" in quality; that he had a "sloppy handwriting," that on occasions he had abused comp time and other privileges; and that he had engaged in excessive socializing that had a disruptive impact on the work of other employees. Murray's memo then went on to point out that Petrov, after seeing some "slight improvement" in Malloy's work had, on the preceding Friday, given Malloy "his very last chance to improve his attitude and unacceptable work habits," but that Malloy later that day had engaged in the paycheck incident. Murray wound up her memo by stating that in her belief, Malloy during his 15 months' employment had been given every opportunity to improve, but had failed. Although Murray's memorandum was requested by Long and written by her on February 5, it was predated February 4. The reason for this was not explained. The memo, as dated, would have made it appear that it was requested by Long and written prior to Malloy's question and comments at the "brown bag" lunch.

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[5] Respondent did through other witnesses attempt to refute Wisdom's testimony, but I find the testimony given by these witnesses to be of insufficient probative force to undermine Wisdom's credibility. Linda Hillegas, whose desk was adjacent to Wisdom's, testified that after the "brown bag" lunch she returned to her desk with Wisdom, but did not at that point "hear" any conversation taking place at Denton's desk. Linda Robb, whose desk was also close to Wisdom's, testified that she could not "recall" hearing Long engage in any discussion at Denton's desk on February 4, 1980. Little weight can be attached to the testimony of these witnesses. They may have been on the phone or absorbed in other work at the time, or they may not have paid attention to what was going on at Denton's desk for other reasons. Or if they did hear it, the subject may have been of insufficient interest to them to retain a recollection of it over the 8-month period that elapsed between the date of that occurrence and the date of hearing.

[6] Considering the nature of the conversation, even as related by Long, I believe it more likely that it took place very shortly after the lunch meeting, as testified by Wisdom, rather than at the time stated by Long. My belief in that regard is buttressed by the following quotation from Respondent's opening statement:

> Mr. Long came out of the meeting and he said what's happened on the probationary aspect of Mr. Malloy? He really had a bad attitude at the meeting. Whereupon one of the supervisors said, did you hear what happened Friday. He's got to go.

Petrov, who had been absent on Monday, was also summoned to Long's office on Tuesday morning, February 5, and asked by Long to submit his recommendation. Malloy was aware that Petrov had been called to Long's office that morning and had spent considerable time with him. As Petrov was leaving for lunch that day, Malloy followed him to the elevator bank and, as appears from Malloy's undisputed and credited testimony, had the following conversation with him:

> I said to him, I imagine by now that you have heard what I said at the meeting yesterday. He said, yes, I have. That was most unfortunate, and I said, well what is going to happen. He said, they have decided to lower the boom. I said, but surely they can't for just expressing my right of free speech. He said, well there's a lot of reasons. It's that, it's poor work, there was an incident where you cursed, you abused compensatory time. I tried to make brief objection to these things, but as I say, the elevator came.

Later that day, Petrov submitted his memorandum to Long. In it Petrov stated that Malloy had received two warnings from him, one several weeks before about the quality of his work, and the other the preceding Friday about excessive socializing. He pointed out that since the time of his first warning Malloy's work had improved to the point of being acceptable, and that Malloy had responded favorably to his second warning by promising "that he would maintain a more professional demeanor in the future." Petrov concluded his memorandum with the following statement:

> Since his current work does meet my standards of accuracy and—in the past few days anyhow—he has not been a disruptive influence, I would suggest that he has a point in maintaining that dismissal at this time is not justified.

At Respondent's facility, the recommendation of an employee's immediate supervisor is ordinarily given substantial weight in determining whether an employee should be discharged. Petrov's recommendation, however, did not alter the determination which Long had earlier reached to discharge Malloy.[7]

5. The discharge

At the close of business on Tuesday, February 5, Malloy was summoned to Long's office. Seville was also there at the time. Long informed Malloy that he was being discharged for poor performance; a bad attitude; and "disruptive" conduct. The specifications given him were essentially those which Murray had supplied Long in her memorandum that day. The payroll incident was among the reasons cited by Long as having contributed to his discharge decision. Even though Malloy denied this to be so, Long repeatedly stressed that Malloy appear to have a "hostile" attitude toward Respondent. When Malloy remarked that he felt he was really being fired because of what he had said about a union at the "brown bag" lunch, Seville, as appears from Malloy's credited testimony, brushed his remark aside with the comment, "Oh, we know this was just a joke."[8] Malloy's discharge was made effective immediately although he was told he would be paid to the end of the week.

6. Long's testimony relating to his reasons for the discharge

Before turning to an analysis of the facts of this case, the following items of testimony given by Long, and not previously reported, should be noted.

Long testified that his determination to discharge Malloy was based exclusively on Malloy's past inconsistent performance and "poor attitude" as an employee, coupled with the paycheck incident. Malloy's question and comments at the "brown bag" lunch, Long further testified, had no impact at all on his discharge decision, which, he added, would have been the same even if there had been no "brown bag" lunch meeting.

Long also testified in the end, although he had given variable and inconsistent testimony on this point as a 611(c) witness, that had the paycheck incident not occurred, he would not have disturbed the recommendation made by Petrov and approved by Seville on Friday, February 1, to extend Malloy's probationary period, and that Malloy would have remained in Respondent's employ until the next time he stepped out of line or his productivity again went down.

Long further testified that when he learned of Malloy's cursing episode he decided that that was "the last bit of disruptive conduct" he was going to tolerate from Malloy. Long made no claim that Malloy had ever cursed or engaged in similar conduct before. But, he explained, he considered Malloy's outburst "disruptive" because it had occurred "in the presence of a young lady" and in the operations area. Long had had no prior occasion to deal with that type of conduct because it had never occurred before. Had it been "a first time incident of a good employee," testified Long, he would have simply warned the employee not to do it again, but in the case of Malloy he regarded it as "the last straw" because of Malloy's past inconsistent performance and other problems Respondent had had with him during the 15-month tenure of his employment.

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[7] Long testified that he was surprised by Petrov's memo because when he met with him earlier that day Petrov had agreed that Malloy should be discharged.

[8] Long's testimony that it was Malloy, not Seville, who said he was joking at the "brown bag" lunch is not credited.

The validity and weight to be given to Long's testimony in the foregoing respects will be dealt with in the next section of this Decision.

C. *Analysis and Concluding Findings*

The initial question in this case is whether Malloy engaged in activity protected by the Act at the "brown bag" luncheon by his questioning of Long as to how management would react to the formation of a union and his subsequent comments about the desirability and advantages to employees of collective bargaining. Malloy's question and comments, which were obviously intended for the ears, not only of Long, but of the assembled employees, not only indicated that he supported the idea of forming a union for the purpose of collective bargaining with Respondent, but in effect proposed to the employees that they give consideration to that idea as a means of furthering their mutual interests. There can be little doubt that Malloy's question and comments constituted protected activity within the meaning of Section 7 of the Act, which, *inter alia*, gives employees the right "to self-organization, to form . . . labor organizations . . . and to engage in other activities for the purpose of collective bargaining and other mutual aid and protection." The right to "self-organization" and to "form" labor organizations quite clearly encompasses the right to propose or suggest such self-organization or formation. And, as stated in *Owen-Corning Fiberglass Corporation* v. *N.L.R.B.*, 407 F.2d 1357, 1365 (4th Cir. 1969):

> The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much "concerted activity" as is ordinary group activity. The one seldom exists without the other.

I find accordingly.

That brings me to the issue of whether there was a causal relationship between Malloy's protected activity, as found above, and his discharge the following day. The respective positions of the parties have been fully set forth in the introductory subsection of this Decision and need not now be repeated. I shall consider this issue in the light of the Board's causation test as set out in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

There can be little doubt from the record in this case that the General Counsel has made out a *prima facie* showing sufficient to support an inference that Malloy's protected activity at the "brown bag" lunch was a motivating factor in Respondent's decision to discharge him. Such an inference may fairly be drawn from the factual findings made above showing: (1) the close timing of the discharge in relationship to Malloy's protected activity; (2) Long's admission at the hearing that he was "upset" by Malloy's question and comments at the "brown bag" lunch and that he regarded Malloy's conduct at the meeting as "aggressive" and as having manifested a "poor attitude" and "hostility" toward Respondent; (3) Long's evident animus toward Malloy for having raised the question of a union at the meeting, as reflected by his irate declaration to Denton and Seville shortly after the meeting, "Who the hell does he think he is, asking to start a union at TERA"; and (4) Petrov's remark to Malloy at about noon on February 5, that it was "most unfortunate" that Malloy had said what he had at the "brown bag" lunch, together with his ensuing statement, in explanation of his remark, that Long had decided to "lower the boom" on Malloy for that among other reasons, including the paycheck incident.

The question remains, however, whether Respondent has sustained the evidentiary burden placed on it under the *Wright Line* causation test of demonstrating that it would have discharged Malloy even in the absence of Malloy's protected activity. Although I confess that this aspect of the case has been a troublesome one for me, I have after long and careful consideration come to the conclusion that an affirmative answer to the question posed above is justified by the evidence in this case—and this for the reasons to be stated below.

The record shows that at the time of his discharge, and for a substantial period preceding it, Malloy had been regarded by Respondent as a marginal employee. As shown by the findings made above, throughout the period of his employment Malloy had a record of inconsistent and often substandard performance. Respondent also had problems with Malloy's job behavior, such as his tendency to engage in excessive socializing that had a disruptive effect on the work of other employees. Several weeks before his discharge, Malloy had been warned about the poor quality of his work and had been placed on probation for a 2- or 3-week period. During the last week of January 1980, serious consideration had been given by his supervisors to terminating him at the end of that week. However, on Friday morning, February 1, Petrov had observed an improvement in the quality of Malloy's most recent work and, with the approval of Seville, had extended his probationary period indefinitely. However, Petrov found it necessary that day to warn Malloy about his excessive socializing, which had grown out of hand, and had also cautioned him about the importance of maintaining a good job attitude. At that time, Malloy promised that he would "maintain a more professional demeanor in the future."

Malloy's paycheck outburst occurred about 2 hours or so after his conversation with Petrov that same Friday. The hostile and obscene language Malloy used in the presence of Robb in expressing his irritation with Denton and her staff over the error on his W-2 form cannot in this case be lightly brushed aside as a trivial matter. Malloy's own testimony shows that Denton, the administrative manager at the facility, was infuriated by the profane and hateful language he had used in the presence of Robb, and regarded it as serious misconduct on his part. Denton, not only complained about Malloy's conduct to Murray, to whom she expressed her opinion that Malloy should be fired for it, but also prepared a written complaint about the incident addressed to Long.

In light of the foregoing facts, I believe that Long, when made aware of the paycheck incident the following Monday, could honestly have viewed Malloy's profane and abusive outburst not only as giving Respondent proper cause for disciplinary action, but also as a "last straw" warranting discharge action, when considered in conjunction with Malloy's probationary status, failure to sustain an acceptable level of performance, and other problems Respondent had had with him as an employee.[9] In these circumstances, I am unable to regard Long's discharge decision as so devoid of legitimate business justification as to negate the plausibility of his testimony that he would have discharged Malloy upon learning of the paycheck incident even if there had been no "brown bag" lunch. Accordingly, I credit Long's testimony in that respect, and on the basis of his testimony and the evidentiary support for it in this record, I find that Respondent has successfully demonstrated that it would have discharged Malloy at the time it did and for the legitimate reasons it asserts it did even in the absence of his union activities.

It follows, as I read the Board's *Wright Line* causation test, that Malloy's discharge must be found to be nondiscriminatory even though, as the evidence in this record shows, Long was displeased with Malloy's questions and comments at the "brown bag" lunch found above to constitute protected activity and may for that reason also have welcomed Malloy's discharge. (See *Mt. Healthy City School District Board of Education*, 429 U.S. 274, 285 (1977), and the quotation therefrom in *Wright Line, supra* at 1086.)

For the reasons stated above, I conclude and find that the General Counsel has failed to satisfy the ultimate burden imposed on him of establishing the complaint's unfair labor practices allegations by a preponderance of the evidence (*Wright Line, supra*, fn. 11). Accordingly, I shall recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not, as alleged in the complaint, engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

[Recommended Order for dismissal omitted from publication.]

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[9] The record does show, to be sure, that on Friday when Murray reported to Seville Denton's complaint about Malloy's cursing conduct in the presence of a member of her staff, Seville merely expressed surprise and apparently did not then regard Malloy's behavior as a matter of serious enough consequence to reverse his earlier approval that day of Petrov's recommendation that no action be taken at that time against Malloy and that Malloy's probationary period be extended indefinitely. This is an item of evidence that has given me some pause in the conclusion I reach here, since it may be construed as an indication that Long would have similarly evaluated Malloy's cursing conduct were it not for Malloy's intervening protected activity. However, I do not think such an inference is reasonably warranted for two reasons: First, Long was Seville's superior and, therefore, not bound by his judgment. Second, Seville and Denton each headed separate staffs at Respondent's facility, Seville the operations staff, and Denton the administrative staff. As project manager, Long could be expected to have a greater sense of obligation to correct grievances emanating from the administrative staff, as well as to support the recommendation of the manager of that staff.

Labor Services, Inc. *and* **International Brotherhood of Electrical Workers, Local 99, AFL-CIO, CLC, Petitioner. Case 1-RC-17208**

January 7, 1982

DECISION AND CERTIFICATION OF REPRESENTATIVE

By Chairman Van de Water and Members Fanning, Jenkins, Zimmerman, and Hunter

The National Labor Relations Board has considered objections to an election held on April 22, 1981,[1] and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs and hereby adopts the Regional Director's findings and recommendations.[2]

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for International Brotherhood of Electrical Workers, Local 99, AFL-CIO, CLC, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All journeymen, electricians and apprentices employed by the Employer from its Pawtucket, Rhode Island location and who work in the Employer's Pawtucket, Rhode Island area operations; but excluding all other employees including all office clerical employees, professional employees, truck drivers, stock clerks, part-time employees who work less than 20 hours a week, estimators, draftsmen, salesmen, guards and supervisors as defined in the Act.

Chairman Van de Water and Member Zimmerman, dissenting:

Contrary to our colleagues and the Regional Director, and for the reasons set forth below, we would sustain the Employer's Objection 1. The election was conducted on April 22, 1981, at the Howard Johnson Motor Lodge in Pawtucket, Rhode Island, from 5 to 7 p.m. Of the 18 ballots cast in the election, 13 were for the Petitioner and 5 against. The Employer filed timely objections to conduct affecting the results of the election, alleging that the Petitioner bought drinks for employees at the Howard Johnson Motor Lodge both immediately before and during the time that the polls were open. The essential facts, contained in affidavits presented by the Employer, are as follows:

At or about 4:30 p.m. on the day of the election, five or six of the Employer's employees entered the cocktail lounge in the Howard Johnson Motor Lodge. The Petitioner's business manager, Richard Stromberg, who was already in the lounge, greeted the employees, and told them he would buy them drinks and would not allow the bartender to take their money. Stromberg then instructed the bartender to put the employees' drinks on his bill. Shortly before 5 p.m., the time the polls opened, two or three of the employees finished their drinks and started to leave the lounge. Stromberg told them there was no hurry, there were still a few minutes before they had to vote, and there was time for another drink. Stromberg reminded them that he was buying their drinks and that they should order what they wanted, and he reminded the bartender to put the drinks on his bill.

After a few more minutes, the employees started to leave and, as they did, Stromberg said to them, "Don't forget how to vote." A few minutes later the employees returned to the lounge and continued to order drinks which were put on Stromberg's bill. Additional employees entered the lounge, and they were also told that Stromberg was buying their drinks. Eventually, 12 to 15 of the Employer's 18 employees were in the lounge charging drinks to Stromberg.

Assuming the truth of these facts, we find that the Petitioner's conduct constituted objectionable election interference. The Board endeavors to conduct each election under conditions which maximize employees' freedom of choice. Towards this goal, the Board announced in *Milchem, Inc.*[3] a rule proscribing certain last-minute electioneering between voters and parties to the election. We recognize that the Petitioner's conduct here does not fall within the four corners of the *Milchem* rule. However, we view the Petitioner's conduct as providing "the potential of distraction, last-minute electioneering or pressure, and unfair advantage"[4] which the Board sought to curtail in *Milchem.* See the dissenting opinion of former Chairman Miller in *Lach-Simkins Dental Laboratories, Inc.*, 186 NLRB 671, 672 (1970).

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[1] The election was conducted on April 22, 1981, pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 13 for, and 5 against, the Petitioner. There were no challenged ballots.

[2] We have considered our colleagues' dissenting opinion but are in full agreement with the Regional Director's findings and recommendations which are in accordance with pertinent Board precedent. Our dissenting colleagues' concerns have been considered, and rejected, in various of the decisions cited by the Regional Director in his report. Accordingly, as more fully described in the Regional Director's report, a portion of which we have attached to this Decision as an appendix, we agree that the Employer's objection should be overruled.

[3] 170 NLRB 362 (1968).

[4] *Id.* at 362.

No justifiable purpose was served by the Petitioner's conduct. Nor was this conduct devoid of campaign rhetoric, which might minimize its impact on employees. Rather, the Petitioner unabashedly and repeatedly purchased drinks for employees prior to, during, and after the election, even to the point of encouraging some employees to delay their arrival at the polls by having another drink, and then underscored the connection between its largess and the election by exhorting them to vote for the Petitioner. Such blatant last-minute campaigning immediately prior to and after opening of the polls in proximity to the polling area at the very least distracts voters and may possibly sway their votes. Further, such conduct undermines the integrity of Board elections and disrupts the atmosphere in which they should be conducted. Casting ballots between drinks diverts employees' attention from the significance of the issue being decided in the election. Even if the Petitioner's conduct was not a planned campaign tactic, the Petitioner took unfair advantage of a fortuitous circumstance, the effect of which impaired employees' free choice.

Under these circumstances, we would sustain the Employer's Objection 1 and remand this case to the Regional Director for purposes of conducting a hearing on the Employer's Objection 1.[5]

APPENDIX

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, I have conducted an investigation of the Objections and make this report thereon.

The election was held on April 22 at the Howard Johnson Motor Lodge at 2 George Street in Pawtucket, Rhode Island between the hours of 5:00 p.m. and 7:00 p.m. The motor lodge also contains a lounge with a bar.

In support of its Objections the Employer presented the testimony of Eugene Champagne and Edward Randall, two members of the Pawtucket, Rhode Island police force, who testify that they observed the following while they were at the bar in the motor lodge on the day of the election. At about 4:15 p.m., Petitioner's Business Manager Richard Stromberg and two other men entered the bar together. Stromberg greeted the men and told them that their drinks would go on his tab, that he would not allow the bartender to take their money. Stromberg instructed the bartender that the men's drinks were on him. The five or six men stayed and drank, while Stromberg and the two men with whom he had entered left briefly and then returned. Shortly before 5:00 p.m., two or three of the group of five or six men finished their drinks and appeared to be leaving. At this time, Stromberg stated in a voice that could be heard throughout the bar that there was no hurry, that there were still a few minutes before they had to vote, and that there was time for another drink. Stromberg again reminded the men that all their drinks were to go on his tab. After a few more minutes, the five or six men left together, and as they did so, Stromberg said, "Don't forget how to vote." A few minutes later, the same men came back into the bar and continued to drink on Stromberg's tab. The original group of men was then gradually joined by other men entering the bar until, eventually, there were 12 to 15 men drinking in the bar on Stromberg's tab. Around 6:20 p.m., Employer's President Robert Blanchette and the Employer's attorney, Robert Corcoran, also entered the bar and spoke with Officers Champagne and Randall.

Business Manager Stromberg testifies that he and other representatives of the Petitioner entered the bar shortly after the pre-election conference ended around 4:50 p.m. and began drinking by themselves. Three of the Employer's employees arrived at the bar, greeted the union representatives, and sat at a table for a drink. One of the employees insisted he buy the union representatives a drink. Stromberg finally agreed on the condition that he, Stromberg, would buy the next round. At that point, Stromberg told the bartender to run a tab for him and to give any of the employees of the Employer a drink when they came in after voting. Stromberg asserts that after the tally of ballots, when employees, the Petitioner's representatives, and Blanchette were all in the bar, Blanchette bought all the employees drinks and talked with some of them.

There is no evidence that drinking, buying of drinks, or any statements about voting took place in the immediate area of the election, or that any employees were inebriated before or during the election. Nor is there any evidence that employees entered the bar other than totally of their own volition, or that they were given advance notice that coming to the bar would result in free drinks. No evidence was presented that a commitment to vote for the Petitioner was a prerequisite for employees' receiving free drinks. Finally, no evidence was presented that any coercive statements were made by any person, or that anything of any exceptional value was bestowed upon employees.

I find that, even assuming the accuracy of the version of the above-discussed incident given by the Employer's witnesses, Business Manager Stromberg's conduct did not constitute objectionable electioneering or otherwise inhibit employees in the exercise of their free choice in the election. I note in particular the absence of any evidence of advance inducement of the employees to come to the bar or to vote for the Petitioner in order to get a free drink, and the fact that the incident occurred outside the polling area. Further, the value of the drinks given to the employees was not, in my opinion, sufficient to interfere with the employees' free choice at the election. Therefore, I conclude that the Petitioner's allegedly objectionable conduct was permissible electioneering and does not warrant setting aside the election. *Movsovitz & Son, Inc.*, 194 NLRB 444 (1971) and cases cited therein at fn. 3; *Lach-Simkins Dental Laboratories, Inc.*, 186 NLRB 671 (1970); *Jacqueline Cochran, Inc.*, 177 NLRB 837 (1969).

Although the Objections allege "other acts of the Union," no evidence of any other acts was presented.

Accordingly, I find no merit to the Employer's Objections and recommend that they be overruled in their entirety and that a certification of representative be issued.

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[5] As the Petitioner denies certain essential facts as alleged by the Employer, there appear to be substantial and material factual issues which warrant a hearing.

Stokely-Van Camp, Inc. *and* Earl Martin. Case 25-CA-12292

January 7, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 26, 1981, Administrative Law Judge John H. West issued the attached Decision in this proceeding. Thereafter, counsel for General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and recommendations of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by attempting to discourage its employees from engaging in a strike and other protected concerted activities by withholding payment of accrued vacation pay. In its post-hearing brief to the Administrative Law Judge, the General Counsel also alleges that Respondent violated Section 8(a)(5) of the Act by canceling certain of its employees' scheduled vacations without notice to the Union and without giving the Union an opportunity to bargain over the unilateral change in working conditions. The Administrative Law Judge dismissed the complaint and the General Counsel's additional allegation in their entirety because he found that Respondent's reasons for withholding vacation pay and rescheduling vacations were legitimate and substantial, and that Respondent's actions were not motivated by antiunion considerations. For the reasons set forth below, we find merit in the General Counsel's exceptions and reverse the Administrative Law Judge's Decision.

The collective-bargaining agreements in effect between Respondent and the Union[2] were to expire on June 6, 1980.[3] During a June 4 collective-bargaining session, the Union notified Respondent that a strike would be called at midnight on Friday, June 6, unless new agreements were ratified by that time. Agreement on new contracts was not reached before the expiration of the old contracts and, consequently, a strike commenced at midnight, June 6.[4] Prior to the expiration of the collective-bargaining agreements and following the Union's notice of its intent to strike, Respondent's labor relations manager, James L. Spurgeon, decided, without notifying the Union, to cancel all scheduled employee vacations and withhold payment of vacation benefits.[5] Following the settlement of the strike, all employees were formally notified by Respondent that all vacations previously scheduled for June, July, August, and September had been "voided" and were to be rescheduled before December 29. Accordingly, Respondent's employees took vacation time and received vacation pay under the terms of the new contract.[6] No employee received money in lieu of time off as a result of rescheduling his vacation.

The collective-bargaining agreements between Respondent and the Union provide, *inter alia*, that each employee who has at least 1 anniversary year[7] of continuous service and who has worked at least 150 days within the anniversary year in which vacation time is earned shall accrue vacation time and vacation pay in direct proportion to the number of anniversary years of service with the Company; that employees shall receive vacation pay at the beginning of their vacation period; and that "vacations may, as far as possible, be scheduled for the employees . . . with mutual agreement of the employees and the Company." The contracts also contain management-rights clauses which speak to Respondent's rights to designate production schedules and to direct the work force. The agreements do not provide for pay in lieu of actual vacation. Respondent stated that it is customary for employees to begin their vacations on Monday and that it

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[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Respondent's business primarily consists of a can manufacturing plant and a food processing plant. The Union is the collective-bargaining representative of the hourly paid production, maintenance, and warehouse employees at each plant. Respondent and the Union are signatories to collective-bargaining agreements at each plant.

[3] All dates herein refer to the year 1980, unless otherwise specifically stated.

[4] The strike ended on August 23 following the ratification of new collective-bargaining agreements.

[5] The General Counsel characterizes Respondent's decision with respect to vacations as a withholding of vacation pay and unilateral cancellation and rescheduling of vacations, while Respondent and the Administrative Law Judge refer to the action merely as a rescheduling of vacations. Despite the differing perceptions of Respondent's actions, it is undisputed that, as a direct result of Respondent's decision, 82 of Respondent's employees did not receive scheduled vacation benefits which had accrued under the terms of the expired collective-bargaining agreements.

[6] As noted by the Administrative Law Judge, the vacation pay eventually received by the employees was greater than that which they would have received under the old contract because a higher wage package was included in the new contract.

[7] The contracts define "anniversary year" as the 12 months following the employee's anniversary date of last hire.

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is an established practice for Respondent to pay vacation benefits on the Friday preceding the start of the vacation period.

In dismissing the complaint, the Administrative Law Judge found that Respondent did not unlawfully reschedule its employees' vacations, that it did so in accordance with past practice and the pertinent provisions of the contracts, and that Respondent, therefore, had legitimate business reasons for rescheduling the vacations. Further, the Administrative Law Judge found that the record contains no evidence of union animus or hostility.

Respondent contends that its decision to cancel scheduled vacations and withhold accrued vacation pay was based on business justification; i.e., its past practice and its belief that it had a contractual right to do so.[8] It asserts that, pursuant to those considerations, it reached that decision (1) because it was not contractually required to pay vacation pay in lieu of vacation; (2) because it did not know how many employees would cross the picket line and, if production continued during the strike, Respondent wanted to maximize the number of employees available to work; and (3) to provide periods of rest and relaxation away from work from which it would benefit in terms of increased efficiency, and, therefore, an employee must be working in order to take a vacation. The General Counsel argues that, but for the strike, the employees entitled would have received vacation pay in accordance with the contracts and past practice, and that, under *N.L.R.B* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), Respondent's failure to pay vacation benefits when due was discriminatory and inherently destructive of employees' rights and violative of the Act, even in the absence of independent evidence of unlawful motive. Alternatively, the General Counsel asserts that the employees had satisfied all contractual requirements necessary to accrue and receive vacation benefits, and Respondent's asserted business reasons for canceling benefits were pretextual and motivated by antiunion considerations.

None of the contractual provisions relied on, including the management-rights clauses, clearly or specifically authorizes the conduct in which Respondent engaged. Respondent claims, and the Administrative Law Judge found, that Respondent's past practice during potential and actual strike activity shows a consistent policy based on *its* interpretation of the effective collective-bargaining agreements. Our examination of the evidence, however, fails to support that conclusion.

The pertinent evidence shows that, during a strike in 1974, Respondent's employees were paid their accrued vacation pay although they were required to take vacations following the strike.[9] In the present case, all vacation benefits were canceled for the duration of the strike.[10] In 1977, in response to the Union's threat to strike, Respondent posted a notice stating that in the event of a strike no vacation benefits would be paid and all vacations would be rescheduled, but no strike occurred, and no vacation benefits were withheld or vacations canceled. Here, Respondent canceled vacations and withheld vacation pay from employees prior to the commencement of the strike and before it could be determined that a strike actually was going to take place. The 1974 and 1977 instances encompass Respondent's history of past practice in strike-related situations, and they clearly fail to establish the pattern claimed by Respondent.

Respondent further asserts as a business justification that an employee must be working in order to go on vacation and, because the employees were striking rather than working, it was permissible to cancel their vacations and withhold vacation benefits. This contention, however, is not supported by either its bargaining agreements or its past practice. As noted, the contract is silent in this regard. Moreover, on June 6, before it knew who, if anyone, would participate in the called strike, Respondent canceled vacations and withheld vacation pay from employees who, but for the strike, would have received their vacation benefits well before the start of the strike. In addition, the withholding of such benefits from nonworking employees has not, in fact, been Respondent's practice. The record shows instead that vacation benefits consistently have been provided on a regular basis to employees on leave of absence and sick leave immediately before the start of their scheduled vacations. Thus, Respondent's asserted belief that it had a contractual right to withhold the benefits cannot withstand scrutiny.

It is immaterial, therefore, that Respondent was not contractually required to pay vacation pay in lieu of vacation. Rather, Respondent was not empowered by either the collective-bargaining agreements or past practice to refuse to pay earned vacation benefits.

It is readily apparent that, under the contracts, the employees were entitled to vacation pay and that, pursuant to past practice, but for the strike activity, those entitled would have been able to take their vacations and receive vacation pay on request. Accordingly, we find no merit in Respondent's contention that employees cannot be on strike and on vacation at the same time. There is no evidence here that Respondent had a contractual right or other legitimate business justification for dictating how time off from work should be spent.[11] Its desire to maximize the number of employees available for work during the strike does not give it the right to penalize employees for choosing to exercise their Section 7 right to strike.

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[8] As set forth in full by the Administrative Law Judge, we specifically note that the contractual management-rights clauses provided, *inter alia*, that the authority vested to the Company "will not be used for the purpose of discrimination against any member of the Union."

[9] It is not clear from the record whether the Union took part in formulating the 1974 arrangement with respect to vacation benefits, or whether Respondent unilaterally decided to pay accrued benefits and rescheduled vacations.

[10] A small number of vacation checks covering vacations scheduled to start on June 9 were erroneously distributed prior to the strike.

The Administrative Law Judge found that the evidence fails to establish antiunion motivation. We have found that the reasons advanced by Respondent are not supported by the record. Here, upon learning of the Union's intent to strike, and prior to the start of the strike, Gary Miller, Respondent's plant superintendent, told the Charging Party, Earl Martin, that it was the Union's fault that Martin did not receive the vacation pay to which he was entitled. By placing the onus on the Union for the withholding of vacation benefits, Respondent clearly demonstrated that its actions were taken in retaliation against the Union and to attempt to discourage its employees from engaging in protected concerted activity and striking. In addition, during the strike, Respondent's employee relations manager told an employee that he would not receive his vacation pay because Respondent decided that he could not vacation and strike at the same time.[12]

We find, therefore, contrary to the Administrative Law Judge, that the reasons asserted by Respondent in defense of its actions are pretextual or unlawful, and that Respondent's denial of earned vacations and vacation pay violated Section 8(a)(1) and (3) of the Act.[13] We further find that, by unilaterally changing the terms and conditions of employment respecting vacation pay and vacations, Respondent also violated Section 8(a)(5) of the Act.[14]

CONCLUSIONS OF LAW

1. Stokely-Van Camp, Inc., is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, Local No. 1473, is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By withholding and deferring payment to its employees of their accrued vacation pay and canceling and rescheduling their earned vacations as specified in the controlling collective-bargaining agreements in effect between Respondent and the Union, Respondent unilaterally changed the wages, hours, working conditions, and terms and conditions of employment of its employees without advance notice and bargaining with the Union, and attempted to interfere with, restrain, or coerce and retaliate against its employees for exercising their rights to engage in union and concerted activities in violation of Section 8(a)(1), (3), and (5) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in, and is engaging in, certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, we shall order Respondent to cease and desist therefrom.

We shall also order Respondent to make the strikers whole for any monetary loss resulting from Respondent's unlawful action.[15] But for Respondent's unfair labor practices, employees whose vacations were scheduled during the strike would have received their vacation pay at that time and then would have worked continuously after the strike, receiving their weekly wages. However, because of Respondent's unlawful conduct these employees were required to take their vacation after the strike, thereby depriving them of work time and accompany wages. Thus, by failing to pay vacation benefits when payment was due, and by requiring employees to take time off following the strike when they would ordinarily have been working, the employees suffered a monetary loss equal to the amount they should have received at the time their vacation pay was denied them.[16]

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[11] Cf. *Borden, Inc., Borden Chemical Division*, 235 NLRB 982 (1978).

[12] In light of Respondent's demonstrated union animus, we find it unnecessary to determine whether or not Respondent would have violated the Act absent proof of antiunion motivation. *N.L.R.B.* v. *Great Dane Trailers, Inc., supra.*

[13] Cf. *Norman Mesnikoff, Receiver in Bankruptcy for Mid-State Broadcasting Co., d/b/a WHLW*, 248 NLRB 1206 (1980).

[14] See, generally, *Wallace Metal Products, Inc.*, 244 NLRB 41 (1979); and *Gulf Envelope Company*, 256 NLRB 320 (1981).

As noted earlier, the alleged violation of Sec. 8(a)(5) was raised for the first time by counsel for the General Counsel in her post-hearing brief to the Administrative Law Judge. Upon a careful review of all the evidence, we are satisfied that the operative facts forming the basis for the violation are well established in the record. Credited testimony of Respondent's labor relations manager, Spurgeon, and employee relations manager, Paulsen, clearly shows that Respondent did not confer with or notify the Union about the cancellation of vacations and withholding of vacation pay. In light of this testimony and because the issue was fully litigated and is closely related to the subject matter of the complaint, we hereby find that Respondent violated Sec. 8(a)(5) by unilaterally canceling employee vacations and withholding and deferring payment of vacation benefits even though such conduct was not alleged to be an unfair labor practice in the complaint. See, generally, *Crown Zellerbach Corporation*, 225 NLRB 911 (1976); and *The Timken Company*, 236 NLRB 757 (1978).

[15] Backpay shall be computed with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Stokely-Van Camp, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local Union No. 1473, United Steelworkers of America, or any other labor organization, by discriminating against its employees by withholding and deferring payment of accrued vacation pay and canceling and rescheduling vacations because they engaged in or were about to engage in protected concerted activity.

(b) Unilaterally canceling scheduled vacations and requiring that all vacations be rescheduled, without notice to or consultation with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole, with interest, all striking employees for any loss of wages and/or vacation pay they may have suffered as a result of Respondent's failure to pay vacation benefits as provided in the effective collective-bargaining agreements. Backpay and interest thereon shall be computed in the manner prescribed in the remedy herein.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Notify and bargain with the aforesaid Union as bargaining representative of its employees in the appropriate bargaining unit regarding any proposed changes in wages, hours, or working conditions of the said employees.

(d) Post at its Indianapolis, Indiana, facility copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discriminate against employees in order to discourage membership in Local Union No. 1473, United Steelworkers of America, or any other labor organization, by withholding and deferring payment of accrued vacation pay and canceling and rescheduling vacations because they engaged in or were about to engage in protected concerted activity.

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[16] See, generally, *Westinghouse Electric Corporation*, 237 NLRB 1209 (1978).

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

We will not unilaterally cancel scheduled vacations and require that all vacations be rescheduled without first giving notice to and bargaining with the Union.

We will not in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

We will make whole, with interest, all striking employees for any loss of wages and/or vacation pay they may have suffered as a result of our failure to pay their vacation benefits as provided in the effective collective-bargaining agreements.

We will notify and bargain with the Union regarding any proposed changes in wages, hours, or working conditions of our employees.

Stokely-Van Camp, Inc.

DECISION

Statement of the Case

John H. West, Administrative Law Judge: This case was heard at Indianapolis, Indiana, on February 9, 1981, pursuant to a charge filed on June 12, 1980, and a complaint which was issued on July 18, 1980, as amended on January 30, 1981. The complaint alleges that the Respondent, Stokely-Van Camp, Inc., violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act), in that it withheld from its employee Earl Martin and other of its employees vacation pay in order to discourage employees from engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection and engaging in a strike. A timely answer was filed by Respondent on July 29, 1980.[1]

Upon the record,[2] including the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I hereby make the following:

Findings of Fact

I. JURISDICTION

Respondent, an Indiana corporation, maintains its principal office and place of business, a can manufacturing plant and a food processing plant, at Indianapolis. During the 12-month period ending June 30, 1980, Respondent (1) sold and shipped from its Indianapolis facilities products, goods, and materials valued in excess of $50,000 directly to points outside Indiana, and (2) purchased, transferred, and delivered to its facilities goods and materials valued in excess of $50,000 which were transported to said facilities directly from States other than Indiana.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits, and I find, that the involved Union, United Steelworkers of America, Local No. 1473, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The issue here is whether Respondent unlawfully rescheduled its employees' vacations because of their union activity.[3]

Respondent has had collective-bargaining relations with the Union at the involved plants since at least 1971.[4] As here pertinent, Respondent and the Union had 3-year collective-bargaining agreements for each of the above-described plants, which period ended June 6. The Union notified Respondent, at a negotiation session on June 4, that both plants' employees would be on strike as of midnight June 6. The strike lasted until new contracts were ratified on August 23 and the employees returned to work on August 25. At no time during the strike were any bargaining unit employees doing bargaining unit work for the Company.[5] Certain employees at the processing plant who were scheduled to begin their regular vacations on June 9 received their vacation checks on June 6. Other specified employees at both plants who had company-approved[6] scheduled vacations to begin on various dates from June 9 to August 25 did not receive vacation pay from Respondent during the strike.[7]

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[1] All dates are in 1980 unless indicated otherwise.

[2] Respondent moves to correct p. 181 of the transcript, and, in support of its motion, it submits an affidavit of someone who was present in the hearing room and heard the testimony in question. The affiant's recollection is correct. The motion is granted and it, with the attached affidavit, is received in evidence as Resp. Exh. 13.

[3] The General Counsel, on brief, also contends that the instant case presents another issue; namely, did Respondent, as more fully described *infra*, unilaterally change the working conditions of its employees without giving notice to the Union and an opportunity to bargain over Respondent's conduct.

[4] The Union is the exclusive bargaining representative of the hourly paid production, maintenance, and warehouse employees at the plants.

[5] Supervisory personnel operated the can manufacturing plant during the strike. The plant manager, James Davis, witnessed pickets threatening truckdrivers and damage (hole in the cab and a shattered windshield) inflicted on a truck by a gunblast. He, himself, escorted trucks from the plant until they were outside Indianapolis. As found by the Superior Court of Marion County, Indiana, in *Stokely-Van Camp, Inc.* v. *United Steelworkers of America, AFL-CIO, and Local Union No. 1473, et al.*, Cause No. 5780 0931, a temporary restraining order dated July 23, 1980, numerous acts of violence occurred during the strike and such violence intimidated and prevented employees who desired to continue to work for Respondent from entering Respondent's facilities. (Resp. Exh. 3. See also Resp. Exhs. 4 and 5.)

[6] Approval was given prior to June 4. Respondent's practice is to have employees fill out a vacation request form (i.e., G.C. Exh. 2). Company approval is either indicated on the form or by the Respondent's failure to deny the written request.

The pertinent portions of the agreements are set forth in the appendix hereto. [Omitted from publication.] Briefly, both required Respondent to pay vacation benefits to employees who complied with specified conditions.[8] The agreement which covered the can manufacturing plant contains the following provision:

> Vacations may, as far as possible, be scheduled by employees, upon sixty (60) day advance notice, according to seniority with mutual agreement of the employee and the Company. [Jt. Exh. 2, p. 15, par. 12.13.]

The similar provision in the processing plant agreement reads:

> Vacations may, as far as possible, be scheduled by the employees, according to seniority with the mutual agreement of the employee and the Company. [Jt. Exh. 1, p. 15, par. 12.13.][9]

Regarding past practices, it is noted that during the strike at these plants in 1974, which occurred subsequent to the termination of prior agreements which are said to be basically similar to the involved agreements, Respondent issued vacation checks and required employees to take time off after the strike ended; that in 1977 Respondent posted the following notice in its can manufacturing plant:

> ATTENTION ALL HOURLY EMPLOYEES
>
> Due to the Union's position that the company can no longer hire summer vacation replacements on a temporary employee basis after June 3, 1977, the company will no longer be able to extend to our employees the number of vacations during the summer months as we have in the past. The company regrets having to take this action, but under the circumstances we have no alternative. Any employee affected will be notified by their foreman of the necessity to re-schedule their vacation.[10]

It also posted the following notice in its can manufacturing plant:

> ATTENTION ALL EMPLOYEES
>
> In the event of a work stoppage at Plant #063, there will be no payment of vacation benefits. All employees scheduled to go on vacation while the work stoppage is in effect, must re-schedule their vacation at a later date.
>
> If there is no work stoppage, all employees scheduled to go on vacation on Monday, June 6, 1977 may pick up their vacation checks on Monday, June 6, 1977 after 9:00 AM.[11]

After it was notified by the Union on June 4 of the upcoming strike, Respondent decided to reschedule vacations so that they would be taken after the strike ended. The basis stated at the hearing by Respondent's labor relations manager, James Spurgeon, for his decision was that (1) he believed Respondent had the contractual right to reschedule vacations pursuant to provision 12.13 of both agreements,[12] as described above, and the management-rights clause, which speaks to the direction of the work force and Respondent's right to designate production schedules,[13] (2) he did not know whether all of the employees would honor the strike and, if production continued during the strike, Respondent wanted as many employees available as possible, and (3) he believed that vacations should be taken from work and if employees are on a strike they are not working. Respondent did not notify the Union of its decision prior to implementing it.[14]

About 3 weeks before the involved strike, Larry Martin, then an employee in the processing plant, asked Lester Paulsen, the employee relations manager at that facility, what would happen to his pay for his vacation which was to begin June 16 if there was a strike. Paulsen stated that Respondent would "probably mail it to you like before, but that's all I can tell you right now." Larry Martin understood "like before" to refer to the 1974 strike.

On Friday, June 6, Earl Martin, then an employee in the can manufacturing plant, received his paycheck at the beginning of the day shift. He did not, however, receive a check for his regular vacation which had been approved (G. C. Exh. 2) and which was supposed to begin on Monday, June 9. In the company of a union representative, Joe Eddington, Earl Martin spoke with the plant superintendent, Gary Miller. Earl Martin pointed out that he was supposed to go on vacation on Monday, and that he had earned the vacation and was entitled to it. Miller agreed. But he said that the employees could not be on a work stoppage and a vacation at the same time, and that it was the Union's fault because during the negotiations they had expressed the desire to go out on strike if the contract was not settled by midnight June 6. Eddington then stated, "Earl, they're not going to give you any more money than they have to to support the strike."[15]

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[7] Involved are approximately 17 processing plant employees and 65 can plant employees.

[8] Essentially, benefits accrued under both agreements to those unit members who had been employed for a full year or more and who worked a minimum of 150 days within the anniversary year in which the vacation was earned.

[9] Both agreements also state "[e]mployees entitled to vacation shall receive their vacation pay at the beginning of their vacation period," and "[v]acation pay is based on the straight time hourly day rate in effect on the date vacation is taken" (Jt. Exhs. 1 and 2, p. 15 in both agreements, at pars. 12.14 and 12.15, respectively). Normally employees receive their regular vacation check on the payday before their vacation begins.

[10] Resp. Exh. 11. The notice was dated May 26, 1977, and was signed by Howard E. Winters, plant manager.

[11] Resp. Exh. 2. This notice was also signed by Howard E. Winters. Reference is also made by Respondent to certain of its conduct at another of its Indiana facilities in 1978 and 1979 at which it had a collective-bargaining agreement with the Union involved herein. The agreement is said to have been substantially similar to those involved herein. Respondent rescheduled for after a strike employee vacations which had been scheduled during the strike. The agreement itself was never introduced herein.

[12] Specific instances of Respondent rescheduling previously approved individual vacations were cited by Respondent; i.e., Resp. Exhs. 7 and 12. These reschedulings were based on Respondent's production needs.

[13] Art. V—Management Rights, in both of the involved agreements (Jt. Exhs. 2 and 3), reads as follows:

> The management of the Plant and the direction of the working forces, including the right to hire, suspend or discharge for just cause, or transfer, enlarge or combine, divide, decrease, or rearrange departments, and the right to relieve employees from duty because of lack of work or other legitimate reasons, designate the type of product to be manufactured, where it will be manufactured, production schedules and methods, processes and means of manufacturing are vested exclusively in the Company, provided this will not be used for purpose of discrimiantion against any member of the Union or be contrary to any other provision of this agreement.

[14] In answering a union inquiry made after Respondent refused to give out regular vacation paychecks on June 6, Spurgeon advised the Union that employees were not going to lose their vacations but would have them rescheduled when the strike ended. Spurgeon told the union representative that he did not believe that Respondent could "schedule somebody for vacation, from time off work when they're not working." The union representative did not demand on behalf of the Union that Respondent give vacation pay to the strikers.

Another employee of the processing plant, Elmer Cox, scheduled a vacation to begin June 16. On Friday, June 13, he picked up his paycheck inside the gate at Respondent's facilities. He asked Paulsen at that time why he did not receive his vacation check. Paulsen responded that vacation checks had all been canceled because Respondent decided that employees could not be on a vacation and on a strike at the same time.

After the 1980 strike ended, employees took time off with pay. Their regular vacation scale was set by the new collective-bargaining agreement. No employee received money in lieu of time off as a result of the rescheduling of these vacations. In fact Respondent points out that in the administration of the involved collective-bargaining agreements employees are not permitted to take vacation pay in lieu of vacation. The following notice was posted in the can manufacturing plant:

> **ATTENTION ALL EMPLOYEES**
>
> All employees with Vacations scheduled in JUNE, JULY, AUGUST or SEPTEMBER, 1980—have been voided. All employees who had a Vacation scheduled during this period, *MUST* reschedule that Vacation, *NO LATER THAN September 5, 1980.*
>
> Employees who began a new anniversary year during June, July, August and September, 1980 and with Vacation time to take from their previous year, *must* start their Vacation no later than December 29, 1980.
>
> Employees with Vacations to schedule from their previous anniversary year will be given priority in rescheduling their vacations, in-so-far as is possible.[16]

III. CONTENTIONS

The General Counsel, citing *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), contends that Respondent's conduct is "inherently destructive" of employees' rights and, therefore, no independent proof of illegal motive is required and no proof of business justification is adequate to defend the violation. It is asserted by the General Counsel that, even if the conduct is not "inherently destructive," Respondent failed to prove a legitimate and substantial business justification since those given by Spurgeon are pretextual in that (1) allegedly, neither the agreements nor any past practice developed at either plant permits Respondent to reschedule, at its will, a group of employees' vacations, (2) the management-rights clause was inapplicable since no bargaining unit employees did unit work during the strike,[17] and (3) Respondent's alleged policy of requiring employees to be working at the time they begin their vacations has exceptions, as admitted by Spurgeon; i.e., employees have been on leave of absence or sick immediately before their vacations, and this does not itself explain why those can plant employees whose vacations were to commence on Monday, June 9, did not receive their vacation paychecks. Moreover, the General Counsel contends that even if these reasons were relied on in good faith, they were insufficient justification, and, even if that is not the case, the challenged conduct still violated the Act because credible evidence shows that Respondent possessed an illegal motive. Consequently, reasons based on contract and past practice are, according to General Counsel, irrelevant.

As indicated above, it is the General Counsel's position that by canceling the vacations of a group of employees without giving the Union notice and an opportunity to bargain over the change in working conditions Respondent unilaterally changed the working conditions of its employees in violation of Section 8(a)(5) of the Act. The General Counsel argues that the violation should be found and remedied even though not specifically alleged in the complaint since assertedly this issue was fully litigated at the hearing and it is intimately related to the subject matter of the complaint.

Respondent argues that rescheduling of vacations is not "inherently destructive" of important employee rights because (1) rescheduling by Respondent is authorized by the contracts[18] and past practices and, therefore, did not represent any diminution of vacation benefits, and (2) rescheduling *vis-a-vis* a denial of vacation benefits can be unlawful only if an antiunion motivation for the action is established.[19] Assertedly, Respondent had a substantial legitimate business justification for rescheduling vacations. It took the same action during prior actual and threatened strike situations involving the Union, which Respondent contends demonstrates that it had the consistent policy based on its interpretation of the involved agreements. Production needs had resulted in rescheduling of individual vacations in the past. And, Respondent continued production at the can manufacturing plant using supervisory personnel and had work available for unit members throughout the strike. Finally, Respondent believes "that the strike made it inappropriate for employees to go on vacation since they were not working from which to take a vacation."[20] It is argued by Respondent that there is no evidence of any antiunion motivation. The statement made by Eddington, the union official, as to Respondent's motivation is assertedly not competent evidence of Respondent's actual motivation.

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[15] The vacation checks which would have been given out on June 6 were in the can manufacturing plant but pursuant to Spurgeon's order to reschedule all vacations they were not given to the employees. As indicated above, apparently because of a misunderstanding those regular vacation checks which were in the processing plant on June 6 were given out (with the exceptions noted in the G.C. Exh. 3).

[16] G.C. Exh. 4. The notice was dated August 28, 1980, and signed by James G. Davis, plant manager.

[17] It is argued that this reason is pretextual; that if Respondent had been acting in good faith, without illegal motivation, then it would have issued the vacation checks when it became apparent that everyone was supporting the strike, or even at the end of the strike.

[18] Respondent points out that during the 1980 negotiations the Union proposed that the 60-day scheduling provision be amended to make the scheduling irrevocable inside the 60 days prior to the beginning of the employee's vacation. Assertedly, the Union, by attempting to obtain irrevocable scheduling of vacations, admitted that Respondent had the right under the preceding contract to reschedule vacations. Resp. Exh. 13.

[19] It is pointed out by Respondent that the vacation pay eventually received by the employees when their vacations were rescheduled was greater than they would have received at the time their vacations were originally scheduled.

While Respondent argues that there is no basis for finding that it committed an unfair labor practice, it points out that, even if this is not the case, an award of backpay would be improper because there is no evidence of any damage. Assertedly, any backpay award would constitute a windfall for the employees who fortuitously scheduled vacations during the strike.[21]

IV. DISCUSSIONS AND CONCLUSIONS

For the reasons set forth below, I do not believe that the involved conduct warrants a finding that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

Under the former, it is an unfair labor practice for an employee "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 7 of the Act." Section 7 guarantees employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Under Section 8(a)(3), it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."[22] *N.L.R.B.* v. *Great Dane Trailers, supra*, cited by the General Counsel is factually distinguishable because there, unlike here, the respondent refused to pay striking employees vacation benefits accrued under a terminated collective-bargaining agreement while it announced an intention to pay such benefits to striker replacements, returning strikers, and nonstrikers who had been at work on a certain date during the strike. As pointed out by the court in *N.L.R.B.* v. *Borden, Inc., Borden Chemical Division*, 600 F.2d 313, 320 (1st Cir. 1979), however, unequal treatment of different classes of employees is not a prerequisite to finding an 8(a)(3) violation where employees are discriminated against because they engaged in a concerted activity. But were the involved employees discriminated against because they engaged in a strike?

Involved herein is the scheduling of vacations. There is no provision in either of the pertinent agreements for money to be paid in lieu of actual vacation. And Respondent points out that in the administration of the involved agreements employees are not permitted to take vacation pay in lieu of vacations; to receive vacation pay employees must take time off from work for vacations.[23] The issue, therefore, is the scheduling of vacations and not merely the payment of accrued vacation pay. *Texaco, Inc.*, 179 NLRB 989 (1969).

Respondent's practice under pertinent agreements with the Union was to reschedule vacations as necessary even after Respondent had given its approval. It appears that Respondent has not taken anything away from those employees who scheduled vacations to begin during the strike but merely required them to postpone their vacation. *The Detroit Edison Company*, 206 NLRB 898 (1973).[24]

In 1974 employees were given vacation pay during the strike but had to take time off after the strike. On the other hand, in 1980, employees, with the exceptions noted *supra*, did not receive vacation pay until they took their vacations, which is in accord with paragraph 12.14 of the involved agreements. When the employees did receive their vacation pay, it was set by the new collective-bargaining agreement and was greater than under the old agreement.

Respondent had legitimate business reasons on June 4 when it decided to reschedule vacations. The General Counsel's argument that the management-rights clause was inapplicable since no bargaining unit employees did unit work during the strike overlooks the fact that when the decision was made on June 4 to reschedule vacations Respondent could not have been aware of this. If subsequent events are to be taken into consideration, included must be the violent nature of the strike and its effect on (1) employees who may have wanted to continue to work, and (2) anyone in management who would contemplate reversing a legitimate determination. The exceptions to Respondent's policy that employees must be working in order to go on vacation prove, rather than disprove, the legitimacy of the rule. The policy is applied generally but exceptions are made when justified in individual circumstances.

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[20] It is conceded that there are exceptions to this rule, i.e., employees on sick leave or leave of absence have been allowed to take their vacation at times when they would otherwise be working, but it is submitted that these exceptions were for the purpose of accommodating employees who were in difficult personal situations.

[21] By not paying vacation pay for vacations which were scheduled during the strike, Respondent contends, it caused all strikers to be treated equally in regard to payment of wages. As pointed out in Respondent's brief, perfect equality was not achieved in that the 19 employees who received vacation paychecks on June 6 and those employees whose vacation began before June 6 and continued into the strike were not required to take vacations without pay after the strike.

[22] The Supreme Court in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 233 (1963), held that discouraging participation in legitimate strikes is included in this section of the Act.

[23] As indicated in fn. 21, *supra*, there were some exceptions to this practice during the 1980 strike. These exceptions, however, appear to be an aberration and had nothing to do with whether these individuals did or did not participate in the strike.

[24] Compare this to the situation in *Westinghouse Electric Corporation*, 237 NLRB 1209 (1978), where the respondent therein denied vacation pay to strikers during a period when the plant was shut down but gave a week's vacation pay to nonstrikers. The strikers were given time off with pay at a later date but in effect were denied a week of work by the respondent because they refused to abandon the strike. This is not the situation at hand.

Antiunion motivation has not been demonstrated. The statements made by Paulsen and Miller do not suggest union animus or hostility. And Union Representative Eddington's statement was not adopted by Respondent.

The General Counsel's charge that Respondent unilaterally changed the working conditions of its employees in violation of the Act is not supported by the record. Respondent did not change the working conditions. As indicated above, Respondent's conduct was in accord with past practice.

I find that Respondent's reasons for rescheduling are legitimate and substantial and are not pretextual since no antiunion motivation has been demonstrated.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act, and engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

3. As found above, Respondent has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

Detroit Building and Construction Trades Council, AFL-CIO *and* Chatham Supermarkets, Inc.

Local No. 982, United Brotherhood of Carpenters and Joiners of America, AFL-CIO *and* Chatham Supermarkets, Inc.

Carpenters District Council of Detroit, Wayne, Oakland, Macomb, Sanilac, St. Clair, Monroe Counties and Portions of Livingston County, AFL-CIO *and* Chatham Supermarkets, Inc. Cases 7-CC-1151(1), 7-CC-1151(2), and 7-CC-1151(3)

January 7, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 12, 1981, Administrative Law Judge Irwin H. Socoloff issued the attached Decision in this proceeding. Thereafter, counsel for Respondents filed exceptions and a supporting brief, the General Counsel filed an exception and a supporting statement and an answering brief to Respondents' exceptions, and the Charging Party filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent Local No. 982, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Detroit, Michigan, and Respondent Carpenters District Council of Detroit, Wayne, Oakland, Macomb, Sanilac, St. Clair, Monroe Counties and Portions of Livingston County, AFL-CIO, Detroit, Michigan, their officers, agents, and representatives, shall take the action set forth in the said recommended Order.

259 NLRB No. 129

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon charges filed on February 6 and 9, 1981, by Chatham Supermarkets, Inc., against Detroit Building and Construction Trades Council, AFL-CIO, herein also called Building Trades Council; Local No. 982, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein also called Local No. 982; Carpenters District Council of Detroit, Wayne, Oakland, Macomb, Sanilac, St. Clair, Monroe Counties and portions of Livingston County, AFL-CIO, herein also called Carpenters District Council; the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued an order consolidating cases, consolidated complaint, and notice of hearing, dated March 3, 1981, alleging violations by Respondents of Section 8(b)(4)(i) and (ii) (B) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondents, by their answers, denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held before me in Detroit, Michigan, on March 30, 1981, at which all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case,[1] and from my observations of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Chatham Supermarkets, Inc., herein also called Chatham, a Michigan Corporation, maintains some stores at various locations in the Michigan counties of Wayne, Oakland, and Macomb (Detroit area), where it is engaged in the retail sale and distribution of food and related products. During the year ending December 31, 1980, a representative period, it derived gross revenues in excess of $500,000 from the operation of those stores. In that same time period, it purchased and received, at its Michigan stores, goods and materials valued in excess of $50,000 which were sent directly from points located outside the State of Michigan. I find that Chatham Supermarkets, Inc., is a person and an employer engaged in commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4) of the Act.

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[1] At the hearing, I approved, over the objections of the Charging Party, an informal settlement agreement by and between the General Counsel and Respondent Building Trades Council. That agreement provides for a full and complete remedy for all violations alleged in the consolidated complaint against this Respondent. As it has not been shown that Respondent Building Trades Council has demonstrated a proclivity to engage in violations of Sec. 8(b)(4) of the Act, I find no merit in the Charging Party's contention that nothing less than a formal settlement agreement should be approved.

II. LABOR ORGANIZATIONS

Respondent Local No. 982 and Respondent Carpenters District Council are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

On January 19, 1981, Chatham began a construction project at Livonia, Michigan; namely, the conversion of a portion of an existing building into a "Warehouse Ways" store. It engaged Blitzit, Inc., herein also referred to as Blitzit, to perform the carpentry work at this jobsite. Chatham also entered into contract with Sokol Floor Covering, Oakland Service Company, and RFD Electric for performance, respectively, of floor work, plumbing, and electrical work.

In the instant case, the General Counsel contends, and Respondents deny, that, in furtherance of their dispute with Blitzit, whose employees are not represented by Local No. 982, Respondents engaged in certain unlawful secondary activities. Thus, the complaint alleges, and the answers deny, that, on or about January 21, 1981, Respondents, in violation of Section 8(b)(4)(ii)(B) of the Act, threatened to picket at all of the Chatham stores unless Chatham ceased doing business with Blitzit. Also at issue is whether, from February 4 through 11, 1981, Respondents engaged in picketing at the Livonia jobsite, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

B. *Facts and Conclusions*

1. The threat to picket[2]

John Sedor, Chatham's labor relations manager, testified that, on January 21, 1981, he received a message stating that Local 982 Business Agent Robert Schultz had called regarding the Livonia remodeling project. Sedor returned the call on January 22.[3] He was told by Schultz that the contractor at the Livonia jobsite was using nonunion help. Schultz further stated that the Union had had earlier problems with Blitzit and that Chatham "would have pickets at the stores." Sedor contended that Chatham did not have control over the contractor but Schultz replied that, nonetheless, Chatham could put pressure on the owner of the building to "get rid of Blitzit."

Schultz, in his testimony, admitted placing a call to Chatham in late January 1981, and leaving a message. He claimed, however, that he did not receive a return call from a Chatham representative. Based on demeanor impressions, I credit Sedor's testimony over that of Schultz and find that Sedor did, indeed, make a return call and have a conversation with Schultz substantially as he, Sedor, testified. I conclude that, during the course of that telephone conversation, Respondent Local No. 982, through its business agent, Schultz, violated Section 8(b)(4)(ii)(B) of the Act by threatening Chatham, a person and an employer with whom it had no dispute, that Respondent Local No. 982 would picket the Chatham stores unless Chatham ceased doing business with Blitzit.

2. The picketing

The parties stipulated that picketing occurred at the Livonia jobsite from February 4 until February 11, 1981. Some of the pickets carried signs readings: "Chatham Unfair. Carpenters District Council." Other signs read: "Blitzit Unfair. Carpenters District Council." In its answer, Respondent Local No. 982 admitted its responsibility for the picketing. At the hearing, it further conceded that its business agents, including Schultz, were present during the course of the picketing. Schultz testified that at least three officials of Respondent Carpenters District Council were also present while said picketing occurred. According to Schultz, the dispute concerned the fact that the Blitzit employees "are not represented by the Carpenters Union." The parties stipulated that Respondents did not have a dispute with an employer at the jobsite other than Blitzit.

In light of the Sedor-Schultz conversation, which occurred shortly before picketing began, and in view of the nature of the picket signs employed by Respondent Local No. 982, there can be little question that this Respondent picketed the jobsite, in furtherance of its dispute with Blitzit, with an object of forcing a neutral employer, Chatham, to cease doing business with Blitzit. Said picketing constituted unlawful restraint and coercion of Chatham and illegal inducement of the employees of neutral employers to refuse to perform services.[4] Respondent Local No. 982 thus violated Section 8(b)(4)(i) and (ii)(B) of the Act.

3. The responsibility of Respondent Carpenters District Council

I further conclude that Respondent Carpenters District Council is legally responsible for the secondary boycott activities as found, above. Under the constitution and laws of the United Brotherhood of Carpenters and Joiners of America,[5] when there are two or more local unions located in one city, they must be represented in a district council which has the power to establish and maintain local work and trade rules for the local unions and their members, and to conduct trials of local union members charged with violating the constitution, the district council bylaws or trade laws, or the trade rules of a local union. The bylaws and working rules of Respondent Carpenters District Council, which includes Respondent Local No. 982, empower it to establish uniform dues and initiation fees to be assessed by all local unions within the district. Section 13(d) of the bylaws provides:

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[2] In reaching the factfindings contained in this section, I have assigned no weight to the testimony of Chatham's construction manager, Alfred Walgenbach, regarding an alleged telephone conversation with the secretary-treasurer of the Carpenters District Council, Ralph Wood. That telephone call has not been properly authenticated.

[3] The telephone was answered by a secretary or receptionist of Local 982 who then transferred the call to Schultz.

[4] Respondents contend, in their brief, that the stipulated facts do not demonstrate that employees of neutral employers were actually present on the jobsite when picketing occurred. As picketing commenced shortly after construction work began, and continued for a period of 1 week, and as such picketing was, demonstrably, designed to enmesh Chatham in Local 982's effort to force Blitzit and its nonunion employees off the jobsite, I think it reasonable to infer, in the absence of evidence to the contrary, that the employees of neutral employers were at the site when picketing occurred.

[5] Respondents are affiliated subordinate bodies of that International union.

> The Secretary-Treasurer shall be authorized to furnish credentials to all Business Agents representing the United Brotherhood in this district and shall act as General Agent for the district, having under his direction all Business Agents of the district, whether employed by the Local Unions or this District Council.

Section 26 of the working rules provides:

> (A) Those members employed by the organization in the capacity of Business Representatives for a Local Union or District Council must at all times uphold and enforce the Working Rules and By-Laws of this district.
>
> (B) The Business Representative of a Local Union shall immediately report to the Secretary-Treasurer of the District Council his findings relative to the investigation and settlement of any dispute on a job.
>
> (C) Any Business Representative employed by a Local Union shall be responsible to the Secretary-Treasurer of the District Council, who as such, shall be considered the Prime Business Representative of the district.

These provisions establish that Schultz, as business agent of Respondent Local No. 982, was, in handling the Livonia jobsite dispute, acting under the direct supervision and control of Respondent Carpenters District Council.[6] Moreover, as noted, the pickets patrolling at the site carried signs bearing the legend of that Respondent. Said picketing was observed by officials of Respondent Carpenters District Council who visited the jobsite during the February 4 through 11 period. They took no actions of disavowal. In these circumstances, I find and conclude that Respondent Carpenters District Council is jointly responsible with Respondent Local No. 982 for violations of Section 8(b)(4) of the Act.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth in section III, above, occurring in connection with the operations of Chatham Supermarkets, Inc., described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices in violation of Section 8(b)(4) of the Act, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Chatham Supermarkets, Inc., is a person and an employer engaged in commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4) of the Act.

2. Respondent Local No. 982, and Respondent Carpenters District Council, are labor organizations within the meaning of Section 2(5) of the Act.

3. By their threat to picket the Chatham Supermarkets, Inc., stores, unless Chatham ceased doing business with Blitzit, Inc., Respondents have engaged in unfair labor practice conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act.

4. By their picketing activities at Chatham Supermarkets, Inc.'s Livonia, Michigan, construction site, as described hereinabove, Respondents have engaged in unfair labor practice conduct within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent Local No. 982, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Detroit, Michigan, and Respondent Carpenters District Council of Detroit, Wayne, Oakland, Macomb, Sanilac, St. Clair, Monroe Counties and portions of Livingston County, AFL-CIO, Detroit, Michigan, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by Chatham Supermarkets, Inc., or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threatening, coercing or restraining Chatham Supermarkets, Inc., or any other person engaged in commerce or in an industry affecting commerce; where in either case an object thereof is to force or require Chatham Supermarkets, Inc., or any other person, to cease doing business with Blitzit, Inc.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act:

(a) Post at their offices and meeting halls copies of the applicable attached notices marked "Appendix A" and

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[6] See *United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Endicott Church Furniture, Inc.)*, 125 NLRB 853 (1959).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

"Appendix B."[8] Copies of said notices, on forms provided by the Regional Director for Region 7, after being duly signed by their authorized representatives, shall be posted by Respondents immediately upon receipt thereof, and shall be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail or deliver to the Regional Director for Region 7, signed copies of the said notices for posting by Chatham Supermarkets, Inc., if willing, at all locations where that employer normally posts notices to its employees.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

APPENDIX A

Notice To Members
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT engage in, or induce or encourage any individual employed by Chatham Supermarkets, Inc., or any other person engaged in commerce or in any industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threaten, coerce, or restrain Chatham Supermarkets, Inc., or any other person engaged in commerce or in an industry affecting commerce; where in either case an object thereof is to force or require Chatham Supermarkets, Inc., or any other person, to cease doing business with Blitzit, Inc.

Local No. 982, United Brotherhood of Carpenters and Joiners of America, AFL–CIO

APPENDIX B

Notice To Members
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT engage in, or induce or encourage any individual employed by Chatham Supermarkets, Inc., or any other person engaged in commerce or in any industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threaten, coerce, or restrain Chatham Supermarkets, Inc., or any other person engaged in commerce or in an industry affecting commerce; where in either case an object thereof is to force or require Chatham Supermarkets, Inc., or any other person, to cease doing business with Blitzit, Inc.

Carpenters District Council of Detroit, Wayne, Oakland, Macomb, Sanilac, St. Clair, Monroe Counties and Portions of Livingston County, AFL–CIO

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Union Carbide Corporation-Nuclear Division *and* **Office and Professional Employees International Union, AFL-CIO.** Case 10-CA-15949

January 7, 1981

DECISION AND ORDER

On June 16, 1981, Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Union Carbide Corporation-Nuclear Division, Oak Ridge, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(b):

"(b) Post at its two Oak Ridge, Tennessee, plant facilities (ORNL(X-10) and Y-12) copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material."

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge: This case was heard before me in Knoxville, Tennessee, on April 29, 1981. The charge was filed by Office and Professional Employees International Union, AFL-CIO, herein called the Union, on June 18, 1980,[1] and the complaint in the case issued on August 15, alleging that Union Carbide Corporation-Nuclear Division, herein called Respondent or the Company, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, beginning around mid-May. More specifically, the complaint alleges that Respondent violated Section 8(a)(l) of the Act by removing, contrary to past practice, notices of union activities from its bulletin boards, by removing an employee petition involving union and protected concerted activities from an employee breakroom, by confiscating from employees notices of union meetings, by threatening employees with loss of personal and sick leave benefits if they designated the Union as their collective-bargaining agent, by soliciting employees to report to it the identity of employees who join or engage in activities on behalf of the Union, and by threatening employees with disciplinary action if they joined or engaged in activities on behalf of the Union. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by denying its employee Jean Kiel use of the Company's telephone, by reprimanding her, and by prohibiting, contrary to past practice, Kiel from talking about the Union with fellow employees during worktime.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New York corporation with an office, plant, and a place of business located at Oak Ridge, Tennessee, where it is engaged in operating certain laboratories and nuclear facilities. During the calendar year preceding issuance of the complaint, Respondent sold and shipped finished products valued in excess of $50,000 from its Oak Ridge facilities directly to customers located outside the State of Tennessee. The complaint alleges, Respondent by its answer thereto admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

259 NLRB No. 130

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[1] Although the Administrative Law Judge stated that *Essex International, Inc.*, 211 NLRB 749 (1974), reflects current Board law, his statement is dictum and, moreover, he was unaware that *Essex* has been overruled by the subsequently issued decision in *T.R.W. Bearing Division, a Division of T.R.W., Inc.*, 257 NLRB No. 47 (1981).

[2] Respondent has excepted to the Administrative Law Judge's recommendation that Respondent be required to post the notice to employees at each of its three Oak Ridge facilities (ORNL(X-10), ORGDP(K-25), and Y-12). Inasmuch as the conduct found unlawful herein occurred only at the X-10 and Y-12 facilities, and because there is no showing that the unfair labor practices found herein had an impact on the organizational activities at the K-25 facility, we find that the record is insufficient to require Respondent to post the notice at the K-25 facility, we shall limit the posting requirement to the two facilities where the unfair labor practices occurred. *Read's, Inc.*, 228 NLRB 1402 (1977).

[1] All dates are in 1980 unless otherwise stated.

II. THE UNFAIR LABOR PRACTICES

A. *The Removal of the Union's Notices From Plant Bulletin Boards and the Confiscation of Union Material From Employees*

Respondent operates three separate plant facilities in and around Oak Ridge utilizing some 17,817 employees represented by 20 various craft labor organizations in a coalition called the Atomic Trades and Labor Council (ATLC). Each plant facility which may consist of many different plant buildings and which may cover several square acres has a different function and/or product. Thus, the Oak Ridge National Laboratory (ORNL) is one plant facility engaged primarily in research and development and is referred to as the X-10 plant. The Oak Ridge Gaseous Diffusion Plant (ORGDP) is engaged in enriched uranium production and is referred to as the K-25 plant, while the third facility, known as the Y-12 plant, is engaged in weapons production. The plant facilities may be separated from each other by several miles and one of the plants is located in an adjoining county.

Respondent maintains bulletin boards in various of its buildings throughout all three of its plant facilities. The collective-bargaining agreement between Respondent and the ATLC, effective June 1978 through June 1981, and covering the Y-12 plant contains a provision on bulletin boards at article 15, section 1. That provision reads as follows:

> The Company shall provide the Union with suitable bulletin boards for the purpose of posting notices of union meetings and union social events. Any other material must be approved by the Company prior to posting.

An identical provision is contained in article 16, section 1, of the collective-bargaining agreement between the ATLC and Respondent applicable to the X-10 plant.

The Charging Party Union herein began its organizational campaign among Respondent's office employees at all three of Respondent's plants in mid-March. In connection with that campaign the Union prepared printed announcements of an open house held each Wednesday at a given location and time and invited employees of Respondent to attend. Employees were further invited in the announcement to call a specific telephone number for further information. These printed announcements were distributed to a number of Respondent's employees by the Union. One such employee, James Gilbert Diden, employed by Respondent in the Y-12 plant, testified that he distributed some of the Union's announcements to employees and about mid-June began posting the announcement on the bulletin board just outside the machine shop office[2] at building 9204-2 at the Y-12 plant. Diden testified that he was aware of no restrictions on the use of the bulletin board and had frequently seen the bulletin board used by individual employees to announce private items for sale, such as trucks, cars, motorcycles, and CB radios.

Diden testified that he experienced some difficulty in keeping the union announcement posted and over a period of about 1 week found it necessary to replace removed notices about 12 times. Diden was ultimately advised by other employees that supervisors, including Paul R. Wilson, the fabrication division general foreman and an admitted supervisor, were removing the announcements. Diden testified without contradiction that on or about June 20 he approached Wilson and asked him why the signs were being taken down. Wilson replied, according to Diden, "You are not recognized." Subsequently, on the same day, Diden observed Wilson remove one of Diden's announcements from the bulletin board, an announcement that Diden had posted only a short time before. Diden related that he had never seen anyone in supervision remove notices from the bulletin board before. He also added that the notices posted for personal items had remained on the bulletin board for from 2 to 4 weeks. According to Diden, the practice was that the employee who posted the notice on the bulletin board removed his own notice.

Wilson was not called as a witness by Respondent and Diden's testimony was thus not contradicted. On the other hand, his testimony received support from that of employee Jerry Peddicord who testified that he was aware of no restrictions on the use of the bulletin boards in the Y-12 facility where he worked. He related that he saw Wilson remove six different union notices from the bulletin board used by Diden. Moreover, Peddicord testified that he personally used the bulletin board in the Y-12 facility to announce personal items for sale. He received no prior approval from anyone and personally removed the notices on the sale of the items referred to in the posted material. One of his notices on a personal item remained posted for 3 months.

Peddicord further testified that he posted several of the Union's announcements on different bulletin boards in Y-12 facility buildings including the one in a facility cafeteria specifically identified as a "union" bulletin board. This also included bulletin boards in the areas of Y-12 where the production employees were represented by the Chemical Workers International Union, another member of the ATLC. While Peddicord related that he knew of no complaints by any union to his postings he observed salaried personnel, not identified as supervisors, remove them.

On June 26, according to Peddicord, Peddicord took a packet of about 25 of the Union's meeting notices into the plant and placed them in his desk drawer. After lunch that day he found that his notices were missing.[3] Subsequently, he had occasion to go to the desk of Wilson to get a tool and, in going through the drawers of the desk, observed the Union's notices he had brought in that morning, identifying them by the manner in which he had folded them for carrying in his shift pocket. He did not confront Wilson about the matter and was told only about a week prior to the hearing herein by Wilson that Wilson did not take the announcements from Peddicord. Nevertheless, Peddicord's testimony on the matter was credible and uncontradicted. Moreover, while Wilson may belatedly have denied taking the union's meeting notices he did not deny that he had had them in his possession, and obviously he did not return them to Peddicord. Accordingly, in the absence of any denial under oath at the hearing by Wilson, and because it is undenied that he removed similar notices when he saw them posted on bulletin boards, I believe it not unreasonable to infer that Wilson either took the announcements from Peddicord or they were taken with his knowledge and approval.

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[2] It appears that the bulletin board was located in the work area of production and maintenance employees represented by Machinists Local Union 480, one of the craft unions in the ATLC. According to Diden, Machinists notices of meetings were posted on this bulletin board from time to time, apparently with no interference from management.

[3] Peddicord conceded that his desk was accessible to other employees looking for tools also retained in his desk drawers.

As the Board said in *Container Corporation of America*, 244 NLRB 318 (1979):

> It is well established that there is no statutory right of employees or a union to use an employer's bulletin board. However, it is also well established that when an employer permits, by formal rule or otherwise, employees and a union to post personal and official union notices on its bulletin boards, the employees' and union's right to use the bulletin board receives the protection of the Act to the extent that the employer may not remove notices, or discriminate against an employee who posts notices, which meet the employer's rule or standard but which the employer finds distasteful.

Here Respondent contractually granted to ATLC unions the right to post notices of union meetings and union social events. While the contracts made other postings subject to Respondent's prior approval it is clear from the credited testimony of Diden and Peddicord that, in practice, postings for personal items by individual employees, even unrepresented clerical employees, were not subjected to Respondent's prior approval. Indeed, there was no evidence of policing of the bulletin boards by Respondent except for the removal of the Union's meeting notices herein. It thus appears, and I conclude, that, in practice, Respondent did not have a restrictive policy with respect to employee use of the bulletin boards and had no previous policy of "policing" the bulletin boards.

Even where an employer has permitted the posting of personal notices by employees on its bulletin boards as well as official union notices regarding meetings, elections, and nominations, it may nevertheless legitimately bar use of the bulletin boards for rival partisan internal union campaigns which could be conducive to continual strife between rival factions and which could make the bulletin boards a battleground for competing groups. *Nugent Service, Inc.*, 207 NLRB 158 (1973). Further, the Board held in *Armco Steel Corporation*, 148 NLRB 1179 (1964), that the contractual reservation of a bulletin board for the exclusive use of an incumbent union does not violate Section 8(a)(1) of the Act since such reservation constitutes a collective-bargaining concession which, when granted by an employer, may be accompanied by such usage regulations that the employer deems appropriate.

In the case *sub judice*, however, the posting of the notices of the Union's campaign meetings was not the posting of "rival" factions within the incumbent unions. Nor was it even posting of notices by a rival union. Indeed, there was no evidence that any of the incumbent unions objected to the meeting notices posted regarding the Union. Such notices could not be the basis for strife or discipline problems. Thus, since Respondent had allowed the indiscriminate use of its bulletin boards by employees for personal items without regard to any contractual reservations or prior approval, I conclude that it had waived such reservations. It follows that Respondent could not lawfully remove the Union's notices here.[4] Accordingly, I find and conclude that, in removing the posted material regarding the Union here, Respondent violated Section 8(a)(1) of the Act as alleged.

I further find that Wilson's confiscation of Peddicord's union notices also violated Section 8(a)(1) of the Act inasmuch as it clearly interfered with his right to possess and distribute his material in nonwork areas on nonworktime. See *Photo-Sonics, Inc., Instrumentation Marketing Corporation; Photo Digitizing Systems, Inc.*, 254 NLRB 567 (1981).

B. *The Threatened Loss of Benefits*

Diden briefly testified regarding a comment made to him by H. E. Hamilton, a dispatching supervisor, on June 25 in Diden's building at the Y-12 facility. According to Diden, Hamilton remarked that if the office employees did organize there was a possibility that they would lose their personal leave with pay and their sick leave with pay. Diden could not recall the context in which Hamilton's remark was made or any other circumstances surrounding the statement, but explained that what he did recall "just happened to register."

While Diden's testimony regarding Hamilton's statement is weak and suspect because of his failure to recall the context in which it was made, such testimony was not contradicted because Hamilton was not called to testify. Accordingly, and because Diden appeared to be a truthful and reliable witness, I credit Diden's testimony regarding Hamilton.

Hamilton's statement points to the "possibility" of a loss of certain benefits as a result of union organization. Without explanation or clarification the statement is clearly subject to the interpretation that the risk of the loss stems directly from the fact of organization rather than from the collective-bargaining process. It is the reasonable tendency of Hamilton's remark to coerce which is critical to the finding of a violation, not the existence of actual coercion of employees or unlawful motivation on Hamilton's part. *El Rancho Market*, 235 NLRB 468 (1978); *American Freightways Co., Inc.*, 124 NLRB 146 (1959). Without explanation or clarification I find and conclude that Hamilton's remark to Diden did tend to coerce and restrain employees in their Section 7 rights and that Respondent by Hamilton's remark violated Section 8(a)(1) of the Act as alleged.

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[4] See *Special Machine and Engineering, Inc.*, 247 NLRB 884 (1980); *Container Corporation, supra; Group One Broadcasting Co., West*, 222 NLRB 993 (1976); *Nugent Service, Inc., supra; Tempco Manufacturing Company, Inc.*, 177 NLRB 336 (1969); *Challenge Cooke Brothers of Ohio, Inc.*, 153 NLRB 92 (1965).

C. *The Taxpayers' Petition*

Curtis Hammontree, an employee in the mechanical department of Respondent's X-10 plant and the chief steward of Millwright and Carpenters Local 2738 which represents certain of Respondent's employees in that plant, testified for the General Counsel that on June 16 he placed a petition given him by Bob Kiel, president of ATLC, in the lunchroom of building 2013 at the X-10 facility. The petition, captioned "Taxpayers' Petition," contained the following language:

> We, the undersigned, object to Union Carbide corporation's use of *our tax dollars* for anti-union activities. The United States Government is officially in favor of collective bargaining. We therefore call upon congress and the president to investigate and stop this improper use of our taxes.

Under the above language was space for signatures and, following that, the instructions to return the petition to the Union at a given address.

Hammontree testified that the petition remained in the lunchroom for 3 or 4 days. When he went back to pick up the petition he could not find it in the lunchroom. A supervisor named Earl Chapman reported to Hammontree that the petition had been picked up by John Fields, a general foreman and an admitted supervisor within the meaning of the Act. Hammontree, in the presence of another steward, Austin Massengill, and at the direction of Kiel, went to Fields' office to retrieve the petition. There Hammontree asked Fields for the petition but Fields related he had turned it in to the labor relations department. Hammontree asked Fields why he had picked it up and Fields replied that it was not acceptable to the Company. Hammontree's testimony on this matter is generally supported by Massengill who also testified. Therefore, and because he was not contradicted by any Respondent witness, Hammontree is credited.

It was also Hammontree's uncontradicted testimony that it was not unusual for employees to leave collection jars and sign-up sheets in the lunchroom for employees retiring or experiencing tragedy or other difficulty. The procedure was for employees to place money in the jar if they desired to contribute and then sign a sheet by the jar showing the amount contributed. These papers, according to Hammontree, were never disturbed by Respondent.

Respondent argues that it always had an unwritten policy against allowing political activity on its premises since its facilities were supported by Federal Government funds. In keeping with this policy, and because it viewed the "Taxpayers' Petition" as a political activity, it admittedly picked up Hammontree's petition.

The rights of employees under Section 7 of the Act are not without limitations and must be balanced with an employer's right to regulate his property. *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793 (1945). And the Board has previously held that it is not unlawful for an employer to bar distribution on its premises of wholly political propaganda which does not relate to employees' problems and concerns *qua* employees. *Ford Motor Company*, 221 NLRB 663, 666 (1975), enfd. 546 F.2d 418 (3d Cir. 1976). But where the material distributed contains matters impacting on the employees' working conditions its distribution may not be lawfully barred because it also has political overtones or contains "social comment." See *Samsonite Corporation, Inc.*, 206 NLRB 343 (1973). In the case *sub judice* the taxpayers' petition in my judgment does have direct impact on the employees' working conditions and, more specifically, their right to organize in order to change or effect such conditions. The petition, rather than seeking to persuade the selection of some political candidate or to influence the endorsement of a political party or platform, sought only to invoke the attention and aid of the President and Congress in enforcing a national policy on collective bargaining. The "problem" identified in the petition was the perception that Respondent, subsidized by Government funds, was utilizing such funds to thwart national policy by combating union organizational efforts. Thus, the petition, whether the premise on which it was based was ill founded or not, was directly related to employee working conditions as affected by their right to organize. It therefore constituted a distribution of material "pertinent to a matter which is encompassed by Section 7 of the Act." *McDonnell Douglas Corporation*, 210 NLRB 280 (1973).

I find and conclude that the taxpapers' petition was clearly a concerted and a union activity since it was produced by the Union and distributed through the ATLC. The distribution of union literature or material may not be lawfully barred in nonwork areas on nonworktime absent special circumstances not shown here. *Republic Aviation, supra*. Accordingly, I find that Respondent by confiscating the taxpayers' petition from a nonwork area violated Section 8(a)(1) of the Act as alleged in the complaint.

D. *The Solicitation To Report Union Employees*

The complaint alleges that on May 21 Respondent, by distributing a document entitled "Freedom From Harassment—A Fact Sheet" to its employees, solicited its employees to report to Respondent the identity of employees who supported the Union. Bob Worrell, Respondent's labor relations manager for its Nuclear Division, admitted that around May 21 certain leaflets were distributed to employees in response to the Union's campaign. One of those leaflets bore the caption specified above in the complaint allegation and stated:

> The N.L.R.A. states that employees have the right to refrain from all or any labor union activities.
>
> The same law also makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their rights to refrain from labor union activities.
>
> Company rules are designed to protect employees while at work. This protection includes protection from harassment of employees while at work or on

> the premises. Any such harassment should be reported to supervision.
>
> Thus any employee threatened, coerced or harassed because of exerting his/her right to refrain from labor union activities, including a refusal to sign a card, has dual protection by supervision and by the National Labor Relations Board if he/she desires to file a charge.

The General Counsel argues that the leaflet constitutes a solicitation to report legitimate union activity or solicitation. Respondent on the other hand argues that it does not, and that it only seeks to preclude that type of union activity which threatens, coerces, or harasses employees.

Recently the Board in *Bil-Mar Foods of Ohio, Inc.*, 255 NLRB 1254 (1981), had occasion to reaffirm the principle that an employer's request that employees report instances in which employees were "put under pressure to join the union" was violative of Section 8(a)(1) of the Act. The rationale for such a finding as stated in *J. H. Block & Co., Inc.*, 247 NLRB 262 (1980), is that such requests to report have "the potential dual effect of encouraging employees to report to Respondent the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organizational activities." Thus, consistent with this rationale the Board has found violations of the Act where an employer solicited employees to report union activity that caused them "trouble" or put them "under any pressure" (*Sunnyland Packing Company*, 227 NLRB 590, 594–595 (1976), enfd. 557 F.2d 1157 (5th Cir. 1977), and *Colony Printing and Labeling, Inc.*, 249 NLRB 223 (1980); that amounted to "pestering or pressure" or being "bothered" (*Lutheran Hospital of Milwaukee, Incorporated*, 224 NLRB 176, 178 (1976)); that constituted a failure to leave employees alone (*Poloron Products of Mississippi, Inc.*, 217 NLRB 704, 707 (1975); or that amounted to being "threatened in any way or subjected to constant badgering" (*Bank of St. Louis*, 191 NLRB 669, 673 (1971)). And in *Bil-Mar, supra*, the Board found an employer's request of employees to report union activity which "harassed, coerced, pressured, or threatened them" to constitute conduct warranting a rerun election.

The Board's rationale in the above-cited cases appears to be applicable to the language in the leaflets in the case *sub judice*. And the language of the leaflet here, particularly the reference to harassment, falls within the realm of language found unlawful by the Board when used as a basis for a solicitation to report union activity. Under these circumstances and on the precedent cited I conclude that the solicitation to report here has the proscribed "potential dual effect" described in *J. H. Block, supra*. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act as alleged in the distribution of the May 21 leaflets.

E. *The Reprimand of Jean Kiel*

Jean Kiel was employed by Respondent as a secretary to George Marrow, the administrative assistant of the director for development, fifth division, at the Y-12 facility, and worked in building 9202. She had worked for a total of 8 years for Respondent but had a break in that employment and had begun her second period of employment about 2 years prior to the hearing. Kiel was described by William H. Dodson, director of development, as "one of the best" workers, and had been rated as "superior" during performance ratings in April. She had received a wage increase in May. Prior to May 29 she had never been warned or reprimanded regarding any aspect of her work.

On April 16 Kiel became involved in activity on behalf of the Union. In connection therewith Kiel posted notices regarding union meetings on bulletin boards at the Y-12 facility as well as on restroom and cafeteria walls, building walls, and facility buses. On May 27 Kiel was called into the office of Marrow, who advised Kiel that another employee had complained to Dodson that she was posting notices during working hours. He advised her that she was not supposed to do that. Kiel admitted that she had posted the notices but added that she had been careful not to do it during working hours. According to the testimony of Kiel, a very convincing and credible witness whose testimony was largely uncontradicted, Marrow appeared to be satisfied with her responses and the discussion of the matter ended.

On May 29 Kiel was again called into Marrow's office and confronted by both Marrow and his superior, Dodson. Dodson told Kiel that he had received two complaints about her union activities, the one that had already been discussed with Marrow on May 27 and the second involving a complaint from an employee at the X-10 plant that Kiel had spoken to her by telephone regarding union activities. Dodson told Kiel with respect to the first complaint that he was satisfied she had not posted notices during working time. With respect to the remaining complaint Dodson was either unwilling or unable to identify the complainant, but Kiel did not deny generally that she had telephoned an employee at the X-10 plant regarding union activity. Dodson admonished Kiel not to use the telephone for union activities because it took up her time as well as the other person's time. Kiel responded that she had not used the telephone for union calls any more than other secretaries in the division had used it for personal calls. According to Kiel, in the ensuing discussion Dodson told Kiel that she was not to use the telephone for personal calls at all explaining that he had to make it that strict because it was the only way he could have control over whether it was a personal call or a union call. Kiel complained that this was overly restrictive but Dodson cited the Company's phone book containing provisions prohibiting the use of company telephones for personal calls. Dodson went on to tell Kiel that she was not to talk with other employees about the Union except before or after work, during lunch hours, and when she and the other employees were on their own time. In addition, he told her that she could post union notices on the bulletin boards coming into the plant, but she should recognize that they would be removed. Further, Kiel was told by Dodson that she was not to use the interplant mail for any union communications. Finally, Dodson told Kiel that if she did not follow these guidelines she would be subject to disciplinary action.

On May 30 after confirming with Marrow her understanding of the limitations explained by Dodson and in keeping with those limitations Kiel rejected a personal telephone call from her daughter's high school. Because of this she apparently became visibly upset. This was reported to Dodson who came to Kiel and in the ensuing discussion explained to Kiel that she had misunderstood his earlier instructions and had overreacted. He said that Kiel could use the telephone for personal calls but not for union activities. He added that the telephone was for business use only, although it was Respondent's accepted policy for employees to use it for some personal calls. Kiel thereupon asked for written guidelines but Dodson denied her request.

According to Kiel employees had previously been allowed to use the telephone for local personal calls, and she knew of no one who had been reprimanded for this. Moreover, she said that secretaries such as herself had previously been allowed to engage in personal nonwork related discussions among themselves during worktime. Kiel admitted in her testimony that she had used her business telephone to talk to two employees at the X-10 plant as well as some employees at the Y-12 and K-25 plants regarding union matters. However, she estimated that such calls which had averaged about two per day were no greater in number or longer in duration than the local personal calls which she was accustomed to making. In addition, she testified that during the period when she made the telephone calls regarding the Union she stopped making her customary personal calls.

Based on Kiel's testimony,[5] the General Counsel contends, in effect, that Dodson's restrictions imposed on Kiel coupled with the threat of disciplinary action for breach of the restrictions constituted disparate and discriminatory treatment in violation of Section 8(a)(3) and (1) of the Act. In short, the General Counsel argues that the restrictions imposed on Kiel were "simply to discourage discussion about, and solicitation for, the Union on Company premises and to punish" Kiel by withdrawing unrestricted telephone usage as a condition of employment.

Respondent, on the other hand, argues that it has consistently restricted the personal use of its telephones. In keeping with this policy of restriction its telephone book states that personal calls were to be made only in an emergency and "must be placed collect, billed to personal credit cards, or billed to your residence telephone." Further, Respondent introduced a number of exhibits in evidence consisting of several back issues of its employee newspaper containing a question box column answering several questions on personal use of Respondent's telephones by employees.[6] Still further, Respondent points to a memo of Dodson in May 1979, to various supervisors in his division relative to abuses in telephone usage in which it is stated that the impression should be made on people that "the phones are business phones and should not be used except for business reasons or personal reasons of a type that we would allow personal leave."[7] Lastly, Respondent relies on a regulation set forth in its employee handbook, "You at Union Carbide" (Resp. Exh. 2) generally distributed to employees, which states that "Plant telephones are for the conducting of Company business only. You must refrain from making unnecessary calls." The handbook also contains the following no-solicitation rule which is cited in Respondent's brief:

> Unless authorized by the Plant Superintendent or Laboratory Director, you are forbidden to solicit, sell tickets, collect, transact any business, or indulge in any activity not related to your employment on Company time.

Respondent's brief refers to the foregoing rule as a valid no-solicitation rule. The General Counsel's brief refers to it as an unlawfully overly broad rule, although the rule was not alleged as a violation of the Act in the complaint.

It is clear from the credited evidence that Respondent, notwithstanding all its stated policies regarding the use of its telephones, had allowed Kiel and other clerical employees to use its telephones for personal reasons. Dodson acknowledged as much in his testimony. It is further clear that, on May 29 and 30, Kiel was chastized and threatened with discipline for any further use of her telephone for union-related matters. She was, however, allowed on May 30 and thereafter to use the telephone for personal reasons to the extent she had done so in the past except for union matters. Accordingly, Respondent did, I conclude, discriminatorily apply its telephone use restrictions against union activities. The issue is whether it was privileged in doing so.

It is well established that an employer may bar union activities including union solicitation on worktime. See, e.g., *Essex International, Inc.*, 211 NLRB 749 (1974). But it may not bar union solicitation on worktime where it allows employees to engage in other forms of solicitation during worktime. See *The Timken Company*, 236 NLRB 757 (1978); *Maremont Corporation*, 229 NLRB 746 (1977); *Walton Manufacturing Company*, 126 NLRB 697 (1960). Where it enforces its work rules in a disparate manner against union activities an employer violates Section 8(a)(1) of the Act. In the absence of a formal and valid no-solicitation rule an employer may discipline an employee for solicitation but has the burden of showing that the solicitation resulted in actual work interference. See *Midwest Stock Exchange, Incorporated; Midwest Clearing Corporation; Midwest Securities Trust Co.; Midwest Stock Exchange Service Corporation*, 244 NLRB 1108 (1979).

In the instant case, I conclude that, as pointed out in the General Counsel's brief, Respondent's no-solicitation was overly broad and unlawful. See *Stoughton Trailers, Inc.*, 234 NLRB 1203 (1978). This is because the phrase in the rule barring solicitation on "company time" has been held by the Board to be reasonably susceptible to the interpretation that an employee may not engage in solicitation while the employee is on the clock even at a time the employee has finished his work and is in a nonwork area. *Florida Steel Corporation*, 215 NLRB 97 (1974). Respondent's rule therefore serves as no defense to disparate application of restrictions without an affirmative showing by Respondent of actual work interference by Kiel.

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[5] Kiel's credibility has already been noted. Dodson testified for Respondent but couched his testimony in more general terms. I credit Kiel wherever her testimony may be viewed as contradicting that of Dodson.

[6] Such answers related essentially to personal use of telephones for long-distance or toll calls or other extraordinary usage, and clearly indicated a company policy against this type of personal use.

[7] The reference to the use of personal leave apparently meant that the personal use of the telephone was acceptable if it were used to handle matters which would otherwise require the expenditure of personal leave, i.e., matters which would take the employee from his job.

Applying the foregoing principles to the instant case, Respondent could unquestionably bar its telephones to any personal use by employees, but once it grants the employees the privilege of occasional personal use of the telephone during worktime, including the privilege of calling other employees at work, it would appear that it could not lawfully exclude the Union as a subject of discussion particularly where, as here, no actual work interference has been shown.

There can, of course, be an abuse of any privilege and Respondent would be within its rights to police any abuses. But, I conclude, absent any such abuse not shown here, it was unlawful for Respondent to disparately apply its phone policy in the manner it did here. See *K-Mart Corporation*, 255 NLRB 922 (1981). Thus, I find and conclude that under the circumstances here Respondent discriminated against Kiel in violation of Section 8(a)(3) and (l) in limiting her personal use of her business telephone including barring her from union discussions or solicitations.

Moreover, although not alleged in the compalint, I find that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation rule in its employee handbook. Respondent itself submitted the rule in evidence and has relied on it in defense of other complaint allegations to the extent that the legality of the rule has been brought into issue. Under such circumstances, the absence of a complaint allegation does not preclude the finding of the violation which I have made on the rule. See *Jax Mold & Machine, Inc.*, 255 NLRB 942 (1981); *The Timken Company, supra.*

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By removing notices of union meetings from its bulletin boards; by confiscating notices of Union meetings from its employees; by removing an employee petition concerning union and protected concerted activities from a nonwork area; by threatening employees with loss of personal leave and sick leave benefits if they selected the Union as their collective-bargaining representative; by soliciting employees to report the identity of other employees who engage in union activity or ask them to sign union cards; and by maintaining a no-solicitation rule which prohibits employees from soliciting for the Union in work areas during their nonworking time, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily restricting its employee Jean Kiel in personal conversations and the use of its telephones, and by threatening Kiel with discipline for the violation of such unlawful restrictions Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action necessary to remedy the unfair labor practices and to effectuate the policies of the Act, to include the usual posting of appropriate notices. In my opinion, since the unfair labor practices found herein directly affected employees of two of Respondent's Oak Ridge plant facilities, and because the policies of Respondent underlying the violation found, particularly with respect to bulletin board useage, telephone useage, and no-solicitation rule appear to be applicable to all of the Oak Ridge plant facilities, effectuation of the policies of the Act will best be achieved by requiring Respondent to post the notices to employees hereinafter recommended at all three of the Oak Ridge facilities.

With respect to the reprimand of Jean Kiel the record does not establish that such reprimand amounted to any more than a threat of discipline. There was no showing the threat was ever reduced to written form nor does it appear that any record was made of any disciplinary action regarding Kiel. Thus, there appears to be no basis for an order for expunging any respondent record on Kiel. However, Respondent shall be ordered to retract the threat of discipline of Kiel and so advise her in writing.

Upon the foregoing findings of facts, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER[8]

The Respondent, Union Carbide Corporation-Nuclear Division, Oak Ridge, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully removing from its bulletin boards notices of meetings of Office and Professional Employees International Union, AFL-CIO.

(b) Unlawfully confiscating from employees notices of union meetings or other union-related material.

(c) Unlawfully removing employee petitions concerning union or protected concerted activity from nonwork areas.

(d) Threatening loss of personal leave and sick leave benefits if employees select a union to represent them.

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[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) Soliciting employees to report the identity of other employees who engaged in union activity or ask them to sign union cards.

(f) Discriminatorily restricting employees in their personal conversations at work or in the personal use of telephones or threatening with discipline employees who breach such restrictions.

(g) Maintaining a no-solicitation rule which prohibits employees from soliciting for unions in work areas during their nonworking time.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Retract the threat of discipline issued to Jean Kiel and so advise Kiel in writing.

(b) Post at its three Oak Ridge, Tennessee, plant facilities copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by a representative of Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed only insofar as it alleges unfair labor practices not found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help a union
To bargain collectively through a representative of your own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all of these things.

WE WILL NOT unlawfully remove from bulletin boards notices of meetings of the Office and Professional Employees International Union, AFL-CIO.

WE WILL NOT unlawfully confiscate from employees notices of union meetings or other union-related material.

WE WILL NOT unlawfully remove employee petitions concerning union or protected concerted activity from nonwork areas.

WE WILL NOT threaten employees with loss of personal leave and sick leave benefits if they select a union to represent them.

WE WILL NOT solicit employees to report the identity of other employees who engage in union activity or ask them to sign cards.

WE WILL NOT enforce any rule which prohibits employees from soliciting in behalf of any union in work areas during nonworktime.

WE WILL NOT discriminatorily restrict employees in their personal conversations at work or in the personal use of business telephones and WE WILL NOT threaten with discipline employees who breach any such discriminatory restriction.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL retract the discriminatory threat of discipline issued to Jean Kiel and so advise her in writing.

UNION CARBIDE CORPORATION-NUCLEAR DIVISION

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

General Baptist Nursing Home, Inc. *and* Meat Cutters Local Union No. 88, United Food & Commercial Workers, AFL-CIO/CLC. Case 14-CA-14735

January 7, 1982

DECISION AND ORDER

By Members Fanning, Jenkins, and Hunter

On September 4, 1981, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, General Baptist Nursing Home, Inc., Campbell, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs accordingly:

"(b) Altering employees' work schedules because of employees' union activities or support for a union or because of their protected concerted activities."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that all other allegations not found violative of the Act are hereby dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT constructively discharge or refuse to reinstate an employee where such action is promoted by the employee's engaging in union activities or other protected concerted activities.

WE WILL NOT alter employees' work schedules because of employees' union activities or support for a union or because of their protected concerted activities.

WE WILL NOT ask employees to surveil employees work performances and furnish us with grounds for terminating employees who are active on behalf of or who support a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL make a valid offer of reinstatement to Esther Fox to her former or substantially equivalent position and work schedule and make her whole for any loss of earnings she incurred as a result of her constructive discharge and/or our refusal to reinstate her, with interest, less any interim earnings.

GENERAL BAPTIST NURSING HOME, INC.

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case was heard before me in St. Louis, Missouri, on May 11, 1981. The complaint, as amended, alleges, *inter alia*, that the administrator of the nursing home, Wanda Britt, interrogated employees about union organizational activity at Respondent's facility and that Director of Nursing Louise Cunningham requested that an employee assist Respondent in finding pretextual grounds to discharge an employee because said employee was supporting the Union and its organizational activities. It further alleges that on or about December 15, 1980, Respondent changed the work schedule of employee Esther Fox and thereby caused her constructive discharge and thereafter refused to reinstate her. The complaint alleges that the above conduct was violative of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, herein called the Act.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We also find no merit to Respondent's assertions that the Administrative Law Judge's findings are irreconcilable and that the case should be remanded for a rehearing by another administrative law judge.

[2] In the absence of exceptions, we find it unnecessary to consider the Administrative Law Judge's finding on the supervisory status of Licensed Practical Nurses Farmer and Romaine, and whether Nursing Home Administrator Britt and Director of Nursing Cunningham unlawfully had requested them to keep Respondent informed about the union activity of other employees.

[3] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

259 NLRB No. 132

On the entire record in this case, including the briefs of the parties and my observation of the witnesses and their demeanor, I make the following finings

FINDINGS OF FACT

I. JURISDICTION

It is alleged and admitted[1] that Respondent during the 12-month period ending February 28, 1981, derived gross revenues in excess of $100,000 from the operation of its Campbell, Missouri, facility and that it purchased and caused to be transported to such facility goods and materials valued in excess of $50,000 which were transported to its facility in Campbell, Missouri, from points located outside the State of Missouri. On the above undisputed facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

It is further alleged and admitted, and I find, that Meatcutters Local Union No. 88, United Food & Commercial Workers, AFL-CIO/CLC, is at all times material a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. 8(a)(1) Allegations

1. It is alleged that Wanda Britt, administrator of the nursing home, interrogated employees about the Union's organizational drive in telephone calls on or about December 8, 1980.

Dana Farmer, a former employee of Respondent from August 1979 through April 10, 1981, testified that she was employed as a licensed practical nurse (LPN hereafter) and in that position monitored and oversaw patient care. She testified credibly that on December 9, 1980, she stopped to pick up her children at a fellow employee's home and learned that one of the women, also employed at the nursing home, had gone to a meeting. When she inquired if it involved the Union, the husband of one of the women present did not respond but merely grinned. Ultimately, Dana Farmer said she later learned that Esther Fox had picked up a fellow employee, and that they had gone to Malden for a union meeting. After several telephone conversations with Louise Cunningham, director of nursing, about this unusual activity among the nurses aides, Farmer and another LPN, Terry Romaine, were informed by Cunningham that Britt had been informed and to let her (Cunningham) know if they found out anything else.

That same evening, Farmer and Romaine, called Britt directly and asked her what they should do, that they did not want a union. At that point, Britt merely advised them to tell her if anything else developed, and that LPNs would not be in the unit. The testimony established that Dana Farmer and Terry Romaine called Britt and informed her of the union activities of other employees. I find, therefore, that the information was voluntarily given by Farmer and Romaine and was not derived from by interrogation on the part of Britt. While Britt did ask them to keep her advised of developments I find it insufficient to support a finding of interrogation. Accordingly, absent other evidence of interrogation, I recommend that the allegation that Britt unlawfully interrogated employees about union activities be dismissed.[2]

However, the evidence as to the supervisory status of LPNs discloses that, at Respondent's facility, LPNs served as charge nurses. They worked 12-hour shifts and monitored the work of some 15 people composed of nurses aides and orderlies. The complement of LPNs consisted of five full-time LPNs and one part-timer. The only registered nurse in the home was the director of nursing who worked an 8-hour shift. Consequently, for 16 hours a day, the LPN there was the only authority in charge. The LPNs had the authority to reprimand nurses aides and orderlies, orally and in writing, which could result in their ultimate discharge. The General Counsel contends that the LPNs here are employees and cites *Shadecrest Health Care Center*, 228 NLRB 1081 (1977), *Sunset Nursing Home, Inc., d/b/a North Miami Convalescent Home*, 224 NLRB 1271 (1976), and *Pinecrest Convalescent Home, Inc.*, 222 NLRB 13 (1976), as authority. While I personally disagree with the Board's findings in those cases, I am bound by Board precedent. While I find it unnecessary to make a finding here in view of my dismissal of the allegation involving alleged interrogation of Farmer by Britt, the record here is similar to the cases cited. In the event Board disposition of this case may require such a finding, I would find the LPNs here employees based on the above-cited precedent.

2. It is alleged that Louise Cunningham, director of nursing, on or about December 10, 1980, requested that an employee assist Respondent in finding grounds to discharge an employee believed to be supporting the Union by reporting deficiences in work performance which would constitute a pretext for discharge.

Dana Farmer credibly testified that around 8 p.m. on December 10, 1980, Cunningham called her and advised Farmer that Administrator Britt was going to get rid of Fox the next day because Fox was a "troublemaker." Cunningham then asked Farmer if she knew of anything Respondent could get on Fox. Farmer replied that Fox was doing her job, but her attitude was not perfect. Cunningham responded that Respondent would have had something if it could have proven that Fox was taking too long for lunch or for her breaks. Cunningham did not specifically deny Farmer's testimony.[3] I find that, irrespective of whether Farmer be deemed a supervisor or an employee, Cunningham's request was discriminatorily motivated because it was an effort to develop a pretextual reason to discharge Fox. Cunningham's conduct constitutes a violation of Section 8(a)(1) of the Act.

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[1] Respondent entered into a Stipulation for Certification Upon Consent Election (G.C. Exh. 8), which sets forth stipulated facts on commerce.

[2] The consent election agreement permitted LPNs to vote subject to challenge.

[3] To the extent Cunningham's testimony conflicts with that of Farmer, I do not credit it.

3. It is alleged that sometime in January 1981 Administrator Wanda Britt asked an employee to watch another employee believed to be supportive of the Union and to report on the activities of such employee.

Theresa Romaine testified that sometime in January 1981 Britt asked her to keep an eye on Ruby Snider's job performance. In a previous conversation with Cunningham, in early December 1980 Farmer had identified Ruby Snider as one of the nurses aides attending a union meeting. Such information in turn had been reported to Britt by Cunningham. There is no evidence indicating that there were any complaints about her work until she became interested in union representation and attended union meetings. Accordingly, this surveillance of her work performance was prompted solely by her union activities. I find that the requested surveillance of Snider's work was discriminatorily motivated and is violative of Section 8(a)(1) of the Act.

B. *8(a)(3) Allegations*

It is alleged that on or about December 15, 1980, Respondent advised employee Esther Fox of a change in her work schedule thereby causing her termination and that, thereafter, Respondent refused and failed to reinstate Esther Fox to her former or substantially equivalent position, and that all such actions were caused by Esther Fox's union or protected concerted activities.

Esther Fox, alleged discriminatee herein, credibly testified that, in October 1980, she contacted one Una Moore, a union steward of Local 88, Meatcutters, and asked about getting a union into her place of employment. Later in October 1980, she met Bill Blassie, representative of the Meatcutters Local. On November 11, she attended another union meeting with Bill Blassie. In early December, specifically December 8, 1980, she and other employees of Respondent went to another union meeting in the town of Malden. On December 15, 1980, Fox was called into the office of Carolyn Stuart, who had become the director of nursing after December 12, 1980. In her office Fox met with Wanda Britt, the administrator of the nursing home, and Stuart, at which time Britt announced that there was going to be a change in Fox's work schedule and that she would rotate shifts like other nurses aides. Prior to this meeting and with the exception of a 6- to 8- week period in 1980, Fox had served in the job classification of bath nurse. Instead of working 8 a.m. to 4:30 p.m., as in the past, she would be on a schedule of 7 a.m. to 3 p.m. and thereafter would be rotated along with other nurses aides into the position of bath nurse. Fox became upset and announced that it was difficult for her to get to work for the earlier shift and said that she would have to resign. Britt advised her to think about it, telling her that Respondent would hate to lose her. At that time, Fox went ahead and wrote a letter of resignation. As her reason for rejecting the new schedule, Fox testified that, although her family had two cars, there were two other women plus her son that rode with her and that changing that shift would affect her carpool and possibly her ability to get any transportation to work. The following day, Fox had another conversation with Wanda Britt and requested that she be permitted to withdraw her resignation, Britt responded that she would have to think it over, noting that Fox had already resigned and that she had a bad record. Ultimately, Britt rejected Fox's request to withdraw her resignation. Fox continued to work until the end of December 1980 when she was terminated.

With respect to Fox, Farmer testified credibly that she had two conversations with Cunningham on December 10, 1980, and in the first conversation she gave Cunningham additional details about 10 people who went to the union meeting. In the process, she listed some of the names, including that of Esther Fox, Ruby Snider, Agnes Jones, and Jeanie Coleman who attended the meeting, but she did not know the names of others who attended. About half an hour later the same night, Cunningham called Farmer and informed her that Britt was going to get rid of Fox the next day because she was a "troublemaker." Cunningham told Farmer not to let anyone know that Britt knew about the Union or the Union's activities. On December 11, 1980, Farmer called Cunningham and asked what happened with Esther Fox. Cunningham replied that Britt had talked to her attorney who told Britt that she should not fire Fox because she could get in trouble with the Union. Cunningham then stated, "You ought to see the job description I have made out for Esther. It will be hard on her." On December 12, 1980, Farmer approached Cunningham and asked if Cunningham had given Fox her job description. Cunningham stated that Fox had been sick that day and that Britt and Carolyn Stewart, the new director of nursing, would present it to Fox on Monday, December 15, 1980.

The evidence is undisputed that Cunningham and Britt were aware of Fox's union activities and that, whether or not they were aware that she was the prime instigator, they were aware that she had picked up a fellow employee to attend a union meeting. The evidence is also undisputed that when Fox had been off in June 1980, for an operation, Fox was assigned nurses aide duties for a while because she could not perform the bath nurse's functions which included lifting patients. At that time Fox informed Cunningham that this change in hours (from 8 a.m. to 4:30 p.m. to 7 a.m. to 3 p.m.) caused her transportation problems. Added to this is the testimony of Farmer, which I credit, that after learning that Fox was involved in a union meeting Cunningham reported that fact to Britt who stated that Fox was a troublemaker and would be terminated.

Viewed in this context, and in light of its timing, I find that the change in Fox's hours was motivated by a desire to make it difficult for Fox to continue working and force Fox to quit her job. Fox did resign as a result of this change in work schedule. The following day Fox attempted to retract her resignation and Britt refused saying that Fox had already quit and that she had a bad record. Fox denied Britt's accusation, stating that her evaluations were always good.

I have reviewed the treatment afforded Doris Foster, another employee whom Respondent took back as a part-time employee, after she left full-time employment as a nurses aide with a 1 day's oral notice. Respondent, through Stewart, its director of nursing, went out of her way to inform Foster when she could take an examination to better qualify herself for employment. The treatment afforded Foster contrasts starkly with the treatment of Esther Fox, who was not permitted to retract her resignation. I find that Respondent's change in Fox's work schedule was discriminatorily motivated with an intent to make it difficult for Fox to retain her job. I find that her resignation was forced and I find it to be a constructive discharge. I further find that Respondent's refusal to permit Fox to withdraw her resignation was also discriminatorily motivated. Both the constructive discharge and the refusal to permit her to withdraw her resignation I find violative of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party, Meatcutters Local Union No. 88, United Food & Commercial Workers, AFL-CIO/CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent by Director of Nursing Louise Cunningham violated Section 8(a)(1) of the Act by requesting, for discriminatory reasons, that Dana Farmer assist Cunningham in finding some reason or pretext for discharging Esther Fox.

4. Respondent, by Administrator Wanda Britt violated Section 8(a)(1) of the Act by asking Theresa Romaine, for discriminatory reasons to keep an eye on the job performance of Ruby Snider and to report on said performance.

5. By changing the work schedule of Esther Fox and forcing her resignation and thereafter refusing to permit Fox to withdraw her resignation, all because of Fox's union or protected concerted activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

6. Except as found herein, all other allegations of the complaint are dismissed.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Respondent shall make an offer of reinstatement to Esther Fox to her former job and work schedule or, if such job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her. Such backpay shall be computed on a quarterly basis, with interest therein to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, General Baptist Nursing Home, Inc., Campbell, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Constructively discharging, and refusing to reinstate employees because they have engaged in union activities or actively supported a union or engaged in protected concerted activities.

(b) Requesting employees to surveil employees' work performances with the unlawful intent of using any reported deficiencies as a pretext for discipline, because of their union or protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Esther Fox, immediate and full reinstatement to her former job and work schedule or, if that job no longer exists because of valid reasons, to a substantially equivalent position without prejudice to her seniority or other rights and privileges and make her whole for her loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to effectuate the reinstatement and backpay provisions of this recommended Order.

(c) Post at its facilities in Campbell, Missouri, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered with any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[4] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Harbison-Walker Refractories, Division of Dresser Industries, Inc. *and* Alex B. Youstic. Case 6-CA-13219

January 7, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 2, 1981, Administrative Law Judge Donald R. Holley issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order,[2] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Harbison-Walker Refractories, Division of Dresser Industries, Inc., Clearfield, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharge of Alex B. Youstic on September 11, 1979, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future discipline against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage employees from filing grievances with United Steelworkers of America, Local 75, AFL-CIO-CLC, or any other labor organization representing our employees, by discharging employees because they engage in such activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Alex B. Youstic immediate reinstatement to his former job or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he may have suffered as a result of the discrimination against him, with interest.

WE WILL expunge from our files any reference to the discharge of Alex B. Youstic on September 11, 1979, and WE WILL notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future discipline against him.

HARBISON-WALKER REFRACTORIES, DIVISION OF DRESSER INDUSTRIES, INC.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge: Upon an original charge and an amended charge filed by Alex B. Youstic (herein called the Charging Party or Youstic), the Acting Regional Director for Region 6 of the National Labor Relations Board (herein called the Board), issued a complaint on April 24, 1980, alleging, *inter alia*, that Harbison-Walker Refractories, Division of Dresser Industries, Inc. (herein called Respondent), discharged Youstic on September 10, 1979, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act). Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged in the complaint.

The case was heard in Clearfield, Pennsylvania, on October 10, 1980. Subsequently, the parties filed briefs which have been carefully considered.

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

259 NLRB No. 133

Upon the entire record and from my observation of the demeanor of the witnesses while they testified, I make the following:

Findings of Fact

I. JURISDICTION

Respondent, a Delaware corporation, operates three refractory brick plants in Clearfield, Pennsylvania. Its No. 2 plant is the only plant directly involved in this proceeding. During the 12-month period preceding issuance of the complaint, Respondent purchased from suppliers located outside the Commonwealth of Pennsylvania goods and materials valued in excess of $50,000, and during the same period it sold finished products valued in excess of $50,000 to customers located outside said State. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that United Steelworkers of America, Local 75, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent's Business Operation*

Respondent operates three brick plants in the Clearfield, Pennsylvania, area. Prior to midsummer of 1979,[1] it had operated its No. 2 plant with a skeleton crew of 15–20 employees. Those employees manufactured brick at the plant, but it was sent to the No. 3 plant for burning in the kiln.

At some unstated time, Respondent received a sizeable order for coke oven brick and decided to reactivate the kiln at its No. 2 plant to produce the order. Such decision dictated that the size of the work force be increased to approximately 70 employees. Alex Youstic, several supervisory personnel, and others were hired as a result of the expansion.[2]

B. *The General Counsel's Case*

Youstic was hired as a maintenance mechanic by Respondent at its No. 2 plant on August 6. He was terminated on September 11, shortly before the end of his 240-hour probationary period. Counsel for the General Counsel contends that Youstic frequently complained because employees other than maintenance mechanics performed maintenance work during his short tenure, and Respondent terminated him because he engaged in such protected concerted and/or union activity. She sought to prove her contention through the testimony of Youstic and employees Anthony Spagnolo, Pete Pontillo, Randy Starck, and Nicholos Nylwalk. The pertinent testimony given by such employees is summarized below.

When Youstic was hired, Respondent operated its No. 2 plant around the clock. He testified he was originally assigned to the second shift (7 a.m. to 3 p.m.) where he was to receive training in the maintenance of brick presses from Anthony Spagnolo, a 40-year employee who also happened to be the recording secretary of the Union. Youstic testified he worked on the day shift with Spagnolo for 2 weeks and that during that period he and Spagnolo discussed the collective-bargaining agreement between the Union and Respondent, with Spagnolo emphasizing the work jurisdictional rights of maintenance mechanics.[3] During one of the conversations, Youstic claims he told Spagnolo he had observed the third-shift foreman, Albert Mayer, operate a brick press while operators just stood around and watched.[4]

Several weeks into his employment, Youstic was working on the 3 to 11 p.m. shift when employee Randy Starck, a press operator, put a brand on a brick mold. At the time, Youstic was working with maintenance mechanic Dave Davis, who had been hired shortly before Youstic was hired. Youstic brought Starck's activity to Davis' attention and informed him that he (Davis) rather than Starck should be performing the work which was maintenance mechanic's work. He also told Davis that there was a possibility that a grievance could be filed against him for permitting an operator to perform maintenance work.

According to Youstic, Foreman Mayer approached him the day after the above-described incident and informed him he had received a complaint that Youstic had been snapping at the men. Youstic claims he told Mayer he had not realized he had snapped at anyone and, if he had, he had not done it maliciously. Youstic testified that he later told several employees of his conversation with Mayer and indicated to them that if they had done the complaining he wanted them to know he had not intended to snap at them.

On September 7, a Friday, Youstic and others were asked to work a double shift because the floor of the kiln had heaved up when it was activated and several cars loaded with brick were wedged between the roof and the floor of the kiln. Youstic testified that, at the beginning of the 3 to 11 p.m. shift, he and maintenance mechanic Davis were assigned to perform maintenance work on brick presses and all the other employees were taken by Foreman Mayer to the kiln where they attempted to remove the stuck cars and brick by cutting the cars with a torch to facilitate their removal. Sometime during the evening, Local Union President Pete Pontillo approached Youstic and asked where the rest of the men were. Youstic told him they were all in the kiln with Mayer. According to Youstic, Pontillo entered the kiln, came back out with Foreman Mayer and the entire crew, and Pontillo and Mayer then conversed in an office for

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[1] All dates herein are 1979 unless otherwise indicated.

[2] Supervision of employees working at the No. 2 plant at all times material was accomplished by: John F. Strathen, manager of Respondent's three Clearfield plants; Walter Clark, general foreman of the No. 2 plant; William H. Teufel, personnel manager; and Shift Foremen Albert Mayer, Jeffrey Peteuil, and Alan Fisch. It was admitted, and I find, that such individuals are agents of Respondent and are supervisors within the meaning of Sec. 2(11) and (13) of the Act.

[3] Respondent's payroll records reveal Youstic was transferred to the 3 to 11 p.m. shift 1 week after he was hired.

[4] No grievance was filed as a result of the discussion and the record fails to reveal that management learned of it.

1-2 hours while the employees stood around doing nothing.[5]

After Pontillo came out of the kiln, Youstic spoke with his fellow mechanic, Davis, and informed him that Pontillo was concerned with contract violations. He further indicated that, if he had not been a probationary employee, he would have filed a grievance. As Davis had then completed his probationary period, Youstic suggested that he file a grievance. Davis failed to indicate whether he would file one. Later the same night, Youstic spoke with forklift operator Witherow, indicating that Witherow and Starck had violated the contract by performing the work of maintenance mechanics. According to Youstic, Witherow told him he felt they should all work together to get the kiln repaired so no employees would be laid off.[6] Youstic informed Witherow he believed he would file a grievance.

According to Youstic, he last worked at Respondent on Monday, September 10. He testified that, at the end of his shift that day, Mayer, who was accompanied by first-shift Foreman Peteuil, told him he was sorry but he had to let him go. What was said thereafter is in dispute. Youstic's version is that he asked the reason and Mayer initially told him he was not cooperating with or getting along with the other employees. Youstic contends he disagreed and asked if he could bid onto a different shift. He claims Mayer replied that he did not think Youstic was a good employee for Harbison-Walker; that he knew there was a lot of union activity going on in No. 3 plant—people filing grievances and so forth—and he did not want this going on in his plant as he wanted a perfect shift. Youstic testified Mayer told him he was a good mechanic but he could not use him because he could not get along with people.[7]

On the morning following his termination, Youstic went to the plant to see General Foreman Walter Clark. When he arrived, Clark was not in and he spoke with the maintenance foreman, Alan Fisch. When Youstic told Fisch he had been terminated, Fisch asked the reason. Youstic told him Mayer felt he had not been cooperative and could not get along with people. Youstic claims Fisch replied that did not sound right because he had worked with him and had no problems with him. At that point Clark came in and indicated he was aware Youstic had been fired the night before, and Youstic asked him if there was any possibility of him bidding on another job. According to Youstic, Clark told him he could not bid on another job and indicated he would back up his foreman who he understood had decided to fire Youstic because he was not cooperating or getting along well with other employees and he had been observed talking to union officials and that was enough cause for him to be terminated.

After speaking with Clark, Youstic visited Respondent's personnel manager, William Teufel. Youstic testified Teufel reiterated that he had been fired because he was uncooperative and did not get along well. Youstic stated he asked Teufel if his speaking with union officials had anything to do with his getting fired and Teufel replied, "No, that's not true, that has nothing to do with it." Youstic asked Teufel if he could bid into a different job and Teufel said no, that he did not think Youstic would be a good employee for Harbison-Walker.

About 2 weeks after his termination, Youstic returned to the plant to pick up his last paycheck. On that occasion, which he places as occurring on Wednesday, September 27, he claims he visited the office of John Strathen, manager of all three plants. During this conversation Youstic claims Strathen stated that Mayer told him Youstic was not cooperating with the men and could not get along well, and also that he had been seen talking to union officials. Youstic asked if there were any possibility of work in a different area and Strathen replied that he would look into it, but that Youstic should not get his hopes up. Strathen further stated that if he had been present at the time that Youstic had been fired things might have worked out differently.

While the General Counsel's case is largely dependent upon my acceptance of Youstic's testimony, supportive testimony was offered through employee witnesses Spagnolo, Pontillo, Starck, and Nylwalk. Spagnolo, who trained Youstic and thereafter remained in daily contact with the employee, testified he got along with Youstic and observed no conflict between Youstic and other employees. Additionally, he testified he could not recall any other probationary employees being fired during his 40 years at Respondent. He indicated he knew several employees who are hard to get along with who are still working at Respondent.[8]

Employee Pontillo testified that prior to Youstic's termination some of the employees told him they had been irritated by Youstic on occasion because he felt he knew everything. The first time he heard it, Pontillo stated he went to Youstic and told him to watch what he was doing because he was on probation. While Pontillo corroborated Youstic's testimony that Youstic had informed him others were performing mechanics' work in the kiln, he testified he did not tell Mayer or any other supervisor that Youstic had complained. According to Pontillo, when he entered the kiln on the occasion in question, he saw Witherow doing mechanics' work and he told Mayer if he had Witherow do the work he would have to pay a mechanic who was at home. Pontillo described the conversation with Mayer as a friendly one which lasted a minute or two.

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[5] I do not credit Youstic's testimony that Mayer met with Pontillo for 1-2 hours while the men did nothing. Pontillo and Foreman Peteuil, who claims Pontillo spoke to him rather than Mayer on the occasion under discussion, both claim the discussion took just a few minutes.

[6] Prior to the occasion described, Witherow, a former construction foreman, had informed Youstic he had no use for unions.

[7] In a letter to the Regional Office placed in the record as G.C. Exh. 2a, Youstic described his termination, stating:

> At the end of the shift, Al Mayer called me in the office and said he would have to let me go. He said he could not let me continue working because I had 237 hours of a "240 hour probation period completed and after that he couldn't get rid of me"! He said his reason was that I did not get along with the men! He said he was satisfied with my work but that he wanted a "perfect shift."

Similarly, in his pretrial affidavit, Youstic indicated Mayer stated the reason for his decision to discharge was "that I did not get along with the men . . . he was satisfied with my work but wanted a perfect shift."

[8] The record reveals that such employees are regular employees who have completed their probationary period.

Press operator Randy Starck indicated during his testimony that, on an occasion in early September, employee Witherow came to the kiln and informed him, in the presence of Foreman Mayer and Peteuil, that Youstic had told him (Witherow) he was going to file a grievance for running a torch in the kiln. He testified he thought Mayer may have heard Witherow's comments. Starck agreed when he appeared as a witness that he had stated in his pretrial affidavit that Youstic had an abrasive personality, felt he knew more than anyone else, and was always giving orders.

Employee Nick Nylwalk, the General Counsel's last witness, testified he is a maintenance mechanic on the day shift, that he had worked with Youstic and could say nothing against him. He indicated he was unaware of any other probationary employees being fired prior to the time Youstic was terminated.

C. *Respondent's Defense*

Respondent claims the sole reason for its decision to terminate Youstic during his probationary period was the fact that he had an abusive personality and could not work in harmony with other employees. Management officials Strathen, Clark, and Mayer vigorously denied saying anything to Youstic at or near the time of his termination which would indicate in any way that his participation in union activities caused his termination.

Youstic's immediate supervisor, Mayer, testified that, within a short time after Youstic transferred to the 3 to 11 p.m. shift, he learned, through direct observation and through comments made by employees to him, that employees Steve Webb, Dave Davis, Oliver Smeal, Wayne Witherow, and Randy Starck did not care for Youstic and did not want to work with him.[9]

While Mayer did not indicate precisely when the employees named above complained to him, he testified the complaints caused him to inform General Foreman Clark of the complaints at a foremen's meeting held on August 23. Mayer claims he then told Clark he did not think Youstic would make it through the probationary period.

Clark testified that he discussed the Youstic situation with Personnel Manager Teufel after the August 23 meeting and Teufel agreed to attend the next meeting scheduled for August 30.[10] While Clark and Mayer claim they told Teufel at the August 30 foremen's meeting that they wanted to terminate Youstic before the end of his probationary period, the record reveals Teufel informed them Youstic should be warned before they terminated him.

As revealed above, Mayer did not actually warn Youstic in accordance with Teufel's suggestion. Instead, he merely told him employees had complained to him that he had been snapping at the men.

Mayer and Clark both indicated during their testimony that Youstic was discussed once again at the foremen's meeting held on September 6, and they decided at that time he would be terminated before the end of his probationary period. Teufel testified that Clark informed him on September 6 or 7 that Youstic had not improved and they still wanted to fire him.

Turning to the Friday, September 7, incident in the kiln, General Foreman Clark testified the kiln was operative throughout the month of August and malfunctioned on September 3 rather than in mid-August as indicated by Youstic. While Youstic claimed that Pontillo and Mayer left the kiln and talked in an office for 1–2 hours on Friday evening while the men just stood around, Mayer testified Pontillo did not speak with him at all on the occasion in question—that the discussion was with Peteuil, foreman for the 11 p.m. to 7 a.m. shift. Peteuil, Peteuil corroborated Mayer and claimed, as had Pontillo, that the conversation lasted only a minute or two. Clark testified Pontillo told him the next morning that several employees had been working out of their job classifications in the kiln the night before.[11]

According to Mayer, he realized during the 3 to 11 p.m. shift on Tuesday, September 11, that overtime would be included when determining when a probationary employee had completed 240 hours of work and this caused him to check Youstic's hours. In checking, he determined that Youstic could not work another shift without exceeding 240 hours, and that discovery led him to call Personnel Manager Teufel at home during the dinner hour to obtain clearance to terminate Youstic. Teufel concurred in his recommendation and advised that Mayer inform Youstic of his fate in the presence of Shift Foreman Peteuil when the latter came to work at or about 10:30 p.m.

Mayer testified he called Youstic into the office at or about 10:30 p.m. and informed him he was sorry but he was going to have to let him go. When Youstic indicated he could not understand why he was being fired, Mayer asserts he explained he just did not fit in with his crew and he wanted a crew that worked together. Thereafter, Mayer informed Youstic he had to make the decision right then because his probationary period was ending and he had decided he did not want him on his shift. Mayer recalled he indicated he wished he had another alternative, like trying Youstic on a different shift, but he had no such option. Mayer denied that he made any reference to the Union during the discussion.

Clark acknowledged during his testimony that Youstic came to see him in his office the morning after he was terminated. His account of the discussion was that he merely indicated Mayer had informed him he had decided on the action because Youstic could not get along with other people on his shift, and he was abiding by

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[9] Mayer indicated he witnessed an altercation between press operator Webb and Youstic during which Youstic told Webb to turn his machine over and Webb took offense indicating Youstic was not his boss. He testified that Smeal, an equipment operator, complained to him that "you could not tell Youstic anything" and asserted that employee Davis told him the same thing. He testified Witherow may have told him Youstic complained because he (Witherow) and Starck operated a torch in the kiln, and that Starck relayed messages concerning Youstic to him in the lunchroom.

[10] The persons normally attending such meetings were Clark, his three shift foremen, and the maintenance foreman.

[11] Pontillo indicated that his technique was to simply advise the new management officials at the No. 2 plant informally when they did something which might constitute a contract violation. He also indicated his approach caused correction of such situations without animosity or the necessity for filing of a formal grievance.

Mayer's decision and would back him up. Clark indicated he asked Youstic at the time if Mayer had talked to him about getting along with others, and Youstic replied he had but in his view the problems he had with other people on the shift were not that major and Mayer was wrong.

Personnel Manager Teufel also verified the fact that Youstic spoke with him the morning after his termination. Teufel subsequently reduced his conversations with Youstic to writing as Mrs. Youstic telephoned him later in the day and threatened to go to the NLRB. Teufel's memorandum was placed in the record as Respondent's Exhibit 2. It states:

> On Wednesday, September 12, 1979, Alex Youstic requested to discuss his termination in his probationary period with me. Alex claimed his termination was unfair and his supervisor Al Mayer had made a wrong decision. Alex explained he was terminated because of his inability to work well with his peers and that was an untrue statement on Mayer's part. Alex first claimed he was never talked to about this and later said Mayer did tell him about 2 weeks ago that "he snapped at the men." When questioned Alex stated that was *all Mayer* said; however, further in the discussion Alex said Mayer told him of his inability to work well with his peers.
>
> I explained to Alex that his inability to work well with his peers had been discussed with me previously and that was the reason this problem was discussed with him. I further explained the need for a cohesive work group and that Mayer was his supervisor and his instructions should be followed unless it would endanger an employee's safety. If Alex felt Mayer had made a poor decision on work assignments he could question Mayer; however, Alex had questioned Mayer on a frequent basis and even with his peers he questioned their suggestions and recommendations.
>
> Alex then began saying he had 5 children and a wife to support and his image in the community would be discolored because of his termination and requested consideration for re-employment. I explained there was nothing the Company could do and that he should not allow this situation to destroy his life. Alex claimed he would not let this situation die and would do something about it.
>
> 9/12/79 Mrs. Youstic called and stated she and her husband were retaining an attorney and would process his claim to the NLRB. She was very pleasant and understanding but did not agree with anything I said.

Finally, Respondent's manager of all three Clearfield plants, Strathen, testified that Youstic came to his office to discuss the termination on a date he could not recall. Strathen testified Youstic wanted to know why he had been terminated and he explained to him that the shift foremen, the plant manager, and the personnel manager said that he could not get along with people and he was terminated for that reason. Strathen denied that he said anything at the time about union activities or anything of that nature. He indicated he makes a final decision on discharge upon the recommendation of the shift foreman, the plant manager, and the personnel manager. He testified his recollection was that he had talked to Clark, Mayer, and Teufel the day before Youstic's discharge and had concurred in the decision to terminate Youstic at that time.

D. *Analysis and Conclusions*

The instant case poses two basic issues. The first is whether Youstic's version of his conversations with Mayer, Clark, and Strathen is reliable, and the second is whether the reason advanced by Respondent for its decision to terminate Youstic is a pretext advanced to mask an unlawful motivation for the decision to terminate the employee. I resolve the first issue in Respondent's favor and the second in the General Counsel's favor for the reasons indicated below.

While the statements attributed by Youstic to management officials Mayer (grievances at No. 3 plant and he desired a perfect shift), Clark (Youstic seen talking to union officials and that was enough reason for discharge), and Strathen (essentially the same comment allegedly made by Clark) would establish, *prima facie*, if credited, that Respondent terminated Youstic in violation of Section 8(a)(1) and (3), I cannot credit such testimony. Youstic was not a particularly impressive witness and he was unable to explain to my satisfaction why he failed to include in his original letter to the Board and in his subsequent investigative affidavit Mayer's alleged reference to a large number of grievances being filed at the No. 3 plant and his (Mayer's) desire to keep such activity away from his shift. Thus, as to the Mayer-Youstic conversation, I credit Mayer. Similarly, I refrain from crediting Youstic's assertion that Clark and Strathen told him one of the reasons for his termination was that he had been observed talking to union officials. In the first instance, Respondent caused Youstic to be trained by the Union's recording secretary, Spagnolo. Neither Spagnolo nor Youstic gave any testimony which would indicate that either ever informed management officials that they discussed anything other than work-related subjects. The only other union official Youstic talked to was Union President Pontillo and the record reveals Respondent's supervisors were in the kiln at the time and that neither Pontillo nor Youstic told any management officials any details of the conversation. Added to the above observations are Youstic's assertion that he discussed his termination with the Union and was informed they could do nothing about it and the fact that he did not seek NLRB assistance until more than 5 months after the termination. All considered, I cannot accept Youstic's claim that Clark and Strathen told him after his termination that he had been fired because he had been seen talking to union officials. The record facts and Youstic's post-termination actions convince me the testimony is not reliable.

Although I have not credited the direct evidence offered by the General Counsel which was intended to prove that Respondent terminated Youstic for discriminatory reasons, I am nevertheless convinced that he was discharged because he had displayed a propensity to question the work assignments made by Foreman Mayer.

According to the scenario advanced by Respondent, Mayer and Clark concurred in the feeling that they would have to fire Youstic before the end of his probationary period as early as August 23. Teufel, the personnel manager, was so informed between August 23 and 30, and he attended the foremen's meeting held at the No. 2 plant on August 30 and advised that Youstic be warned. As indicated above, Mayer thereafter reprimanded rather than warned the employee and, according to both him and General Foreman Clark, they reported to Teufel on or immediately after September 6 that their final decision was that Youstic had to go. Although Teufel purportedly concurred in their decision, Youstic was not terminated until the end of his shift on September 11. In the interim, the kiln incident occurred and Mayer and Clark both admit they heard through the grapevine that Youstic had complained because others were doing mechanics' work. Moreover, during the interim period, Manager Strathen claims he talked to Teufel, Clark, and Mayer and decided the day before Youstic was terminated that their recommendation that the employee should be terminated should be accepted. Finally, for some reason, which was not adequately explained, Mayer telephoned Teufel at home on the night of the actual discharge to obtain his approval of his contemplated action.

Viewing the chronology of events set forth above, it appears to me that the final decision to fire Youstic was made on Monday, September 10, rather than on Thursday, September 6. In addition to the fact that Strathen indicated this was the case, I note that Mayer's Tuesday evening telephone call would have seemingly been unnecessary if the final decision had been reached on September 6.[18] Patently, if the decision to discharge was made on Monday, it was made immediately after Mayer and Clark learned that Youstic had indicated he might file a grievance because others had been assigned to perform the work of maintenance mechanics in the kiln over the weekend. While all of Respondent's witnesses claim that Youstic's efforts to enforce the collective-bargaining contract had nothing to do with his termination, the memorandum prepared by Teufel on September 13 belies such claims. Thus, in the memorandum, Teufel stated, *inter alia*:[19]

> I explained to Alex that his inability to work well with his peers had been discussed with me previously and that was the reason this problem was discussed with him. I further explained the need for a cohesive work group and that Mayer was his supervisor and his instructions should be followed unless it would endanger an employee's safety. *If Alex felt Mayer had made a poor decision on work assignments he could question Mayer, however, Alex had questioned Mayer on a frequent basis and even with his peers he questioned their suggestdons and recommendations.* [Emphasis supplied.]

In sum, careful review of the entire record in this case convinces one that the testimony given by Respondent's witnesses Mayer, Clark, Teufel, and Strathen regarding the reason for the decision to terminate Youstic is no more reliable than Youstic's account of what was said to him at the time of discharge. It is clear that Teufel refused to approve line supervision's recommendation that Youstic be terminated because he could not get along with other employees on August 30; it is equally clear that he and Strathen subsequently approved a recommendation that Youstic be fired on September 10 and 11, respectively. The record reveals the only significant event which occurred during the interim period was the kiln incident. As Mayer and Clark were admittedly aware that Youstic had informed other employees at the time of that incident, that he felt a grievance should be filed over the incident and Teufel made pointed reference to the fact that Youstic had questioned Mayer's work assignment decisions in the memorandum previously discussed, I infer that top management was motivated to agree the employee should be fired when informed of his actions during the kiln incident. Accordingly, I find, as alleged, that Respondent terminated Alex Youstic because he engaged in protected concerted and/or union activities. By engaging in such conduct, it violated Section 8(a)(1) and (3) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Alex B. Youstic on September 11, 1979, because he engaged in protected concerted and/or union activities, Respondent violated Section 8(a)(1) and (3) of the Act.

4. Respondent has not engaged in any unfair labor practices other than those specifically found herein.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent will be required to offer Alex B. Youstic reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, anyone who may have been hired to perform the work which he had been performing. Additionally, Respondent will be ordered to make this employee whole for any loss of earnings he may have suffered by reason of his unlawful termination with backpay to be computed on a quarterly basis, less his net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289

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[18] Mayer offered no real explanation for the telephone call. He indicated he computed the number of hours Youstic had worked on September 11 "for some reason, whether I received another you know, another complaint or what."

[19] See Resp. Exh. 2.

(1952), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[14]

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[15]

The Respondent, Harbison-Walker Refractories, Division of Dresser Industries, Inc., Clearfield, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging employees from filing grievances with the United Steelworkers of America, Local 75, AFL-CIO-CLC, or any other labor organization representing its employees, by discharging employees because they engage in such activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Alex B. Youstic immediate reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings resulting from the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Clearfield, Pennsylvania, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint against Respondent be, and it hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.

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[14] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[16] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Special Service Delivery, Inc. *and* Thomas Lew and Teamsters Local Union No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 7-CA-17818

January 7, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 19, 1981, Administrative Law Judge Robert T. Wallace issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Special Service Delivery, Inc., Highland, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge: Upon a charge filed by Thomas Lew, an individual, against Special Service Delivery, Inc. (herein Respondent), a complaint was issued on July 9, 1980, in which it is alleged that Respondent violated Section 8(a)(1) and (2) of the National Labor Relations Act, as amended, by according premature recognition to Teamsters Local Union No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein Local 486), as the exclusive bargaining representative of employees at its facility in Highland, Michigan. The case was heard before me in Detroit on February 25, 1981.

Upon the entire record, and after due consideration of the brief filed by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Michigan corporation, is engaged in interstate and intrastate transportation of freight; and, as pertinent, it has a terminal and office in Highland, Michigan. Its annual gross revenues are in excess of $500,000, and it annually delivers within Michigan goods valued in excess of $50,000, which goods moved directly from points located outside the State of Michigan. It admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 486 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The facts are brief and virtually undisputed. On April 8, 1980, Respondent executed a collective-bargaining agreement with Local 486. The agreement was made effective on April 1, 1980, and was to continue for 3 years. Among other things, it recognized Local 486 as the exclusive representative of all drivers, contained a union-security provision, and provided for monthly deduction (checkoff) of dues and initiation fees of drivers, as well as monthly payments by Respondent to the Michigan Conference of Teamsters Welfare Fund.

At the time the contract was signed, Respondent had no employees and operations in Michigan were not scheduled to begin until June 6, 1980. However, by June 5, it had established its terminal at Highland and had employed 11 drivers to operate out of that facility. On that day, all of the drivers assembled at the Highland facility, having been advised by Respondent that a meeting was to be held at the request of Local 486's business agent. The subject of the meeting was the previously signed collective-bargaining agreement. The business agent states that he apprised the "members" of the contract and expressed his view that it contained one of the best health and welfare programs ever negotiated. He also told them that the 90-day probationary period for new drivers should be changed to 60 days, whereupon he went into an adjoining office and persuaded two representatives of Respondent to agree to that change. The "membership" then asked him about the possibility of including a cost-of-living clause. The agent again went to the office and broached that subject. He returned shortly thereafter and told the drivers that the proposal had been turned down. They accepted the rejection after representatives of management gave reasons why Respondent could not afford such a clause. Finally, it was agreed that several "typographical" changes would be made to correct errors of the business agent in drafting provisions dealing with incentive bonuses.

According to the business agent, the only reference to representation by Local 486 made during the meeting was a comment by the membership to the effect that his office in Saginaw was 80 miles away, while Teamsters Local 337 was in nearby Pontiac, to which the agent responded: "Gentlemen, if you need my services I can be here inside of an hour and a half anytime you need me."

III. ANALYSIS AND CONCLUSIONS

Respondent is shown knowingly to have recognized Local 486 as the exclusive bargaining agent of its driver employees on April 8, 1980, and well before it had hired any drivers. Although it asserts that the collective-bargaining agreement executed on that date was "conditional" and subject to review and approval by a representative complement of drivers when hired, that claim appears to be entirely unsupported. The agreement contains no indication that its effectiveness was to depend on a subsequent event. On the contrary, it was made unqualifiedly retroactive from April 1. In these circumstances the law is clear. By its premature and exclusive recognition of Local 486, Respondent confronted drivers who were later hired with a *fait accompli*, thereby interfering with guaranteed organizational rights of employees in violation of Section 8(a)(1) and gave unlawful support to a labor organization in violation of Section 8(a)(2). *International Ladies' Garment Workers' Union, AFL-CIO* v. *N.L.R.B.*, 366 U.S. 731 (1961), affg. *Bernhard-Altman, Texas Corporation*, 122 NLRB 1289 (1959).

Respondent, however, argues that any unlawfulness was rendered harmless by subsequent ratification of the agreement by 11 drivers on June 5. That circumstance, assuming it occurred, is irrelevant. Respondent's premature recognition conferred on Local 486 a deceptive cloak of authority with which it would be able persuasively to elicit employee support, and thereby negated any real possibility that a subsequent ratification would be uncoerced. Compare *Ladies' Garment Workers', supra.*[1]

In any event, ratification is an affirmative defense and, on this record, Respondent has failed to establish that a valid ratification occurred. For example, it does not appear that the drivers who assembled on June 5 were ever told that they had an option to accept or reject Local 486 as their bargaining agent. Instead, Local 486's business agent appears diligently to have kept the focus of the meeting on the merits of the health and welfare package and on his ability to deal with Respondent in the matter of *ex post facto* changes in the collective-bargaining agreement.

CONCLUSIONS OF LAW

1. By recognizing Local 486 as the exclusive bargaining representative of its employees and by executing a collective-bargaining agreement with Local 486 at a time when Respondent had no employees, and by maintaining such agreement in effect after employees were hired, Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights in violation of Section 8(a)(2) and (1) of the Act.

2. The aforesaid actions are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I will order Respondent to withdraw all recognition from Local 486 as the representative of its employees for purposes of collective bargaining unless and until Local 486 has been duly certified by the National Labor Relations Board as the exclusive representative of such employees. I will also order Respondent to cease giving force and effect to the collective-bargaining agreement executed on April 8, 1980, or any renewal, modification, or extension thereof; provided, however, that nothing in the order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, and conditions of employment which may have been established pursuant to that agreement. In addition, I shall order Respondent to reimburse, with interest, all present and former employees for all initiation fees, dues, and other moneys which may have been exacted from them by, or in behalf of, Local 486. The latter requirement is a remedial rather than a punitive measure, since it serves simply to restore to Respondent's driver employees sums involuntarily withheld pursuant to the checkoff provision in a collective-bargaining agreement here shown to have been unlawfully executed and maintained. *Vernitron Electrical Components, Inc., Beau Products Division*, 221 NLRB 464 (1975), enfd. 548 F.2d 24 (1st Cir. 1977).

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[2]

The Respondent, Special Service Delivery, Inc., Highland, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Assisting or contributing support to Local 486 by recognizing or bargaining with such labor orgnization as the exclusive representative of its employees for the purpose of collective bargaining unless and until Local 486 is certified by the Board as the collective-bargaining representative of said employees pursuant to Section 9(c) of the Act.

(b) Maintaining or giving any force and effect to the collective-bargaining agreement between Respondent and Local 486 dated April 8, 1980, or any extension or modification thereof; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, and conditions of employment which may have been established pursuant to the performance of said contract.

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[1] Respondent cites *Coppus Engineering Corporation v. N.L.R.B.*, 240 F.2d 564 (1st Cir. 1957), for the proposition that hasty recognition does not necessarily indicate domination of a union by an employer. Here, however, the issue is more fundamental than a question of employer domination since Respondent had no employees at the time it accorded exclusive recognition to Local 486.

[2] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Withholding from the pay of any of its employees union dues or other union fees or assessments which have been deducted because of any obligation of membership in Local 486, and paying to Local 486 any dues, fees, or assessments which have been deducted from the pay of its employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Withdraw and withhold all recognition from Local 486 as the collective-bargaining representative of its employees unless and until said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

(b) Reimburse all former and present employees for all initiation fees, dues, assessments, and other moneys, if any, paid by or withheld from them in the manner provided in "The Remedy" section of this Decision.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Highland, Michigan, facility copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT assist or contribute support to Teamsters Local Union No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, by recognizing or contracting with such labor organization as the bargaining representative of our employees unless and until it has been certified as such representative by the National Labor Relations Board.

WE WILL NOT give effect to our April 8, 1980, contract with Teamsters Local Union No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or to any renewal, extension, modification, or supplement thereof, but we are not authorized or required to withdraw or eliminate any wage rates or other benefits, terms, and conditions of employment which we have given to our employees under said contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Teamsters Local Union No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the collective-bargaining representative of our employees.

WE WILL reimburse all our employees, former and present, for dues and other moneys unlawfully exacted from them under the contract with Teamsters Local Union No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

SPECIAL SERVICE DELIVERY, INC.

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

East Chicago Rehabilitation Center, Inc. *and* Retail Clerks Union, Local 1460, Chartered by United Food and Commercial Workers International Union, AFL–CIO. Case 13–CA–19196

January 8, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 16, 1981, Administrative Law Judge Peter E. Donnelly issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief to which the Respondent filed a brief in response. In turn, the General Counsel filed a motion to strike the Respondent's responding brief. Finally, the Respondent filed its exceptions in opposition to the General Counsel's motion to strike the Respondent's brief filed in response to the General Counsel's cross-exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, East Chicago Rehabilitation Center, Inc., East Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT suspend, discharge, or otherwise discriminate against employees for engaging in a strike or other concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL make the below-named employees whole for any loss of pay they may have suffered as a result of the discrimination practiced against them, with interest, and WE WILL reinstate them:

Emma Baldwin
Betty Banks
Lillie Beard
Gail Bradford
Bula Clinton
Joyce Hathaway
Mary Hardy
Annie Pugh
Betty Reese
Terry Stewart
Cecelia Stone
Edward Veal, Sr.
Jeff Veal
Eloise White
Stella Williams
Eula Woods
Jurline Woods

EAST CHICAGO REHABILITATION CENTER, INC.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge: The charge herein was filed on October 15, 1979, by Retail Clerks Union, Local 1460, Chartered by United Food and Commercial Workers International Union, AFL–CIO, herein called Charging Party or Union. A complaint thereon was issued on April 24, 1980, alleging that East Chicago Rehabilitation Center, Inc., herein called Employer or Respondent violated Section 8(a)(1) of the Act by suspending and discharging 17 employees for engaging in an economic strike.[1] An answer thereto was

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[1] The General Counsel's motion to strike the Respondent's responding brief is denied as lacking in merit.

[2] The Respondent contends that the strike caused disruptions in patient care and the employees therefore sacrificed the protection of the Act. We disagree. The walkout involved fewer than half of the day-shift employees, with the remaining employees and supervisors working as scheduled. The strike lasted only 2 hours. Although some patient care schedules were not completely adhered to, there is no showing that the strike jeopardized any patient's safety or health. We find the employees did not lose the protections afforded health care employees under the Act. Further, once the strikers offered to return to work they could not be held responsible for any subsequent interruption in normal patient servicing. In particular, the strikers cannot be held accountable for the Respondent's refusal to take them back, nor for the cutback in physical therapy for 3 days. Anything that occurred after the employees offered to return was the Respondent's sole responsibility and is irrelevant to the strike.

In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth in that opinion.

[3] The Respondent requested an opportunity to argue its case orally before the Board. In our opinion the record, exceptions, and briefs adequately set forth the issues and positions of the parties. Accordingly, we deny the Respondent's request for oral argument.

[1] The complaint was amended at the hearing to allege the status of Metta Stone as a supervisor.

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timely filed by Respondent and pursuant to notice, a hearing was held before me in Chicago, Illinois, on October 22 and 23, December 8, 9, and 17, 1980. Briefs have been timely filed by General Counsel and Respondent, which had been duly considered.

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

The Employer is an Illinois corporation with a place of business located in East Chicago, Illinois, where it is engaged in the business of providing extended nursing care. During the past calendar year, Respondent, during the course and conduct of its operations, derived gross revenues in excess of $100,000, and also purchased and received goods valued in excess of $5,000 directly from points outside the State of Illinois. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

While the status of the Union as a labor organization is not specifically alleged, it is undisputed that the Union, the recently certified collective-bargaining representative of the employees, is acting in that capacity, and has negotiated a contract on behalf of the unit employees. Accordingly, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Employer is a 24-hour skilled nursing care facility employing about 100 employees and serving about 116 patients. After a Board-conducted election, the Union was certified on December 11, 1978, as the collective-bargaining representative for a unit of service and maintenance employees.

Thereafter, a series of some 12 negotiating sessions took place in an effort to achieve a collective-bargaining agreement. The Union was represented at all of these bargaining sessions by Union Business Agents Wallace Evans and Arthur Primm. In addition, there was a three-member employee negotiating committee with two alternate members. Pursuant to an understanding with the business agents, the negotiating committee members did not participate directly in the negotiations but communicated with the business agents who actually conducted the negotiations. While all of the negotiating committee members except Jurline Woods attended at least some of the negotiating sessions, none of them attended the last three sessions conducted on May 23, June 11, 18, 1979.[2] Respondent was represented at all the negotiating sessions by Dr. Jerry Henderson, part owner of the facility and member, along with five others, of the facility's board of directors, and Steven Sanders, the administrator of the facility. Sanders, however, was not present at all times during all sessions due to other matters requiring his attention from time to time. During earlier sessions, a management consultant named Renee Stein participated on behalf of Respondent. Beginning with the May 23 session, another consultant named Dominic Licata represented Respondent.

Respondent sought a contract provision providing some overlap in shift hours in order to exchange information and smooth the transition between shifts. At the June 11 session, while discussing the shift lengthening proposal, other proposals were made by the Union, including certain proposals with a view towards extending the lunch period from one-half hour to 1 hour, with two 15-minute breaks. During this discussion it appears that Licata learned for the first time that employees of the facility were being permitted to leave the premises during the one-half hour paid lunch then in effect. Licata advised Henderson that Respondent was liable under workmen's compensation regulations for accidents to employees during this lunch period even while off Respondent's premises, because the one-half hour lunch was paid time. Licata also told Henderson that something would have to be done about the problem. Upon being so advised, Henderson, apparently accepting this advice as accurate, expressed the view to both Evans and Primm that the practice would have to be stopped and that it was his intention to bring the matter to the attention of Respondent's board of directors for resolution. The Union, for its part, conceded that the liability of Respondent existed, but both Evans and Primm cautioned Henderson that any precipitous corrective action at this time would be unwise, particularly since they were close to an agreement on a contract.[3]

As he had indicated at the June 11 session, Henderson did bring the matter to the attention of the board of directors on June 13. At this time, a decision was made to divest the facility of the presumed liability by ending the practice of employees being permitted to leave the premises during the one-half hour lunchbreak. Henderson then directed Sanders to prepare a memo to the employees so advising them. Sanders prepared the following memo dated Friday, June 15, 1979:

> May I take this opportunity to communicate and share with you one of the many concerns encountered by the Rehab.
>
> The East Chicago Rehabilitation Center currently engages the services of over eighty employees, all of whom enjoy a list of benefits; the expenses of which, are borne primarily by the facility.
>
> *Please Note*:
> Breaks and meal periods are fringe benefits paid solely and exclusively by our employers.

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[2] All dates refer to 1979, unless otherwise indicated.

[3] Respondent contends that the evidence shows that the Union's representatives agreed to the elimination of the one-half hour paid lunch on June 11, citing primarily the testimony of Henderson. However, my review of the testimony of all the participants at the June 11 session convinces me that Henderson's account of the June 11 session is confused and often contradictory, and I am persuaded that the Union did not agree to the elimination of the paid one-half hour lunch period.

> Because of this fact, the Rehab is liable and accountable for you under Workmen's Compensation during these periods.
>
> It has been the PRACTICE of the Center to allow employees to leave the facility during meal periods and break periods.
>
> This is both ill advisable and unfortunate.
>
> If *any* employee is injured while out of the facility on company time (break, lunch, etc.) the employer is liable for that employee and may be subject to unnecessary legal action.
>
> As you can see, this places Rehab on unsteady ground.
>
> In a serious attempt to avoid involvement in needless litigation, it will be needful to implement the following Policy:
>
> Effective June 18, 1979 it will be NECESSARY and MANDATORY that all employees enjoy their lunch and break periods on the PREMISES of East Chicago Rehabilitation Center.
>
> Failure to comply with this policy will result in Immediate Termination.
>
> Please recognize, we are aware and mindful of your needs as an employee and are presently researching the possibility of a Food Service which will be accessible to all personnel during all shifts. However, until then, may I present to you a list of restaurants that provide delivery service.

Barton's Pizzeria 932-333	Chez Toni's Pizza 397-9009
Leonardo's Pizzeria 397-7711	Pizza Pat 931-2240
Mehilo's Pub 398-9837	Papa B's Red Onion Pizzeria 844-1234
Ralph's Pizzeria 398-6119	Iggy's 397-4141

> Also, remember our dietary service is available until 7:00 P.M. and bringing lunches from home as individuals or as a group has historically exemplified Americanism.
>
> If you have any questions concerning this policy, please contact your immediate supervisor who is knowledgeable and capable of answering your questions.

The above memo was distributed to the employees at the facility, with their paychecks, beginning about 7 a.m. on Friday, June 15.[4] Many of the employees were disturbed by the memo and feeling thus aggrieved, met with Metta Stone, nursing supervisor. Apparently not assuaged, some 10 to 20 employees thereafter went to the office of Sanders, who met with them about 8:15 a.m. in the dining room, along with several other late arrivals for a total of between 30 to 40 employees. Sanders explained the matter of the facilities off premises lunch liability, but stated that he would try to have the change delayed. Still dissatisfied, a number of the employees punched out and left the premises, causing substantial disruption in the normal operations of the facility and creating serious patient care problems.

About 10 a.m., employee Rebecca Brown called Primm and told him that the employees were walking out. She told him about the paychecks and memo. Primm asked her to try and hold the people from walking out and to ask them to please wait until he got there. Brown told Primm that she was trying to stop them. Primm told her that he would be over right away and he arrived about 10:15 a.m. Several employees outside the facility were asked by Primm to go inside with him. Once inside, Primm met with Henderson and asked for permission to use the conference room to talk to the 10 employees, and Henderson agreed.

The meeting took place, attended by some 23 to 26 employees. Evans, having been contacted at Primm's request by the union secretary, arrived about 10 minutes after the meeting began with some three or four more 15 employees that Evans had met outside the facility and brought in with him. The employees complained about the memo and not being able to leave the premises for lunch. Primm explained the matter of Respondent's liability and told them that the Union was attempting to work out the problem in contract negotiations. Both Evans and Primm explained that it was not proper to leave the facility and that there were Federal laws which governed the matter. Evans and Primm told them that the Union did not condone or approve of the walkout and asked if they would be willing to go back to work. The employees agreed to return to work at which point Evans and Primm went to seek out Henderson.

About 10:30 a.m., they located Henderson and Sanders in Sanders' office. Evans told Henderson that the Union had not called the strike, did not condone the strike, and did not agree with the strike. He expressed surprise that the lunch hour change had already been announced and that they had hoped that it would not have been done because it was going to make a contract hard to sell. Henderson said that the board of directors wanted to stop the practice and that the change had to be made. Evans told Henderson that the people were ready to return to work and that the Union would appreciate their being put back to work. Henderson responded that the situation was very serious and that he would have to consult with the board of directors in deciding what action to take as to the 17 employees who had participated in the walkout. Henderson told Evans that the employees were to go home for the day and that they were being suspended subject to a determination by the board of directors as to their terminations. The meeting ended and the employees left the premises. On the evening of June 15, Sanders sent mailagrams to the 17 striking employees advising them that they were being suspended indefinitely pending a review by the board of directors.

The board of directors met on Wednesday, June 20, and decided that discharge was the appropriate discipline for having engaged in the walkout and leaving patients unattended on June 15. On the same date, June 20, mailagrams from Sanders were sent to the employees advising them of their terminations, "for the reasons that on June 15, 1979 you walked off your job and left the building and otherwise abandoned your employment without just cause and in violation of applicable laws."

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[4] It is undisputed that the Union was not advised or consulted concerning this decision.

On June 18, the parties met in another negotiating session. The Union again solicitated Henderson to try to get the employees returned to work. This effort was not successful. However, the parties were successful in reaching agreement on the terms of a contract which became effective on June 28, 1979. This contract included provisions for a one-half hour unpaid lunch, two 20-minute paid lunchbreaks, and a shift overlap of 30 minutes.

B. *Discussion and Analysis*

The facts of this case raise the basic issue of whether the employees who participated in the walkout on June 15 were engaged in protected concerted activity. Respondent contends that they were not, on various grounds. First, Respondent contends that the failure to give written notice, as required under the provisions of Section 8(g) of the Act,[5] had the effect of depriving the walkout of any status as protected activity that it might have otherwise enjoyed. I do not agree.

In reviewing the facts of the instant case, it is clear that the basic problem giving rise to the walkout, i.e., the prohibition against employees leaving the premises during lunchtime, was not raised until the bargaining session of June 11 when it was raised by Licata.

At this session, the Union did not agree with Respondent to any change in Respondent's lunchtime practice which had permitted employees to leave the premises. All that the Union did was to express the view, in agreement with Respondent, that Respondent liability existed.[6] It was Respondent's board of directors who took the *unilateral* action of prohibiting employees from leaving the work premises during lunchtime.[7] As noted above, this was done by written notice with the paychecks of the employees on Friday, June 15, to become effective on Monday, June 18. This change was made without notice to the Union who had in fact cautioned against precipitous action being taken by Respondent at the June 11 meeting.

Upon being notified on June 15 of the change, the employees became agitated and disgruntled. After receiving no satisfactory response in meetings with Respondent, 17 employees walked out in protest.

There is no evidence that the Union had any prior notice of the walkout. Clearly, the Union was taken by surprise by the events of the morning of June 15. The Union was not aware that the strike had begun until it was so advised by an employee after the walkout had occurred. Thereafter, both Evans and Primm went to Respondent's facility, met with the employees, told them that they were wrong in striking, that the Union did not condone the strike, and exacted from the employees an agreement to return to work.

Thereafter, Evans and Primm met with Henderson and Sanders, told them that the Union did not condone the strike, and asked Respondent to allow the striking employees to return to work. This request was rejected by Respondent and the employees were suspended and subsequently discharged.

It is clear that the Union did all that it could after learning of the walkout to end it. Within about 2 hours, it had an agreement from the striking employees to return to work. Since Respondent rejected this, any deleterious effect that the strike may have had thereafter was assignable to Respondent, not the Union.

In these circumstances, it would not have been possible for the Union to have given the 8(g) notice contemplated by the Act since it had no prior notice of the walkout. Accordingly, I find that the Union's failure to provide such notice did not deprive the walkout of its protective character. Nor did the failure of the employees to provide 8(g) notice, render the walkout unprotected. The notice requirements of Section 8(g) run to the Unions, not employees, and the failure of employees to give such notice prior to striking a health care institution does not deprive the strike of its normally protected character. *Walker Methodist Residence and Health Care Center, Inc.*, 227 NLRB 1630 (1977); *Montefiore Hospital and Medical Center*, 243 NLRB 681 (1979), enfd. 621 F.2d 510 (2d Cir. 1980); *Villa Care, Inc., d/b/a Edmonds Villa Care Center*, 249 NLRB 705 (1980).

However, Respondent also contends that the action of the employees in striking was in derogation of their collective-bargaining representative, and that therefore the striking employees are not entitled to the protection of the Act.

An examination of the facts herein discloses that after its certification on December 11, 1978, the Union and Respondent engaged in negotiations for a first contract. On June 11, the matter of Respondent's liability for employees leaving the premises on paid lunchtime was raised for the first time. No employees attended this negotiating session and there is nothing in the record to indicate that any of them were even aware that the subject was under discussion, and the Union did not agree to any change in the existing policy. Obviously, the Union and the employees were not taking inconsistent positions on this issue, and it was in this posture that the matter was brought to the attention of the employees on Friday, June 15, when they were notified of the change in policy becoming effective on the following Monday.[8]

On these facts, Respondent's "derogation" argument cannot be sustained. First, the position taken by the

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[5] Sec. 8(g) of the Act reads:

> (g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[6] Whether such liability actually existed, as a matter of law, was never established.

[7] For whatever reason, no 8(a)(5) violation was alleged as to this unilateral change, and no finding of a violation is made herein.

[8] While there may have been other matters causing discontent among the employees, which were expressed by them in meetings on June 15, it is clear that Respondent's action which precipitated the walkout was the newly announced ban on leaving the premises at lunchtime.

Union at the June 11 negotiating session was not inconsistent with the position expressed by the employees by walking out. The Union and Respondent had not negotiated any agreement to end the practice.[9] It was a unilateral change undertaken by Respondent, and it was essentially to protest this unilateral change that the employees took the strike action. Moreover, on a basis of this record, it does not appear that the employees who struck were even aware that the matter had been raised for discussion at the June 11 meeting. These facts do not describe any "derogation" theory so as to strip the employees of their status as economic strikers.

Nor, on the facts of this case can the walkout by the employees be construed as an effort on the part of the striking employees to seek separate bargaining with Respondent despite the existence of their collective-bargaining representative. The walkout was simply a spontaneous reaction to Respondent's unilateral action in changing a term of their employment, without prior notice or consultation with either the employees or their collective-bargaining representative. As noted earlier, the striking employees were not even aware that the basic issue that they were protesting had even been raised in collective bargaining. Certainly such employee activity cannot be construed as an effort to seek separate bargaining. And, so, is obviously factually distinguished from the governing principle set forth in *Emporium Capwell Co.* v. *Western Addition Community Organization, et al.*, 420 U.S. 50 (1975).

Respondent also makes the argument that, apart from notice requirements of Section 8(g), striking employees should not be entitled to the protection of the Act inasmuch as their actions resulted in patient neglect, and as a matter of public policy is repugnant to the Act. However, apart from the restrictions imposed upon unions by the requirements of Section 8(g) of the Act, there is nothing in the Act which imposes greater restrictions on the activities of employees in the health care industry than employees of any other industry subject to the jurisdiction of the Act. *Montefiore Hospital and Medical Center, supra.*

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent as set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I have found that Respondent suspended and discharged employees for reasons which offended the provisions of Section 8(a)(1) of the Act. I shall therefore recommend that Respondent make them whole for any loss of pay which they may have suffered as a result of the discrimination practiced against them. The backpay provided herein with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[10]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union, Local 1460, Chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending and discharging employees for having engaged in protected concerted activity, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, East Chicago Rehabilitation Center, Inc., East Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending, discharging, or otherwise discriminating against employees for engaging in a strike or other concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its enqloyees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which I find necessary to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to their former jobs to:

Emma Baldwin
Betty Banks
Lillie Beard
Gail Bradford
Bula Clinton
Joyce Hathaway
Mary Hardy
Annie Pugh
Betty Reese
Terry Stewart
Cecelia Stone
Edward Veal, Sr.
Jeff Veal
Eloise White
Stella Williams
Eula Woods
Jurline Woods

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[9] One could argue that since the Union conceded Respondent's liability, it would have been sympathetic to any change in the practice, but this is speculation in which I am not disposed to indulge, and is not tantamount to agreeing to the change in practice.

[10] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102. 48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

If those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the above-named employees whole for any loss of earnings they may have suffered due to their suspension and discharge in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records and reports and all other records necessary to analyze the amounts of backpay due herein.

(d) Post at its facilities in East Chicago, Illinois, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms to be provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the works in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Town Concrete Pipe of Washington, Inc., Employer-Petitioner *and* Laborers International Union of North America, Local No. 252, AFL-CIO. Case 19-RM-1656

January 8, 1982

DECISION AND DIRECTION

By Chairman Van de Water and
Members Jenkins and Hunter

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Acting Regional Director for Region 19 on January 20, 1981, an election by secret ballot was conducted in the above-entitled matter on April 16, 1981, among the employees in the following appropriate collective-bargaining unit:

> All production and maintenance employees (including employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements) employed at 4601 S. Orchard, Tacoma, Washington; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots showed that, of approximately 94 eligible voters, 23 cast ballots for and 38 cast ballots against the Union. There were 33 challenged ballots which were sufficient to affect the results of the election.

On May 1, 1981, following an investigation, the Acting Regional Director issued a Report on Challenged Ballots and Direction and Notice of Hearing.

Pursuant to the notice, a hearing on challenged ballots was held in Tacoma, Washington, on May 12, 13, 26, and 27 and June 4, 8, 10, and 11, 1981, before Hearing Officer Catherine M. Roth, in which the Employer and the Union participated. The parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues herein.

On July 31, 1981, the Hearing Officer issued her report in which she concluded that the challenges to 27 ballots should be overruled and the challenges to 6 ballots should be sustained.[1] She recommended that the overruled challenged ballots be opened and counted and a revised tally of ballots issued. Thereafter, the Employer filed timely exceptions and a supporting brief, and the Union filed an answering brief to the Employer's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

The Board has reviewed the record in light of the exceptions [2] and briefs and hereby adopts the Hearing Officer's findings and recommendations,[3] as modified herein.[4]

We agree with the Hearing Officer's recommendation to overrule the challenges to 27 ballots, and to sustain the challenges to 4 ballots. However, for the following reasons, we disagree with her recommendations that the challenges to the ballots of Roland Prouty and Robin Urich be sustained.

1. The Hearing Officer concluded that, as of the date of the election, Prouty was a temporary employee and thus ineligible to vote. She found that

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[1] Specifically she recommended that challenges to the ballots of the following voters be overruled: Raymond R. Bame, Edward Combs, Richard L. Crocenzi, David C. Ell, Duane M. Felix, Robert W. Halsey, Douglas Hite, Mark D. Hite, Ralph Johnson, Joseph H. Kistler, Chris A. Markum, John H. McVey, Russell Morrison, Aaron Olson, Horace Olson, Gary Lee Parkos, Stuart J. Schreiner, John E. Sears, Mario S. Serka, Allen H. Stevens, Floyd Thompson, Timothy B. Wegner, Ken Wolever, Ted Wilson, Robert Creger, Leroy Henke, and Ron Owens. She recommended that challenges to the ballots of the following voters be sustained: Brian Cameron, Walter Davis, Eric Rehwaldt, Roland Prouty, Robin Urich, and James L. Sullens.

[2] In the absence of exceptions thereto, we adopt, *pro forma*, the recommendation of the Hearing Officer to sustain the challenges to the ballots of Brian Cameron, Walter Davis, Eric Rehwaldt, and James L. Sullens, and to overrule the challenges to the ballots of Robert Creger, Leroy Henke, and Ron Owens.

In its brief in support of its exceptions to the Hearing Officer's report and recommendations, the Employer noted that, during the hearing, the Employer withdrew its challenge to the ballot of Edward Combs and, in its brief to the Hearing Officer, it withdrew its challenges to the ballots of David C. Ell, Robert W. Halsey, Ralph Johnson, Chris A. Markum, Russell Morrison, Horace Olson, and Allan H. Stevens. The above-named voters were all employed at Tacoma Boat at the time of the hearing. However, elsewhere in this brief, the Employer excepted to the Hearing Officer's recommendations to overrule the challenges to the ballots of these voters. Additionally, in its motion to reopen the record, the Employer requested that it be permitted to revoke its withdrawal of its challenge to Ell's ballot. We find that, even if the Employer intended to preserve its challenges to the ballots of these voters, the challenges should be overruled for the reasons stated by the Hearing Officer in her analysis with respect to the other strikers who subsequently were employed at Tacoma Boat.

[3] The Employer has excepted to certain credibility findings made by the Hearing Officer. It is the established policy of the Board not to overrule a Hearing Officer's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing her findings.

[4] On August 24, 1981, the Employer filed with the Board a motion to reopen the record. The Union opposed the motion. the Employer seeks to introduce evidence that, during July and August 1981, the Employer offered reinstatement to several former strikers and that these offers were refused. However, the voting eligibility of these individuals hinges upon whether they had abandoned employment with the Employer as of the election date. See *Pacific Tile and Porcelain Company*, 137 NLRB 1358 (1962). The Employer's allegations involve post-election conduct and, even if true, are not relevant to our determination. Accordingly, we deny the Employer's motion.

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Prouty was on layoff status with his former employer, Southwest Deliveries, and that he maintained a home in Vancouver, Washington, 135 miles from the Employer's facilities.[5] She further found that, at a February 28, 1981, union meeting, Prouty told two union business agents that he was employed at Town Concrete Pipe on a temporary basis. The Hearing Officer concluded that Prouty intended to stay at his job with the Employer only until he was recalled by Southwest Deliveries.

The Employer excepts to this conclusion, contending that Prouty was hired as a permanent employee, and remained as such at the time of the election. We believe that the weight of the record evidence supports the Employer's contention.

Orville McKenzie, a mechanic with the Employer who became incapacitated by a back ailment, recommended Prouty as his replacement. Pursuant to this recommendation, Plant Superintendent Dan Columbini hired Prouty on November 25, 1980. Both Columbini and Prouty testified that there was no mention at the hiring interview that the job would be temporary. Columbini stated, "[I]t was understood when he was hired that he was a full-time employee."[6]

Prouty had been laid off at Southwest Deliveries due to a lack of available work on February 5, 1980, more than 9 months before he commenced employment with the Employer. James Barnes, the general manager of Southwest Deliveries, testified that Prouty was technically eligible for recall for 3 years after being laid off. However, he also stated that Prouty's reemployment was extremely unlikely, and that Prouty was never given any indication that he would be recalled.[7] Under these circumstances, we find that while Prouty was working for the Employer he did not have a reasonable expectation of returning to Southwest Deliveries.

We do not attribute considerable significance to Prouty's statement at the union meeting that he was only a temporary employee. Prouty may have hoped that he would soon obtain a job at Southwest Deliveries or elsewhere, but there is no evidence that he reasonably expected to leave at anytime soon.

Considering all of the relevant evidence, we find that the Petitioner has not demonstrated that Prouty was a temporary employee. Accordingly, we overrule the challenge to his ballot.

2. Urich resigned his position as a machine operator with the Employer on April 7, 1981, 9 days before the election. Company Vice President Raymond Davis telephoned him the following day to ask why he quit, and Urich replied that he did not like his supervisor and disapproved of the way the plant was run.[8] On April 9, Urich met with Davis and Columbini at the company offices and admitted that he actually quit because he had severe problems with drugs and alcohol, and he believed that he was "falling apart." Upon his assurance that he would seek professional help for his problems, the Employer changed Urich's status from voluntary quit and granted him a medical leave of absence. Urich remained out of work until April 20, 1981.

The Hearing Officer found that Urich was not a bona fide employee at the time of the election, but was rehired by the Employer in an effort to "flood" the unit with antiunion employees. She emphasized that Urich was an outspoken opponent of the Union's organizing drive and served as a company observer at the election. The Hearing Officer also indicated that Urich had received disciplinary warnings from the Employer, and observed that another employee who had also quit was not asked to return because he had disciplinary problems. In addition, the Hearing Officer found that Urich was rehired although he did not get professional help as he had promised.

We disagree with the Hearing Officer and find that Urich was an eligible voter. Urich had been employed by the Employer since July 1977. Although he received several warnings for absenteeism,[9] he was not considered to be a serious disciplinary problem, and there is no evidence that he was not a competent employee.

Additionally, we find that the Employer's treatment of Urich was consistent with its past practice. The record indicates that, during the past few years, the Employer contacted several other employees who had quit and asked them to return. With respect to the individual referred to by the Hearing Officer who was not requested to return, Columbini testified that his disciplinary problems were such that the company management was of the opinion that he was "not salvageable."

Urich testified that, during the week that he was on leave, he applied to enter a free clinic but was not accepted. He told Columbini that he intended to seek private counseling, but he needed to work in order to pay for it. He also stated that he had not had any drugs or alcohol for a week. Columbini believed that Urich was making a serious effort to obtain professional help to get well and therefore permitted him to return to work.

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[5] Prouty commuted to Vancouver each weekend.

[6] The record indicates that Columbini granted Prouty's request for a 2-week probationary period, after which he would be paid at his full salary. The Employer generally required a 90-day probationary period.

[7] The Hearing Officer fully credited Barnes' testimony.

[8] Davis testified that it is his policy to speak to employees who quit and to ascertain the reasons why.

[9] His unexplained absences apparently resulted from his problems with alcohol.

We note that the Employer granted medical leave from December 24, 1980, until March 2, 1981, to another employee whose ballot was challenged because he was hospitalized due to severe psychological problems. In recommending that we overrule the challenge to that ballot,[10] the Hearing Officer stated, inter alia, that "there is a presumption that an employee granted a leave of absence is still an employee." She further indicated that "[t]he only evidence presented by the Union to show that the Employer was packing the unit was the placement of two employees on medical leave and the Employer's alleged failure to give special consideration to a union adherent."[11] We find that these considerations support our conclusion that the Employer granted medical leave to and rehired Urich for legitimate reasons.

The evidence herein does not demonstrate that the Employer rehired Urich as part of a scheme to pack the unit. In contrast to the Hearing Officer, we do not find it extraordinary that the Employer contacted a longstanding employee such as Urich to find out why he quit, and offered him an opportunity to return to work. Accordingly, we overrule the challenge to his ballot.

DIRECTION

The Regional Director is hereby directed to open and count the ballots of Raymond R. Bame, Edward Combs, Richard L. Crocenzi, David C. Ell, Duane M. Felix, Robert W. Halsey, Douglas Hite, Mark D. Hite, Ralph Johnson, Joseph H. Kistler, Chris A. Markum, John H. McVey, Russell Morrison, Aaron Olson, Horace Olson, Gary Lee Parkos, Stuart J. Schreiner, John E. Sears, Mario S. Serka, Allen H. Stevens, Floyd Thompson, Timothy B. Wegner, Ken Wolever, Ted Wilson, Robert Creger, Leroy Henke, Ron Owens, Roland Prouty, and Robin Urich, and thereafter prepare and cause to be served on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

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[10] There was no exception to this recommendation and we adopted it, *pro forma*, in fn. 2, *supra*.

[11] The facts with respect to this individual are not relevant herein.

Delta Hosiery, Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC. Cases 4-CA-11161, 4-CA-11278, and 4-CA-11442

January 8, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On August 12, 1981, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Delta Hosiery, Inc., Wilkes Barre, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees about their union sympathies or those of other employees.

WE WILL NOT refuse to employ employee applicants because of the union sympathies of their relatives.

WE WILL NOT threaten employees with loss of employment or the closing or moving of our facilities because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL make Michele Evans whole for any loss suffered by reason of our discrimination against her, with interest, and offer her immediate employment in the same position she would have been employed absent such discrimination.

DELTA HOSIERY, INC.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard on March 3, 4, and 5, 1981, in Wilkes Barre, Pennsylvania. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by threats and interrogations made by agents of Respondent and violated Section 8(a)(3) and (1) of the Act by laying off one employee for 4 days, by refusing to hire an employee and by "constructively" discharging another for discriminatory reasons. The complaint also alleges that the Charging Party (hereafter the Union) had obtained signed authorization cards from a majority of Respondent's employees and that, because of its unfair labor practices, Respondent's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act and required a bargaining order remedy. Respondent denied the essential allegations of the complaint. All parties filed briefs which were received on or about June 1, 1981.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I hereby make the following:

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[1] Respondent, Charging Party, and General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Member Jenkins would compute interest in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

259 NLRB No. 139

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New York corporation, is engaged in the packaging of hosiery at its facility located at 100 S. Pennsylvania Boulevard, Wilkes Barre, Pennsylvania. During a representative 1-year period, Respondent had gross revenues in excess of $500,000 and purchased goods and services valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent employs some 53 employees, most of whom fold and package hosiery which is manufactured elsewhere and sent to Wilkes Barre for packaging. During the winter, Respondent's facility operates between 8 a.m. and 6 p.m., Monday through Friday, and 8 a.m. to 3 p.m. on Saturday. During the summer, it operates between 8 a.m. and 4:30 p.m., Monday through Friday, with no work on Saturday. In addition to regular full-time employees, Respondent employs high school students who work part-time on the so-called night shift during the school year, that is, 3 p.m. to 6 p.m. on weekdays and a full day on Saturday. At all material times until his death in the autumn of 1980, the plant manager in charge of the Wilkes Barre facility was Jim Murdock. Until Jim Murdock's death, his son, George, was a supervisor in charge of the shipping and receiving department. George Murdock became plant supervisor upon his father's death. In addition, Respondent's work force included two senior employees, Helen Javick and Mary Goff, who were identified as floor ladies. The floor ladies basically separated stock when it arrived at the facility and distributed it to other employees for folding and packaging. Most, but not all, of the folding and packaging was performed upstairs on the second floor. The material arrived on the first floor where it was separated and placed on a conveyer leading to the second floor. The floor ladies and Murdock had desks on the first floor of the facility. Respondent has no job classifications because all jobs are interchangeable, except perhaps that of Carol Gross, an employee who operates a printing machine on the first floor.

The General Counsel does not allege that floor ladies Mary Goff and Helen Javick were supervisors of Respondent within the meaning of Section 2(11) of the Act. He entered into a stipulation with Respondent that they were included in the bargaining unit of 53 employees. He nevertheless alleged in his complaint that Goff and Javick were agents of Respondent and that Respondent was liable for certain statements made by them to employees. The evidence shows that the floor ladies transmitted orders, warnings, and complaints about low production from Jim Murdock to other employees, distributed work to them and instructed new employees on how to do their jobs. They also occasionally sent people home if there was no work and handled sick leave requests, although it is not clear that they had independent judgment in these matters. They certainly did not responsibly direct employees within the meaning of Section 2(11) of the Act.

The evidence reveals that Jim Murdock supervised Respondent's operation very closely and the employees were well aware of his close supervision. For example, Desiree Evans testified at length about his expressed concern over her production and her absenteeism. She also testified that he gave her permission to take time off because of vacation and illness. Jim Murdock also warned other employees about their production and moved employees because they were "talking." Thus, while it appears that for some, but not all, purposes Goff and Javick were agents of Respondent, they were not supervisors and utilized little, if any, independent judgment in carrying out their functions.

B. *The Union Campaign*

After some initial contacts from employees, the Union arranged for a meeting of Respondent's employees on May 20, 1980, at a Wilkes Barre hotel. Fifteen employees attended. A union representative, Ted Gatto, passed out an information leaflet to employees and explained their rights under the Labor Act. He then distributed union authorization cards and read aloud the content of the cards. All 15 employees signed the cards. At the meeting, the employees elected an organization committee composed of employees Louise Groner, Jeanne Strausser, Cindy Walkowiak, Desiree Evans, Sharon Ridinger, and Suzanne Evans.

By May 22, about 30 employees had signed cards. At least eight of these cards were secured through the solicitations of Louise Groner and Suzanne Evans. They talked to employees in the parking lot of Respondent's facility, at a Mr. Donut Shop nearby, and in a restroom inside the facility.

On May 28, the Union sent a mailgram to Respondent informing it that a majority of its employees had designated the Union as bargaining representative and requesting recognition and bargaining. This mailgram was received by Respondent the same day. Respondent never replied to the mailgram although it apparently did file an election petition with the Board which was dismissed because of the initiation of these proceedings.

C. *The Alleged Misconduct of Goff and Javick*

At about 2:30 p.m. on May 28, Mary Goff approached employees individually at their work stations and asked them what they thought about supporting a union. She carried a piece of paper with her which contained the employees' names on it and columns designating prounion or antiunion. She marked the paper after receiving responses from the employees. Goff gave no reason for the inquiries and no assurances against reprisals. When she finished her poll, Goff joined Jim Murdock and

Helen Javick who were standing at one end of the upstairs room in which the employees worked. Goff showed the paper to Murdock and they went downstairs together.[1]

Jeanne Strausser testified that when Mary Goff approached her and Cindy Walkowiak on the afternoon of May 28, in addition to inquiring about their union sympathies, she stated that "she did not want a union, and if there was any indication of a union, New York was going to close the plant." The testimony was uncontradicted since Mary Goff did not testify in this proceeding. Walkowiak did testify but was not questioned on this matter. I credit Strausser who testified in a clear and straightforward manner and survived vigorous cross-examination.

Employee Carol Gross testified that, on May 28, she told Mary Goff that she supported the Union. Goff also talked to her 1 or 2 days later. She asked whether Suzanne Evans or Louise Groner had approached her about the Union. Gross said it was Groner. Goff also said that she had determined that there were only seven employees who supported the Union and she asked Gross if she knew the names of the people who supported the Union. Gross said she did not, but stated she thought there were more than seven and that about 90 percent supported the Union. According to Gross, Goff said, "the big boss said if this union gets in, they're moving out." Gross was cross-examined thoroughly by counsel for Respondent but was not questioned about this conversation. Gross' testimony about Goff's remarks concerning the moving of the facility was in effect corroborated by Strausser who testified that Goff mentioned this subject to her on May 28. Although I found Gross unreliable in other parts of her testimony, her testimony about the Goff encounter was reliable and it was compatible with other testimony concerning Goff's approach to employees about the Union.

Employee Andrea Chvera testified that Helen Javick approached her at her work table on June 9 and asked her if "anyone had asked me about the union." She said no. Javick then asked if Louise Groner "didn't nab me yet." She said no. Javick then asked what she thought about the Union and Chvera said "I don't know." Javick also asked Chvera how her sister felt about a union and Chvera told Javick to ask her, which she did. Javick asked Patricia Chvera if she knew anything about the Union and Patricia said she did not. Javick then walked away. Employee Bonnie Zadora testified that Javick also asked her if anyone had approached her about the Union. She said no, and Javick asked if Zadora knew "what they were offering" and then she said "they hadn't approached her either."

The next day, according to the testimony of Zadora and Theresa Allabaugh, Javick approached a group of employees while they were on break. She asked if they knew what the Union was offering. The response was that the employees did not know. She asked whether they would all stick together and vote no and the employees said they would. Javick also said she did not know why anyone would want a union because the employees had paid vacations and holidays. She also said "if the Union got in, that we would have to start from scratch."

According to Suzanne Evans, on June 10, Javick saw her in the restroom and asked if she was "involved with the Union." Evans said yes. Javick asked if another employee was involved and Evans said she did not know. Javick then said, "why don't you go to Jim for a raise and I said, you know, I didn't know."[2]

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by virtue of interrogations and threats by Mary Goff and interrogations by Helen Javick. As I have indicated, the General Counsel does not allege that Goff and Javick are supervisors. Indeed, he stipulated that they were properly members of the bargaining unit in this case. He does allege, however, that they were agents of Respondent and that Respondent was thus responsible for their conduct and statements which he further alleges were violative of the Act.

An employer may be liable for the acts of nonsupervisory employees who act as his agents. See *International Association of Machinists, Tool and Die Makers Lodge No. 35 [Senick Corp.]* v. *N.L.R.B.*, 311 U.S. 72, 80–81 (1940). It is settled that where an employer places a nonsupervisory employee in a position in which employees could reasonably believe he speaks for management, the employer may be responsible for the coercive statements of that employee. *Edgar L. Landen t/a Speed Mail Service*, 251 NLRB 476–477 (1980). The critical issue is "whether under all the circumstances, the employees would reasonably believe that the non-supervisory employee was reflecting company policy and speaking and acting for management." *Community Cash Stores, Inc.*, 238 NLRB 265 (1978). Another factor to be considered in determining employer responsibility in this case is that the two alleged agents, Mary Goff and Helen Javick, were stipulated to be unit employees and not alleged to be supervisors within the meaning of the Act. In analogous circumstances—where individuals are included in a bargaining unit or permitted to vote without challenge in a Board election and they are later found to be supervisors—the Board finds an employer responsible for the acts and statements of such supervisors only where the employer encourages, authorizes, or ratifies the supervisors' activities or "acted in such a manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management." *Hy Plains Dressed Beef, Inc.*, 146 NLRB 1253, 1254 (1964).

In applying the above principles, I find that Respondent is responsible for the conduct and statements of Mary Goff, but is not responsible for the conduct and statements of Helen Javick. In addition, I find that the alleged misconduct of Javick was not coercive within the meaning of Section 8(a)(1) of the Act.

Goff's polling of employees on May 28 was clearly viewed by employees as an act of management and management itself acquiesced in her conduct. Goff, who was certainly an agent for transmitting orders from Jim Murdock and for assigning work, made a systematic poll of employees about their union sentiments. Jim Murdock was present and visible to employees at least when Goff finished her poll because she brought the paper with the results of the poll to Murdock and they walked away together. Thus, because of the circumstances of the poll, Goff's general authority as a floor lady, and the presence of Jim Murdock, it is clear that Respondent, through Murdock, authorized—or apparently authorized—and ratified Goff's polling of employees. The poll itself was unlawful because Goff did not explain its purpose and did not give assurances against reprisals. Some of the employees gave obviously untruthful or evasive answers. The poll was thus coercive and violative of Section 8(a)(1) of the Act. In addition, Goff's inquiries of Carol Gross 1 or 2 days later about whether Groner or Suzanne Evans had approached her were also unlawful. Gross, who had been polled on May 28, obviously regarded Goff in the same light during the individual interrogation as she had in the earlier one because management had authorized or ratified Goff's role during the May 28 questioning. Thus, this interrogation was also coercive.

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[1] The above is based on the uncontradicted and mutually corroborative testimony of several employees.

[2] The above was based on uncontradicted testimony since Javick was not called as a witness.

The General Counsel also alleges as unlawful Goff's remarks to Strausser on May 28 and to Gross 1 or 2 days later to the effect that Respondent would close or move the plant. Although, at first blush, it might appear that Goff would not be privy to such management decisions in her limited capacity as a floor lady, the fact that Respondent authorized and ratified Goff's role in polling employees imbued her, in the minds of employees, with special competence in reflecting the views of management on the union effort. This is particularly so with respect to the remark to Strausser because it was made during the May 28 poll. The remark to Gross was made 1 or 2 days later also during an interrogation. When Goff spoke about unions, employees listened. No explanatory business reasons or reasons beyond the control of the employer were given for the economic holocaust which would eventuate if the employees selected a union. Thus, Goff's remarks about the closing or moving of the facility were coercive and violative of Section 8(a)(1) of the Act.

In contrast, I do not believe that the employees who participated in the alleged unlawful conversations with Javick could reasonably believe that she spoke for management or was reflecting management policies. First of all, she, like Mary Goff, was not a supervisor and was stipulated to be an employee in the bargaining unit. She was therefore entitled to participate in discussions about the Union and to convince other employees or to be convinced by others when it came to support or rejection of the Union. Secondly, unlike Mary Goff, Javick was not intimately connected with a systematic poll of employees which was obviously ratified and authorized by Jim Murdock. Her inquiries and statements to employees took place some 2 weeks after Mary Goff's poll. Finally, the Javick inquiries themselves were not made in the context of coercing or in circumstances that would indicate that Javick was speaking for management. Rather she spoke as if she was a fellow employee sharing her views—albeit antiunion views—with others. Thus, she asked Andrea Chvera if Louise Groner, a union supporter, had "nabbed [her] yet" and she told Zadora that "they," meaning the union supporters, had not "approached her either." Her remarks to a group of employees on break are likewise innocuous. She simply asked what the Union was offering, asked whether they would stick together and vote no—apparently the election petition had been filed at this point—and gave her view as to why a union was not necessary. She also made the remark that if the Union came in "we would have to start from scratch." The General Counsel argues that this statement is coercive. I disagree. First of all, there was no suggestion on the part of Javick that existing benefits would be taken away by Respondent and that bargaining would begin from scratch. It is in this context that bargaining from scratch statements may be viewed as coercive. Without evidence from which such an inference could be made, the remark is ambiguous and noncoercive. Secondly, and more importantly, there is no evidence that Javick had any authority to rescind benefits or would have any voice in collective bargaining on Respondent's behalf. Nor would her relatively low status as an agent of Respondent for transmitting orders and assigning work create in the minds of employees the impression that she spoke with authority in these matters. In these circumstances, I consider Javick's remarks to have been her personal opinion as an employee and I believe they were regarded as such by other employees. Accordingly, I shall dismiss the allegation that Respondent violated Section 8(a)(1) of the Act by virtue of Javick's questioning of employees.

D. *The Alleged Misconduct of Jim and George Murdock*

Employee Carol Gross testified that, on June 18, Jim Murdock approached her and said, "if this union gets in, that's going." He pointed to the printing machine Gross worked on, and said "if you can find another job, you better take it, because I don't want to see you get hurt by all this. And then he started to walk away and he turned around and said, I'm pretty sure have them beat by at least 15 votes, but you never can tell, so I just thought I would tell you." After counsel for Respondent tried unsuccessfully to impeach Gross' testimony by reference to her pretrial affidavit, Gross explained that she made the same statement in the affidavit that she did on the witness stand. Gross remained firm about Jim Murdock's remarks despite vigorous cross-examination. I credit Gross' testimony on this point and find that Jim Murdock's remarks amounted to a threat that there would be a loss of work if the Union won representation rights. This was violative of Section 8(a)(1) of the Act.

Carol Gross also testified that, at some indeterminate time "from October up until last month [February 1981]," George Murdock, who had taken over his father's job after the latter's death, accused the Union of having caused his father's death and said that he was going to "press charges against . . . the Union and everybody who pressed charges against Jim." He said that "when this was all over, he intended to swing a big axe and he didn't get mad, he got even." He also said that if there was anyone "looking for a job, they should come in to fill out applications because when this was over, there was going to be a lot of tables to be filled." According to Gross, there were three or four other employees present when these statements were made. However, none of these people corroborated Gross.

On cross-examination, Gross, for the first time, separated Murdock's remarks into two conversations. The first—the swinging the axe remark—she identified as having occurred "probably" in January 1981. She said the remark was made to all four employees who had been talking about the "people upstairs" who were identified as "weird." Murdock said he could not stand them, and, according to Gross, he mentioned swinging an axe in connection with the people upstairs who had been referred to as "weird." Gross testified that, in this conversation, the word "union" was not mentioned.

The second remark, according to Gross' testimony on cross-examination, was made in February 1981. Even on cross-examination, however, Gross was unable to specify dates. She also testified that, in these remarks—that people should fill out applications when "this was over" because there were "going to be a lot of tables to be filled"—the word "union" was not mentioned.

I do not credit Gross' testimony on the alleged George Murdock threats even though it was not contradicted. Gross' testimony on this aspect of the case—as it was on the Desiree Evans allegation discussed later in this Decision—was vague and unreliable. Gross was unable to pinpoint the dates or times of the alleged conversations. Her testimony on direct conflicted with her testimony on cross-examination. Moreover, she was not corroborated even though she identified three or four other employees who were allegedly present when George Murdock made his remarks. Significantly, Gross kept notes of other conversations about the Union she had with officials of Respondent but failed to do so with respect to the conversations with George Murdock. This might well explain her vague testimony on some issues in this case. Gross testified in such general terms about the context of the alleged George Murdock conversations and the date or dates of the conversations that I am unable to credit her testimony. In these circumstances, and because George Murdock was not accused of unfair labor practices by any other employee, I cannot credit Gross' uncorroborated testimony on this issue.

Employee Sharon Wojcik testified that, at about 2:20 p.m. on the afternoon of May 28, Jim Murdock approached her and asked her if she had signed a union card. She said she did not know anything about a union. She also testified that he said "That's okay because the big boss wouldn't go for it and he would close and move to Reading." She testified that she understood the "big boss" to mean one of the owners of Respondent from New York. Wojcik also testified that employees Ridinger and Desiree Evans were present during this conversation. However, neither of these employees—both of whom testified in this proceeding—corroborated Wojcik. Indeed, Evans testified that Murdock did not talk to her between May 28 and September 9 about the Union. Although Wojcik testified that Murdock talked to her and not Evans, it seems likely that if a threat to close the plant had been made in the presence of Evans she would have testified about it. Moreover, I find it highly unlikely that Murdock would have approached a group of three employees to question one of them 10 minutes before Mary Goff went around to poll employees in circumstances which clearly showed he wanted to insulate himself from the polling. Finally, I perceived in Wojcik a personal animosity towards Murdock because he frequently complained to her, through Helen Javick, about her low production, particularly in the summer of 1980 shortly before his death. In these circumstances, I do not credit the uncorroborated testimony of Wojcik and I shall dismiss any alleged violations based solely on her testimony.

E. *The Failure To Hire Michele Evans*[3]

Michele Evans, the sister of employee Desiree Evans, applied for work at Respondent's facility on Tuesday, May 27, 1980. She spoke to George Murdock. He told her he would call her some time that week. That day, Helen Javick talked to Desiree and told her that Michele had been hired and that she was to tell Michele to come to work on Thursday. That same day Jim Murdock approached Desiree. He asked whether Javick had talked to her about Michele and confirmed that Michele was hired. He told Desiree to tell Michele to report on Thursday.

Desiree also testified that Goff approached her on the afternoon of May 28. She testified as follows:

> Mary Goff, the floor lady had approached me and asked me if I knew anything about the Union and I told her no and then she asked me would I like to have a Union—like did I sign a union card and I asked her do I have to give you an honest answer and once again, she said would you like to have a union and I said, sure, why not.

A question mark was placed after Desiree's name on the poll. Desiree also testified that, a few minutes after Mary Goff and Jim Murdock went downstairs, they returned, and Jim Murdock approached her and "asked me if Michele was still coming in Thursday and I said yes. He told me to tell her not to come in and he said that there were other girls waiting ahead of her."[4]

The General Counsel alleges that Respondent's reversal of position and refusal to hire Michele Evans was based on her sister's possible union sympathy and was thus discriminatory. I agree. An employer's refusal to hire an applicant based on the union activity of a relative has been found to be violative of the Act. See *Coper-Vulcan, Inc.*, 237 NLRB 1253, 1257 (1978), enfd. in pertinent part 611 F.2d, 440, 442 (3d Cir. 1979).

In the instant case, the uncontradicted evidence establishes a *prima facie* case of a violation. On May 27, Desiree Evans was told by Jim Murdock and by Helen

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[3] The General Counsel submitted a motion to correct the transcript in certain respects, including an erroneous identification of Michele Evans as Cheryl Evans. The motion was unopposed. I hereby grant the motion and correct the transcript.

[4] The above reflects the transcript as corrected.

Javick that her sister, who had been interviewed that day for a job with Respondent, was hired and that she should report for work on Thursday. The next day, Respondent received the Union's demand for recognition and, through Mary Goff, polled employees concerning their support of the Union. When Goff approached Evans, Evans indicated to her that she might support the Union. A question mark appeared next to her name. Goff showed the results of her poll to Murdock and, shortly thereafter, Murdock told Evans that her sister should not report for work. The timing of Respondent's change of position makes it likely that the reason for failing to hire Michele, after Respondent indicated the day before that she had been hired, was her sister's possible support of the Union and Respondent's concern over the Union's professed majority status and request for recognition. Although the issue is a close one, I am constrained to find that Respondent either did not want another employee who, like her sister, might support the Union or wanted to exert some pressure on Desiree to reject the Union. The evidence was sufficient to require Respondent to rebut the natural inference of illegality which flowed from the facts presented by the General Counsel. Respondent submitted no evidence on this issue, even though George Murdock, who had interviewed Michele, did testify, and Helen Javick, who transmitted Jim Murdock's decision that Michele had been hired, and Mary Goff, who spoke to Murdock just before he told Desiree Evans that Michele should not report for work, were still employed by Respondent. In these circumstances, I find that Respondent's failure to hire Michele Evans after it had made a decision to hire her and have her report for work was discriminatorily motivated and violative of Section 8(a)(3) and (1) of the Act.

F. *The Layoff of Colleen McGrady*

The General Counsel alleges that Respondent unlawfully laid off employee Colleen McGrady from May 28 until June 2, 1980, because of her union activities. There is a paucity of evidence concerning McGrady's union activities or any animus directed to McGrady. McGrady, who was a high school student, worked from 3 to 6 p.m. on weekdays and from 8 to 3 on Saturdays. She had signed a union card on May 22. Other employees working part time along with her had signed cards and later changed their minds after talking with their parents. On May 27, McGrady overheard Helen Javick talking to an employee with whom McGrady had previously spoken about the Union. According to McGrady, Javick told that employee, "there is no way of stopping it, all they could do was wait and see what would happen." On May 28, the next day, Javick called McGrady's school and left a message for her not to come to work that day. This was the normal procedure by which Respondent got in touch with high school students who worked part time. McGrady called Javick that evening and Javick told her there was no work. On May 29, Javick tried to call McGrady at her school but she was absent. Javick also tried to call her at her home but she was not there. Two other part-time employees were hired on May 29 and McGrady apparently returned to work on June 2 after missing 4 days of work.

The evidence set forth above does not establish that McGrady was laid off for discriminatory reasons. McGrady was not a leader in the union effort. There is no evidence of union animus directed towards her or of Respondent's knnwledge that she had signed a union card. Any evidence based on the overheard conversation between Javick and another employee would be speculative since the conversation did not involve McGrady's union activities. Nor was McGrady questioned with the other employees on May 28. Two employees were hired on May 29, but this does not establish a discriminatory motive for not permitting McGrady to work on May 28. McGrady herself returned after missing only 4 days of work. She then broke her leg, and, after she recovered, returned to work once more. She then quit her employment. Respondent's benign treatment of McGrady after she returned to work in June belies any inference of wrongdoing in late May. At best, the evidence submitted by the General Counsel raises a suspicion that McGrady may have been laid off for a reason—lack of work—which was refuted by the hiring of two part-time employees. But this is not enough to sustain the General Counsel's burden of affirmatively proving a *prima facie* case of a violation by a preponderance of the evidence. For there is no evidence that the reason for McGrady's layoff was based on her union affiliation.

G. *The Alleged Constructive Discharge of Desiree Evans*

The General Counsel also alleges that Desiree Evans was transferred and harassed and eventually constructively discharged, that is, Respondent forced her to quit her employment on September 9, 1980, because of her union sympathies. The applicable legal principle may be stated as follows:

> There are two elements which must be proved to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities. *Crystal Princeton Refining Company*, 222 NLRB 1068, 1069 (1967).

Desiree Evans began working for Respondent in February 1980 as a full-time folding employee. She signed a union card at the union meeting of May 20. She was elected to the six-person organizing committee and she spoke to two employees before May 28 about signing cards. Neither of these employees signed cards as a result of her solicitation. Desiree Evans was questioned along with other employees on May 28, and, although she gave a mildly affirmative response, a question mark appeared after her name on the polling sheet used by Mary Goff to assess the union sympathies of employees. According to Carol Gross, Jim Murdock identified three people as union supporters "Susan, Louise, Sharon and the rest he just referred to as the followers." I have also found that Desiree's sister, Michele, was not hired in late May for discriminatory reasons.

There is no evidence that any management representative spoke to Desiree Evans about the Union between late May and August 27, 1980, at which time Desiree was moved downstairs by Jim Murdock. She asked him why she was being moved, and he replied "there was work to be done downstairs."

Carol Gross testified that a "couple of days" before Evans was moved downstairs she overheard the following conversation:

> I was sitting at my machine. There's a small table by the machine and I was putting stickers and Jim came out of the office really fast and Helen was standing at a table down a little further and when he started up the aisle, he yelled, "That was Desiree on the phone" and Helen started walking towards Jim and Jim said, "She's saying that you told her I was going to hire her sister and I didn't hire her because of the Union and that's what she's telling the Labor Board." And Helen said, "She's a goddamn liar" and he said, "I thought so," he says, "I'm bringing her down here and I'm going to keep an eye on her."

Although Gross' testimony on this point was uncontradicted and undisturbed on cross-examination, its inherent reliability is suspect. For example, if, indeed, Desiree had called Jim Murdock and talked to him about the charge that her sister had been discriminated against, it would seem that Desiree would have testified about this conversation and established the date of the conversation. The timing of this alleged conversation *vis-a-vis* the transfer of Desiree would, after all, be crucial to the General Counsel's case. However, Desiree did not testify about any such conversation. Nor does it seem plausible that such a conversation occurred or that it occurred a "couple of days" before Desiree's transfer downstairs on August 27, as testified. The complaint alleging the refusal to hire Desiree's sister issued some 3 weeks before the transfer. Gross' testimony strikes me as a reflection of what Gross believed was the reason for the transfer of Desiree rather than an accurate reflection of the facts as she heard and observed them.

The General Counsel, in apparent recognition of the implausibility of Gross' testimony, states in his brief that it should be "interpreted as either that Murdock meant that the conversation was about Desiree or that he said the conversation was about Desiree and Gross misperceived his exact words." Findings cannot be based on such speculation. Obviously,if Gross misperceived what was said in one part of the conversation, she could have misperceived other parts of it. I have credited parts of Gross' testmony but I have not credited other parts of it. On this issue I do not find her testimony reliable.

Evans apparently worked downstairs on August 27, as well as Thursday and Friday of that week. The following Monday was Labor Day, a holiday. Desiree did not come into work on Tuesday and Wednesday, September 2 and 3.

On September 4, 1980, Jim Murdock wrote a letter to Desiree which was delivered to her the next day and read as follows:

> This letter is to inform you that your performance on the job at Delta Hosiery has been unsatisfactory in several areas.
>
> You have been tardy, absent without excuse and unresponsive to requests for improvement in your work habits.
>
> It is expected that you call in to report off from work. If you are off more than one day, we expect you to call in and let us know when you expect to return to work.
>
> Desiree, you have been warned verbally and in writing as to the above. Further incidents will result in your suspension from work for one day without pay. Any further incidents will result in your discharge from Delta Hosiery.
>
> I sincerely hope that this letter will cause you to improve in those areas mentioned and that further disciplinary action will not be necessary.

Desiree worked downstairs on Thursday and Friday, September 4 and 5, and on Monday, September 8. During this period, Murdock complained about her production and her absenteeism. Desiree testified that before August 27, 1980, she had not received such complaints. She also testified that the day after she was moved downstairs, Murdock started "yelling at me about my production and of my taking off days from work . . . ." She told him she was "really trying" and "he started mumbling some stuff . . . ." According to Desiree, he also directed that she stay at her seat and that she be kept supplied with material.

Carol Gross testified that, at one unspecified point in time, she heard Jim Murdock "screaming about [Desiree Evans'] time off." He insisted upon warning her in the presence of "Sharon and Suzanne," presumably Sharon Ritinger and Suzanne Evans, employees Murdock regarded as leaders in the union movement. Suzanne Evans, no relation to Desiree, testified that, on September 8, the day before Desiree quit, Murdock showed her the production records of Desiree to demonstrate that Desiree's production was low. When Suzanne asked why he was showing her these records, Murdock said, "Well, you're [the] speaker, aren't you." Suzanne also testified that she was aware that Desiree had received oral warnings for low production before September 8, although she did not specify when these were given. Suzanne also testified that other employees were given oral warnings for low production, a fact confirmed by other witnesses.

On September 9, Desiree worked 1 hour before punching out and quitting. Desiree testified that, on September 9, Jim Murdock again complained about her production. He said that the next time her production slipped or she missed another day she would be sent another notice, and that, if this happened again, she would be "out." She responded that she was trying and that the work downstairs was hard. Murdock said "if it wasn't for your sneezing and coughing all the time, you could do more." Carol Gross basically corroborated Desiree's testimony on this point although she could not hear all of the conversation. She testified that Desiree said she "couldn't help her production if it was down."

Later in this conversation Desiree testified that the following occurred:

> Well, while he was yelling at me, he also said to tell Ted Gatto, your Union man about this for all he cares and I said to him, I know why you're doing this to me and he said, why, and I said—wait—I told Jim I know why you're doing this to me and he said why and I said, I found out about your part of the Union or something like that and he said that isn't why, we don't even have a vote here, something like that.

On cross-examination, Desiree testified as follows: She said "I know why you're doing this to me." Murdock said, "why?" and Desiree said that he had found out that she was a union supporter. Murdock responded, "no, no, something about you don't have a vote and you could tell Gatto, your union man for all I care." Desiree was unable to remember which came first, the remark about Gatto, or her statement that Murdock was screaming at her because he found out about her supporting the Union. Carol Gross—who did not hear all of the conversation—testified that Murdock was "yelling a lot about the Union, Teddy, go tell Teddy something and then Desiree said, 'I *don't* know why you're doing this to me' . . . and he said, 'why because of that silly Union of your's? You said you don't even have a vote yet, you stupid ass.'" (Emphasis supplied.) Gross was not cross-examined on this point.

My view of the above conversation is that Desiree volunteered that she knew why Murdock was screaming at her and that it was because he found out she was a union supporter. I also believe that he denied this, as Desiree testified on direct. It was only then that Murdock told her that she could tell the union representative, Gatto, for all he cared. It would make no sense for Murdock to have said that she could tell Gatto about her contention that Murdock was mistreating her unless Desiree had implied that the mistreatment was based on her union affiliation and unless that remark came first. On cross-examination Desiree's account of the conversation seemed to support this view. Gross' account is somewhat in accord with Desiree's testimony on direct that the Gatto statement came first, but her testimony is a bit different from Desiree's and does not strike me as a coherent account of the conversation. She also admittedly did not hear all of the conversation. In any event, the testimony on this most crucial exchange was extremely vague. It was insufficient to support the General Counsel's view that it reflected Murdock's desire to punish Desiree because of her union activities.

After the conversation, Murdock walked away. Desiree finished her work, and, about a half hour later, she got up, told Murdock "I have had too much of this" and punched out. In response to Murdock's inquiries, Desiree said she was quitting. During this half-hour period Murdock and Desiree did not speak.

Suzanne Evans testified that, after Desiree had quit, she talked to Murdock and asked, "do you blame her for leaving the way you have been harassing her." According to Suzanne, Murdock said "no" and then "mumbled something and he told me I was next." On cross-examination, Suzanne was extremely confused as to when this incident took place and she even suggested that this had happened more than once. Nor does Suzanne's reference to Murdock having "mumbled" something offer the clarity of context which might render her testimony reliable enough to credit. Suzanne Evans was still employed at the time of the hearing in this case and there is no evidence in the record that Respondent retaliated against her for her union activities even though it is clear that Respondent knew she was a leader in the union effort. The General Counsel made no effort to rehabilitate Suzanne Evans after the considerable doubts about her reliability on this point created by her testimony on cross-examination. I therefore do not credit Suzanne's testimony that Murdock told her that he did not blame Desiree for quitting and that she was next.

Prior to August 27, 1980, Respondent had not issued written warning notices to employees. Since that date, apparently only three were issued, one of which was the September 4, 1980, letter to Desiree Evans. George Murdock testified that for the first few months of a person's employment no production warnings are given because the employee is presumed to be learning his or her job. No employees have been laid off for poor production or absenteeism. However, one person was terminated for poor production.

Desiree had had a number of absences since she began her employment in February 1980. She admitted she was absent a substantial portion of the time. Actually, she worked very few full 40-hour weeks, but this was true of most of the so-called full-time employees, according to Respondent's production records. In addition, in August and September 1980, there were many absences by other employees, as documented in notes kept by George Murdock. Desiree attributed most of her absences to dental appointments. She missed an entire week in July and another in August. Desiree testified that she probably was sick 1 week and on vacation another. She did work 40 hours in the week ending August 30 when she was moved downstairs. The week before she missed most of Tuesday. It is unclear whether this absence was excused or not, although Desiree testified generally that she always had permission for her absences and for leaving work early.

The production records for the week of August 30 do not indicate that Desiree's production was significantly less than that of other employees who worked 40 hours. Indeed, it appears that she topped several other employees. For the other weeks in August when she worked, Evans' production was higher than at least three other employees. It is difficult to compare production records, however, because of the different type of work done by each employee and the different hours worked. For example, some employees folded different types of hosiery and others did boxing or bagging work which is incapable of specificity. The last 2 weeks of her employment Desiree worked 16 and 9 hours, respectively, and it is difficult to compare her production records with other employees. She did, however, miss 2 days of work during this period and there is no specific evidence in the record as to why she missed those days or whether they were excused.

Two other employees were moved downstairs in July 1980. They remained downstairs doing folding work at the same time as Desiree was working downstairs. A number of employees had been moved between floors in the past. The working conditions downstairs were no different than they were upstairs except that there were less people working downstairs and the tables were set further apart.

According to Desiree, the work she was doing downstairs involved folding control top panty hose instead of the plain panty hose which she folded upstairs. Desiree testified that she had folded control top panty hose "once or twice before." She testified that the latter work was harder but she did not satisfactorily explain how or why it was harder. Actually, it appears that the work of the three folding employees downstairs was the same as the work upstairs. Respondent's production records make no distinction between types of panty hose folded although they do specify three or four other types of hosiery.

The evidence does not preponderate in favor of a finding that Evans was transferred downstairs and forced to quit her employment because of her union activities. I find nothing unlawful or untoward about the August 27 transfer of Evans. Other employees were assigned to work downstairs, including two employees in July just before Evans was transferred. The work was not substantially different than that being performed upstairs. I find no evidence supporting Evans' suggestion that the different type of panty hose she folded downstairs was harder to fold than those she had been folding in the past. She admittedly had folded this type of panty hose once or twice in the past. Nor was Evans considered a leader in the union effort. She was considered at most a follower and Mary Goff had had a question about whether she supported the Union or not. More importantly, 3 months had elapsed since the last union activity, and, in the interim, no one from management had engaged in any conversations with Evans about the Union. Nor did the transfer come on the heels of the complaint, as the General Counsel suggests. It came 3 weeks later. And Carol Gross' testimony about Murdock's reasons for transferring Desiree downstairs was not reliable. In these circumstances, I cannot conclude that the August 27 transfer of Evans to the downstairs work area was discriminatory or in retaliation for her union activities.

Working conditions imposed on Evans after August 27 were not unduly restrictive and they were not imposed for discriminatory reasons. She missed 2 days of work in early September and was issued a warning notice primarily for her absenteeism. Evans did miss these 2 days of work as she had other days earlier in her employment. Nor is there any credible evidence that the September 4 warning was issued because of Evans' union activity. The evidence that Murdock insisted on warning Evans in the presence of the two union leaders does not militate against this finding. Murdock could well have thought that, in the face of a bargaining demand and a Board complaint, he was protecting himself from a charge of discrimination by telling the union leaders that he was disciplining Evans for business reasons. Nor were Murdock's September 9 complaints shown to be based on Evans' union activities. Murdock screamed at Desiree about her production and her absenteeism as he had in the past after her transfer to the downstairs work area. But none of that criticism was shown to be based on her union activities. Desiree had received oral warnings for low production in the past and she told Murdock that she was trying to keep her production up. Murdock apparently was a volatile person who screamed at other employees about low production. His remarks about the Union on September 9 were not indicative of discriminatory motive because they followed Desiree's expressed opinion that he was mistreating her because she was a union supporter. Indeed, it appeared to me that Evans was baiting Murdock and trying to establish a discriminatory motive for alleged misconduct. Thus, the General Counsel has not shown that Respondent was responsible for harassing Evans or making her working conditions intolerable and that Respondent did this because of Desiree Evans' union activities or any other prohibited reason. Accordingly, Desiree's action in quitting her employment was entirely voluntary and not as a result of a constructive discharge in violation of the Act.

H. *The Bargaining Order Request*

The evidence shows that the Union had obtained valid authorization cards from 29 of the 53 employees in the bargaining unit[8] when it asked for recognition on May 28, 1980. Respondent declined to grant recognition and refused to bargain with the Union.

The General Counsel requests a bargaining order to remedy Respondent's refusal to bargain and the unfair labor practices committed in May and June 1980. I do not agree with the General Counsel that a bargaining order should issue in this case.

The standards for determining whether the unlawful conduct found herein requires a bargaining order are set forth in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). There, the Supreme Court held that such an order would be an appropriate remedy for: (1) "'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices . . . of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had,'" and (2) "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." The Court also noted that there was a "third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." However, the Court continued, "[t]here is . . . no *per se* rule that the commission of any unfair labor practice will automatically result in a §8(a)(5) violation and the issuance of an order to bargain." (395 U.S. at 613-615).

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[8] I do not count the card of Lisa Everett. No one testified that she signed the card or that she signed the card on any particular date.

I find that the unfair labor practices in this case were not so serious that they cannot be eradicated by traditional remedies or that a fair election cannot be held in the future. The unfair labor practices were committed by Jim Murdock, who is now deceased, and Mary Goff, who was acting under his authority. Goff was an employee who was acting as Murdock's agent in polling employees. Her polling and questioning of employees is not likely to linger. Her remarks to two employees about the possibility of Respondent closing or moving the facility, while coercive, do not have the sting and the lingering effect such threats normally radiate because of Goff's low level in the management hierarchy. The impact of her remarks had some significance at the time they were made because employees believed that she acted with Jim Murdock's blessings in her discussions about the Union. This impact is lessened because of Murdock's death and also because, after the passage of time, a floor lady's statement to two employees about the closure of a plant cannot be regarded in the same light as a similar statement from a high-ranking management official. I cannot believe that employees would view her remarks so seriously after compliance with a cease-and-desist order. The same applies to Murdock's unfair labor practices. Jim Murdock was the person responsible for the decision not to hire Michele Evans and the threat to Carol Gross that her machine might be moved. With his death, I cannot say that the effects of these unfair labor practices cannot adequately be remedied by a cease-and-desist order and a hire and backpay remedy. Nor, for the same reason, do I believe that these unfair labor practices will recur. On balance, I believe that a free election could be held at Respondent's facility after the unfair labor practices herein are remedied by conventional means.

CONCLUSIONS OF LAW

1. By interrogating employees about their union sympathies and those of other employees, by threatening the possible closing or moving of its facility because of the union activities of employees and by threatening the loss of employment because of union activities, Respondent violated Section 8(a)(1) of the Act.

2. By failing and refusing to hire Michele Evans after indicating that she had been hired and should report for work because of her sister's suspected union sympathies, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not otherwise violated the Act.

5. The unfair labor practices committed by Respondent do not warrant the issuance of a bargaining order.

REMEDY

I shall recommend that Respondent be ordered to cease and desist from the unfair labor practices found above and to post an appropriate notice. I shall also order that Respondent offer Michele Evans employment in the same position she would have been employed absent the discrimination against her. It will be further recommended that Respondent be required to make Michele Evans whole for any loss of earnings she may have suffered by reason of the discrimination against her. Such backpay and interest thereof shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case, I recommend the issuance of the following:

ORDER[7]

The Respondent, Delta Hosiery, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about their union sympathies or those of other employees.

(b) Refusing to employ employee applicants because of the union sympathies of their relatives.

(c) Threatening employees with loss of employment or the closing or moving of its facilities because of the union activities of employees.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Make Michele Evans whole for any loss suffered by reason of the discrimination against her and offer her immediate employment in the manner and to the extent set forth in the "Remedy" section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records necessary to compute the backpay and reinstatement rights set forth in the "Remedy" section of this Decision.

(c) Post at its place of business in Wilkes Barre, Pennsylvania, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found herein.

Spirit Mountain Farms, Inc. and Donald R. Brown, I. Lois Brown, and Marilyn E. Brown, Executor of the Estate of Robert H. Brown, deceased, a Limited Partnership, d/b/a Spirit Mountain Farms *and* Martin Hitt. Case 28-CA-6527

January 8, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Upon a charge filed on June 29, 1981, by Martin Hitt, an individual, and duly served on Spirit Mountain Farms, Inc., herein individually called Respondent Corporation and Donald R. Brown, I. Lois Brown, and Marilyn E. Brown, executor of the estate of Robert H. Brown, deceased, a limited partnership, herein individually called Respondent Partnership, d/b/a Spirit Mountain Farms, herein collectively called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 28, issued a complaint on July 23, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended.

The charge was filed on June 29, 1981, by the Charging Party, and duly served on Respondent by certified mail on or about the same day. The Acting Regional Director on July 23, 1981, issued a complaint and notice of hearing, which was received and signed for by Donald Brown on July 31, 1981. When no answer was filed, counsel for the General Counsel on August 13, 1981, sent, by ordinary mail, a letter advising Respondent that it had failed to timely file an answer to the complaint as required by the Board's Rules and Regulations and further informing Respondent of the consequences of its failure to timely file an answer thereto, namely, that such would have the effect of admitting each and every allegation in the complaint.

On August 31, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment on the pleadings. Subsequently, on September 8, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's motion should not be granted. Respondent has not filed a response to the Notice To Show Cause and, therefore, the allegations in the Motion for Summary Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides, *inter alia*: "All allegations in the complaint, if no answer is filed . . . shall be deemed to be admitted to be true and shall be so found by the Board." As set forth above, Respondent has not filed an answer to the complaint; the time within which to file having passed, we find all allegations in the complaint to be true. There being no issues in dispute, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

1. At all times material herein, Respondent Corporation and Respondent Partnership have been affiliated business enterprises with common officers, ownership, directors, management, and supervison; have formulated and administered a common labor policy affecting employees of said operations; have shared common premises and facilities; have provided services for each other; have interchanged personnel with each other; and have held themselves out to the-public as a single integrated business enterprise.

We find, on the basis of the foregoing, that Respondent Corporation and Respondent Partnership constitute a single integrated business enterprise and a single employer within the meaning of Act.

2. At all times material herein, Respondent, with an office and place of business in Mohave Valley, Arizona, has been engaged in the business of producing, packaging, and selling fibre, grain, grass, fruit, and related products, including melons, and has packaged and sold melons which were produced by Respondent and other agricultural producers. During the past 12 months, Respondent in the course and conduct of its business operations, derived gross revenues in excess of $500,000 and sold and shipped from its Mohave Valley, Arizona, facilities products, goods, and materials valued in excess of $50,000 directly to points outside the State of Arizona.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and

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that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Fresh Fruit and Vegetable Workers Local P-78-B, United Food and Commercial Workers, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

On or about June 23, 1981, Respondent discharged Charging Party Martin Hitt and, since that date, has failed and refused to reinstate him to his former position of employment. Respondent engaged in the acts and conduct described above because Martin Hitt refused to join the Union and to authorize Respondent to deduct periodic dues and initiation fees from his wages on behalf of the Union and in order to encourage employees to engage in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

On the basis of the foregoing, we find that Respondent has discriminated, and is continuing to discriminate, in regard to hire, tenure, or terms and conditions of employment of its employees,[1] thereby encouraging membership in a labor organization, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

We shall order that Respondent offer Martin Hitt immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. Moreover, we shall order that Respondent make him whole, with interest, for any loss of earnings he may have suffered as a consequence of the discrimination against him by payment to him of a sum equal to what he would have earned, less net earnings, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest on the backpay shall be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[2]

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Spirit Mountain Farms, Inc., and Donald R. Brown, I. Lois Brown, and Marilyn E. Brown, executor of the estate of Robert H. Brown, deceased, a limited partnership, d/b/a Spirit Mountain Farms, constitute a single integrated business enterprise and a single employer within the meaning of the Act.

2. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Fresh Fruit and Vegetable Workers Local P-78-B, United Food and Commercial Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent, by discharging Martin Hitt and by failing and refusing to reinstate him to his former position of employment, has discriminated against employees in order to encourage union membership and activities, in violation of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Spirit Mountain Farms, Inc., and Donald R. Brown, I. Lois Brown, and Marilyn E. Brown, executor of the estate of Robert H. Brown, deceased, a limited partnership, d/b/a Spirit Mountain Farms, Mohave Valley, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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[1] The record indicates that Respondent is engaged, *inter alia*, in the business of packaging and selling melons produced by other agricultural producers. Accordingly, in the absence of evidence to the contrary, we find that Charging Party Hitt is an employee within the meaning of the Act. *Employer Members of Grower-Shipper Vegetable Association of Central California, et al.*, 230 NLRB 1011 (1977).

[2] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 116 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

(a) Discharging or otherwise discriminating against employees because they have refused to join Fresh Fruit and Vegetable Workers Local P-78-B, United Food and Commercial Workers, AFL-CIO, and have refused to authorize Respondent to deduct periodic dues and initiation fees from their wages on behalf of the Union, in order to encourage union activities or membership.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Martin Hitt immediate and full reinstatement to his former position or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole, with interest, for any loss of earnings he may have suffered as a result of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Mohave Valley, Arizona, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees because they have refused to join Fresh Fruit and Vegetable Workers Local P-78-B, United Food and Commercial Workers, AFL-CIO, and have refused to authorize us to deduct periodic dues and initiation fees from their wages on behalf of the Union, in order to encourage union membership or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Martin Hitt immediate and full reinstatement to his former position or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered due to the discrimination practiced against him, with interest.

SPIRIT MOUNTAIN FARMS, INC., AND DONALD R. BROWN, I. LOIS BROWN, AND MARILYN E. BROWN, EXECUTOR OF THE ESTATE OF ROBERT H. BROWN, DECEASED, A LIMITED PARTNERSHIP, D/B/A SPIRIT MOUNTAIN FARMS

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

A & A Ornamental Iron, Inc. *and* **William David Jones. Case 31-CA-10388**

January 11, 1982

DECISION AND ORDER

By Members Jenkins, Zimmerman, and Hunter

On August 19, 1981, Administrative Law Judge Michael D. Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, A & A Ornamental Iron, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Make whole William David Jones by paying to him backpay from August 28, 1980, to May 11, 1981, computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977)."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT interrogate job applicants about past or present union membership or affiliation.

WE WILL NOT tell job applicants that we do not hire individuals who are or were members of unions.

WE WILL NOT refuse to hire job applicants because of their present or past union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL make William David Jones whole for any loss of pay suffered as a result of our discrimination against him, with interest, and would offer employment to William David Jones except he does not desire to be employed by us.

A & A Ornamental Iron, Inc.

DECISION

Statement of the Case

Michael D. Stevenson, Administrative Law Judge: This case was heard before me in Las Vegas, Nevada, on

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[1] Respondent has excepted to the Administrative Law Judge's denial of its motion for continuance. The granting or refusal of a continuance is within the discretion of the Administrative Law Judge. Sec. 102.43 of the Board's Rules and Regulations, Series 8, as amended. We have carefully examined the record and the exceptions and find that the Administrative Law Judge did not abuse his discretion when denying Respondent's request.

[2] Respondent has excepted to the central credibility finding made by the Administrative Law Judge, wherein he credited Jones' version of the August 27 telephone conversation. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless a clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] We hereby correct the Administrative Law Judge's Decision and recommended Order to reflect the General Counsel's agreement that backpay liability will be tolled as of May 11, 1981, rather than May 13, 1981.

In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on backpay due based on the formula set forth therein.

259 NLRB No. 138

June 4, 1981,[1] pursuant to a complaint issued by the Regional Director for Region 31 of the National Labor Relations Board on October 30, and which is based on a charge filed by William David Jones (herein called the Charging Party) on September 2. The complaint alleges that A & A Ornamental Iron, Inc. (herein called Respondent), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act).

Issue

The issue presented is whether Respondent violated Section 8(a)(1) and (3) of the Act in a telephone conversation between Michael Ayers, a statutory supervisor, and Jones, a job applicant—wherein (1) Jones was interrogated by Ayers about his past union membership or affiliation; (2) Ayers advised Jones that Respondent did not hire individuals who were members of a union; (3) Ayers refused and continues to refuse to hire Jones because of the latter's present or past union affiliation.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Neither the General Counsel's nor Respondent's counsel filed a brief.[2]

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a Nevada corporation engaged in the business of fabrication of ornamental iron and miscellaneous steel and has a shop and office located in Las Vegas, Nevada. It further admits that during the past year, in the course and conduct of its business, it has sold and sent goods or services valued in excess of $50,000 to customers outside the State of Nevada. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.[4]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Between December 1975 through November 1978, Jones was employed at a manufacturing plant in Spokane, Washington. While there, Jones had experience with a drill press, a grinder, and some subassembly. He also had prior experience with a welding torch from a high school training class. When Jones left his job in Spokane, due to layoff, he also elected withdrawal status from a Spokane Teamsters local.

At some point subsequent to his layoff, Jones moved to Las Vegas, and later to Florida, then back to Las Vegas. He held a series of short-term, unskilled jobs such as day labor, vacuum cleaner salesman, and construction worker.

On or about August 27, Jones, then age 24, went to a local Las Vegas office of the Nevada Employment Security Department, seeking employment through a job referral. He observed a job notice for "Shophand" which had been called in by Respondent. The job paid $4 per hour. After an interview by a job counselor to verify that Jones was qualified for the job, Jones was given a job referral card (G.C. Exh. 2) and was sent out for an interview.[5]

Jones first consulted a map at his home to determine the approximate location of the business. He found the street without great difficulty, but could not immediately locate the exact address. Jones went to a nearby restaurant and called Respondent on the telephone and asked for "Mike," the contact person on his referral card. Mike Ayers, age 24, shop foreman and Respondent's vice president, admitted receiving a telephone call in late afternoon on the day in question. However, he sharply disputes the contents of the conversation.

According to Jones, he told Ayers that he was on referral from the Nevada employment office and that he was applying for the job of "Shophand." Jones further explained that he was having trouble finding Respondent so he needed better directions. Ayers allegedly said, "Let me ask you a couple of questions first: How long have you been in the State?" To this, Jones responded, "Off and on for about two years." Ayers made no reply but then allegedly asked a second question: "Are you a member of union." Jones explained that he had been a member of the Teamsters, but that he was then on a withdrawal card. To this, Ayers replied that Respondent was not going to hire anybody from the Union. Again Jones reiterated that he was on withdrawal from the Union. However, Ayers said he knew of a local company who had hired a union member, but then was forced to close down because the new employee had tried to bring in the Union. Then Ayers referred Jones to still another local company which Ayers said did hire union members. Ayers concluded the conversation by telling

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[1] All dates herein refer to 1980 unless otherwise indicated.

[2] In addition to not filing briefs, neither attorney notified me that they were waiving their right to file one. I am disappointed that this commonsense courtesy escaped their attention. Because Respondent's attorney in particular made reference on two occasions at the hearing as to what he expected to accomplish in his brief, a clerical employee expended needless time and energy making several telephone calls attempting to determine whether the briefs may have been timely filed, but possibly lost in the mails, or misplaced here.

[3] Respondent's answer was amended at the hearing to reflect the above.

[4] Respondent's answer was amended at the hearing to reflect the above.

[5] The General Counsel called as a witness Jenny Henderson, manager of the job order service unit. This witness testified that the job of shophand was a full-time position, for which four other persons were sent out in addition to Jones. Records show that a person named Anderson was ultimately hired for the position, but Ayers could not recall hiring him.

Jones that he could come in and file an application with Respondent, but that it would do Jones no good.

According to Ayers, the person he talked to was seeking employment as a "forklift operator." Ayers allegedly explained that Respondent had no such job available, but did have others which paid $4 per hour. At this point, Ayers said the person became nasty and abusive over the telephone and threatened to go to the Operating Engineers Union and get a job for $10 per hour. Ayers specifically denied the conversation as related by Jones.

In resolving this central credibility question in favor of Jones, I note the following factors: First, I found Jones to be a more credible witness both as to demeanor and content.[6] More specifically, I find Ayers' account of the conversation to be incredible. Why would Jones ask for a forklift job when his referral card clearly specified the job as shophand. Moreover, Respondent had never called in such a job, so no applicant for it would have been referred by the Nevada employment office.

While I discredit Ayers for the reasons stated above and specifically find that his testimony contains its own impeachment, I also find that Jones was corroborated in a significant and persuasive way.

The day after talking to Ayers, Jones talked to Vince Benneman, a business agent for Local 14, I.B.T. Jones related to Benneman his experience of the day before and Benneman referred him to the Board's office. At the hearing, Benneman did not testify, but the parties stipulated that Jones did in fact complain to Benneman the next day and tell him substantially the same facts concerning the conversation he had with Ayers the day before, just as Jones had testified at the hearing. This prompt complaint by Jones together with the absence of any reason as to why he would fabricate his testimony are additional factors which cause me to credit Jones and discredit Ayers.

B. *Analysis and Conclusions*

I begin with a recent Board-approved statement of law made by Administrative Law Judge Saunders:

> . . . Questions concerning former union membership and union preference, in the context of job application interviews, are inherently coercive, without accompanying threats, and are therefore violative of Section 8(a)(1) of the Act. . . .[7]

Based on this authority, I find that, when Ayers asked Jones whether he was a member of a union and stated that Respondent did not hire union members, Respondent violated the Act.[8]

In addition, the Board has held that an employer violates Section 8(a)(3) and (1) of the Act when it refuses to consider an application for employment for reasons proscribed by the Act.[9] Thus, I find that an employer is not permitted to refuse employment to a job applicant because of union membership or affiliation, reasons proscribed by the Act. I further find that Jones was not hired for those very reasons. Moreover, I find that Jones was qualified to perform the work of shophand and that Respondent had a vacancy as of August 27. Finally, I find that there is no evidence even to suggest that Jones would not have been hired in the absence of his protected activity. Accordingly, I find that, by not hiring Jones for the position of Shophand, Respondent violated Section 8(a)(1) and (3) of the Act.[10]

In conclusion, I note that on May 11, 1981, less than a month before the hearing in this case was due to commence, Respondent sent Jones a letter which read as follows:

> Dear Mr. Jones:
>
> At this time our company has the position of Shophand available. If you are interested in applying, we would be more than happy to accept your application and offer you employment for that position. Due to the circumstances we would appreciate your reply to our offer in writing. If we do not hear from you by May 18, we will assume that you are not interested.
>
> B. N. Ayers [G.C. Exh. 3.]

On May 13, 1981, Jones wrote back to Respondent, "At this time I am unable to accept your job offer." (G.C. Exh. 4.) The General Counsel agreed that any backpay liability would be tolled as of May 13, 1981, and further stated that Jones did not desire to be hired by Respondent.

CONCLUSIONS OF LAW

1. A & A Ornamental Iron, Inc., is an employer engaged in commerce, and business operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act, as amended.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act, as amended.

3. Respondent violated the Act as follows:

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[6] What follows is an exchange between Ayers and myself wherein I was attempting to determine which of Respondent's current employees were related to him by blood or marriage:

> AYERS: Okay, Andy Young married my sister.
>
> JUDGE STEVENSON: So he is your brother-in-law.
>
> AYERS: Brother-in-law.
>
> JUDGE STEVENSON: And what is his [Andy Young] job?
>
> AYERS: He is not one of the five, though, but I don't consider him a Shophand, or what we would call "employee."
>
> JUDGE STEVENSON: What would you consider him? What does he do?
>
> AYERS: Shophand.
>
> JUDGE STEVENSON: He is a Shophand, but you don't consider him to be one of the five or more that you referred to a moment ago?
>
> AYERS: Well, do you consider your cousin an employee? I sure don't.

This last answer was given in a sarcastic and disrespectful tone of voice.

[7] *Quality Drywall Company, Inc.*, 254 NLRB 617, 621 (1981).

[8] *Daily Transit Mix Corporation*, 238 NLRB 879 (1978).

[9] *Valley Cabinet & Mfg., Inc.*, 253 NLRB 98, 99–100 (1980).

[10] Ayers testified that Respondent never hired a job applicant who failed to submit a job application. Putting aside that, even without an application, Respondent offered Jones an immediate job in a letter dated May 11, 1981—a matter to be considered below—I find that, in light of the credited testimony, it would have been entirely futile for Jones to file a job application with Respondent. Accordingly, this failure to file one in no way affects his rights in this case.

(a) Section 8(a)(1) of the Act by interrogating Jones, a job applicant, about his past union membership or union affiliation.

(b) Section 8(a)(1) of the Act by telling Jones that Respondent did not hire individuals who were members of a union.

(c) Section 8(a)(1) and (3) of the Act by refusing to hire Jones because of Jones' past or present union membership or affiliation.

THE REMEDY

Since I have found that A & A Ornamental Iron, Inc., has engaged in, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act, as amended.

ORDER[11]

The Respondent, A & A Ornamental Iron, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall:

. Cease and desist from:

(a) Interrogating job applicants about union membership or affiliation.

(b) Telling job applicants that Respondent did not hire individuals who are or were members of or were affiliated with a union.

(c) Refusing to hire persons because they are members of or are affiliated with a union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Make whole William David Jones by paying to him backpay from August 28 to May 13, 1981, computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

(b) Post at its place of business in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Robert E. Cashdollar, Sr., d/b/a Nelson Metal Fabricating *and* United Steelworkers of America, AFL-CIO-CLC. Case 6-CA-11736

January 11, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 9, 1981, Administrative Law Judge William A. Gershuny issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Robert E. Cashdollar, Sr., d/b/a Nelson Metal Fabricating, Butler, Pennsylvania, his officers, agents, successors, and assigns, shall pay Eugene Zdral the sum of $3,441.38, Larry Jurysta the sum of $3,087.46, and Dennis Grame the sum of $5,763.74, plus interest to be computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). Payment of these sums shall be minus any taxes required to be withheld by Respondent under Federal, state, and local law.

SUPPLEMENTAL DECISION

WILLIAM A. GERSHUNY, Administrative Law Judge: This backpay proceeding, initiated by specification dated January 29, 1981, followed court of appeals enforcement on October 17, 1980, of a Board Decision and Order of February 1, 1980, 247 NLRB 730, ordering reinstatement and backpay for four employees found to have been wrongfully discharged by Respondent on October 24, 1978.

A hearing was conducted in Pittsburgh, Pennsylvania, on August 31, 1981.

Counsel for the General Counsel admits that valid offers of reinstatement were made and declined on January 16, 1981, and that one of the four employees, Robert Black, sustained no wage loss.

The record facts are undisputed and support the backpay computations set forth in Appendices A-1 through A-10, B-1 through B-10, and C-1 through C-10. [Omitted from publication.] Payroll records provided for inspection by Respondent reflect the average weekly hours worked by each of the three employees, their rates of pay, and the amounts of pay increases thereafter received by comparable employees. The wage policy of Respondent is further reflected in a written notice to employees and, while to some extent pay raises were dependent on individual performance, there was no evidence offered which would suggest, let alone support, a finding, that any of the three employees would not have qualified for such raises.

Excess mileage data, representing mileage to and from interim employment in excess of mileage to and from Respondent's place of business, was credibly established by employee testimony. The mileage cost computations of the Board's field examiner were made on the basis of 17 cents per mile, a not unreasonable basis, and one employed by the Internal Revenue Service for business vehicle use. Union dues in connection with interim employment were establshed by information obtained from local union records. And, finally, offsetting interim earnings were established through reports of interim employers and the credible testimony of the three employees themselves that no other income was derived during the period from employment of any kind. There is no evidence that any of the employees neglected to seek interim employment or intentionally interfered with their ability to obtain or maintain such employment. While this case raises no factual issues, Respondent's answer does raise a number of legal ones. The first, a request for jury trial, was denied at the hearing on authority of *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The second, that travel expenses and union dues are not proper elements of a backpay award generally or under the specific facts of this case, similarly is denied, and to that extent Respondent's answer is stricken, on authority

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[1] The General Counsel's exceptions erroneously state that the Administrative Law Judge failed to rule on his motion to strike those portions of Respondent's answer challenging the use of the *F. W. Woolworth Company*, 90 NLRB 289 (1950), quarterly backpay computation formula in this case. As Respondent admits in its exceptions, the Administrative Law Judge did, in fact, grant the General Counsel's motion to strike at the hearing.

We, however, do not adopt the Administrative Law Judge's discussion of the supposed inequities of the *Woolworth* formula as applied to the facts of this case, where two of the discriminatees had interim earnings exceeding gross backpay.

The Board with longstanding court approval orders *reinstatement* and *backpay*—utilizing a quarterly balancing—against interim earnings—of the amount that would have been due the employee from his former employer. The purpose of this quarterly balancing is to discourage delay of an offer of reinstatement. Such an offer tolls backpay liability. An employer is, of course, entitled to resist reinstatement and backpay up to the point of court enforcement of the Board's order. If the employer is successful, it avoids both the duty to reinstate and to pay backpay. If it is not, the result may be, as here: two of the employees, who were skilled, achieved more gainful employment for the greater part of the backpay period. A third employee, unskilled, also achieved more gainful employment, but for a shorter period. In effect this Respondent took the risk of such variables and lost.

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of *Crossett Lumber Company*, 8 NLRB 440, 497–498 (1938), and its progeny.

The third issue—Respondent's principal contention—that the computation of backpay on a quarterly basis is without foundation in law, equity, or reason, similarly was rejected at the hearing, and to that extent Respondent's answer was stricken on authority of *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344 (1953). *Woolworth*, of course, represented a departure by the Board from its original method for computation of backpay established in *Pennsylvania Greyhound Line, Inc.*, 1 NLRB 1, 51 (1935), enfd. 303 U.S. 261 (1938). Respondent seeks a return to that method of computing backpay based on the entire period of unemployment. But there is yet another side to Respondent's contention which must be addressed—that the quarterly method of computation was never intended by the *Woolworth* Board to be a rigid, inflexible one, to be applied without regard to the circumstances of the particular case. Indeed, as the Supreme Court in *Seven-Up* noted, the pre-*Woolworth* rule was varied on a case-by-case basis where its application was oppressive. Based on strong suggestions by the Board in *Seven-Up* that it would continue to look to the special facts of each case in computing backpay, the Supreme Court commented, "We assume that the *Woolworth* formula will be applied in like manner." 344 U.S. at 350.

In this case, a number of factors warrant consideration in applying *Woolworth*. First, as the following computations indicate, two of the three employees actually earned considerably more through other employment than they would have earned in the employ of Respondent:

Eugene Zdral	
Gross wages loss, including pay raises	$12,723.12
Interim earnings, less expenses	14,986.97
Wage loss	0
Larry Jurysta	
Gross wages loss, including pay increases	$14,377.35
Interim Earnings, less expenses	28,457.36
Wage loss	0
Dennis Grame	
Gross wages loss, including pay increases	$11,778.36
Interim Earnings, less expenses	8,858.56
Wage loss	$2,919.80

Yet, applying the quarterly method of computation, Respondent's liability for backpay for those two employees exceeds $6,500, plus interest. The third employee actually earned $2,900 less through interim employment, yet, under the quarterly formula, he is entitled to $5,700, plus interest. Second, there is no evidence and no suggestion that Respondent delayed making an offer of reinstatement in order to diminish his backpay liability. His right to contest his liability under the Act, of course, is not challenged and the delay is wholly attributable to the 2-year litigative process: 6 months to reach hearing; 6 months for a recommended Decision and Order; 4 months for the Board Decision and Order; and 9 months for appellate court review. No contempt proceedings were required and a valid offer of reinstatement was made within 90 days of appellate court enforcement. Third, it is noteworthy that reinstatement was declined, despite the fact that two of the three employees were unemployed at the time. And fourth, had reinstatement been offered following either the Administrative Law Judge's Decision of September 1979 or the Board's Decision and Order of January 1980, each employee presumably would have declined it, since, at both times, each was employed and earning considerably more in other employment.

While there may be considerable merit, under the circumstances of this case, to Respondent's contention that application of the *Woolworth* formula produces a punitive remedy, it is one which properly is directed to the Board itself. Despite its assurances to the Supreme Court in 1953 to the contrary, the Board appears to have adopted an inflexible policy as to the application of *Woolworth*. An administrative law judge has no authority to disregard or revise established Board policy.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[1]

The Respondent, Robert E. Cashdollar, Sr., d/b/a Nelson Metal Fabricating, Butler, Pennsylvania, its officers, agents, successors, and assigns, shall make whole the following individuals by paying them the amount set forth opposite their name, plus interest thereon accrued to the date of payment and computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977), less tax withholdings required by Federal and state law:

Eugene Zdral	$3,441.38
Larry Jurysta	3,087.46
Dennis Grame	5,763.74

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[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Vincent et Vincent of Allentown Mall, Inc. *and* Barbers and Cosmetologists Division, United Food and Commercial Workers' Union, Local 400, AFL-CIO. Case 5-CA-12004

January 12, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 16, 1981, Administrative Law Judge Morton Needelman issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge only to the extent consistent herewith, to modify the remedy,[3] and to adopt his recommended Order, as modified herein and set forth in full below.

The facts, more fully set out in the Decision of the Administrative Law Judge, indicate that in late 1979 and early 1980 the Union attempted to organize several of Respondent's beauty salons including one in Camp Springs, Maryland. From the outset Camp Springs employee Barbara Akers supported the Union. She passed messages from the organizers to her coworkers, distributed union literature, and solicited authorization cards. The evidence shows her efforts on behalf of the Union were known to Camp Springs Manager Dale Terwilliger. In response to the organizational effort, Respondent distributed literature adverse to union membership in mid-January 1980,[4] and called a meeting on February 9 at which Supervisor Freide told approximately 15 employees of Respondent's opposition to the Union. As set forth below, Freide's remarks included a number of statements violative of Section 8(a)(1) of the Act.

The Administrative Law Judge concluded, and we agree, that Respondent violated Section 8(a)(3) on February 20 by discharging Akers because of her protected union activities.[5] We also agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) by virtue of Freide's statements during the February 9 meeting that he would never engage in collective bargaining with a union. Such a statement constitutes an anticipatory refusal to bargain, as fully detailed in the Administrative Law Judge's Decision. We also find, contrary to the Administrative Law Judge, that Freide's statements at the February 9 meeting threatening to discharge or replace employees if they went on strike, and that if they objected to his views about unions they could leave, as well as his earlier solicitation and interrogation of Karen Davis, were all violations of Section 8(a)(1) of the Act.

During Freide's conversation with employee Karen Davis in January, he asked Davis if she had heard about the Union. He also remarked to Davis that since she had been in the business a long time and knew that a union could not help the employees she should discourage the "young girls" from joining the Union. We do not agree with the Administrative Law Judge that the conversation was so brief and conducted in such a casual manner as to preclude an inference of improper interference or a tendency to be coercive.[6] The solicitation of Karen Davis to reject the Union is, in itself, an 8(a)(1) violation regardless of the alleged noncoercive tenor of the supervisor's actual remarks during such conversation.[7] By soliciting help from Davis individually, Freide was actually soliciting her to influence other employees to support Respondent

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

In the absence of exceptions we adopt *pro forma* the Administrative Law Judge's finding that there was no evidence that Terwilliger engaged in illegal interrogations of employees concerning an employees' meeting which took place sometime in February. In reaching this conclusion, we note that the General Counsel's exceptions refer only to alleged unlawful interrogation by Freide. We likewise adopt *pro forma* his failure to find unlawful certain restrictions placed on employee discussions of the Union.

[3] See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

[4] Hereinafter all dates are 1980 unless otherwise specified.

[5] Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), cited by the Administrative Law Judge. That decision concerns identifying the cause of a discharge where a genuine lawful and a genuine unlawful reason exist. Where, as here, the asserted lawful reason is found to be a pretext, only one genuine reason remains—the unlawful one. To attempt to apply *Wright Line* in such a situation is futile, confusing, and misleading.

[6] The Administrative Law Judge's reliance on *Delco-Remy, Div. of General Motors v. N.L.R.B.*, 596 F.2d 1295 (5th Cir. 1979), in which the court denied enforcement of a Board Order is, with all due respect to that court, inconsistent with current Board law. It is well settled that the duty of an administrative law judge is "to apply established Board precedent which the Supreme Court has not reversed." *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1965).

[7] *Electrical Fittings Corporation, a Subsidiary of I-T-E Imperial Corporation*, 216 NLRB 1076 (1975).

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against union representation.[8] It is equally well settled that interrogation of employees with respect to their union attitudes and sympathies without a legitimate purpose and adequate assurances against reprisal, which is the situation disclosed by this record, is inherently coercive, and hence violates Section 8(a)(1).[9]

We turn next to Freide's threat on February 9 to discharge or replace the employees if they went on strike. The record reveals that the three employee witnesses gave somewhat different versions of Freide's remarks at the February 9 meeting with respect to the possibility of being replaced or fired. According to Akers, Freide said that, if the employees went on strike, he would replace them. Kyle testified that Freide said, if the employees went on strike, they would either lose their jobs or be replaced. Davis testified that Freide said "that if we went union, he would fire us all."

Although the Administrative Law Judge made no credibility determinations with respect to the differences in these witnesses' testimony, we find it unnecessary to resolve any inconsistency in these accounts. The threat to fire strikers is clearly illegal. Additionally, the threat to replace strikers in the context presented here is likewise unlawful. An analysis of Respondent's entire antiunion campaign reveals an implicit warning that in dealing with the Union Respondent would so conduct the negotiations that a strike would result. Thus, there was but one theme: the inevitability of a strike if the employees selected the Union as their bargaining representative, and the dire consequences of such a strike, namely, the loss of jobs by the strikers. As the Administrative Law Judge here held, "Such an anticipatory refusal to bargain interferes with employees' free choice since it tends to create an atmosphere of futility, and of the inevitability of failure and concomitant employer-employee strife which, in turn, may lead to strikes and loss of jobs." We conclude that such appeals to the employees created an atmosphere rendering the exercise of free choice impossible and tended to interfere with, restrain, and coerce its employees in the exercise of their rights guaranteed by Section 7. Accordingly, the Respondent's threats of discharge or replacement were violative of Section 8(a)(1).[10]

Also, as found by the Administrative Law Judge, the accounts of witnesses Akers and Kyle indicate that at this February 9 meeting Freide said in effect that he did not want a union, that in his opinion a union brought trouble, and that if the employees did not like it they could leave. Although the Administrative Law Judge acknowledged that this statement could be interpreted as a threat of reprisal, he found that, since it was capable of a lawful interpretation, it was protected by Section 8(c) of the Act. This analysis is inconsistent with established Board law. In accord with precedent, we find that such remarks constitute a veiled threat designed to convey the impression that management considers continued employment incompatible with engaging in union activities. *Markle Manufacturing Company of San Antonio*, 239 NLRB 1353 (1979).[11] Accordingly, we conclude that Respondent's statement comes within that interference and coercion proscribed by Section 8(a)(1).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Vincent et Vincent of Allentown Mall, Inc., Camp Springs, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that Respondent would not bargain with Barbers and Cosmetologists Division, United Food and Commercial Workers' Union, Local 400, AFL–CIO, or any other labor organization.

(b) Discouraging membership in Barbers and Cosmetologists Division, United Food and Commercial Workers' Union, Local 400, AFL–CIO, or any other labor organization, by discharging employees or by discriminating in any other manner against employees in regard to hire or tenure of employment or any term or condition of employment.

(c) Telling employees that continued employment is incompatible with union activity.

(d) Threatening employees that if they go on strike they will be discharged, fired, or replaced.

(e) Soliciting employees for the purpose of discouraging other employees from joining the Union.

(f) Interrogating employees about the Union.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer Barbara Akers immediate and full reinstatement to her former job or, if that job no longer exists to a substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of pay she may have suffered by reason of the discrimination against her by payment to her of a sum of money equal to the amount she normally would have earned as wages, plus interest, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy."

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[8] See *Amber Delivery Service, Inc.*, 250 NLRB 63 (1980).

[9] See *Aero Corporation*, 233 NLRB 401 (1977).

[10] Moreover, the Board has held that an employer violates the Act when he avers that strikers, whether for economic or unfair labor practice reasons, will be permanently replaced immediately upon striking, without limiting his statements to a lawful pronouncement that he is legally entitled to replace economic strikers only. See *Huck Manufacturing Company*, 254 NLRB 739 (1981).

[11] In addition, we find the threat to continued employment by Freide in a context of the antiunion remarks set forth above was in fact designed to have a coercive effect on the employees.

(b) Expunge from its files any reference to the discharge of Barbara Akers on on February 20, 1980, and notify her in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future discipline against her.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its premises in Allentown Mall, Camp Springs, Maryland, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discourage membership in Barbers and Cosmetologists Division, United Food and Commercial Workers' Union, Local 400, AFL-CIO, or any other labor organization, by discharging employees or by discriminating in any other manner against employees in regards to hire or tenure of employment or any term or condition of employment.

WE WILL NOT inform our employees that we will never engage in collective bargaining with a Union.

WE WILL NOT employees that continued employment is incompatible with union activity.

WE WILL NOT unlawfully threaten our employees that if they go on strike they will be discharged, fired, or replaced.

WE WILL NOT solicit our employees for the purpose of discouraging other employees from joining the Union.

WE WILL NOT interrogate our employees about the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by the National Labor Relations Act.

WE WILL offer Barbara Akers immediate and full reinstatement to her old job or, if that job no longer exists, to a substantially similar job without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL pay Barbara Akers any wages she lost because we fired her, plus interest.

WE WILL expunge from our files any references to the discharge of Barbara Akers, and WE WILL notify her in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future discipline against her.

All our employees are free, without any objection from us, to become or refrain from becoming or remaining members of Barbers and Cosmetologists Division, United Food and Commercial

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[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Workers' Union, Local 400, AFL-CIO, or any other union.

VINCENT ET VINCENT OF ALLENTOWN MALL, INC.

DECISION

STATEMENT OF THE CASE

MORTON NEEDLEMAN, Administrative Law Judge: This case was heard in Washington, D.C., on January 27, 1981. The charges were originally filed by the Barbers and Cosmetologists Division, United Food and Commercial Workers' Union, Local 400, AFL-CIO, and later amended on May 15, 1980.[1] The complaint was issued on July 17, 1980. It alleges that Vincent et Vincent of Allentown Mall, Inc. (hereinafter Respondent), acting through its treasurer, William Freide, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (hereinafter Act), in January and February 1980 by interfering with, restraining, and coercing employees at its Camp Springs, Maryland, location in the exercise of their rights guaranteed under Section 7 of the Act by engaging in the following practices: threatening employees with discharge for supporting the Union; interrogating employees regarding their own and their fellow employees' union activities; soliciting employees to discourage their fellow employees from supporting the Union; telling employees that Respondent would close down before it would bargain with the Union; saying to employees that Respondent would not have a union at the Camp Springs, Maryland, shop, and if the employees did not like that prospect, they could leave. The complaint further alleges that Respondent discriminated against Barbara E. Akers by terminating her employment because of her membership in, assistance to, and activities on behalf of the Union.

Respondent's answer denied the substantive allegations of the complaint, but at the hearing Respondent admitted all jurisdictional facts as well as allegations relating to status of the Union as a labor organization and the supervisory status of William Freide and Dale Terwilliger, manager of Respondent's Allentown Mall salon. As a result of these admissions, the issues at the hearing were limited to (1) whether William Freide engaged in threats, solicitation, and interrogation which interfered with and coerced employees in the exercise of their rights under Section 7; and (2) whether Respondent discriminated against Barbara Akers by firing her because of her union acitivties.

All parties were given full opportunity to participate in the hearings by introducing evidence, examining and cross-examining witnesses, and presenting oral argument. Briefs were filed by the General Counsel and Respondent on March 25, 1981. Upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *Respondent's Business; the Union's Labor Organization Status; Commerce; The Role of William Freide*

The jurisdictional facts are not in dispute. Respondent, Vincent et Vincent of Allentown Mall, Inc., a Maryland corporation, operates a beauty salon in the Allentown Mall in Camp Springs, Maryland. Respondent corporation is part of a related chain of 16 corporations which operate 16 beauty salons under the trade name "Hair Pair" in the Washington, D.C., area.[2]

Respondent and all other corporations in the chain are owned and controlled by Vincent Gesumaria, president, Walter W. Stern, vice president, William Freide, treasurer, and Meyer Samuels, secretary. By virtue of the control exercise by these officers over the business operations and labor relations policies of the entire chain, the 16 corporations are properly considered as a single employer.

During the 12-month period prior to the issuance of the complaint, a representative period, the gross volume of business from the operations of the various beauty salons in Respondent's chain exceeded $500,000. During the same period, Respondent purchased and recieved products valued in excess of $50,000 directly from points located outside the State of Maryland.[3]

Thus, it is undisputed that Respondent is, and has been, an "employer" as defined in Section 2(2) of the Act; that Respondent is, and has been, engaged in "commerce" and in operations "affecting commerce" as defined in Section 2(6) and (7) of the Act, respectively; that the Union is, and has been, a labor organization within the meaning of Section 2(5) of the Act; and that William Freide is, and has been, an agent of Respondent and a supervisor within the meaning of Section 2(11) of the Act.

B. *Background; Union Activity; Alleged 8(a)(1) Violations*

This matter involves a labor-relations conflict which arose between January and February 20, 1980, at Respondent's beauty salon in the Allentown Shopping Mall in Camp Springs, Maryland. The Camp Springs salon employs 18 workers who are variously classified as receptionists, hairdressers (or haircutters or operators), and shampoo girls. From the time the Camp Springs salon opened 7 years ago, its has been managed by Dale Terwilliger. Respondent's treasurer, William Freide, regularly calls at the Camp Springs salon as part of his chainwide supervisory responsibilities.

In the background of the Camp Springs labor dispute was an attempt by the Union to organize several of Respondent's shops including the salon on Seminary Road in Virginia, where the Union had planted one of its paid organizers, Lisa O'Leary-Young, to work as a shampoo girl. In mid-December 1979, Freide learned that a union campaign was underway at Seminary Road. His reaction to the campaign was described as follows by O'Leary-Young:

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[1] After the complaint issued, the Barbers, Beauticians and Allied Industries International Association merged into the United Food and Commercial Workers' Union (hereinafter Union). The name in the case has been changed to reflect this merger.

[2] The complaint refers to seven corporations. Freide testified that two of the salons listed in the complaint are not Hair Pair shops. In all, there are 16 corporations under the same management, including Vincent et Vincent of Allentown Mall, which operate 16 "Hair Pair" salons in the Washington, D.C., area.

[3] See stipulation of February 24, 1981.

> He told the employees that he was very upset about the union, that he did not want a a union in the shop, he would not have a union in his shop, he wouldn't have anybody that belonged to a union working in his shop, they could just leave if they didn't like it, told them he was very distressed that there was a paid union organizer working at his shop. He told the employees that if they wanted to walk in the cold out on the picket line for however long they wanted to do it, that was fine with him, he didn't care.
>
> He told all the employees that if they joined the union or tried to join the union, that they would be black listed and that they would not get a job anywhere else and no one would want to hire them, and then he also made references to look what unions had done to the United Auto Workers and some stuff about Jimmy Hoffa and other matters like that.[4]

The testimony of O'Leary-Young concerning Freide's attitude toward union activity at Seminary Road was offered (and received without objection) as evidence of union animus on the part of Respondent, and not as proof of a substantive 8(a)(1) violation. Freide's remarks during the Seminary Road campaign led eventually to the filing by the Union of unfair labor practice charges against Respondent, but these charges were not pursued after the Union was defeated in a representation election.

While the instant complaint makes no mention of the Seminary Road campaign, Respondent was put on notice even before this proceeding began that the Seminary Road remarks, which contain a patently unlawful threat of retaliation if the Union is supported, would be offered to show Respondent's general hostility to the Union's campaign. Since nothing in O'Leary-Young's account of Freide's remarks on Seminary Road was contradicted by Respondent, her testimony should at least be considered as evidence of Freide's general attitude toward the Union which may be weighed against other evidence indicative of a possible change in his attitude. As shown in the evidence reviewed below, there is no evidence whatever of such a change in attitude.

Soon after the Camp Springs organizational campaign began on January 14, 1980, Freide handed Barbara Akers and Becky Kyle, haircutters, a Chamber of Commerce pamphlet outlining the case against union membership. Akers, the alleged 8(a)(3) discriminatee, testified that Freide said, "Lisa [Lisa O'Leary-Young] thinks I can't fire you, I'll show you that I can." This testimony, however, was uncorroborated since it was not recalled by Kyle. Later, Freide asked haircutter Karen Davis if she had heard about the Union. He also remarked to Davis that since she had been in the business a long time and knew that a union could not help the employees, she should discourage the "young girls" from joining the Union. Freide then took a union flyer away from Davis, and told her that she need not read this material. Respondent's attitude toward the Union was also demonstrated by the rule imposed by Manager Terwilliger forbidding employees to discuss the Union in the shop, although similar restrictions were not imposed on other private conversations.

In response to management's opposition to the organizational effort, several employees asked Freide to attend a meeting at the Camp Springs salon on February 9, 1980. Present at the meeting were Freide and some 15 employees. In Freide's version of what was said at this meeting, he was so scrupulous in avoiding *any* mention of the Union that he even refrained from bringing up his opposition to the signing of organizational cards, although he claims to have given some general advice warning the employees against the ill-advised singing of *any* papers.

Freide's account of what he said at the February 9 meeting taxes credulity. For even he concedes that the meeting was called to discuss employee grievances in the context of the Union's organizational campaign which management opposed. It is implausible that in such a setting the Union and its organizational effort were not mentioned by both the employees and Freide. In a word, Freide's version of what was *not* discussed, "I do not remember discussing unions," is so incredible, that I do not accept his version of what *was* said.

On the other hand, the testimony of three operators who attended the February 9 meeting (Akers and two other employees, Kyle and Davis) contains nothing which is innately unbelievable, and in giving testimony they seemed to be straight forwarded and sincere. This is not to say, however, that I have assigned equal probative weight to all facets of their testimony: corroborated recall was given great weight, while a single witness' uncorronorated version of what was said (in circumstances where corroboration was readily available) was given none. But it should be emphasized that differences in the ability of these three witnesses to recall uniformly all that was said at the meeting, which goes to the weight to be assigned a particular version of what happened, is in sharp contrast to the inherently incredible statement by Freide that the Union was never discussed at all.

According to the three witnesses, at the February 9 meeting the employees (through Becky Kyle, a haircutter and spokesperson for the employees) cited their grievances respecting pay, health benefits, and working conditions as their reasons for wanting the Union. All three witnesses testified that Freide responded by saying that he did not want a union, that in his opinion a union brought trouble, and that if the employees objected to his views about unions they could leave.

With respect to the possibility of being replaced or fired, the three employees gave somewhat different versions of Freide's remarks. According to Akers, Freide said that, if the employees went on strike, he would replace them. Kyle testified that Freide said, if the employees went on strike, they would either lose their jobs or be replaced. Davis testified that Freide said "that if we went union, he would fire us all."

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[4] At the time of the hearing herein, O'Leary-Young was a full-time employee of the union. O'Leary-Young has never worked at Respondent's Camp Springs shop. She voluntarily left the Seminary Road shop in February 1980.

Finally, Akers and Kyle testified that at the February 9 meeting Freide said he would never engage in collective bargaining with a union, and that if the employees went on strike they would lose their jobs.[5] This statement, which significantly was not part of casual conversation with a single worker, but instead was announced before practically all the employees who had gathered to hear management's response to the Union's organizational campaign, is an unfair labor practice under Section 8(a)(1) of the the Act as alleged in complaint paragraph 5(d). Such an anticipatory refusal to bargain interferes with employees' free choice since it tends to create an atomosphere of futility, and of the inevitability of failure and concomitant employer-employee strife which, in turn, may lead to strikes and loss of jobs. Moreover, Freide's statement that, in effect, he would never come to the bargaining table with an open mind (scarcely an accurate prediction if the statutory obligation to bargain in good faith is to be met) was calculated to have a coercive effect on employees who, "no more than the generality of mankind, are inclined to indulge in futile acts." *The Trane Company (Clarksville Manufacturing Division)*, 137 NLRB 1506, 1510 (1962).

Apart from Freide's remarks about his prospective refusal to bargain, the proof of other alleged 8(a)(1) violations has gaping holes. Thus, the evidence of alleged threats of reprisals by Freide for union activity, i.e., his alleged statement that "Lisa thinks I can't fire you, I'll show you that I can," and a threat purportedly made at the February 9 meeting, is murky. The "Lisa" statement could be recalled by only one of the two persons to whom it was directed, and two of the three witnesses who were present at the February 9 meeting did not even claim that there were any threats made of firing because of union activity.

Equally unimpressive is the evidence introduced to show that Freide solicited Karen Davis to discourage the "young girls" from joining the Union and improperly interrogated Davis about the Union. As far as the record will allow, this conversation, involving Freide, Davis, and one other employee (in contrast to the February 9 meeting when nearly all the employees were gathered to hear management's views), was so brief and conducted in such a casual manner as to preclude an inference of improper interference or a tendency to be coercive. See *Delco-Remy Division of General Motors Corp.* v. *N.L.R.B.*, 596 F.2d 1295 (5th Cir. 1979). In addition, there is no reliable evidence that Dale Terwilliger engaged in illegal interrogations of employees. The record shows that Terwilliger asked several employees about what was discussed at an employees' meeting held sometime in February (but *not* the February 9 meeting). Terwilliger's interest, however, is understandable since he had received an anonymous telephone threat that his arms would be broken if he opposed the Union. There is no evidence linking this phone call with any of the employees or the Union, but the call explains why Terwilliger asked the employees what was discussed at a meeting held prior to the telephone call.

Finally, the evidence is weak that Freide said that continued employment is incompatible with union activity as alleged in paragraph 5(e) of the complaint. In the account given by two witnesses (Akers and Kyle), what Freide said, in effect, was that he did not want a union, that in his opinion a union brought trouble, and that if the employees objected to his views they could leave. While these remarks could conceivably be interpreted by employeess as an implied threat of reprisal if union activity continues, it is equally plausible that the remarks were preceived by employees as simply a confirmation that Freide does not like unions, an opinion which he had the right to express under Section 8(c) of the Act, and which could hardly have come as a suprise to the employees.

In sum, what the record shows is that Freide was more cautious and circumspect in his conduct during the Camp Springs campaign than he had been at Seminary Road, but his hostility to the Union remained firm as shown when he overstepped the line of permissible antiunion argument and engaged in unlawful interference by saying he would not bargain collectively. As for the other alleged 8(a)(1) violations cited in complaint paragraphs 5(a), (b), (c), and (e), the evidence is either too meager to support an order, or there was a total failure of proof.

C. *The Discharge of Barbara Akers: The Alleged 8(a)(3) Violation*

From the outset of the Camp Springs campaign in January 1980, Barbara Akers was identified to union organizers as an employee who was actively seeking a union, and was willing to help organize one. Thereafter, beginning on January 14, 1980, Akers became one of the intermediaries between the union organizers, John Brown and Lisa O'Leary-Young, and the employees of the salon. Akers passed messages from the organizers to her coworkers, distributed union literature, and solicited authorization cards. Her efforts on behalf of the Union must have been known to Dale Terwilliger since he was seen by Terwilliger in conversation with organizer Brown, who wears a windbreaker with the words "Local 400" emblazoned on the back. It is also reasonable to infer that Terwilliger passed on his knowledge of Aker's union activity to Freide, given the fact that Freide was so vehemently opposed to any union attempt to organize his shops.[6]

The chain of events which led to the firing of Barbara Akers on February 20, 1980, began innocently enough when Akers interrupted a conversation between the receptionsiat, Denise Edwards, and Patricia Hunt, an operator, by remarking that Edwards should not believe everything she heard.[7] This caused Edwards to ask Terwilliger to reprimand Akers about interrupting her conversations. At this point, Freide happened to enter the salon on one of his periodic visits. Terwilliger conveyed to Freide Edwards' request to reprimand Akers. Akers was then asked by Friede to step outside the salon and into the public area of the mall. Akers refused to step outside, insisting that her job or "business" be discussed on the jobsite. Freide then spoke to her in the reception area of the salon. He accused Akers of harassing other employees and spreading rumors and threats. Akers became agitated, and she asked him in a loud voice to identify specific employees whom she had threatened. Freide told her to lower her voice. She refused. Freide told her to leave. Akers asked whether she was fired. At first, Freide replied that she was not fired, and that Akers should "go back and read [her] book." Akers replied, "What, my law book," an obvious reference to her legal right to engage in union activity. As Akers was walking to her station, she was recalled by Freide who said that she was fired for being rude. Akers was not given an opportunity to obtain further elaboration from Freide about the charge that she was spreading rumors or making threats.

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[5] Akers: "He said if we went on strike, he would replace us, and he said he would not bargain in any collective bargaining table"; Kyle: "He told us that if we went on strikes . . . . that we'd all lose our jobs, we would be replaced. And, he said, even if we were to get in the union and he was to be at a bargaining table, that he didn't have to bargain at all."

[6] Freide's testimony that he never discussed union activity with Terwilliger is unbelievable and, in fact, was contradicted by Freide's own statement that "Dale [Terwilliger] had told me that there were rumors because these people had come in passing out pamphlets . . . ."

The firing of Barbara Akers was an unusual occurrence. She was a competent haircutter, and as Freide testified, "you don't let good hair dresses go." Apparently, Akers was so proficient that she was hired on *two* occasions. She worked for Respondent between 1976 and 1978, left briefly to work for another salon, and then was rehired in the fall of 1978. That her services were highly regarded is also shown by the fact that Freide interceded on her behalf to ease tensions which had arisen among Akers, a shampoo girl, and an assistant manager.

While Respondent's employees often leave on their own, discharges are so rare that in Respondent's entire chain there have been less than 6 discharges in 20 years, and prior to the Akers discharge, Freide had not been personally involved in a single firing. All discharges, according to Freide, represent "less than 1 to 5 percent . . . a minute amount."

As Freide would have it, this rare event—the firing of Barabra Akers on February 20, 1980—was justified because "she was rude, abusive and impossible." But the record shows that management of Respondent ordinarily does not react as severely as Freide did on February 20 to other brief flurries of indecorous or even embarassing behavior. There have been several instances when voices have been raised in the presence of customers, and no one was fired. Thus, in early 1980, while operator Becky Kyle was discussing with a customer the benefits of union membership, she was reprimanded in a loud voice by Dale Terwilliger and told not to discuss the Union. On still another occasion during the summer 1980, operator Karen Davis was reprimanded by Terwilliger, who used a loud and vociferous tone in the presence of customers.

These incidents indicate that management of Respondent is extremely reluctant to fire capable employees. Moreover, there is evidence that even if just cause arises, the employee will usually be given a second or even a third chance to mend her ways. Moreover, should an employee be discharged, there is precedent for her to be reinstated. Against this background, it is simply not plausible that Freide would allow such a trivial incident—Barbara Akers' interruption of a conversation (significantly, not work but apparently a private conversation) between Denise Edwards and Patricia Hunt and Akers' subsequent heated, but brief, exchange with Freide—to assume such serious proportions that it would lead to the discharge of such a capable worker, unless there was an overriding other reason. As it happens, there is positive evidence that Respondent was actively searching for a pretext to fire Akers because of union activity. On February 20, the very day she was fired, Dale Terwilliger was overheard to say that if Akers was just 5 minutes late "she's gone." Besides, it is noteworthy that the conversation between Freide and Akers on February 20 did not center on whether it was proper or improper, polite or impolite, to interrupt Denise Edwards; the conversation became heated when Freide brought up the *real* subject which was bothering management—Akers' efforts on behalf of the Union, which he characterized as spreading rumors and threats.

Under the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), first, the General Counsel must make a *prima facie* showing that protected conduct was a "motivating factor" in the employer's decision to discharge an employee. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected activity.

The General Counsel has clearly met its burden by showing the following: Barbara Akers was one of the most agressive supporters of the Union; her activity on behalf of the Union was known to Respondent; Respondent demonstrated a union animus in Freide's remarks during the Seminary Road campaign and his statement that he would never bargain with a union; and on February 20, 1980, Akers was fired notwithstanding her reputation as a competent hairdresser.

Since the General Counsel has met his responsibility for establishing a *prima facie* 8(a)(3) violation, the burden then shifts to Respondent to show that Akers would have been fired anyway even if she had not engaged in union activity. Not only was there a total failure of proof on Respondent's part, but the preponderance of the evidence indicates outright pretext. Terwilliger's statement that if "she [Akers] is five miniutes late she is gone" suggests that Respondent was just looking for an excuse to fire Akers. Also, the argument between Freide and Akers began over a matter of the utmost triviality—

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[7] I have considered all accounts of the February 20, 1980, incident—General Counsel's witnesses Akers, Kyle, Davis and Responent's witnesses Freide, Terwilliger, Edwards (present employees of Respondent), and Hunt (former employee of Respondent)—and except for discrepancies about the tone and voice level of the participants, there were no major differences. The testimony of Becky Kyle that the incident ended with Terwilliger's remark, "there goes your union," was not corroborated by other testimony. Terwilliger testified that he said, "Good riddance" which in itself is an odd reaction of a manager to the departure of a competent employee, and suggests that management was happy to see a union "trouble-maker" leave.

Akers' interruptions of Denise Edwards' conversations—and it became heated only when Freide brought up Akers' alleged spreading of rumors and threats (clearly a reference to Akers' union activity), again indicating that what was really bothering Freide was Akers' union activity and not a petty squabble with a coworker. Moreover, even accepting Freide's statement that Akers was loud and rude during the January 20 argument, it is doubtful that a display of bad manners would have resulted in her firing if she had not been engaged in union activity. Good hairdressers are simply too hard to replace; comparable "scenes" in Respondent's shop have not been grounds for dismissal in the past; and it is reasonable to infer that but for Akers' union acitivity at most she would have been warned not to raise her voice again in the shop, and to step outside when asked to do so.

Respondent's reliance on *Sullair P.T.O., Inc.* v. *N.L.R.B.*, 641 F.2d 500 (7th Cir. 1981), as justifying the dismissal of Akers is misplaced. There, an employee was warned against publicly directing profanities toward his employers. In response to this admonition during a companywide meeting, he proceeded to characterize management generally as "rotten m— f—g c—s," and the company controller as a "f—g poor manager." Moreover, the record showed that the employee had a history of such outbursts, that his use of especially ripe profanity even exceeded the "shop talk" standard of the plant, that his outburst disrupted a management-employee meeting, and that the employee acknowledged that he had been fired for insubordination. Similarly, *Badische Corporation*, 254 NLRB 1195 (1980), involved direct employee defiance of a specific order and a willingness to incur the risk of discipline, which had been clearly articulated in advance. In contrast, the brief flareup between Freide and Akers involved no more than perhaps an unseemly raising of voices which clearly had been tolerated on other occasions.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Seciton 2(5) of the Act.

3. By telling employees that Respondent would never bargain with the Union, Respondent has engaged in, and is engaging in, an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. By discharging Barbara Akers and thereby discouraging membership in the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The unfair labor practies engaged in by Respondent, as set forth in Conclusions of Law 3 and 4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not engaged in any unfair labor practice not specifically found herein.

THE REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, my Order will require Respondent to cease and desist from these practices, and to take such affirmative action as is consistent with the policies of the Act. Therefore, my Order will require Respondent to offer full and immediate reinstatement to Barbara Akers and to make her whole for any losses she may have suffered by reason of the discrimination practiced against her. Any backpay found to be due to Akers shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and shall include interest in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]

Associated Milk Producers, Inc. *and* **Donald L. Brower** *and* **L. D. McDaniel.** Cases 16–CA–9163 and 16–CA–9406

January 13, 1982

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On March 13, 1981, Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Decision of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. At the hearing, during the rebuttal stage of the proceeding, Donald Brower testified on behalf of the General Counsel concerning a conversation he had with Supervisor Foster just prior to the union election in 1979:

> The Witness [Brower]: I had talked to him [Foster]—or was talking to him before the union election, and we was talking about Dean Cinnamon and L. D. McDaniel and Jessie Smith and a couple of others that was batting heavy for the Union.
>
> And I made the remark that it was a damn shame that people like that had to be around, because I was nonunion, I was for the company and I was out there doing what I could for the company
>
> And he told me not to worry about it. He said, "I'll get rid of the fat bastards any time I want to."
>
> He said, "He'll make a slip . . . an error or something, and I'll get him."

At another point in his testimony Brower recounted another preelection conversation with Foster concerning McDaniel:

> The Witness [Brower]: I didn't like L. D. [McDaniel], and I told J. D. [Foster] I didn't like him. I was going to whip his ass the first chance I got.
>
> And he said, "Well, when you whip him, make sure that I don't see it," he said, "then I won't have to do nothing about it."
>
> And he said, "I wish you would whip him, as a matter of fact." He said, "I'd like to see somebody whip him."

259 NLRB No. 131

Respondent moved to strike the foregoing testimony as prejudicial, since the evidence should have been offered during the General Counsel's case-in-chief. Citing *Acute Systems, Ltd. d/b/a McDonald's*, 214 NLRB 879, 881 (1974), the Administrative Law Judge sustained Respondent's motion. The General Counsel has excepted to this ruling, and we find merit in his exception.

An administrative law judge has the discretion to exclude evidence improperly introduced on rebuttal, but his discretion should not be exercised to the detriment of a party's rights. In *McDonald's, supra*, the Administrative Law Judge declined to keep the record open to receive evidence that should have been subpenaed and introduced during the General Counsel's case-in-chief. She specifically observed, however, that the result reached in her Decision would not have been altered had the excluded evidence been considered. In the case before us, on the other hand, the Administrative Law Judge was at some pains to point out that the excluded evidence would have constituted strong support for the General Counsel's theory that L. D. McDaniel had been unlawfully discharged. In the absence of the excluded evidence, the Administrative Law Judge concluded that the General Counsel had failed to establish a *prima facie* case. Thus, it is clear that the excluded evidence was not only relevant but crucial to an informed legal assessment of Respondent's reasons for the discharge and therefore to the protection of McDaniel's statutory rights.

Under those circumstances, the preferable course would have been to admit the evidence, and we do so now.[1] We are aware, however, that the evidence was introduced at a stage in the proceeding that made it difficult for Respondent to counter effectively, assuming that it could have done so. Further, by sustaining Respondent's motion to strike, the Administrative Law Judge relieved Respondent of the responsibility of introducing its own evidence concerning the conversations between Foster and Brower. Respondent, of course, would be far more severely prejudiced by the lack of opportunity to present evidence to contradict Brower in this respect were we prepared to find, on the basis of the previously excluded testimony, that McDaniel was discriminatorily discharged in violation of Section 8(a)(3) of the Act. Under those circumstances, we would consider a remand necessary to permit

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[1] We credit Brower's testimony based on the fact that the Administrative Law Judge found him to be a generally credible witness.

Respondent to introduce further evidence on the matter. As discussed at length in this Decision, however, we have upheld the Administrative Law Judge's conclusion that the discharge of McDaniel was lawful.

2. The Administrative Law Judge found that Donald Brower was discharged for failing to conform to a valid work rule and concluded that his termination therefore did not constitute a violation of the Act. The General Counsel has excepted to this conclusion, and we agree with the General Counsel that Brower was first laid off and then discharged by Respondent in retaliation for his having expressed prounion sympathies and having complained about his wages.

The record establishes that, during the 1979 organizing campaign conducted at Respondent's facility by Teamsters Local 47, Brower, a new employee, was openly and vociferously opposed to the Union. The Union was defeated in an election held on November 2, 1979.[2]

Sometime in early 1980[3] Brower began to change his mind about the advisability of union representation at his employer's facility. His conversion was completed and his prounion attitude fixed when he learned from Supervisor Foster in March or April that over-the-road drivers would soon be paid an hourly wage instead of the mileage rates they had been receiving.[4] Brower's reaction to the information was to tell Foster that in the future he intended to support the Union.

About a month after Brower announced to Foster that he intended to campaign for the Union, Brower was sent to Respondent's El Paso terminal; while there he urged the El Paso drivers to support the Union and accused the Company, in frank and unflattering terms, of being unfair. El Paso Supervisor Smith learned of Brower's activities and telephoned Foster. When Brower returned from El Paso to Crowley, Foster told him to turn in his credit card, and that he was being placed on sick leave.[5] When Brower protested, Foster told him that he could not return to El Paso. Foster told Brower, "The management doesn't want you to come back to El Paso because you talk too much. You agitate."

The Administrative Law Judge found, and we agree, that Respondent laid off Donald Brower in retaliation for the remarks made to his fellow employees at El Paso, which were protected under the Act, and we therefore conclude that the layoff constituted a violation of Section 8(a)(3) and (1) of the Act. We shall order a remedy accordingly.

Brower was laid off on May 23. He made numerous calls to Foster during the layoff to inquire about returning to work and was eventually recalled as a route driver[6] on June 11. He was discharged on June 15, ostensibly for failing to report an accident.

There is no doubt that Brower did in fact have a minor accident while backing a tractor-trailer into a loading bay at Vandervoort's Dairy, but there is considerable question whether Brower was aware that he had scratched the vehicle. The damage consisted of a shallow scratch 10-12 inches long on the left rear fender of the trailer, caused when Brower scraped against the wall of the unloading bay as he was backing the vehicle down the ramp. Two witnesses, both of whom testified at the hearing, saw the accident, but neither mentioned it to Brower himself. Under all the circumstances, we find it entirely possible, and even probable, that Brower, engaged in the noisy and delicate task of backing a large tractor-trailer rig down into an enclosed loading bay, did not realize that the side of the truck had slightly scraped a post. Thus, although we agree with the Administrative Law Judge that Brower did damage the truck, we draw no adverse inferences from the fact that he denied having done so when Foster confronted him with his failure to file a report of the accident or from the fact that he maintained his denial at the unfair labor practice hearing. In this connection we observe further that Brower had in the past reported all accidents to his vehicle and that Respondent therefore had no reason to assume that he would deliberately have failed to do so in this instance.

Based on the foregoing, we agree with the Administrative Law Judge that the General Counsel established a *prima facie* case of unlawful discharge. We disagree, however, that Respondent introduced sufficient credible evidence to rebut the General Counsel's case and demonstrate that it would have terminated Brower even absent his union activities. Respondent argues that it fired Brower pursuant to a valid and written work rule that required its employees to report all damage to vehicles, however minor. Respondent's rule, however, did not mandate termination for violations of the rule. To the contrary, according to Respondent's "Driver's Manual," which contains an explanation of work rules and regulations, "Any driver failing to report an accident *could* be subject to immediate discharge."[7] Elsewhere the manual provides that "[f]ailure to report an accident is cause for immediate dismissal."[8] Nowhere does the handbook suggest that the discipline imposed for failure to report an accident is not discretionary with management.[9] Since the rule on its face is discretionary, the burden was upon Respondent to demonstrate that termination was the discipline uniformly imposed for violation of the rule. The evidence here suggests the contrary; when Brower asked Foster how many other employees had been fired for failing to report an accident, Foster replied, "None. But I'm firing you."

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[2] That election was subsequently set aside and a new election ordered. *Associated Milk Producers, Inc.*, 255 NLRB 750 (1981).

[3] All dates are in 1980 hereafter unless otherwise indicated.

[4] The change in the wage structure reduced Brower's net income by almost 60 percent.

[5] The reference to medical leave was apparently Foster's peculiarly humorous response to Brower's remark that the Company's conduct made him sick.

[6] Brower had been an over-the-road driver prior to his layoff. The record is insufficient to enable us to determine whether Brower's June 11 recall was to a substantially equivalent position; therefore, insofar as such a determination is relevant to the issue of reinstatement and backpay, we leave it to the compliance stage of this proceeding.

Moreover, Respondent's defense is undermined by its past practice of imposing disproportionately harsh punishment upon union activists for infractions of its rules. In a prior case involving Respondent, the Administrative Law Judge concluded, and the Board affirmed, that employee Charles Tingle was unlawfully discharged in retaliation for his union activities, noting that "[t]he apparent unreasonableness of the punishment here carries an inference that the asserted reason for the discharge was pretext."[10] Clearly, Respondent's method of ridding itself of union adherents was to seize upon the infraction of a rule to justify their discharges. In Brower's case, as we noted earlier, it is not even clear that the rule requiring an employee to report all accidents was, in any but the most literal sense, violated at all. We therefore find that Respondent has failed to rebut the General Counsel's *prima facie* case by showing that the discharge would have been made in the absence of Brower's protected activity and conclude that Donald Brower was discharged in violation of Section 8(a)(3) and (1) of the Act.

3. In concluding that Respondent's discharge of L. D. McDaniel did not constitute a violation of the Act, the Administrative Law Judge found that the General Counsel had not established a *prima facie* case of unlawful motivation. While we agree with the Administrative Law Judge that Respondent did not discharge McDaniel unlawfully, we find that the General Counsel did establish a *prima facie* case, which Respondent successfully rebutted.

L. D. McDaniel was a longstanding union activist, and there is no question that at the time of his discharge on September 30 Respondent was acutely aware of his union sympathies. In addition to his organizational efforts, McDaniel testified against Respondent at an unfair labor practice hearing, and Respondent was reminded of that fact shortly before McDaniel's discharge when, on September 9, Administrative Law Judge Anderson issued his Decision in that proceeding, finding Respondent in violation of the Act. Moreover, the record demonstrates that Respondent harbored animus toward the Union and its supporters. We have concluded that Respondent violated Section 8(a)(3) in the discriminatory layoff and discharge of Donald Brower; in addition, the conversations between Foster and Brower in 1979 indicate union animus directed specifically against McDaniel.[11] The elements of protected activity on the part of the discharged employee, employer knowledge of the protected activity, and employer animus toward the Union, taken together, are sufficient to establish a *prima facie* case of unlawful discharge. Certainly those elements are present here. We therefore find that the General Counsel established *prima facie* that D. McDaniel was discharged in retaliation for union activity.

Respondent argues that McDaniel and another employee, Forrest Cottrell, were fired for fighting on the job, not for union activity. The record establishes that Respondent maintains an unwritten rule against fighting and that McDaniel was aware of the rule. McDaniel testified that he would have expected to be fired had he been the aggressor in the fight.[12] There is no question that McDaniel did engage in a fistfight and did hit his opponent with a wrench in the course of the conflict. Moreover, Cottrell was also fired, and the General Counsel introduced no evidence that Cottrell was a union supporter or that he was fired in an attempt to legitimize the unlawful discharge of McDaniel. Thus, we find that Respondent maintained a legitimate no-fighting rule which was evenly adminstered, and that McDaniel and Cottrell broke the rule and were terminated after an investigation of their conduct. We conclude that Respondent has introduced sufficient evidence to rebut the General Counsel's *prima facie* case of wrongful discharge. Accordingly, we conclude that the Administrative Law Judge properly dismissed that portion of the complaint alleging that the discharge of L. D. McDaniel violated Section 8(a)(3) of the Act.

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[7] Resp. Exh. 1 at p. 5.

[8] *Id.* at 12.

[9] The handbook also states:

> The heart of the Safe Driving Award Program is the careful determination of the preventability of each accident in which a driver is involved. This must be done in light of all the facts pertinent to the accident's occurrence. Unearthing of these facts is sometimes difficult in practice but it can be made easier by training drivers to report the accidents in which they are involved, completely and accurately.

Complete investigation by management is equally necessary. In finding Brower's discharge legitimate, the Administrative Law Judge determined that termination was not a disproportionate discipline in light of the importance of the rule to Respondent's operation. To the extent that the Administrative Law Judge advanced reasons for Respondent's reporting rule other than that given by Respondent, we disavow his findings. Insofar as such justification may be necessary to rebut an inference of unlawful motive, the burden is upon Respondent, not upon the Administrative Law Judge, to advance reasons for its rules and to justify imposition of seemingly disproportionate discipline.

[10] *Associated Milk Producers, Inc., supra.*

[11] We find, however, that the probative value of these conversations is diminished by time, since they occurred nearly a year before McDaniel's termination.

[12] McDaniel testified that he struck the first blow but maintained that it was in self-defense, as Cottrell was approaching in a menacing fashion.

THE REMEDY

Having found that Respondent laid off and discharged Donald Brower because of his union activities and sympathies in violation of Section 8(a)(3) and (1) of the Act, we shall order that Respondent cease and desist therefrom and take certain actions intended to effectuate the policies of the Act. We shall order Respondent to offer Donald Brower immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of the discrimination practiced against him, with backpay computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[13]

CONCLUSIONS OF LAW

1. Associated Milk Producers, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Teamsters and Helpers Local 47, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off and discharging Donald Brower in retaliation for his union activities and other protected activity, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Associated Milk Producers, Inc., Blue Mound, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off employees as a result of their union activity.

(b) Discharging employees as a result of their union activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Donald L. Brower immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him, together with interest thereon, computed in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Blue Mound, Texas, facility copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

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[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would compute the interest due on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT lay off employees because of their union activities and sympathies.

WE WILL NOT discharge employees because of their union activities and sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL offer Donald L. Brower immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered as a result of our discrimination against him, with interest.

ASSOCIATED MILK PRODUCERS, INC.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge: These consolidated cases were heard before me in Fort Worth, Texas, on January 8, 1981, pursuant to a consolidated complaint, dated November 6, 1980, issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 16 of the Board. The consolidated complaint is based on charges filed by Donald L. Brower, an individual (Brower), and L. D. McDaniel, an individual (McDaniel), against Associated Milk Producers, Inc. (Respondent or AMPI herein).

In the consolidated complaint, the General Counsel alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, by unlawfully interrogating an employee around mid-March 1980; Section 8(a)(3) of the Act by laying off Brower on May 21, 1980, and discharging him on June 15, 1980; and Section 8(a)(3) and (4) of the Act by discharging McDaniel on September 30, 1980.[1]

By its answer, Respondent admits certain allegations, but denies that it has violated the Act in any manner.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel[2] and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Kansas corporation headquartered in San Antonio, Texas, operates as a distributor of dairy milk from various locations in Texas. Its former facility at Crowley, Texas, now located at Blue Mound, Texas, is the operation involved herein. During the past 12 months, Respondent had gross sales in excess of $500,000, and purchased and received at its Texas locations goods and services valued in excess of $50,000 directly from points located outside the State of Texas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] All dates shown are for 1980 unless otherwise indicated.

[2] I am constrained to observe that the General Counsel's brief contains certain gross inaccuracies. For example, at br. p. 4 the General Counsel states that El Paso location Supervisor Bob Smith was aware of Brower's "change of sentiments from supporting Respondent in the union organizational campaign to supporting the Union." Not only is none of the cited pages support for the assertion, but the following appears in the cross-examination of Smith by the General Counsel:

> Q. That you—when he was talking against the company and for the union—
>
> A. He didn't say whether or not he was for the union at that time. *And I didn't say that.* [Emphasis supplied.]

At br. p. 7 the General Counsel asserts that Crowley Supervisor J. D. Foster "testified that he had never fired anyone before for fighting and *hired* an employee named Webber who was known to have been a frequent fighter while in the employ of Respondent. In *rebuttal*, the General Counsel's witness, Brower, testified that he had had a conversation with Foster in which Foster asked Brower to whip McDaniel but not to let Foster see it. The surface question related to whether Foster had rehired Webber, for Foster had become a supervisor after Webber had earlier left. During the General Counsel's cross-examination of Foster, the latter stated:

> Q. All right, sir. But you hired him [Webber] anyway?
>
> A. I didn't rehire him. He was hired up at the Sanger location and then later transferred, when we put the Crowley location together and the Blue Mound location together, I inherited that location up there.

With respect to the *rebuttal* testimony that Foster allegedly encouraged Brower to whip McDaniel, that evidence was *stricken* when I sustained Respondent's motion to strike on the basis that it was not proper rebuttal. At the General Counsel's request that the evidence be made an offer of proof, I granted such motion and rejected the offer. To the extent that the General Counsel's reference to this rejected evidence in his brief is an unarticulated motion that I reverse my ruling, I decline to do so and adhere to my rulings at the hearing.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Chauffeurs, Teamsters, and Helpers Local 47, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union or Local 47 herein) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Introduction

The principal issues involved in this consolidated case are whether Respondent laid off Donald L. Brower on May 21, 1980, and fired him on June 15 because of his support of Union (or, as Respondent asserts, for failing to report an accident), and whether it fired L. D. McDaniel on September 30 for the same reason (or, as Respondent asserts, for engaging in a fight with another driver) plus the additional reason that he testified against Respondent on April 22 before Administrative Law Judge Clifford H. Anderson in a Board proceeding.

At the time of their discharges by Respondent, Brower had been employed only since August 1979 as a transportation (over-the-road) driver, whereas McDaniel had been employed as a route (local pickup) driver for nearly 12 years.

Complaint paragraph 7 (in conjunction with par. 14) alleges that Respondent violated Section 8(a)(1) of the Act by Crowley Terminal Manager J. D. Foster's conduct, "since on or about mid March," of orally "interrogating one of its employees concerning such employee's union preferences and desires."

At the close of evidence, Respondent moved that I dismiss complaint paragraph 7 on the basis that no evidence was adduced in support of it. (the General Counsel opposed the motion.) I denied the motion then on the ground that a reading of the record might disclose some evidence in support of the allegation even though I could recall none. In his brief, counsel for the General Counsel "concedes that there is insufficient evidence to warrant a finding of oral interrogation as alleged in paragraph 7 . . . ." (Br. p. 2.) Although the General Counsel moves to withdraw the oral interrogation, he seeks to retain the generalized phrase of interference, restraint, and coercion in paragraph 7 for "derivative 8(1)" purposes. As complaint paragraph 14 (conclusionary 8(a)(1) allegation) may serve the derivative purpose, I now grant Respondent's motion to dismiss complaint paragraph 7 in its entirety on the ground there is no record evidence to support such allegation.

2. Administrative Law Judge Anderson's Decision

As Administrative Law Judge Clifford H. Anderson outlined in his September 9, 1980, Decision[3] involving Respondent's same facility,[4] an election was held among Respondent's approximately 34 Crowley employees on November 2, 1979. The Union, apparently losing the election, filed objections which were consolidated for hearing with a complaint which alleged, among other matters, that on October 20, 1979, Respondent discharged driver Charles Tingle because of his support of the Union. Among other unfair labor practice findings, Administrative Law Judge Anderson found that Tingle's discharge violated Section 8(a)(1) and (3) of the Act as alleged. As previously noted herein, because Administrative Law Judge Anderson's Decision is not final, I do not rely on his findings of animus or unfair labor practices by Respondent.

For background purposes only, I take note of certain factual matters recited in the Decision. Thus, I note that L. D. McDaniel[5] figured prominently as a union supporter and the General Counsel's witness in the case before Administrative Law Judge Anderson. The parties stipulated here that McDaniel was a card solicitor and that he testified in the prior case. Moreover, it appears McDaniel also served as the Union's election observer and attended the preelection conference. He testified against Respondent's interests at the April 22 hearing.

B. *Donald L. Brower's Layoff and Discharge*

1. Brower's layoff

It is undisputed that in the weeks between his August 1979 hiring and the November 2, 1979, election, Brower was outspoken against the Union. There is a dispute concerning whether Respondent became aware that Brower switched his position to support of the Union in the early spring of 1980. The subject matter of this question leads directly to Brower's layoff about May 23.

Crowley-Blue Mound terminal Manager J. D. Foster testified that on April 21, General Manager Sonny Pride told him in Arlington, Texas, that everyone would convert to an hourly pay basis and that he could give his employees 1 or 2 weeks notice.[6] Shortly after receiving this information, Foster told Brower (and presumably the other seven transportation drivers) that the pay conversion would be effective on May 4.

Brower testified that beginning around January-February he changed his position regarding the Union. According to Brower, around March or April 25 he learned from Foster that the transportation drivers were to be converted from a mileage to an hourly pay rate of $4.62. Brower protested, and informed Foster that he definitely would do everything "I could to campaign the union in and get a union in the next time we voted, that I wasn't going to try to swing it the other way for them after what he had done to us." He said Foster displayed a "go-to-hell" look or attitude indicating it did not matter to him. Foster apparently said nothing. In his testimony on this point, Brower added that Foster had said (at an earlier time, apparently) that he could get rid of anyone he wanted to, when he wanted to, union or not, whenever he felt like it.[7] Foster did not address the earlier conversation in his testimony, and denied speaking with Brower or any employee about the Union after the April hearing.[8]

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[3] As requested by the General Counsel at the instant hearing, I take official notice of Administrative Law Judge Anderson's Decision. As the Decision does not become final until adopted or modified by the Board, I do not rely here on the unfair labor practices found by Administrative Law Judge Anderson.

[4] At the time of the April 22, 1980, hearing before Administrative Law Judge Anderson in consolidated Cases 16-CA-8782 and 16-RC-8022, the facility was located in Crowley, Texas. Respondent moved its Crowley terminal to Blue Mound, Texas, around late May 1980. Crowley is a short distance south of Fort Worth, Texas, and Blue Mound is just north of Fort Worth. Thus, Respondent combined its Crowley and Blue Mound operations into a single terminal.

[5] One of the two alleged discriminatees herein.

[6] Route drivers, such as McDaniel, already were hourly paid. Transportation (over-the-road) drivers, such as Brower, were paid by the mile. Brower testified without contradiction that the pay change reduced his take-home pay by about 60 percent. Foster testified that as of on or about May 4 at the Crowley location there were some eight transportation drivers, 28 hourly paid route drivers, and 4 hourly paid mechanics.

About a month after Brower told Foster of his intentions to support Local 47, Brower had occasion to make a trip to Respondent's El Paso terminal. According to Brower, he urged the drivers there to support the Union because the drivers were not being paid as much as AMPI claimed they were; that Crowley drivers were not being paid for bunk time; and that the drivers should select Local 47 in the next vote and shut AMPI down until it treated the drivers fairly. He admittedly made the urging in language unflattering to Respondent, including cursing AMPI and Foster. He denied telling El Paso Location Supervisor (or Terminal Manager) Bob Smith that he was sick of Respondent copulating the drivers around, and denied calling Respondent a copulating "son-of-a-bitch" for treating him unfairly, and stated that he knew better than to do so because Smith repeats what he hears. He said he spoke with Smith only generally about the trip there.

El Paso Location Supervisor Smith testified that, on May 21, Brower came into his El Paso office. When Smith asked him how he was doing, Brower replied, in latrine terminology, that he was not worth "a scato." Brower reportedly said that AMPI wanted him to run for nothing and that AMPI was not worth a defecation. Brower then began to curse Foster and Sonny Pride, describing them as "god-damn" maternal fornicators.[9] Smith responded, "In other words, if anybody needs to know anything about AMPI, all they've got to do is ask you?" Brower replied in the affirmative.

Smith testified that a little while later he encountered Brower in the drivers' room where Brower told him he was going to write a letter to President Carter and let him know what a sorry company AMPI was. Smith did not describe what response, if any, he gave. He testified that he told the foreman to get Brower loaded as soon as possible. Smith then called Foster at Crowley, reported Brower's remarks, and stated that he did not want Brower sent to El Paso again. Smith testified that Brower said nothing about the Union on this occasion, and that the only time Brower had ever mentioned Local 47 to him was around April when he said he was "not for the union."

Brower testified that, on his return to Crowley, Terminal Manager Foster told him to turn in his credit card, that Foster was sending a new driver to El Paso, and that Brower was going on sick leave. When Brower protested that he was not sick, Foster stated that Brower had said he was sick and that he was being placed on sick leave. Brower turned over the credit card and went home.

Explaining the reference about being sick, Brower testified that he had told Foster he was sick of getting fornicated around by AMPI. Foster denied that Respondent was mistreating the drivers. According to Brower, Foster told him that he could not return to El Paso because:

> The management doesn't want you to come back to El Paso because you talk too much. You agitate.

Although it is not entirely clear from Brower's testimony that all of the foregoing occurred in the same conversation, it seems clear that he was describing either a single conversation or two conversations held close in time.[10]

Terminal Manager Foster testified that on May 23, 1980, he told Brower that he could not let him return to El Paso, and as Foster knew that Brower did not desire to drive a route there was no work for him since there was no transporting for Brower to do. Foster therefore told Brower to go home and wait, that perhaps something would develop. He testified that at the time, and for the previous 3 months, the only transporting being done was between Crowley and El Paso (some 600 miles west of Crowley). Foster denied that Brower ever told him he was going to campaign to get the Union in at AMPI, and, on cross-examination, denied knowing that Brower's sentiments had switched to support of the Union as of the May 1980 telephone report from El Paso terminal Manager Bob Smith.[11]

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[7] According to Brower, until he changed his position on Local 47, Foster could freely discuss union issues with Brower. Thereafter, Foster would remark, "I don't want to talk about it" if Brower brought up the subject.

[8] Brower had a tendency to date admitted events at an earlier time than did Foster. Thus, while it is undisputed that Brower received a 1-week suspension for having an unauthorized person in his truck, Brower placed the date in December 1979 whereas Foster dated the event in February. While I credit Brower concerning the undisputed conversation reported above, it is likely the conversation occurred in late April after Foster had been told himself about the pay conversion by General Manager Pride.

[9] During his earlier cross-examination, Brower denied these assertions and testified that he did not know Pride. Pride's exact position in the corporate hierachy is unknown, notwithstanding Smith's testimony that Foster reports to Pride. Such fact is not at all clear from the pleadings or the record. In any event, Pride apparently did not have an office at Crowley. Thus, I note that Assistant Transportation Manager McAdams testified that his own office is located at the Dallas-Fort Worth Division's headquarters in Arlington. Brower did not clarify whether he meant that by not knowing Pride he had never heard that Sonny Pride was general manager (or a managerial superior of Foster). Respondent did not present any evidence showing that it informs drivers of the names and titles of management located away from the terminals where the drivers are assigned.

[10] Brower's testimony was presented in a rambling and confusing fashion at times.

[11] I credit Brower over Foster. Not only did the former testify in a more believable fashion, his story is more consistent with the undisputed facts, particularly in reference to the pay system change for the transportation drivers. Moreover, I note that on cross-examination Foster concedes that he became aware through gossip that Brower, who was "mad as a hornet," was no longer supporting AMPI against the Union.

2. Brower's discharge

Following his May 23 layoff, Brower testified that he telephoned Foster numerous times in an unsuccessful effort to obtain work. Finally, around June 11, he received a registered letter (not offered in evidence) from Foster advising him to report for work as a route driver picking up milk at farmers' dairies. Brower so reported and worked 3 days at $4.62 per hour until his discharge on June 15 at the Blue Mound terminal.

Foster testified that he learned on June 13 from route driver Calvin Worley that Brower had bumped his vehicle against a wall while backing into Vandervoort's Dairy facility in Fort Worth, Texas. On Sunday, June 15, when Brower came to the Blue Mound terminal, Foster asked him whether he had failed to report an accident. Brower replied in the negative. Foster and Brower then went to look at the tank trailer and observed where it had been dented slightly and skinned.[12]

Part VII of Respondent's driver's manual (Resp. Exh. 1) covers the subject of accidents. Paragraph 2, p. 12, (Resp. Exh. 1) instructs drivers as follows:

> Every accident is to be reported to AMPI. Gather all possible information—before leaving the scene of an accident. Failure to report an accident is cause for immediate dismissal.

Foster testified that the above rule has been discussed in safety meetings with drivers and that copies of the manual have been distributed at such meetings and to all new drivers.[13] When Brower persisted in denying responsibility for the bump scratch, Foster in effect suspended him and told Brower he would let him know the outcome the following day. The next morning Foster telephoned attorney Andrew who advised him that Brower be terminated. Foster testified he thereafter fired Brower for not reporting the accident and for failing to fill out an accident report.

Brower testified that on June 15, in the Blue Mound office, Foster told him he had a report that Brower had been engaged in an accident with his truck. Brower denied such. Foster said he had two witnesses that it was true, and that "I'm going to have to fire you." They then went to the trailer and inspected the scratch-dent on the trailer skirt. According to Brower, whom I credit, Foster put his finger on the 10-12 inch scratch and said "There it is right here." Foster pointed to the mark and said, "I'm firing you for doing this." Brower said he did not do it, but even if he had it was nothing to fire him for. He then asked Foster how many people he had ever fired for such a matter. Foster replied, "None. But I'm firing you."

When Brower asked Foster who the two witnesses were, Foster replied, "I don't have to tell you a damn thing. I'll let my lawyers take care of that. You're fired."

At the hearing, Calvin Worley, formerly employed by AMPI (as a route driver), testified on behalf of Respondent that on June 13 at Vandervoort's Dairy he heard a noise, walked out to the dock area, and observed that Brower had the left rear of his tank trailer (at the point of the scratch in issue) up against the wall.

On June 13, Carl Stine was employed by Vandervoort's as a raw milk receiver. On that date he observed Brower back into the unloading hole (a slant-down at the unloading dock). Brower's initial attempt to back in was out of alignment, and on the second attempt Brower hit the building with the left rear of the tank trailer. Stine was called as a witness by Respondent.

Called as a witness for the General Counsel, M. E. Brawley testified that on June 13 he, as garage foreman for Vandervoort's Dairy, was situated across the street and observed Brower back into the "hole" for unloading. Brawley concedes that the left side of the truck was blocked from his field of view and that the vehicle could have hit something and Brawley would not have known it. On the other hand, it seems that Brawley would have noticed if Brower's movement had halted at the entrance to the unloading ramp (hole), for the import of the testimony of Worley and Stine is that Brower got hung up at the entrance post.[14] Indeed, Worley testified that he assisted (apparently by hollering instructions, directions, and observations) Brower in extricating his tanker from its predicament.

I credit Worley and Stine. While I do not discredit Brawley, I note that his view was from across the street whereas Worley and Stine were at the spot. Moreover, Brawley concedes Brower could have made an earlier attempt (and, presumably, bumped into the entrance guard post then). Accordingly, I find that Brower backed into the steel entrance post as described by Worley[15] and Stine.

3. The wage-hour complaint

In the April conversation between Brower and Foster, the latter told Brower of the pay system change and Brower became "mad as a hornet" and told Foster thereafter that he would seek to get the Union in at AMPI.[16]

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[12] Color photographs taken by Brower of the skin marks are in evidence as G.C. Exhs. 2, 3, and 4. Brower described the mark as being a scratch about 10–12 inches long with the right end of the scratch having an indentation as if made with a screwdriver.

[13] Assistant Transportation Manager James McAdams, whose office is in Arlington, Texas, testified that AMPI's policy is that drivers are to report all accidents which result in "any damage." He further testified that a Comanche, Texas, driver (employed in the Dallas-Fort Worth division of AMPI) was fired in March 1980 for failure to file an accident report. McAdams did not describe the nature of the accident. Brower, in fact, testified that he knew AMPI has a rule requiring drivers to report any accident, no matter how small. Indeed, he has filed two accident reports since becoming an employee of AMPI. The first accident occurred on September 4, 1979, in Dallas and involved a similar incident to the event in question here. The estimated amount of damage shown on p. 1 of Resp. Exh. 2 is the amount of $1,500. The second accident occurred December 15, 1979, in Dallas and involved an estimate of no damage to API's truck when a car skidded into it. Respondent's accident review committee charged the first accident against Brower as being "preventable," but found the second accident to be "non-preventable." (G.C. Exhs. 9 and 10.)

[14] The diagram (Resp. Exh. 8) drawn by Stine clearly depicts such fact.

[15] While the fact that Worley volunteered the accident information to Foster suggests a possible bias on his part, no further evidence was adduced, such as that he may have been openly antiunion or that he and Brower were unfriendly, to call for such a finding.

[16] I credit Brower over Foster. I observed Brower to be more sincere and straightforward even though he dated events incorrectly.

It appears that around that time, apparently shortly after the conversation, Brower complained to the Department of Transportation and the wage-hour division of the United States Department of Labor regarding the change in the pay basis from mileage to hourly for the over-the-road drivers. Brower testified he and one other driver signed a formal complaint against Respondent with the wage-hour division.

Called as a witness by Respondent, Roy W. Watkins testified that he has been a compliance officer for the wage-hour division for approximately 14 years. He testified that he began an investigation of wage-hour matters at Respondent's Stephenville, Texas, terminal around January-February 1980. Following completion of a backpay settlement of that investigation around mid-May, Watkins asked Attorney Andrew to look at the Crowley terminal, ascertain whether there were similar violations there, and, if so, to indicate whether he was willing to settle them on the same basis as had been done at Stephenville. Attorney Andrew agreed, and on July 15 he sent Watkins a letter (Resp. Exh. 7) suggesting that Respondent pay overtime compensation to 20 employees. Brower was 1 of the 20, and the figures of $1,865.31 beside his name is nearly double that of the next highest figure of $1,036.89.

On the ground that departmental regulations made such information confidential, Watkins declined to answer questions concerning who had filed a complaint and even whether a formal complaint had been filed regarding the Crowley terminal. Watkins did testify that the first mention of Brower's name between him and Andrew was in Andrew's July 15 letter to Watkins. Moreover, he testified that no letter was sent prior to that time from his office to Attorney Andrew or to Respondent naming Brower in any way.

As already noted, Brower testified he filed a formal complaint with the wage-hour division. There is no record evidence disproving this assertion. Brower, I note, has a tendency to refer to Federal agencies in an indiscriminate manner, and in so doing his testimony becomes rambling and confusing. As an example of this disorderly portion of Brower's testimony, he stated that, on the day Foster fired him, Foster said he had received a letter from the "Wage and Hour and the Labor Board, and that my name was the only name that showed up on it." No such letter was offered in evidence.[17] When then asked to restate the reference to the Board, he stated that such came in when he told Foster he would go to the Board and Foster replied he did not care.

Another apparent inaccuracy is Brower's testimony that a wage-hour division representative told him the agency would have to tell Respondent that Brower was the person filing a complaint against the company. According to Watkins' undisputed testimony, such a disclosure (except through mistake) would be prohibited by departmental regulations.[18]

Despite Brower's disorderly and inaccurate, at times, testimony on the foregoing subject, I find that Brower complained (either orally or in writing) to the wage-hour division following his April conversation with Foster.[19] Although Foster denied (in answer to leading questions) that Brower ever told him he had filed a wage-hour complaint, and asserted that he was unaware of the department's investigation, he conceded on recross-examination that he had heard talk of charges having been filed with the wage-hour division but that "I hadn't been told directly."

4. Analysis and conclusions

Notwithstanding Brower's disorganized and, at times, inaccurate testimony regarding the Federal agencies, I find that he was a more believable witness than Terminal Managers Foster and Smith regarding their conversations. Moreover, Brower's version of these conversations in fact is internally consistent and also consistent with the critical, and undisputed, fact that, around late April 1980, Foster told Brower that the transportation (over-the-road) drivers would switch to an hourly pay basis on May 4. That information converted formerly pro-AMPI Brower into a "mad hornet" who launched a flurry of verbal attacks upon AMPI. Respondent countered by laying Brower off for his protected El Paso remarks, and thereafter discharged him in part for what I find to be an unlawfully motivated reason.

With respect to the unlawful motivation for the discharge, I note that Foster's remark to Brower, in response to how many others he had fired for similar conduct, "None, but I'm firing you," is suggestive of animus. Moreover, the 10-12-inch scratch with indentation obviously constituted far less damage than the "dented tank" (Resp. Exh. 2, p. 2) caused by Brower when he hit a column post and a steel cabinet while backing into a bay at the Oak Farms Dairy in Dallas on September 4, 1979, in an almost identical accident. The $1,500 repair estimate for the Oak Farms accident reflects the fact that the *tank* was dented. In our situation, it was not the tank which was scratched, but the fender skirt—and the scratch, while deeper, just added to the other scrapes appearing on the skirt as shown in the color photographs in evidence.

More significantly, when Brower hit the post at the Oak Farms Dairy in Dallas on September 4, 1979, he was openly favoring AMPI against Local 47. At that time Foster told Brower, "Well, it's no big deal. It happens. Make an accident report, and we'll take care of it."[20] When Brower several months later switched his support to the Union, Foster gave him the "cold shoulder."

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[17] In fact, later in his testimony, Brower asserts that Foster had told him on an earlier occasion of receiving a wage-hour letter with Brower's name on it. While I do not overlook the possibility that Foster was jousting with Brower by relying on information he possibly received from his superiors in mid-May, I do not find such to be the case in the absence of any evidence to that effect.

[18] No citation of a specific regulation was given. There is some question whether a published regulation exists in light of 46 Fed. Reg. 7392 (January 23, 1981), wherein the Secretary of Labor proposed a rule governing situations where department employees are subpenaed to testify. Compare Sec. 102.118 of the Board's Rules and Regulations.

[19] Brower's complaint presumably related to the pay system switch. I find it immaterial whether Brower's complaint is related to the subsequent backpay payment he and others received at Crowley-Blue Mound.

[20] Foster did not contradict this evidence when he testified.

Finally, I note that Foster told Brower just prior to the November 2, 1979, election that he could get rid of anybody, union or not, and that he "would get rid of the agitators when the time comes."[21] This prophetic utterance became more personal to Brower on May 23 when Foster told him, "You talk too much. You agitate." The prophesy, I find, became a fulfilled reality for Brower on June 15 when Foster fired Brower.

Accordingly, I find that the General Counsel established a *prima facie* case that Respondent, as alleged, violated Section 8(a)(3) and (1) of the Act by laying off Donald L. Brower on or about May 23, 1980, until on or about June 11, 1980, and by discharging him on or about June 15, 1980.

Under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), once the General Counsel has established that an employee's protected activities were a motivating reason for the discharge, the burden shifts to respondent to establish that it would have discharged the employee notwithstanding such protected activities. In this case it appears, and I find, that Respondent carried its burden. This is so even though Crowley Terminal Manager Foster told Brower that the September 1979 $1,500 damage to the tank part of the trailer (where the milk is contained) was "no big deal" when Brower was antiunion, yet 9 months later, with Brower now openly prounion, a scratch on the fender skirt had suddenly become a matter of significance.

Foster testified that he fired Brower for failing to report an accident and failing to submit an accident report. I do not credit such testimony in its import that Brower's union activities were not one reason for the discharge. On the other hand, in the absence of disparity evidence, and in light of Brower's own testimony that any accident, no matter how small, is to be reported, I conclude that one reason for the discharge was Brower's failure to report the incident. Thus, I deem this to be a "mixed motive" case rather than a case of discharge on a "pretext" (i.e., this is not a case where the reason advanced is not at all why the employee was discharged but in fact is seized upon only as a pretext) under the *Wright Line* guidelines. The General Counsel offered no evidence of disparity regarding application of the requirement to report all accidents, and I cannot say that discharge for violating the reporting rule is so grossly disproportionate in relation to the need to maintain the integrity of the rule as to indicate that such discipline would have been lesser, or not imposed at all, in other circumstances.

It must be remembered that Brower did in fact file a report regarding the September 1979 accident. Clearly the integrity of the accident reporting rule is of supreme importance to Respondent. If failures to report seemingly insignificant accidents are sanctioned, drivers may get to the point of not reporting an event resulting in a suit for big damages. Early knowledge is important for notifying the insurance carrier, interviewing witnesses, and the like. Aside from potential damage claims, good customer relations (where a customer's property is damaged) is another obvious reason Respondent would seek to maintain the integrity of its rule.[22]

In light of the foregoing, I shall dismiss the complaint with respect to Donald L. Brower.

C. *L. D. McDaniel's Discharge*

As earlier noted, the General Counsel alleges that Respondent discharged L. D. McDaniel on or about September 30, 1980, because of his activities on behalf of the Union and because he testified under the Act before Administrative Law Judge Anderson. McDaniel, a route driver, had been employed by AMPI for nearly 12 years at the time of his discharge.

Crowley-Blue Mound Transportation Supervisor J. D. Foster testified that he discharged McDaniel, and fellow driver Forrest Cottrell, on September 30 for fighting on the job 9 days earlier at Super Brand Dairy.[23] That McDaniel and Cottrell engaged in a brief fist fight on such occasion is undisputed.[24] Cottrell did not testify. McDaniel, who had never even been reprimanded previously, testified that he would have expected to have been discharged had he been the aggressor, but that he should not have been discharged since he acted in self-defense. I largely credit McDaniel, on the basis of his credible testimony, regarding the nature of the fight, although I find that in the fight he dealt Cottrell a glancing blow on the hip with a wrench.

There is no other record evidence of a fight between employees on the job.[25] Although Foster testified that AMPI has no written rule prohibiting fighting, he has told the drivers at safety meetings that they will be discharged if they get in a fight on company time. Foster further testified that he is unaware of any fights by Crowley employees since he has been manager, and, therefore, he has not discharged anyone else for fighting. James McAdams, assistant transportation manager from AMPI's Arlington office, testified that he attended most of the safety meetings held at Crowley, but that he did not recall any reference to fighting at such meetings.[26]

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[21] Brower was speaking to Foster about the union activities of L. D. McDaniel (an alleged discriminatee herein) and Dean Cinnamon.

[22] Although Respondent has not cited these examples as some of the reasons for its rule, I cannot overlook the fact that the record compels a finding that Respondent expects the rule to be followed strictly. Commonsense supplies the above examples of why Respondent would want to maintain the integrity of its rule.

[23] The complaint makes no allegation regarding Cottrell, such as on a theory that Cottrell was discharged in order to give an air of legitimacy to McDaniel's discharge. Driver Cottrell had been employed by AMPI less than 1 year.

[24] Cottrell, scheduled to unload ahead of McDaniel, was late in arriving. Consequently, McDaniel proceeded to unload upon the suggestion of the dairy's attendant. On arriving during McDaniel's unloading, Cottrell became upset. He first angrily asked McDaniel why he was unloading first. The second time he approached McDaniel a fight ensued. McDaniel testified he thought he was about to be attacked when Cottrell approached him a second time. McDaniel pushed Cottrell back and, in the ensuing fight, each hit the other in the mouth. A witness, driver Dean Cinnamon, testified that McDaniel hit Cottrell a glancing blow on the hip with a large wrench. The fighters wore down quickly, and the fight ended. Foster testified he learned about the fight from another driver a few days after it occurred. McDaniel and Cottrell were suspended while Foster investigated the matter.

[25] There is a sketchy hearsay reference to driver Don Webber having a fight with a dairyman about 10 years previously. Whatever the actual facts regarding Webber's altercation, it predated Foster's becoming manager of the Crowley terminal in August 1975.

During the rebuttal stage, Donald L. Brower was permitted to testify, subject to a motion to strike, that before the election he (being antiunion at the time) did not like McDaniel (a prounion driver) and was going to whip him at the first opportunity. Foster replied that he wished Brower would do so, but:

> Well, when you whip him, make sure that I don't see it because I'll have to fire you if I see it. If I don't see it then I won't have to do nothing about it.

I sustained Respondent's objection and motion to strike the foregoing on the basis that such evidence could have been offered during the General Counsel's case-in-chief and therefore was not proper rebuttal.[27] It is clear that such evidence, if admitted and credited,[28] would have constituted strong support for McDaniel's case since it reflects (1) animus toward McDaniel; (2) a willingness to condone, and even encourage, fighting so long as it is directed toward beating of a union supporter; and (3) only fighting personally observed by Foster would subject the fighters to the penalty of discharge.

In the absence of disparity evidence, or testimony such as that excluded during rebuttal, I am compelled to conclude that the General Counsel has failed to establish a *prima facie* case that Respondent violated Section 8(a)(1), (3), and (4) by discharging McDaniel on September 30, 1980. Accordingly, I shall dismiss that portion of the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not committed any of the unfair labor practices alleged in the consolidated complaint.

[Recommended Order for dismissal omitted from publication.]

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[26] Sequestration having been invoked by the parties, McAdams was not present during Foster's testimony.

[27] *Acute Systems, Ltd. d/b/a McDonald's*, 214 NLRB 879, 881 (1974).

[28] In general, I previously have credited Brower's testimony.

San Diego County Association for the Retarded *and* Aiko Hinojosa. Case 21-CA-19138

January 13, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 17, 1981, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, both the Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, San Diego County Association for the Retarded, San Diego, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modfied:

1. Substitute the following for paragraph 1:

"1. Cease and desist from:

"(a) Disciplining its employees for engaging in a strike for the purpose of securing satisfactory resolution of their work-related grievances.

"(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraphs 2(a) and (b) and reletter the subsequent paragraphs accordingly:

"(a) Offer Robert Acosta, James Dunkin, David Gilmore, Aiko Hinojosa, Karen Peckell, Therese Sullivan, Genevieve West, and Warren Werwage immediate reinstatement to their former positions, if necessary terminating their replacements, or, if such positions no longer exists, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings resulting from the discrimination practiced against them, in the manner described in 'The Remedy' section of this Decision."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge you for engaging in a strike for the purpose of causing us to favorably resolve your work-related grievances (grievances over your rates of pay, wages, hours, or working conditions).

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Acosta, James Dunkin, David Gilmore, Aiko Hinojosa, Karen Pickell, Therese Sullivan, Genvieve West, and Warren Werwage reinstatement to their former positions, if necessary terminating their replacements, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage whole for any losses in wages or benefits they suffered by virtue of our discharging them for engaging in a strike to cause us to favorably resolve their work-related grievances, with interest.

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[1] The Respondent's request for oral argument is denied because, in our opinion, the record, exceptions, and briefs adequately set forth the issues and positions of the parties.

[2] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[4] We find the Respondent's unlawful conduct in discharging eight employees for engaging in a strike is so egregious as to demonstrate a disregard for its employees' fundamental statutory rights. We find it necessary, therefore, to order the Respondent to cease and desist from "in any other manner" interfering with, restraining, or coercing employees in the exercise of their protected Section 7 rights. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

259 NLRB No. 136

SAN DIEGO COUNTY ASSOCIATION FOR THE RETARDED

DECISION

GEORGE CHRISTENSEN, Administrative Law Judge: On November 24–25, 1980,[1] I conducted a hearing at San Diego, California, to try issues raised by a complaint issued on July 18 and amended on August 7, based upon a charge filed on June 9 and amended on July 17.

The amended complaint alleges that San Diego County Association for the Retarded (herein called Association) violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act), by discharging eight employees because they engaged in protected concerted activities for the purpose of collective bargaining or other mutual aid and protection.

The Association concedes it discharged the eight, but contends that the jurisdiction of the National Labor Relations Board either does not or should not be extended to its operations and denies the eight employees were discharged for engaging in activities protected by the Act, asserting the eight were discharged for engaging in unlawful, unprotected activities.

The issues are whether the Board has jurisdiction over the Association; if so, whether it should exercise that jurisdiction; and if so, whether the eight discharges were violative of the Act.

The parties appeared by counsel at the hearing and were afforded full opportunity to adduce evidence, to examine and cross-examine witnesses, to argue, and to file briefs. Briefs were filed by the General Counsel and the Association.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs, analysis and research, I enter the following:

FINDINGS OF FACT

I. JURISDICTION

The amended complaint alleges, the answer admits, and I find at all pertinent times the Association was a nonprofit California corporation engaged in the business of educating and training mentally retarded children and adults; that it operated four facilities in San Diego County, California, including a facility known as the Arrow Center (herein called the Center) at 3035 G Street, San Diego, California; and that during the year 1979 it received gross revenues in excess of $250,000 from its operations, grants in excess of $5,000 from the United States Department of Labor, and purchased and received goods and products from outside California valued in excess of $5,000.

On the basis of the foregoing, I find and conclude that at all pertinent times the Association was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act. I further find and conclude, in view of the nature, substantiality, and scope of the acts alleged in the complaint as violative of the Act and their actual or potential effect on interstate commerce, it effectuates the purposes of the Act to exercise jurisdiction in this case.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Center's Operations*

At times pertinent the Center employed approximately 20 teachers or instructors and aides in its activities department and 12 supervisors, instructors, and aides in its workshops department for the purpose of training and instructing about 185 students ranging between 22 and 60 years of age, with IQ's of between 20 through 70, with most students at the lower end of that range. Charles E. Covell was the director of the Center and in overall charge of its operations. Directly under Covell and in charge of the activities department was Dorothy Cummings, activities supervisor.[2]

Included among the teachers or instructors and aides in activities in late April were Robert Acosta, James Dunkin, Julie Fish, David Gilmore, Maureen Hillman, Aiko Hinojosa, Karen Pickell, Ruri Pierre, Therese Sullivan, Genvieve West, and Warren Werwage.[3]

B. *The Concerted Activities and the Discharges*

In late April, Hinojosa was teaching a class of approximately 20 students in Basic Education II, assisted by two aides. Several days prior to Friday, April 25, Covell gave his written approval to Hinojosa's proposal for her and another class to take a field trip to the zoo on April 25. Following that approval, Hinojosa informed her class of the scheduled trip and they discussed what they would see and do during the trip.

About 2 p.m. on April 24, Cummings informed Hinojosa that the field trip was canceled since Covell, forgetting it had been scheduled, granted the schoolbus driver's request for a day off on April 25. Hinojosa protested the cancellation, stating Covell already approved the trip and it was up to the administration to find another driver. Cummings replied there was another person qualified to drive the bus employed in the workshops and stated she would check into the possibility of assigning that person to drive the bus on April 25.

Hinojosa discussed the problem with another activities department employee, Ruri Pierre, and Pierre stated she could and would be willing to drive the bus, since she had done so on several previous occasions when it was necessary to transport students between the Center and various destinations.

When Hinojosa checked back with Cummings over the scheduled trip, Cummings informed her the trip still was off, she had not been able to make the necessary arrangements. Hinojosa suggested she contact Pierre, since Pierre could and would drive. Cummings told Hinojosa to forget about it, "the front office is in a bad mood."

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[1] Read 1980 after all further date references omitting the year.

[2] I find at all pertinent times Covell and Cummings were supervisors and agents of the Association acting on its behalf within the meaning of Sec. 2 of the Act.

[3] Teachers and aides from the California school system also worked at the Center; the employees named above were full-time Association employees at the Center.

By the time Hinojosa had Cummings' final word, most of her class had gone home (at approximately 3:15 p.m.). Pierre and Gilmore joined Hinojosa in her classroom and Hinojosa voiced her frustration over her inability to proceed with the trip, the disappointment she anticipated among her students the following day, particularly since she had not been able to inform them of the cancellation before they left the Center that day, and her anger at the administration's handling of the matter. Gilmore stated he would talk to Covell. He left the other two, returned a short time later, and informed them that while he caught Covell in the parking lot, Covell proceeded to his car and drove off, refusing to discuss the matter, which angered Gilmore.

The three discussed the entire matter, their dissatisfaction with that and other administration actions, and decided to gather their associates. Within a short time Acosta, Dunkin, Fish, Hillman, Pickell, Sullivan, West, and Werwage arrived. Hinojosa, Gilmore, and Pierre informed them what happened. In the ensuing discussion, various staff members recounted grievances and complaints they had against the administration. The group finally agreed Fish would prepare a list of their grievances from notes she and Pickell took during the course of the meeting;[4] that Fish and Pierre[5] would present their grievances to Covell the following morning at the regular Friday morning staff meeting;[6] and that all those present other than Fish and Pierre would withhold their services beginning the following morning at 8 a.m. and gather instead at Pickell's home to demonstrate their solidarity and impress Covell with the seriousness of their grievances and the necessity to resolve those grievances in a manner satisfactory to the grievants.[7] It was also agreed that Fish or Pierre would telephone the assembled group at Pickell's home the following morning and advise them of Covell's reaction to the presentation of their grievances. The group did not consider or decide what they would do if the reaction was unsatisfactory.

By shortly after 8 a.m. on Friday, April 25, Covell and Cummings were aware that almost the entire activities staff were withholding their services that day, since most of the absentees telephoned the Center, spoke either to Covell or Cummings, and stated they would not be in (with some stating they were sick). When Cummings secured their time records to note the absences, she discovered they already were marked absent (with some marked "sick"), advised Covell of the markings, and observed the records must have been marked the previous day.[8]

When Covell and Cummings arrived for the staff meeting, Covell commented it looked like most of the activities staff were withholding their services to express their anger over the reduction scheduled for that day in the number of their assistants.[9] Pierre responded that was not the reason the activities staff was withholding their services that day, that she and Fish had been asked by the staff to present their reasons, and requested a meeting. Covell assented and he, Cummings, Fish, Pierre, Donna Rosenberg, and Muriel Collins proceeded to Cummings' office.[10] While the ensuing discussion was under way, Hillman arrived and joined the conference.[11] The conference began about 8:30 a.m. Fish followed the procedure of reading off a grievance from her list, adding her comments, soliciting the comments and views of the others present on the subject matter of that grievance, responding to those comments, etc. Both Fish and Covell were tense and at times spoke in raised voices. Fish was only part way through the list when Covell, noting the time and the presence of a large number of students on the grounds, stated it was getting close to starting time, he was going to have to cover the classes and workshops, and the meeting would have to continue at some other time.[12] At that time Fish advised Covell she could summon the strikers by telephone. Covell requested she do so, suggesting that the discussion of the grievances and complaints resume at a noon staff meeting. Pierre went to the telephone while Fish and Covell continued their discussion of the grievance before them. When Pickell answered the telephone, and while she and Pierre exchanged greetings, Pickell heard raised voices in the background; Pickell asked Pierre how it was going and Pierre responded it was not going well and advised Pickell to tell the group to come in to work. Pickell replied she would relay Pierre's advice to the group.

Following completion of Pierre's call, the Covell-Fish conference terminated and the participants went to their respective classrooms, workshops, and other duties.

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[4] The notes included the following grievances: (1) cancellation of the April 25 field trip and management refusal to discuss the cancellation; (2) understaffing; (3) too heavy a workload; (4) inconsistency in pay scales; (5) overtime payments scheduling; (6) failure of management to communicate with staff re alleged budgetary limitations; (7) failure of management generally to communicate with staff re problems and attempt to resolve them; (8) providing the services of a nurse; etc.

[5] In an election conducted by Covell and Cummings the previous year, Fish was elected "staff representative" and Pierre was elected as her alternate. Fish and representatives similarly elected from the other three facilities operated by the Association met periodically with representatives of the executive director of the Association to discuss personnel and related problems.

[6] Covell regularly conducted a staff meeting each Friday morning between 8 and 8:45; the staff was scheduled to report for work at 8; the students arrived at the Center between 8:30 and 9; classes and workshops commenced at 9.

[7] Fish opposed this decision, favoring attendance of the entire group at the staff meeting the following morning and a presentation of the grievances at that time, but was overruled.

[8] Cummings was correct; Dunkin procured the time records of the group during the meeting the previous day, distributed them to the group, each member marked himself or herself absent for April 25 and in some cases inserted "sick" as the reason; and Dunkin returned the records to the office.

[9] Personnel from the adult education division of the California schools regularly assisted the staff in educating and training the students; their numbers were reduced on April 25.

[10] Rosenberg and Collins were on the workshops staff. Rosenberg was Fish's predecessor as elected staff representative and Fish thought the familiarity of the two with several of the matters set out in the grievances and their input at the conference would be helpful.

[11] While Hillman agreed to join the other members of the activities staff in withholding her services on April 25 and to join the others at Pickell's home that day, she changed her mind overnight and decided to report for and go to work.

[12] By doubling classes and assigning workshops staff to cover some of the classes in activities, all classes and workshops were manned without incident and without bringing in additional personnel.

By 10 a.m. the absentee activities staff had not come in. Both Covell and Cummings asked Fish why they were not in, Covell stating if they were not in by noon, action could be taken against them, including discharge.[13] Fish telephoned Pickell and asked why the staff had not come in, stating that their absence was putting her in a bad position, that Covell was going to take action against them (including possible discharge) if they were not in by noon, though everything was under control (all classes and workshops covered). Pickell's reply was evasive; she told Fish not to worry, the strikers were discussing strategy.

Following that conversation, Fish realized that the absentees no longer trusted or were willing to follow her lead; she subsequently advised Cummings she resigned as staff representative.

The strikers decided after prolonged discussions concerning the telephone calls and their position that, since they risked discipline whether or not they reported for work, they would continue on strike for the entire day, go in as a group their next scheduled workday (Monday, April 28), and demand Covell meet with them as a group and resolve their grievances prior to any return to work.

When Covell made contact with Farmer (on Saturday, April 26), Farmer gave Covell carte blanche concerning Association action against the employees who engaged in the Friday strike. Covell decided to discharge all the employees who engaged in the strike because, as he put it, "leaving the whole day without coming in and basically for—to get some attention for me to listen to some grievances, was not a valid thing."

The strikers never had an opportunity to present and attempt to resolve their grievances. When they arrived at the Center on April 28, they were instructed to report to Room 14. Prior to proceeding to that room, Fish notified the strikers she no longer could speak for them for she had resigned as staff representative. Fish and Pierre accompanied the strikers to Room 14, where Covell read a prepared statement wherein he accused the strikers of irresponsible conduct, stated he was deeply disturbed over their action, stated the staff manual set out a chain of command and procedures for the processing of grievances,[14] addressed some of the grievances on the list Fish gave him the preceding Friday,[15] and stated since the strikers chose strike action against the Association to pressure him into resolving their grievances to their satisfaction rather than reporting for work and processing their grievances through Cummings, etc., they were discharged. He closed with a direction to turn in all keys and other Association property, to gather all personal property, to be off the premises by 9 a.m., and not to reenter the premises unless and until they made an appointment with him. At the close of his statement, Pierre announced that, since she was part of the strike group and fully supported the strike, she resigned. Following the discharges and the resignation, only Fish, Hillman, and Jan Gilbert continued to work in the activities department.[16]

At a subsequent (May 1) meeting sought by the eight discharged and one resigned employee with Farmer[17] for the purpose of requesting reinstatement, Farmer not only rejected the request, he informed the nine they were finished in the field (educating and training the handicapped) within the area, since he had contacts with "everybody" and "word gets around fast."[18]

C. *Analysis and Conclusions*

When two or more employees withhold their services (strike) for the purpose of pressuring their employer into resolving to their satisfaction grievances over their rates of pay, wages, hours, or working conditions, they engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7 of the Act and it is an unfair labor practice within the meaning of Section 8(a)(1) of the Act for their employer "to interfere with, restrain, or coerce" (discharge) them for so engaging.[19]

The Association argues its discharge of the eight strikers did not violate the Act because: (1) they did not go on strike over work-related grievances; (2) their strike did not further any interest they had in resolving work-related grievances; (3) they were not seeking a specific remedy or result by virtue of their strike; and (4) their strike was unlawful, and/or improper and/or indefensible.

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[13] Covell testified that the Association's executive director, Richard B. Farmer, had to authorize any disciplinary action before it could be effected and Farmer was out of town on April 25; he therefore had to defer taking any action until he contacted Farmer with his report and recommendations and secured Farmer's decision on what action would be taken.

[14] Referring to a provision of the manual stating, "If you have any questions, complaints or problems about your work or position with DWCAR, your point of view and the facts will be fairly and reasonably considered. You should first discuss the matter with your immediate supervisor (Cummings), you may then request a conference with the area director (Covell). . . . If the problem is not resolved to the satisfaction of the employee, he may request action from the Personnel Practices Committee. If still not resolved, action may be requested from the Board of Directors."

[15] Fish was requested to and surrendered the list of grievances before reporting to her assigned class on April 25. Covell, referring to the list, stated that the board was considering granting substantial pay raises—that he had requested budget increases to supply many items sought by the strikers—that he and the board were trying to secure more classroom space and money to improve present classrooms and relieve overcrowded conditions—that the four centers were budgeting for one-fourth of a nurse apiece so a nurse's services could be provided for the four centers—that he was trying to secure budget increases to alleviate their complaints over the constant increases in the number of students without corresponding increases in staff to handle them—that the executive director was seeking wages more comparable to the norm, the institution of a retirement plan and better health and dental plans—and that he would in the future make more of an effort to counsel with the staff and to resolve their grievances.

[16] Gilbert did not attend the employee grievance meeting of April 24 but did join the group at Pickell's home on April 25 and joined in their decision that day to remain on strike all day; Covell was unaware of the latter and stated at the hearing that he intended to confront Gilbert, ask her directly about the extent of her support of the strike, and, depending on her answer, decide what action was appropriate.

[17] I find at all pertinent times that Farmer was a supervisor and agent of the Association acting on its behalf within the meaning of Sec. 2 of the Act.

[18] The findings in this sec. B are based upon documentation and the testimony of Collins, Covell, Cummings, Fish, Hillman, Hinojosa, Pickell, and Pierre with any conflicts between the testimony of Hinojosa, Pickell, and Pierre and that of the other witnesses resolved by crediting the testimony of Hinojosa, Pickell, and Pierre, since their testimony was the more plausible, sincere, and creditable in the conflicting areas.

[19] *N.L.R.B.* v. *Washington Aluminum Co., Inc.*, 370 U.S. 9 (1962); *N.L.R.B.* v. *Robertson Industries*, 560 F.2d 396 (9th Cir. 1976); *Shelly & Anderson Furniture Manufacturing Co., Inc.* v. *N.L.R.B.*, 497 F.2d 1200 (9th Cir. 1974); *First National Bank of Omaha* v. *N.L.R.B.*, 413 F.2d 921 (8th Cir. 1969).

Findings have been entered that on April 24 the eight (plus Fish, Pierre, and Hillman) met after work on April 24 and developed a number of grievances for presentation to Covell the following morning at 8 a.m. Those grievances involved wages (inconsistent pay scales), hours (overtime payment, scheduling), and working conditions (understaffing; too heavy a workload; failure to advise re alleged budgetary limitations; failure to communicate with staff re problems and attempt to resolve them; arbitrary cancellation of a field trip and refusal to discuss reasons therefor; etc.).

I find the foregoing were work-related grievances.

The Association contends, assuming the above-recited matters were work-related grievances, that the strikers did not go on strike at 8 a.m. on April 25 to cause Covell to resolve those grievances to their satisfaction, but rather for the limited purpose of securing Covell's attention.

I reject the argument; certainly the strikers decided on April 24 to commence a strike on April 25 at 8 a.m. to secure his attention; but also to cause Covell to resolve those grievances to their satisfaction. I therefore find and conclude that the strikers went on strike at 8 a.m. to cause Covell to resolve their work-related grievances in a manner satisfactory to them; i.e., to further their interests *vis-a-vis* those grievances.

The Association next argues that, even if the strikers went on strike for the purpose of causing Covell to resolve work-related grievances to their satisfaction, from the time Covell stated his willingness to meet and discuss the grievances with them, their objective was accomplished and the strike thereafter became an individual decision by each striker to remain off work rather than risk discharge for making a false statement of his or her reason for withholding service (by calling in sick or placing the word "sick" on a time record) or for unauthorized absence (in view of Covell's comment that any employee who failed to report for work by noon risked discipline, including possible discharge), and thus was unprotected after that time.

I reject this contention. Findings have been entered that on April 24 the strikers agreed to go on strike at 8 a.m. on April 25, and to continue on strike until they received a report on Covell's reaction to the presentation of their grievances, without considering or deciding what they would do following receipt of that report; and that, after they received that report, they decided to continue on strike the balance of April 25 and until they learned Covell's reaction to their appearance en masse at the Center at 8 a.m. and demand for his consideration and resolution of their grievances in a manner satisfactory to them (a demand they never had the opportunity to make). It is undisputed that the strikers at their April 25 meeting discussed the fact that a number of them called in sick and marked their timecards as sick, that the appearance of those strikers at the Center that day would constitute an admission they were not ill, and that Covell might discipline them on that basis, but it is equally undisputed that other strikers did not call in sick nor mark themselves as sick and Covell was well aware they were out on strike and not sick,[20] and that, after such discussion, the strikers *decided as a group* to remain on strike at least until they heard Covell's April 28 response to their demand for resolution of their grievances.

On the basis of the foregoing, I find that all times on April the eight discharged employees were engaged in a strike for the purpose of causing the Association to resolve work-related grievances to their satisfaction.

In view of the foregoing, I find that the eight were seeking a remedy for their grievances of sufficient specificity within the meaning of the cases recited above (see fn. 19, particularly *Shelly*, where a strike for the purpose of causing the employer to negotiate earnestly was considered sufficient purpose for the strike).

Lastly, the Association contends that, even if the eight discharged employees went on strike for the purpose of achieving satisfactory resolution of work-related grievances, their conduct nevertheless was unprotected within the meaning of Sections 7 and 8(a)(1) of the Act because it was unlawful, and/or improper, and/or indefensible—arguing that alleged falsification of timecards, and/or failure to resort to established procedures for grievance resolution instead of striking, and/or alleged exposure of students and staff to "dangerous conditions" constituted such unlawful, and/or improper, and/or indefensible conduct.

The obvious answer to the first contention is that Covell did not discharge any of the eight for alleged falsification of a timecard. Both in his April 28 oral discharge notice and his accompanying written termination notices, Covell gave only one reason for discharge—seeking to resolve grievances through strike action rather than through established grievance procedures. It is further evident that not all of the eight employees discharged marked "sick" on their timecards (or called in "sick"). On the basis of the foregoing, I find and conclude that the entry by some of the eight of the word "sick" on their timecards (or calling in "sick") is irrelevant, since that entry and notice was not the reason for their discharge. I further find and conclude, in any event, that the entries and calls are insufficient basis for finding that those discharged employees who reported that their April 25 absences on strike were occasioned by illness thereby engaged in concerted activities unprotected by Section 7 and 8(a)(1) of the Act.

With regard to the election by the strikers to go on strike against the Association in an attempt to secure satisfactory resolution of their grievances rather than resorting to the procedure set out in the staff manual for the resolution of grievances, I find no authority for the premise that such election denies strikers the protections afforded by the Act; in fact, there is authority to the contrary.[21] A contrary holding would make a travesty of

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[20] Covell termed the strike a "sickout" when Cummings pointed out how some of the strikers marked their timecards at 8 a.m. on April 25 and stated at the opening of the April 25 staff meeting that most of the activities staff apparently were on strike because of their dissatisfaction at the loss of services of personnel from Adult Education that day.

[21] See *Washington Aluminum, supra,* holding the existence of a rule prohibiting absences without permission without effect, and *First National*

Continued

the protections afforded by Sections 7 and 8 of the Act, for an employer by the device of unilaterally establishing a procedure for the processing of employee grievances could effectively bar employees from resorting to direct economic action for their satisfactory resolution, a right guaranteed by the Act. I also note the procedure is *permissive*, not mandatory. I therefore find that, by engaging in direct, economic action to achieve a satisfactory resolution of their grievances rather than resorting to the grievance procedure unilaterally established by the Association for permissive resort thereto, the eight discharged employees did not engage in illegal, improper, or indefensible conduct depriving them of the protections afforded by Sections 7 and 8(a)(1) of the Act.

The Association next contends that, by engaging in the April 25 strike, the eight discharged employees subject the students and staff at the Center to "dangerous conditions" and thus removed themselves from the protection of the Act.

It is undisputed that all classes and workshops were manned by instructors or aides previously scheduled for work on April 25, without incident, and without calling in additional help. Thus, the short answer to this contention is that it is speculative without proof that the strikers created "dangerous conditions" by their absence, and proof that similar staff shortages in the past produced "dangerous conditions." I therefore find that the Association failed to establish that the eight striking employees subjected the students and staff to "dangerous conditions" warranting a finding that by striking against the Association on April 25 in an effort to secure satisfactory resolution of their work-related grievances they engaged in conduct unprotected by Sections 7 and 8 of the Act.

On the basis of the factual findings, analysis, and conclusions set out above, I find and conclude that on April 28 the Association violated Section 8(a)(1) of the Act by discharging Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage for engaging in a strike on April 25 for the purpose of causing the Association to resolve their work-related grievances in a manner satisfactory to them.

CONCLUSIONS OF LAW

1. At all pertinent times the Association was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act.

2. At all pertinent times Farmer, Covell, and Cummings were supervisors and agents of the Association acting on its behalf within the meaning of Section 2 of the Act.

3. The Association violated Section 8(a)(1) of the Act by discharging Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage for engaging in a strike for the purpose of causing the Association to resolve their work-related grievances in a manner satisfactory to them.

4. The aforesaid unfair labor practice affected commerce as defined in Section 2 of the Act.

THE REMEDY

Having found that the Association engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, I recommend that the Association be directed to cease and desist therefrom and to take affirmative action designed to effectuate the purposes of the Act. Having found the Association discharged Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage for engaging in concerted activities protected by the Act, I recommend that the Association be directed to offer Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage reinstatement to their former positions, if necessary terminating any employees hired to replace them,[22] and to make them whole for any losses in wages or benefits they suffered by virtue of the discrimination against them, with the amounts due calculated in the manner set out in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and interest thereon computed in accordance with the formula set out in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

On the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I recommend the issuance of the following:

ORDER[23]

The Respondent, San Diego County Association for the Retarded, San Diego, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from disciplining its employees for engaging in a strike for the purpose of securing satisfactory resolution of their work-related grievances.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer to Robert Acosta, James Dunkin, David Gilmore, Aiko Hinojosa, Karen Pickell, Therese Sullivan, Genvieve West, and Warren Werwage reinstatement to their former positions, if necessary terminating any employees hired or assigned to replace them in those positions.

(b) Make whole Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage in the manner set out in "The Remedy" section of this Decison.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and any other records neces-

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Bank of Omaha, *supra*, holding the grievants had no duty to refrain from striking while giving their employer an opportunity to resolve their grievances.

[22] I reject the Association's contention the eight are barred from reinstatement by their participation in the preparation and circulation to parents of the students and the public of a letter on April 28, 1980, wherein they appealed to the parents and the public for support in their effort to resolve the work-related grievances which led to their strike and their discharges. Appeals by strikers to third parties for support concerning issues related to their dispute with their employer do not deprive strikers of reinstatement rights under the Act.

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

sary to analyze and determine the amounts due to Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage under the terms of this Order.

(d) Post at its premises in San Diego, California, copies of the attached notice marked "Appendix."[34] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[34] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Quick Find Co. *and* **Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 14–CA–14435 and 14–RC–9292

January 13, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On August 7, 1981, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Quick Find Co., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

BERNARD RIES, Administrative Law Judge: These proceedings were consolidated for hearing by an order of the Regional Director for Region 14 issued on January 27, 1981. A hearing on the consolidated matters was held in St. Louis, Missouri, on February 5 and 6, 1981.

At issue is whether Respondent's agents violated Section 8(a)(1) and (3) of the Act by various statements made to employees in October, November, and December 1980, and January 1981, and by refusing to give them a bonus in December 1980; whether Respondent violated Section 8(a)(3) by terminating the employment of five employees on November 6, 1980; whether the ballots cast by four of those employees in an election held on January 9, 1981, should be opened and counted; whether another employee is a statutory supervisor; and whether there is substance to the Employer's objections to the election, which essentially claim that the election was tainted by the union activities of the asserted supervisory employee.

Briefs have been received from all parties.[1] On the basis of the entire record,[2] my recollection of the demeanor of the witnesses, and the briefs, I make the following findings of fact, conclusions of law,[3] and recommendations.

I. ESSENTIAL FACTS

Respondent manufactures storage chests for use on truck beds. It is a small concern, usually employing about eight production employees and one clerical employee. Its facility is located in a warehouse-style building which it shares with other businesses.

Dwight Gold started the business 10 years ago, and he remains its president. Until around July or August 1980, Gold had concerned himself with both sales and production functions; sometime in the summer of 1980,[4] Gold named Nathan Fogel, who had begun work for Gold as a salesman in May, to the newly created post of general manager, and Gold thereafter devoted himself more to sales. Other than these two men, there are and have been no managerial personnel.

The production employees signed authorization cards for the Union in October and, on October 22, the Union filed a petition for election with the Regional Office. The complaint alleges that Respondent thereafter engaged in a number of 8(a)(1) violations. On November 6, Respondent laid-off five of its seven full-time production employees, an action alleged to be violative of Section 8(a)(3). The Union filed an unfair labor practice charge on November 13. On December 18, Respondent wrote to the laid off employees, instructing them to return to work on December 26, and all save one did so. After a hearing in the representation case on December 3, an election was held on January 9, 1981. Of the seven ballots cast, five were challenged by Respondent, and the propriety of counting those ballots is an issue here.

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[1] After the hearing closed, Respondent moved to reopen the record, attaching to the motion an affidavit alleging certain post-hearing criminal conduct by a witness for General Counsel. Although the motion to reopen was denied, Respondent's brief makes reference to the contents of the affidavit. Terming the allusion "grossly improper," General Counsel has filed a motion to strike Respondent's brief and, as well, to "excise from the file in this proceeding and deliver back to Respondent" the motion to reopen and the affidavit. While I share General Counsel's view of the impropriety of argument predicated on untested allegations, I see no point in engaging in the meaningless and ritualistic action sought by General Counsel. Obviously, I have ignored the affidavit to the extent of my capacity to do so.

[2] Errors in the transcript have been noted and corrected.

[3] The record establishes that it is appropriate for the Board to assert jurisdiction over Respondent, and that the Charging Party is a labor organization within the meaning of the Act.

[4] Unless otherwise specified, all dates hereafter refer to 1980.

259 NLRB No. 144

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Interrogation of Eugene Emily on October 23*

The complaint alleges that, on October 23, Respondent's president, Gold, unlawfully interrogated an employee.

Eugene Emily testified that, on the day Gold received a copy of the election petition, Gold called him into the office and asked if he knew anything about the letter. Emily said that he did. Gold asked if he had signed a card. When Emily gave an affirmative reply, Gold said, "That's all I wanted to know." Gold acknowledged at hearing that the interview had occurred basically as alleged.

Several distinct legal issues in this case relate to Respondent's claim that Eugene Emily is a supervisor within the meaning of the Act. Since Respondent would have been privileged, if Emily was a supervisor, to ask him whether he had signed a card, I shall turn now to the issue of Emily's status.

Emily began working for Respondent at some uncertain time, left employment, and then returned to work for Respondent again in 1976. As of October 1980, he was the most experienced of the seven full-time employees in the shop, the next most senior having been there for perhaps 3 years.

It is clear that, in a real sense, Emily was "in charge of" the production area, which is some 75–100 feet distant from the office and separated therefrom by the premises of another company. Before Fogel was appointed general manager around July 1980, no one, other than Gold, had occupied such a position. Before Fogel, Gold was often away from the plant attempting to market the product, and Emily was plainly the only one available to handle routine supervisory chores.

Gold testified, in fact, that a few years ago he left Emily in charge of the plant for 21 days. Emily testified that there were days, even when Gold was around, that the latter did not enter the production area. At one point, said Gold, he hired a man named Meyer as Emily's "assistant foreman," but Meyer and Emily did not get along, and when Emily "more or less" suggested that Meyer be dismissed, Gold fired him.[5] Fogel testified that, since becoming general manager, he has been away for weeks at a time, leaving Emily "in charge."

Gold testified that, before Fogel, he would screen applicants for employment and send on to Emily those who had passed: "If Emily didn't want them or didn't like them or didn't think he could do it, the employee was just sent away." Fogel testified that, since he had become general manager, 10–15 people have been fired and, on each occasion, after interviewing and selecting a number of attractive prospects, he has had Emily interview them and has then consulted with Emily for his opinion as to their acceptability: "He and I together will select one."[6]

Emily was not asked about his experience prior to Fogel's arrival but, when he was questioned as to occasions on which Fogel has consulted him about hiring, he said that Fogel had brought "a couple of guys out there," one whom he interviewed and the other whom he tested on the punch press as well. Respondent put in evidence four application forms. Two of them, dated June 14 and December 18, 1979, show that the applicants were "interviewed by" Emily (Gold is not mentioned); on a third, dated July 30, 1980, Emily's wife, who serves as the office secretary, wrote, "Looks good to me, Nate [Fogel] & Eugene"; and a fourth, dated August 5, 1980, says, "Eugene said would work out."[7]

It seems apparent that Gold has never comprehensively outlined to Emily the scope of his duties,[8] but his authority seems to have been inherent in the position, as he himself indicated by his actions. Emily conceded that he once warned employee Milton Kernebeck about his drinking but, asked if he had warned anyone else, Emily replied, "No, not for the company." However, employee Hoffman, testifying for General Counsel, said that Emily has "warned a few," and he specified an employee named Chester who was "warned" because he "fooled around with the spray gun." Emily's affidavit also states, "I do try to warn other employees about matters of safety or to keep working, but this is just so nobody gets hurt. "At the instant hearing, he amended this to read that he only tells employees to keep working "if a boss comes around."

Although Emily first testified that he had not recommended the discharge of any employee, he later conceded as truthful the statement in his affidavit that he "did suggest to Fogel that he let one man go," since the man was "on drugs and a danger to the rest of us." Fogel acquiesced in the suggestion, and he testified that he did so without further investigation. Gold further testified that the dismissal of employee Hedrick in 1979 came about because "Eugene suggested that we get rid of him. "Since Hedrick was evidently the "Chester" (see Resp.

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[5] Employee Charles Hoffman effectively corroborated part of this testimony. His affidavit states that he himself "used to be leadman" (although he testified that no one ever *told* him that he was the leadman), but that "Dave Meyer took over" as leadman and was then discharged.

[6] In stating on brief, "Fogel acknowledged that upon occasion, he had rejected applicants for hire who Eugene Emily had recommended be hired." General Counsel mischaracterizes the evidence. Fogel testified that in the course of selecting from a pool of applicants already approved by Emily, their joint selection of one *ex necessitate* constituted "rejection" of others recommended by Emily.

[7] Where Emily's testimony conflicts with that of Gold or Fogel on this supervisory issue, I am not inclined to credit Emily. A reading of the transcript leads me to believe that Emily was of a mind to shape his testimony according to the needs of the case. He testified, for example, that before Fogel, "no one" was in charge if Gold was absent, a most unlikely state of affairs. While Emily answered negatively a question whether Gold had told him that it was his job "to catch the mistakes of the new employees," his pretrial affidavit states, "Gold has told me that it is my job to catch the mistakes of new people. "Again, Emily testified in the representation case hearing, "Well, I approved them to go home early. When they tell me they have to go home, why, I say, well, sure . . . . Then I go out and tell the supervising manager that he had to go home early." In his pretrial affidavit, he contrarily said, "If the bosses aren't present I can't let the men off, if the bosses are there, the men must see the bosses." But then at the hearing, he further contradicted his representation case testimony by answering "No" to the question whether the men "come to [him]" when they want to take off and no higher authority is present. Although Emily was a personally impressive witness, this sort of testimony seriously weakens his reliability.

[8] I note, however, as earlier brought out, the statement in Emily's affidavit that Gold told him it was his job "to catch the mistakes of the new employees." Emily said this happened in 1976.

Exh. 12) who was, according to Hoffman, warned by Emily for his behavior with the spray gun, Gold's testimony seems probable.

The record shows that Emily is primarily in charge of training new employees and gives them the required orientation. Gold further said that, before Fogel, the decision about whether to retain a probationary employee depended entirely on Emily's evaluation of him, and Fogel testified that he asks Emily periodically how new employees are working out and whether they should be kept on. Emily conceded that "sometimes" Fogel asks him how a new employee is getting along.

Emily spends most of his day at physical labor, primarily in operating a punch press. When he arrives in the morning, he evaluates the situation in order to determine the kind of parts which need to be manufactured, and they are accordingly fabricated. When a special unit needs to be built Fogel will tell Emily, and the latter will instruct the other employees.[9] If a part is needed, Emily will "sometimes" send an employee to the office to get it, and it is also Emily's responsibility to notify Fogel that supplies are needed. He further conceded that if he finds that "something is done incorrectly," he will bring it to the attention of the offending employee. While Emily testified that he moves employees from one job to another only if "they run out of work," Kernebeck testified that Emily "does have the power to move people around" to help make parts which are in short supply, and Kernebeck has seen him do so. Emily testified that when an employee runs out of work, "in order to keep them working, you know, I'll switch them to something else."

There are other indicia of supervisory rank. Emily earns $5.62 an hour; the other employees earn from $4 to $4.43. For the period of a year in which the timeclock was broken, Emily certified the hours worked by the employees on their timecards. According to Gold's uncontradicted testimony, Emily undertook, without instruction, to "cross-train" employees in functions other than the ones they were performing. His sense of management-oriented responsibility seems to be demonstrated by the fact that he once volunteered to work overtime for a week because they were "real low on stock."

It does seem reasonable to argue that the hiring of Fogel introduced an extra layer of supervision into the plant which would naturally have tended to diminish Emily's own position. But it appears from the record that, when Fogel took over, Gold spent less time at the business,[10] thus leaving Fogel to assume some of Gold's duties, and correspondingly less of Emily's than might be expected. Fogel testified that, on a normal day, he spends 30-45 minutes in the shop (apparently in a series of visits), and sometimes as much as an hour. That is not an inconsequential total period of time per day, and it might be contended that Fogel's daily presence suggests that Emily's supervisory authority is negligible.[11] Nonetheless, it appears to me that in many respects Fogel, continuing to be active in sales after becoming the general manager, relied upon Emily to oversee a production operation with which Fogel had no prior experience, and that, as shown above, Emily in fact regularly exercised recognized supervisory functions.[12]

The foregoing analysis leads me to believe that Emily is a "supervisor" within the meaning of Section 2(11) of the Act. While not a high-ranking manager, Emily does appear to have the authority, "in the interest of the employer," to "transfer," to "assign," and "responsibly to direct" employees, and to "effectively . . . recommend such action[s]" as "hire" and "discharge." An employee who, *inter alia*, plays a vital part in the hiring process, who takes it upon himself to recommend that employees be discharged, who warns employees about their behavior, and who tells employees to stop doing one job and start upon another, possesses the authority contemplated by the statutory definition.

I further find that Gold did not violate the Act when he asked Emily about the letter on October 23. General Counsel argues, in the alternative, that even if Emily is a statutory supervisor, Gold's questioning would have tended to coerce Emily's wife, a statutory employee who was present at the time. The short answer is that if Gold was acting legitimately in interrogating Eugene Emily, that action could not have radiated an unlawful fallout on Susan Emily who, the law presumes, recognized the propriety of the questions put to her husband.[13] I therefore recommend dismissal of this allegation.

B. *The Alleged November 7 Violation*

Employee Milton (Bud) Kernebeck figures in most of the 8(a)(1) allegations.

Kernebeck worked for Respondent from 1974 to 1976, when he was discharged. He returned to work around February 1980, left in May, and then came back around August.

Kernebeck and Eugene Emily were the only full-time production employees not laid off on November 6.[14] On the morning of November 7, Kernebeck, Eugene Emily, and Susan Emily were in the production area when General Manager Fogel came in. The three employees gave generally congruent testimony as to the nature of the conversation which followed. In Kernebeck's words, Eugene asked Fogel why the employees had been laid off. Fogel said that Respondent's inventory was overstocked. Kernebeck asked if it had anything to do with the Union. Fogel asked what the main complaints of the employees were. Kernebeck named several items. Fogel commented, "I wish I'd have known something about this. Maybe I could have done something about it." Kernebeck replied, "Well, no matter what you can do, you're not going to stop the Union." More was said, which Kernebeck could not recall, and Fogel left, saying, "Well, let me see what I can do."

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[9] Normally, however, it appears that the work is routine, and that employees require no particular instruction.

[10] Gold said that he is sometimes there no more than "10 minutes a week," and never "all day."

[11] I take note here of Fogel's testimony that he tries to be in the production area at the beginning of each workday, and that he once asked a group of employees, at 7:30 a.m., and in Emily's presence, why they were not working (thereafter, however, he asked Emily, "Why aren't your men working?").

[12] Since I conclude that the November layoff was motivated by unlawful considerations, it does not surprise me that Fogel did not consult with Emily, a known union supporter, about that decision.

[13] Gold testified, without contradiction, that not long before the hearing, Susan Emily had remarked to him that she "always thought [Eugene] was the foreman until [she] talked to the National Labor Relations Board lawyer."

[14] I put aside here Gold's brother, a Social Security pensioner who worked half-days.

Fogel remembered the conversation generally, but recalled no reference to the Union. He did, however, remember being told of the employee complaints and saying that he was "new as a manager there," that he had implemented a hospitalization program for the employees, and that he "would try and do things that would be better for the employees." He did "not recall" asking what grievances the employees had.

The complaint alleges that Fogel "solicited grievances from employees and impliedly promised to remedy those grievances in order to discourage employees' union organizational activities and/or union sympathies."

Although, as earlier noted, the testimony of the Emilys on this point is generally supportive of Kernebeck, there is one difference. The Emilys had Fogel saying only that he "wished we would have come to him first instead of going to the Union" (Eugene) or that "he wished that he had known, he could have done something about it" (Susan). This has a wistful, beyond-repair, connotation, arguably inconsistent with an implied promise to rectify wrongs. But Kernebeck testified that Fogel said, "Well, let me see what I can do," and Fogel himself recalled saying that he "would try and do things that would be better for the employees." Given this concession, and given my conclusion that, as the three employees testified, Fogel did solicit them to express their grievances,[15] I conclude that Fogel did indicate to the employees that Respondent would improve their employment conditions if they would withdraw their support of the Union, in violation of Section 8(a)(1).

C. *The Alleged November 12 Violations*

The complaint perceives four separate violations of the Act in a single conversation between Kernebeck and President Gold on November 12; it alleges that Gold unlawfully "interrogated" Kernebeck, informed him that employees "would not better their employment conditions," "threatened employees with loss of benefits," and "threatened to discharge employees."

Kernebeck said that, on November 12, Gold came into the plant area and called him away from working with Eugene Emily. Gold asked, "What's going on around here?" After some coy parrying, Gold said, "You know what I'm talking about, this Union. Did you join it?" When Kernebeck said he had, Gold then asked why he had not told him; Kernebeck spoke of a fear that Gold would have fired the lot of them. Gold then asked if Kernebeck planned to "stick with this," and the latter said that the employees were trying to better themselves. Gold told him, "Well, you're not going to better yourself, I guarantee it."

After further argument about whether certain employees were being treated fairly, Gold again asked if Kernebeck was going to "stick with this." Kernebeck indicated that likelihood. Gold then said, "You know, you were booked for a raise," and also said, "There was two guys that were definitely going to get fired, and you know who they are." After finally asking whether Kernebeck was "going to stick with this," Gold left.

Asked about an approach made by him to Kernebeck on November 12, Gold recalled a conversation in which Kernebeck had argued with him about the entitlement of certain employees to a vacation. He said that "[w]hen it came to the union business, he asked me about the thing and the question did arise as a result of one of his questions, are you going to stick with that?" Gold then said that Kernebeck "brought the union up," and that he did not "ask [Kernebeck] how he felt about the Union." Gold further agreed that there had been a conversation in which Kernebeck "was talking about the Union and I said two of those guys should have been fired."

Kernebeck is a convicted felon, and his convictions—for armed robbery and for concealing that prior conviction on a Federal form relating to the purchase of a shotgun—are relevant to his trustworthiness. Despite his checkered background, he was a most spontaneous and convincing witness. Gold, on the other hand, became less and less persuasive as his testimony went on. In this particular instance, for example, I find it very difficult to reconcile his admission that he asked Kernebeck whether he was "going to stick with" the Union with his denial that he asked Kernebeck "how he felt about the Union."

Eugene Emily, standing 20 feet away, testified that he overheard some of the conversation. As noted, Gold confirmed that he had a conversation or conversations in which he asked Kernebeck if he was going to "stick with" the Union and said that "two of those guys should have been fired." The record shows that Gold returned to this country from a long absence only the day before November 12, and it seems likely that he might have chosen that day to sound out Kernebeck. I conclude that the discussion between Gold and Kernebeck occurred as the latter says it did.

The persistent questioning about Kernebeck's union activities and intentions is, under Board law, violative. Gold's "guarantee" that Kernebeck would not "better himself" by resorting to the Union does, as General Counsel argues, unlawfully connote that such resort is a futile act. The comment that the employees "were booked for a raise" implies, without more, that benefits would be withheld because of the union activity.[16]

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[15] Fogel made a pleasant personal appearance, but he only could "not recall" asking the employees what their complaints were, and in other respects his testimony seemed suspect. The three employees did not, I believe, fabricate this, and the course of the conversation would logically flow as the employees described it and as Fogel partially corroborated it.

[16] That Gold actually made such a statement is supported by his testimony at the hearing that "to be very frank with you, all of them were booked for a raise at that particular time, that's right, and then this occurred." On brief, General Counsel requests that, although the matter was not alleged, Respondent be found to have unlawfully withheld a previously scheduled wage increase. In my view, the question was not sufficiently litigated. Among other things, I have no idea what Gold meant by "booked," the size of the purported increase, or when such an increase would have become effective. Indeed, in view of Respondent's failure, due to business conditions, to pay employees their customary bonuses in 1980, as discussed hereafter, I very much doubt that a wage increase was more than a distant cloud on Gold's mental horizons, despite his testimonial assertion. In my view, Gold was simply attempting to put pressure on Kernebeck by this remark.

I disagree, however, with General Counsel's final contention that Gold's reference to "two guys that were definitely going to get fired" constitutes a "threat to discharge employees due to organizing activities." While the allusion did occur in a conversation linked to the union effort, this statement was not given a specific context by Kernebeck, and it does not fit easily into the conversation described by him. The remark very likely related to the November 6 layoff and to a claim by Gold that, even if there had been no layoff, two of the employees were destined for departure in any event. Since there is no showing that those two (whoever they might be) to whom Gold was referring played any prominent role in the organizing activity—indeed, the record shows that Emily and Kernebeck, the two employees *not* released on November 6, were the only employees at all instrumental in bringing in the Union—there is no basis for finding a threat to discharge employees because of their union affiliation.

D. *The Alleged November 13 Violation*

The complaint alleges that Gold unlawfully told an employee "that Respondent had delayed employees' efforts to be represented by Charging Party by causing the proceeding in Case 14–RC–9292 . . . to be blocked from processing."

A hearing on the petition was to be held on November 13. Gold appeared at the Regional Office as scheduled, but because the Union filed an unfair labor practice charge on November 13, based on the November 6 layoff, the hearing was not held.

Kernebeck testified that later on November 13, when he went to Gold's office to tell him something, Gold, with Fogel present, made reference to the fact that he had been at the Regional Office and said, "Well, we've got you blocked for a couple of weeks." Gold's testimony on this point is less than pellucid; he seemed to be saying that he did have a conversation with Kernebeck on November 13, but that is not at all clear. He denied, however, ever telling Kernebeck that the Union had been "blocked."

I do not believe that Kernebeck fabricated the essence of this unusual remark. On the other hand, it seems possible that Kernebeck misunderstood the import of what Gold was saying. Under routine procedure, the effect of the Union filing a charge was to "block" the processing of its own representation petition; it then apparently filed a waiver which allowed the election to proceed. Gold, a layman representing himself at the time, was probably told about that procedure by the Board agent assigned to the case. In turn, Gold probably told Kernebeck, also presumably a stranger to Board procedures, that the case had been "blocked," an arcane usage whose meaning likely escaped Kernebeck. There is no reason to think that Gold would have said that "we've got you blocked" when the blocking effect arose from the Union's own charge, a fact easily ascertainable by Kernebeck.

Moreover, even if Gold made the remark as testified by Kernebeck, I would doubt that it violated the Act. General Counsel regards it as analogous to cases where employers have expressed their "intent to delay Union representation through endless appeals," citing *Two Guys Discount Department Stores, Inc., a wholly owned subsidiary of Vornado, Inc.*, 242 NLRB 1139, 1149 (1979). No such broad-gauged intention is indicated by the statement assertedly made by Gold.

E. *The Alleged November 14 Violation*

On or about November 14, Gold had a brief conversation with Susan Emily, his secretary. The complaint has parsed this conversation and analyzed it as containing three separate violations of the law, asserting that Gold "interrogated" Emily, "solicited grievances" from her, and "impliedly threatened to discharge employees."

Emily testified that Gold told her, on what she "believe[d]" was the day that he had had a meeting with the Labor Board, that "they had come out second."[17] He asked her if "we were going to go through with this," and she said she had nothing to do with it. Gold then inquired whether her husband intended to "go through with it." She said that he would and that, even if he wanted to back off, he would not do so, "because as soon as the Union would turn away, you would fire him." Gold then said, "Well, what can they do now." Emily replied, "Well, by what a Union guy has told him, they can't be fired for wanting a union in there." Perhaps at some point in this conversation, although Emily was not sure about that,[18] Gold said that he "couldn't see why the guys couldn't come and talk to him first. And, you know, see if they couldn't come up with something."

While Gold denied asking Emily if she was "going through with this" or how her husband "felt about it," he did seem to concede having had a conversation with her at least generally along the lines described by Emily.[19] Susan Emily was a most credible witness, and I believe her testimony.

The interrogation of Emily as to the future plans of the employees was a violation; I think; even though the question was inapplicable to Susan, who was excluded from the petitioned-for unit, it did inquire into the sentiments of the other employees ("if we were going to go through with this"). I think the Board would hold this to be coercive.

Abstractly, Gold's question, "Well, what can they do now," may be ambiguous, but I think the context reveals it to be threatening. Emily spoke of Eugene's concern that he would be subject to discharge by Gold if he abandoned the Union. Gold's response, "Well, what can they do now," intimates that he was telling her that "they" had no protection from discharge even with the shield of the Union, and Susan's reply to the remark suggests that she, too, thought that he was saying that he was free to fire the employees: "Well, by what a Union guy has told him, they can't be fired for wanting a union in there." I think Gold's statement amounts to a distinct, if implicit, threat that, as General Counsel puts it on brief, he "could fire the employees for their activities if he so chose." See *General Iron Corp.*, 218 NLRB 770, 776 (1975).

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[17] This suggests that the conversation occurred on November 13, not November 14 as alleged. Emily did not clarify who Gold intended to characterize as the "they" who had finished second.

[18] That might have been in the same conversation.

[19] To the question whether he asked her if Eugene and the others were going through with the effort and whether she had replied that Eugene would not back down for fear of being fired without union support, Gold replied, "I think that she mentioned that, I think that she strung up a conversation and did say that."

As set out, Gold also said that he "couldn't see why the guys couldn't come and talk to him first. And, you know, see if they couldn't come up with something."[20] I believe this was, as alleged, a solicitation of employee grievances, and that it did imply that those grievances would be remedied if the Union was abandoned. While the solicitation was not addressed to the direct concerns of the employee who heard it—a nonmember of the proposed bargaining unit—it does appear to be intended for transmission to those to whom it would be meaningful. I doubt that Gold was simply engaging in idle or uncalculating chatter. I suppose, rather, that his deliberate intention was to send a message to Susan's husband and the other employees that he would lend a willing ear to employee complaints if only, to use other words uttered by Gold, they would not "go through with this."

Accordingly, I find the three violations alleged in the complaint.

F. *The Alleged December 22 Violations*

The complaint alleges that Gold unlawfully interrogated an employee on December 22. Kernebeck testified that, on that date, Gold and Fogel came to his work location. Gold said, "You're back here all by yourself. We thought we'd come back and aggravate you for a while."

Gold then asked, "What's going on?" Kernebeck said he had heard nothing "since you guys went down to the Labor Board." Gold said that he thought Kernebeck did "know something" and that "You and Eugene both know what's going on." After referring to the forthcoming election, Gold asked, "Well, how are you going to go?" Kernebeck replied that he had already told them how he was "going to go." Somewhere along the line, Gold asked, "Who started this thing with the union?" Kernebeck told him that Eugene was the original instigator, but that he himself reactivated the effort after a hiatus.

Fogel recalled Kernebeck telling them that Eugene had originated the campaign, but said that that discussion took place in Fogel's office. Questioned at the hearing about an occasion on which Kernebeck was asked about the latest "scuttlebutt," Fogel had a "vague recollection" of a time when Gold made the comment "what's happening" to Kernebeck, after which "Mr. Kernebeck said, nothing, and we kept on walking." It would be surprising that a brief encounter could have been so memorable, unless it was less succinct than Fogel suggests. Gold, however, did "think" that he had a "conversation out in the plant with Kernebeck about the 22nd." In his recollection, however, Kernebeck "came to me and started talking Union." Nonetheless, he conceded that he asked, "Who started this thing,' and asked how Kernebeck "was going to vote with regard to the Union."

I credit Kernebeck's detailed account, as partially corroborated by Gold, that the two managers approached and questioned him, and I find that Respondent thereby engaged in impermissible interrogation, in violation of Section 8(a)(1).

The complaint alleges that,on December 22, Gold "advised an employee that this employee would not receive a bonus or a raise due to the union organizing"; and that, since that date, "Respondent has failed and refused to grant its employees a regularly scheduled Christmas bonus because the employees engaged in union and/or concerted protected activities."

Kernebeck said that, after the conversation with Gold and Fogel on December 22 set out above, Fogel later came into the shop again, at which time Kernebeck asked for his Christmas bonus. Fogel said his hands were tied, but that he thought it was "going to be delayed." He said he would ask Gold to speak to Kernebeck the next morning, however.

Gold followed up the next day, coming into the production area and telling Kernebeck that no bonuses would be given because "we haven't made enough money this year." Kernebeck argued that he thought he was "entitled to my bonus," and Gold replied, "Well, we do too. We want to give you a raise, but we can't because the NLRB will be on my ass." After a long discussion, Gold relented and then and there wrote Kernebeck a check for $50. When Kernebeck thanked him, Gold said, "You're welcome. I still don't know how you're going to go."

The testimony shows that, for the preceding several years, Gold had given his employees a bonus each July and December. The amount of the bonus was evidently discretionary with Gold. The evidence also shows that Gold had not paid the bonus in July of 1980, due, he said, to business conditions. In view of that circumstance, there is no reason to believe that he would have given all the employees a bonus in December, Union or no Union. Accordingly, I recommend dismissal of the allegation that the Christmas bonus was withheld due to union activities.

General Counsel's lengthy brief does not alternatively argue that the $50 payment to Kernebeck was an unlawful grant of benefit. It would seem to fall into that category. By giving Kernebeck $50 and saying, "I still don't know how you're going to go," Gold related the payment, which he at first had said he would not make, to Kernebeck's vote in the upcoming election.[21] The grant of such a benefit, in these circumstances, is a good example of the "fist inside the velvet glove" effect held by the Supreme Court in *N.L.R.B.* v. *Exchange Parts Company,* 375 U.S. 405, 409 (1964), to be the theoretical underpinning of the prohibition against awarding certain benefits. I believe that the issue was sufficiently litigated to permit a finding of violation here.

The complaint asserts that Kernebeck was unlawfully "advised . . . that . . . [he] would not receive a bonus or a raise due to the union organizing." As for the bonus, Kernebeck testified, as noted, that Gold ascribed his (initial) failure to pay a bonus to the fact that Respondent had not "made enough money this year." He did go on to say, however, "We want to give you a raise, but we can't because the NLRB will be on my ass."

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[20] I have noted above that Susan Emily seemed unsure whether these particular comments were also made on November 13. Since they clearly did occur within the 10(b) period, the precise date is immaterial. Gold was not asked whether he had made such remarks to Susan.

[21] Gold conceded that he gave Kernebeck the money, and explained that he did so because Kernebeck "badgered" him.

I find no violation here. In the first place, there was, in point of fact, no demonstrated actual withholding. In view of Respondent's failure to pay bonuses in July and December, I do not believe that it had any real intention of giving a wage increase in the latter month, and I am certain that Kernebeck so appraised the situation.[22] Gold was simply engaging in puffing when he said that "[w]e want to give you a raise." Moreover, the explanation that no such raise could be given "because the NLRB will be on my ass" was, in the circumstances, a wholly realistic judgment of that portion of the corporate anatomy on which the Region might land if Respondent were to suddenly award a nonscheduled benefit just prior to an election. Gold did not attribute the failure to grant a raise to the fact that the employees were interested in the Union as such, nor did he imply that the outcome of the election would make a difference as to whether the employees would or would not receive an increase.

General Counsel cites the violation found in *Pacific Southwest Airlines*, 201 NLRB 647 (1973), where the employer summoned the employees to his office and "informed them that the promised wage increases would be canceled in view of the Union's demand for recognition, pointing out that the law did not permit the Company to provide higher wages or benefits which could persuade employees not to support the Union." In that case, however, the employees had been told only 5 days before (and prior to receipt of the union demand) that they would be receiving the increase. It is clear that the employer could have properly proceeded with the increase under controlling law, and that the Board reasonably inferred that the cancellation would be understood by the employees as "an act of retaliation for their continued adherence to the Union." *Id.* at 648.

The Board also said, in dicta, that in cases in which no violation has been found arising from a withholding of increased benefits, the mechanics and resolution of which have not been finally formulated . . . full explanation of the reasons for the withholding along with the assurance of future consideration of the withheld benefits, notwithstanding the outcome of the union's election campaign, serve to dissipate any assumption that the employees may or may not have that the union's presence is the sole obstacle to the ultimate realization of the promised benefits." *Ibid.* The Board did *not* say that such "full explanation" is a prerequisite to legality, and, in fact, in the case cited by the Board in its discussion, *The Great Atlantic & Pacific Tea Company, Inc.*, 192 NLRB 645 (1971), where no violation was found, the Board had specifically noted that "Respondent made no announcement to the employees that its policy had changed and that the employees would receive the raise regardless of how they voted in the election."

Here, Gold spoke to a single employee about a possible raise which, I am confident, that employee had no reason to believe had been under serious consideration. Gold did not lay at the Union's doorstep the blame for withholding the tenuous raise, but attributed the problem to a legal prohibition. I consider the remark considerably less offensive than those found by the Administrative Law Judges to be proper in *C. P. & W. Printing Ink Company, Inc.*, 238 NLRB 1483, 1512 (1978) (speech to employees; the normal wage increases would not be given "because under the National Labor Relations laws it would be illegal for me to do so at this time while the Union election is pending. If I were to do so the Union would claim that I was trying to bribe you . . . . All I can tell you is that once the election is over one way or the other then something can be done") and *Richard Tischler, et al., d/b/a Devon Gables Nursing Home et al.*, 237 NLRB 775, 787 (1978) (employees were told that "pay raises were at a standstill [because] of the Union's representation petition and that if the Union succeeded in representing the employees, their wages would be a matter for collective-bargaining negotiations"). These remarks might be said to contain "assurance of future consideration of withheld benefits"; to my mind, they can be construed as more ominous than assuring, and perhaps a good demonstration of why such "assurances" are better omitted altogether.

Accordingly, I recommend dismissal of this allegation.[23]

G. *The November 6 Layoff*

The complaint charges that when, "on or about November 6, 1980, Respondent laid off and/or terminated employees Michael Rangel, Joseph Emily, Charles Hoffman, Robert Moore and Donald Dilschneider," it violated Section 8(a)(3) of the Act. I find substance in the allegation.

The election petition, as earlier noted, was filed on October 22. On November 6, General Manager Fogel told Susan Emily that all the production employees, with the exception of Eugene Emily and Milton Kernebeck, were to be laid off that day.[24] After November 6, the latter two employees were put to work fabricating safety guards for the machinery, a measure evidently thought to be prudent as a result of an earlier OSHA investigation. Eugene Emily, however, also continued to perform production work, finishing up some incomplete units, during the first week after the layoff.[25]

A hearing in the representation case was held on December 3; the Regional Director's Decision and Direction of Election issued on December 12, setting an election for January 9. The complaint in this case issued on December 4.

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[22] Gold testified that 1980 sales were down 24 percent from 1979.

[23] I have, nonetheless, found violative Gold's November 12 statement to Kernebeck, "You know, you were booked for a raise." The situations differ. In November, Kernebeck had not been informed that Respondent could not even afford to pay a bonus. Moreover, the open-ended November 12 statement strongly implies that future benefits would be withheld simply because of, and for no other reason than, the union activity.

[24] Gold's brother, a part-time worker, was also retained, according to the payrolls in evidence.

[25] G.C. Exh. 4, however, also shows that a substantial number of units were produced on November 25 and 26, and December 5, 9, 12, and 22, prior to the recall of the employees; this was apparently done by Kernebeck.

On December 18, the laid-off employees were recalled to work, effective December 26.

Respondent contends that the layoff was simply necessitated by an excessive stockpile of inventory. Gold, who left for Europe on Sunday, October 26, and did not return to this country until November 11, testified that before he left, and even before he received the petition, he told Fogel, "If you can't sell the merchandise and there is no place to put it, they are not working, just lay them off." Fogel testified that he thereafter decided to lay off the employees on November 6 because the space available for storing completed units was "totally used up" and the inventory was spilling into the aisles, and he thought it necessary to cease production until the inventory had been reduced by sales.

In his testimony, however, Fogel did not mention that Gold had given him any instructions in the matter before he left on his trip. Fogel's testimony, in fact, sounded as if he had received no instructions. Asked if he made the layoff decision himself, Fogel answered:

> THE WITNESS: There was a—no—well, I guess, yes, I did because there was no one available for me to talk to and I am referring to Mr. Gold. He was on a trip, on an extended trip and he wasn't available and so because of no space available I couldn't see where we would go if we were still manufacturing, so I laid them off.
>
> JUDGE RIES: Can you recall how many days prior to November 6 you first made that decision?
>
> THE WITNESS: It was on my mind for at least a week; for at least a week I did not consult with Susan or anything. It is just when I reached that point I just laid them off.
>
> JUDGE RIES: I see, and you did not consult with Mr. Gold about that?
>
> THE WITNESS: No, he was unreachable. To be specific he was out of the country.

There was plenty of opportunity here for Fogel to refer to Gold's prior instructions, but it appears that he deliberately chose not to do so, perhaps to insulate Gold from any role in the decision.

Of considerable importance to Respondent's case, and for different reasons, to General Counsel's, is the fact that once before in 1980 Respondent had also laid off its employees. In May, because of an inventory buildup, Respondent began reducing the hours of its production employees and, for a 5-week period, each employee worked from 1 to 4 days a week; not a week went by during this time in which each employee did not work at least 1 day.[26]

Employee Charles Hoffman, who counts the inventory of finished units each day, testified that, at the time of the May layoff, there were "[a]bout 150" units in stock.[27] While Gold, asked if he has ever had 150 pieces in inventory, answered, "I don't know of any," he also professed so scant a knowledge and recall of the circumstances surrounding the May layoff (e.g., as to the part he played in it, he "may have offered the suggestion to [Eugene Emily] or said something" about the need for laying the employees off) that there is no reason to discredit Hoffman.[28]

General Counsel's Exhibit 4 is a stipulated summary of Respondent's daily inventory and daily shipments (permitting, by deduction, calculation of each day's production) from July 7 through December 31.[29] It shows that, as of the morning of November 6, the inventory consisted of 125 units. It further shows that there had been a steady increase in the size of the inventory since July. In that month, the number of units on hand ranged in the 40's and 50's; in August, in the 60's and 70's; in September, it reached the 80's and 90's; in October, it started at 94 and hovered in the 120's; and for the days of November 3–6, the inventory showed, respectively, 118, 122, 125, and 125.

But the stock had been at 125 before November. It hit that figure on October 17 and again on Ocotber 20, went to 126 on October 22, was at 128 on October 24 (the day after Respondent's receipt of the election petition, and Gold's last day at the office before leaving for Europe), and had reached 130 on the morning of October 30.

Thus, when Fogel says that the storage space was "totally used up" and the inventory was spilling over into the aisles with 125 units on November 6, that intolerable state of affairs, and worse, had also been true on the mornings of October 17 (125), 20 (125), 22 (126), 24 (128), 27 (127), 29 (127), and 30 (130). And it is hard to imagine where Respondent had stowed the 150 units, representing 17 percent more inventory than on November 6, on hand when the May layoff, which was only a partial one, was instituted.

Although Fogel is inconsistent on the point, it seems to be implicit in his testimony that he delayed the layoff in the hope that a rash of sales would reduce the inventory; that is a not insensible position. But there was no particular reason, so far as the record shows, for Respondent to have expected a sudden and immediate sales surge as of October 17, when the unacceptable 125 figure was first reached, and no employee was laid off, any more than it might have anticipated one in early November. The evidence indicates that this is an unpredictable, day-to-day, business: orders apparently come in suddenly and without advance notice, and Respondent attempts to fill them immediately from stock, unless a special, customized order is received. If it were true that 125 units left Respondent "totally out of space" on November 6, that same problem certainly existed on October 17, and no persuasive reason presents itself for not having laid off employees on the earlier date, or even more urgently on any of the successive days on which the inventory reached or exceeded that figure; either there was enough space or there was not.[30]

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[26] During this period, Eugene Emily was the only employee who continued to work full time.

[27] Unfortunately, Respondent's retained inventory records begin only with the July 1980 figures.

[28] I recognize, of course, that Hoffman stands to benefit from an unfair labor practice finding.

[29] Although Fogel at first testified that the "Total Daily Inventory" shown represents inventory at the end of the workday, he subsequently said that it depicts the inventory at the beginning of the day; the figures on the exhibit make clear that the latter statement is the accurate one.

The exhibit is plainly inaccurate in certain respects, and incomplete in others. For example, Respondent should show a greater daily inventory on December 3 than the 70 units indicated, since it began December 2 with 73 units and shipped out only 2 on that day. The numbers given for November 12 and 13 do not distinguish between the figures for each of those days; and there are no figures shown for certain days in the final 2 weeks of November.

In answer to the hypothetical question whether he would have laid the workers off if he had more room for inventory, Fogel replied, "It wouldn't have crossed my mind to lay them off at this time if there was room for storage." But since the record shows that Respondent had managed to accommodate 130 units on October 30 and 150 units in May, it seems reasonable to believe that it could not have been pushed to the hilt by 125 units on November 6.

Other evidence tends to create serious suspicion about Respondent's motive. Susan Emily testified that, soon after the layoff, Gold came to her and told her to cancel the shipment of two units for which she had already made shipping arrangements; he had never previously taken such an action.[31] She also said that Gold was holding on his desk orders for some two dozen units, also an unusual occurrence. While Gold denied that he had done so,[32] I believe Emily.[33] The fact that two extraordinary shipments of 16 and 19 units were made on November 25 and 26 (such a pattern—35 units shipped in 2 days—is not replicated during the period shown, although in July 34 units were sent in a 2-day period) indicates that units were, as Emily said, held back. It seems reasonable to suppose that Gold, who had only returned to the country on November 11, had some half-formed idea about padding the size of the inventory for a while,[34] but finally allowed his better judgment to get the best of him.

Susan Emily also testified that when, on November 6, Fogel told her that the men were to be laid off, he said, "Frankly, I was told to lay them off last week." Fogel testified that he believed he made a remark that he "should have had the layoff a week earlier." Susan Emily seemed quite believable but, since the two versions, while similar in structure, have quite different meanings, I am not inclined to rely upon what may have been a mistaken impression on Emily's part as to the intention behind Fogel's comment.

The most suspicious circumstance is the fact that, in contrast to May, when the employees had been permitted to work part time, until the inventory had been reduced, in November the layoff was total (except, of course, for the retention of Kernebeck and Eugene Emily). Fogel testified that he had been aware that the earlier layoff had been partial, and he said that he had "thought about . . . and discarded" the notion of using a similar system in November. His reasoning is opaque:

> Because it seemed to me that production would really suffer from that. You know, if we are going to have any kind of production and health and system there [sic], let the same two people, especially with the need for the safety guards and a welder, that to hire someone who cannot weld, I cannot have him making safety guards.

This seems to be an attempt to say that the need for the installation of safety guards had become so pressing that, to Fogel's mind, only those employees whose skills could contribute to the manufacture of such equipment could be retained until the job was done. Why there could not be both safety guard fabrication and regular production is not clear to me. Indeed, the record shows that, during the week following November 6, one of the retained employees continued to put the parts drawers together while the other made safety guards.

There was obviously no urgency about the installation of the guards. Fogel testified that he had anticipated installing them for "[a]t least a month to a month and a half" as a result of an OSHA investigation into an injury. On the other hand, his earlier noted testimony that "[i]t wouldn't have crossed my mind to lay them off at this time if there was room for storage" clearly shows that installation of the guards had no high priority.

But beyond this, if the only reason for not retaining all the employees on a part-time basis was, as Fogel seemed to be saying at this juncture, because he wanted to accomplish the safety work, it would seem that once that work was completed, he might then have been in a position to do what he had "thought about . . . and discarded." But although the guards had been finished at least by December 10, as indicated by Fogel's testimony, the men were not recalled until December 26.

The inventory exhibit shows that the stockpile dropped substantially after November 6. By December 5, it had fallen to 62 units, the lowest inventory Respondent had had on hand since August 11. The laid-off employees, however, were not recalled to work until December 26, 3 weeks later. As indicated, Fogel explained this by saying that December was anticipated to be a "slow month." This explanation, of course, directly conflicts with his other testimony that the layoff was solely due to lack of space, and that he would not have thought of laying off the employees "if there was room for storage." Surely, by the beginning of December, when the inventory dropped into the 70's, there was no question that there was sufficient "room for storage." And one would expect that in an inflationary economy, it makes some sense to produce now rather than later; if the inventory were to start to accumulate again, the employees could always be laid off again.

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[30] Fogel, a newcomer to the trade, also testified that he anticipated no sales increase in December, traditionally a "slow" month. While that history may be true, and the following may be fortuitous, the figures for 1980 in this record show almost an exact parity of units shipped for September-October and November-December (respectively, 72–64, and 72–63). Gold could not "recall" ever having had a layoff in November or December prior to 1980.

[31] Emily was confused at the hearing about the time of this incident. Her pretrial affidavit, given on November 19, states that it occurred "about last Wednesday or Thursday or Friday, November 12–14."

[32] Gold's denial was less than surefooted. Asked if two dozen orders were held up, he replied, "I heard that yesterday too and not to my knowledge." That rather uncertain posture was strengthened when the question was asked again: "No way because I want to see them going out the door."

[33] The record shows that one unit was shipped out on November "12 & 13," but the exhibit does not show on which of those days it was shipped. The exhibit also shows a shipment on Friday, November 14; it reflects no figures at all relating to Monday, November 17, but it may arguably be deduced from the inventory figures for November 14 and 18 that no shipments were made on the November 17; two units were shipped on November 18, none on November 19, and one on November 20. Susan Emily testified that a customer inquiry during this period led Gold partially to rescind his order.

[34] The representation proceeding was scheduled for November 13.

Despite the new availability of storage space, the recall of the employees was long delayed.[35] The contrast between May and November is, thus, striking. In May, when the inventory had crept up to 150 units, Respondent had nonetheless been sufficiently considerate of its employees to permit all of them to continue working part time, obviously for the purposes of benefiting them personally and maintaining the crew intact. In November, after the advent of the Union, not only was the bulk of the work force totally severed from the payroll, but also no effort was made to retrieve them until long after the time at which, according to one branch of Fogel's thought process, it would have been appropriate to recall them—when there was "room for storage."

The evidence shows that Respondent has for years posted on a shop wall a set of plant rules. One of them reads, "Any employee off three days or more, unless on paid vacation is automatically removed from employees list. If they are allowed to return they return as a new employee." In composing the eligibility list for the January 9 election, Respondent omitted the five employees who had been laid off on November 6, claiming, as it still does, that the rule operated to render the five ineligible to vote, since they had been "automatically removed from employees list" as of the election eligibility date (which was "the payroll period ending immediately preceding the date of" the Regional Director's December 12 Decision and Direction of Election). On brief, General Counsel theorizes that "the true motivation for the timing of the layoff" was Respondent's intention to attempt to take advantage of this rule.

The argument appears to be substantial, although I am less than sure that Gold was trying to manipulate the initial layoff in accordance with any Board procedures known to him. The record indicates that at least as of December 11, when he filed an answer to the present complaint, Gold was still unrepresented by counsel; I doubt that he was cognizant of the eligibility date concept, as such, on November 6.

Nonetheless, it probably did seem likely to him around that period that employees who had not been working for him for some time might not be allowed to vote when and if an election was ultimately held, and that it would possibly work to his advantage to attempt to sever their connection with Respondent in the hope that Respondent's 3-day rule would be honored by the Board in the future. To the extent that it makes sense to draw a retroactive inference from later behavior, Respondent's subsequent insistence in the representation case, and here, that the employees lost their status by operation of the rule seems specious. As explained by Gold, the rule was evidently adopted in order to allow him to have a printed scapegoat to which he could point when an employee went on an unannounced absence and then returned several days later to find that a replacement had been hired; apparently, Gold felt more at ease having something in writing on which he could blame the employee's loss of a job. This situation, obviously, is a far cry from the case of an employee who has been involuntarily laid off and is awaiting recall to work.[36]

I have taken into account Kernebeck's testimonial confirmation of his statement in a pretrial affidavit that: "Work was getting slow. We were pretty much stocked up at Quick Find. Employees were sort of expecting a layoff." On later examination, he said that since they were getting close to the 150 units which had been in stock in May, he thought that Respondent would use that situation to combat the union effort by a total layoff.[37] It is understandable that the employees might foresee the possibility of a layoff in the near future, should the stock reach the 150-unit mark. There was also every reason for them, and for us, to suppose, however, that, in more ordinary circumstances, there would be no layoff at all until the same conditions existed—accumulation of 150 units—which had obtained in May, and that any layoff then required would only be partial.[38]

From the foregoing, I conclude that Respondent was acting in response to the union effort when it laid off five employees on November 6.[39] While it could be argued that the vice lay only in the failure to invoke a partial layoff rather than a total one, and that the remedy should be limited accordingly, I think that the evidence supports a more comprehensive finding. Given that Respondent allowed the stock to reach 150 units in May before concluding that it had run out of storage space, it must be inferred that space was still available at the 125-unit mark on November 6, and that the layoff was simply not warranted on that basis on that date.[40] Given, again, Fogel's testimony that he would not have considered a layoff on November 6 had there been room for storage, it must again be inferred that, in more normal circumstances, even assuming *arguendo* the initial propriety of the layoff, there would have been an earlier recall than December 26 once there had been a decline in inventory (such as, for example, when it had fallen to 78 units by the end of November 26). In these circumstances, it seems proper to conclude that a full backpay remedy is in order.

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[35] Fogel testified elsewhere that the reason for eventually calling back the employees on December 26 was that "inventory had been reduced through my efforts of selling and it was time to go back into production." If reduction of inventory was the criterion, the record shows that on December 18, when Respondent wrote to the employees, the inventory stood at 64 units, a level higher than the 62 in stock at the end of the day on December 5.

[36] One might seriously question whether this rule was meant to be more than symbolic. Another rule reads, "Any employee not reporting for work by eight o'clock in morning has voluntarily quit." It seems doubtful that, on every occasion on which an employee failed to arrive by the appointed time, Respondent marked him down in the records as "quit" and "rehired." Furthermore, the two rules seem to be inconsistent. If an employee has "quit" by failing to report at 8 a.m., what would be the purpose or effect of waiting for 3 days of absence to "remove [him] from employees list"?

[37] Employee Charles Hoffman testified that he also "was looking for a layoff, but not that soon."

[38] While the record is silent on the question of whether Respondent could have anticipated its immediate future shipments as of November 6, I note that in the 3 workdays following that date, it shipped 20 items, reducing its stockpile to 110 units as of the end of the day on November 11. This latter figure evidently includes production of nine units by Emily during the 3 days, not too much below Respondent's normal daily production, as given by Fogel, of five or six units per day.

[39] I have considered the evidence, conceded by Gold, that 5 or 6 years before he fired the entire work force when the men refused to work ("a partial rebellion") because "they had some gripe or something." I do not believe his steadfast testimony that he did not "recall" what their grievance was, but I cannot say, on this record, that Gold has been shown to have a proclivity to react improperly to lawful concerted activity. Since there is no showing that the earlier activity was protected, Gold's reaction to it may have been legitimate.

[40] As earlier pointed out, there were 130 units in stock on the morning of October 30.

H. *The Alleged January 9 Violation*

The complaint alleges that on January 9, 1981, Fogel "threatened an employee with discharge if this employee refused to accept a supervisory position, in order to discourage the employee's union activities."

Shortly after the representation election was held on January 9, Fogel called Eugene Emily into his office and complained that the employees were bothering him about items that Emily should be taking care of. Fogel said that if Emily did not do his job, he would be discharged. Emily said that the question of whether he was supposed to be the foreman was then "in court." Later, after consulting his attorney, Fogel said he would let matters ride. Fogel testified that, since the union campaign, employees had been bothering him about problems which Emily used to handle, and that he wanted Emily to resume his control over these matters.

Having found above that Emily is a statutory supervisor, it follows that the admonition to Emily cannot be considered coercive. I might add that I suspect that, in an effort to shore up his claim of nonsupervisory status, Emily was refusing to perform functions which he had undertaken in the past. He testified that Fogel had been spending more time in the production area "since he asked me if I was going to [run the shop] and I said no." This at least suggests that Emily failed to perform some tasks he might normally have done, thus requiring Fogel to devote himself more to the production area.

III. THE ISSUES IN CASE 14–RC–9292

The Regional Director has ordered consolidation of the complaint case with certain unresolved issues in the representation case. Those issues are (1) the disposition of the ballot cast by Eugene Emily; (2) the disposition of the ballots cast by discriminatees Joseph Emily, Charles Hoffman, Robert Moore, and Michael Rangel; and (3) Respondent's objections to the election, based upon a claim that Emily's participation in the organizational effort "served not only to taint the original showing of interest, but also permeated the entire atmosphere in such a manner as to destroy laboratory conditions and frustrate the full enjoyment of the employees' choice in the election."

Since I have found that Eugene Emily occupied supervisory status at material times, I conclude that his ballot should not be opened and counted. Since I conclude that the four named employees were not on the payroll on the eligibility date only because of Respondent's unlawful discrimination against them, their ballots would normally be opened and counted. *Atlantic Foundry and Pattern Corporation*, 192 NLRB 745, 749 (1971).[41] The propriety of counting those ballots turns, however, on the validity of Respondent's objections to the election grounded on the extent of Emily's role in bringing in the Union.

The evidence shows that in August, Emily and the other employees spoke of getting organized by a union. Emily then made an appointment with a union agent, but when an employee was injured on the appointed day, the meeting was canceled.

In October, according to Emily, "we started talking about trying to get a union in and [Kernebeck] volunteered to call [the union agent] and set up an appointment. "Kernebeck did so, and all the employees went to the Teamsters hall, some in Emily's automobile and the rest in the car of another employee. After speaking with the business agent, and discussing it among themselves, all the employees signed authorization cards. The Union then filed a petition, using those cards as the 30-percent "showing of interest" which the Board requires as a prerequisite to the holding of an election.

Several early cases held that participation by a supervisor in the solicitation of authorization cards impairs a union's showing of interest *pro tanto* and may require dismissal of the petition. *Desilu Productions, Inc.*, 106 NLRB 179 (1953); *The Wolfe Metal Products Corporation*, 119 NLRB 659 (1957); *Southeastern Newspapers, Inc.*, 129 NLRB 311 (1960). Insofar as the Regional Director has referred to me the Respondent's election objection pertaining to the alleged "taint[ing of] the original showing of interest" by virtue of Emily's participation, I find myself in a peculiar position.

In *Georgia Kraft Company*, 120 NLRB 806, 808 (1958), the Board held that "allegations of supervisory participation in, or influence upon, a union's solicitation of a showing of interest" would thereafter be investigated only "administratively" by the Region, rather than litigated in a representation proceeding. It thus seems to have been the Board's intention that an employer was not to be permitted an opportunity to litigate this issue, but rather that the Regional Director was to make his own, presumably unreviewable, determination after an informal investigation. The issue has, nonetheless, been presented here as part of an adjudicatory proceeding, and it would seem pointless to ignore the body of testimony which has thus been developed.[42]

Emily undoubtedly made plain to other employees his preference for union representation. He very clearly did this in August when he contacted the union agent; he reiterated his interest in October when Kernebeck revived the effort. Although there is no evidence that Emily brought any direct influence to bear on the other employees when they signed the cards, considering that he may have seemed to them a person of some authority in the plant, his presence could have had an effect on their decision to sign the cards.

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[41] Indeed, apart from the unfair labor practice finding, it might be said that the four employees were entitled to vote because of their "reasonable expectancy of reemployment" at the time of the direction of the election. *Snap-out Binding & Folding, Inc., Automated Folding & Binding Co.*, 160 NLRB 161, 163 (1980); *D. H. Farms Co.*, 206 NLRB 111 (1973). In so saying, I have considered the rule earlier discussed; even if it can technically be argued to apply to these employees, it would not preclude their having, very clearly, a sufficient "expectancy of reemployment" to warrant their enfranchisement.

[42] In *LeBoe Tire and Rubber Company, d/b/a Mission Tire & Rubber Company*, 208 NLRB 84, 93 (1974), a similar situation, the Administrative Law Judge suggested that his findings on the record made before him could constitute the "administrative" investigation called for by *Georgia Kraft*. The point was evidently not properly before him, as he acknowledged.

Insofar as Respondent's election objection refers to "taint[ing of] the original showing of interest," however, I think it has become a moot question in these circumstances. The requirement of a "showing of interest" is not jurisdictional or statutory; it is merely a self-imposed rule employed by the Board to determine whether there is a demonstration of enough genuine employee interest in a union to justify the expenditure of agency resources for an election. Once an election has been held, as here, that inquiry becomes pointless.

Respondent also argues, however, that Emily's participation "permeated the entire atmosphere in such a manner as to destroy laboratory conditions and frustrate the full enjoyment of the employee's choice in the election." That seems quite unlikely to me. Aside from his presence at the time the cards were signed, there is no evidence that Emily applied any pressure on the other employees with respect to their voting preference. After the cards were signed, and before the election, Respondent unlawfully terminated these employees, an act which, I would think, might have had two material consequences: first, any employee who did not care to be represented by a union before that happened might certainly have had independent reason to think thereafter that union representation would be desirable; second, the termination would have made it clear to them that Respondent did not favor the Union and, in the remote chance that Emily might seek to visit reprisals upon them for refusing to support the Union, that an appeal to Gold or Fogel would find sympathetic listeners.[43] Compare *William B. Patton Towing Company and Tex-Tow Inc.*, 180 NLRB 64, 65 (1969), where the Board refused to set aside an election on the ground of supervisory participation because the employer had made it clear that it was opposed to the union and because of the nature of the perceived relationship ("fellow employees rather than management and rank-and-file") between the supervisors and the employees.

Accordingly, I recommend that the objections to the election be overruled.

CONCLUSIONS OF LAW

1. Respondent, Quick Find Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off Michael Rangel, Joseph Emily, Charles Hoffman, Robert Moore, and Donald Dilschneider on November 6, 1980, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By, in November and December 1980, impliedly promising to rectify employee grievances, coercively interrogating employees, informing an employee that selecting a union would not improve working conditions, impliedly threatening an employee with loss of benefits, impliedly threatening employees with loss of jobs, and granting a benefit to an employee, Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as set out above, Respondent has not violated the Act in any other respect alleged in the complaint.

THE REMEDY

Having found that Respondent unlawfully laid off the five employees previously named on November 6, 1980, I shall recommend an appropriate remedy. It appears from the record that Respondent made a valid offer of reinstatement to all five employees, and the remedy as to them, shall, accordingly, be limited to the payment of backpay. It is recommended that Respondent make the five employees whole for any loss of earnings they may have suffered from November 6, 1980, to December 26, 1980, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[44]

I shall also recommend that Respondent be required to post the customary notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[45]

The Respondent, Quick Find Co., St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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[43] I consider the possibility of Emily taking revenge to be "remote" simply because, in a secret-ballot election, as the employees would know, he would have no way of ascertaining which employees had voted against the Union unless all of them did; and in the latter case, I cannot imagine Emily attempting any reprisals.

There is, moreover, a clear indication in the record that the employees had no concerns about offending Emily. Both Gold and Fogel testified to an occasion, perhaps about November 13, when Kernebeck came into the office and proposed to abandon the Union if employee Hoffman was recalled to work; Kernebeck represented that Hoffman might also back down in that event. The record shows that Hoffman was recalled on Friday, November 14, and, although Respondent's testimony is that the recall was made because it was believed that Kernebeck would be jailed on November 13, the fact is that Kernebeck returned to work on November 14 and Hoffman was nonetheless retained on the payroll until Wednesday, November 19, when he left to work for his brother.

Kernebeck did not deny the testimony about this proposal to Gold and Fogel, and I believe that it occurred. Among other things, this episode indicates that Kernebeck, at least, exhibited a willingness to independently turn against the Union, regardless of Emily's desires.

[44] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[45] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Discharging, laying off, or otherwise discriminating against employees because of any activities on behalf of the Union, or any other labor organization.

(b) Coercively interrogating employees, and, for the purpose of inducing employees to refuse to support the Union or any other labor organization, promising benefits to employees, granting benefits to employees, informing employees that they would not improve their working conditions by selecting a union, threatening employees with loss of benefits, and threatening employees with loss of jobs.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make Michael Rangel, Joseph Emily, Charles Hoffman, Robert Moore, and Donald Dilschneider whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary, or appropriate, to analyze the amount of backpay due under this Order.

(c) Post at its place of business in St. Louis, Missouri, copies of the attached notice marked "Appendix."[46] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon recipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that those portions of the complaint found to be without merit are hereby dismissed.

IT IS FURTHER ORDERED that the challenge to the ballot of Eugene Emily cast in the election held on January 9, 1981, in Case 14-RC-9292, be sustained, and that the ballot not be opened and counted; that the challenges to the ballots of Joseph Emily, Charles Hoffman, Robert Moore, and Michael Rangel cast in that election be overruled and that the ballots be opened and counted; and that a revised tally of ballots be issued.

IT IS FURTHER ORDERED that the Employer's objections to the aforesaid election are overruled.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to abide by the following:

The Act gives employees the following rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively trhough representatives of their own choosing

To act together for collective-bargaining or other mutual aid or protection

To refrain from any or all these things.

WE WILL NOT discharge, lay off, or otherwise discriminate against any employees to discourage membership in Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT coercively interrogate employes about union matters, and WE WILL NOT, in order to affect their support for the Union or any other labor organization, promise benefits to employees, grant benefits to employees, tell employees that selection of a union would not improve their working conditions, threaten employees with loss of benefits, or threaten employees with loss of jobs.

WE WILL NOT in any other manner interfere with, coerce, or restrain employees in the exercise of their rights under the National labor Relations Act.

WE WILL make whole, with interest, Michael Rangel, Joseph Emily, Charles Hoffman, Robert Moore, and Donald Dilschneider for the loss suffered by them because of their layoff from November 6 to December 26, 1980.

QUICK FIND CO.

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[46] In the event that this Order is enforced by a Judgment of United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Steiner-Liff Textile Products Co. *and* Franklin D. Gunter. Case 26-CA-8483

January 13, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On August 7, 1981, Administrative Law Judge Richard A. Scully issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Decision of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

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[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge: This case was heard by me in Nashville, Tennessee, on March 2 and 3, 1981. Pursuant to a charge filed on June 12, 1980, by Charging Party Franklin D. Gunter, a complaint was issued by the Regional Director for Region 26 of the National Labor Relations Board on July 30, 1980. The complaint alleges that Steiner-Liff Textile Products Co. (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act), by discharging Franklin Gunter because he engaged in union and/or other concerted activity protected under the Act. Additionally, it alleged that on several occasions the Respondent interrogated an employee concerning the union activities of its employees in violation of Section 8(a)(1) of the Act. The Respondent's timely answer denied that it had committed any violations of the Act.

Upon the entire record, my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits that it is engaged in the business of recycling textile products at its facility in Nashville, Tennessee, and that annually in the course of that business it has sold and shipped from its Nashville facility directly to points outside the State of Tennessee products, goods, and materials valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find, that the Amalgamated Clothing and Textile Workers Union, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

For approximately 6 years the Respondent has maintained an employee representative program, wherein employees of the various shifts or departments of its Nova Fill Division have elected representatives to meet with company management and owners on a periodic basis, usually once a month, to present complaints, grievances, and suggestions concerning plant operations and to facilitate communications between management and employees. Although it does not appear that the employee representatives operated under a formal charter or bylaws, that they had any officers, or that they had any written agreement with the Respondent, it is clear that the employee representatives presented proposals to management concerning wages, hours of employment, and working conditions both at the monthly meetings[1] and through direct contacts with supervisors,[2] and that the Respondent took action on those proposals.[3] In addition, there was uncontradicted testimony from Franklin Gunter that, while acting in his capacity as an employee representative, he undertook to represent fellow employees in the presentation of grievances to the Respondent on at least two occasions.[4]

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[1] Although minutes of all employee representative meetings were not maintained, the minutes of one such meeting which were typed up, indicate that the representatives' proposals involved, *inter alia*, adjustments in the payment of various bonuses, increasing accumulated sick leave, modification of existing vacation policies, modification of the existing profit-sharing program, modification of overtime policies, a general wage increase, modification of existing health insurance benefits, and monitoring of the way supervisors treat employees.

[2] Franklin Gunter gave uncontradicted testimony that upon being selected employee representative he was successful in having the maintenance department's lunch period extended from 10 to 20 minutes after raising the matter with Maintenance Superintendent Heinz Tews and Production Manager Hans Deligne.

[3] Respondent's vice president of personnel, Louis Gangi, testified that the majority of the problems brought up by the employee representatives have been corrected and that while the Respondent has not negotiated with the employee representatives, employee benefits have been expanded as a result of information received from them.

[4] Although the Respondent's production manager, Hans Deligne, denied that the employee representatives have any authority of any kind,

Continued

Section 2(5) of the Act defines the term "labor organization" as:

> . . . any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The Supreme Court has held that the term "dealing with" in this definition is not the same as and is broader than the term "bargaining with."[5] Consequently, the fact that the employee representatives did not engage in collective bargaining with the Respondent is not material. They did deal with the Respondent concerning such matters enumerated in Section 2(5) as grievances, wages, hours of employment, and conditions of work. This is sufficient to constitute a labor organization under the meaning of the Act.[6] Accordingly, I find the employee representatives to be a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Discharge of Franklin Gunter*

It is alleged that Franklin Gunter, who is also known as "Dee Gunter," was discharged by the Respondent because he engaged in union and/or other concerted activities protected by the Act. The Respondent denies this and contends that Gunter was discharged because of his conduct on the job and because he threatened to beat up a supervisor at the plant. Inasmuch as there is evidence in the record tending to support the Respondent's position, this is a "mixed motive" case which must be analyzed in accordance with the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

During the spring of 1979, the Union began a campaign to organize employees at the Respondent's Nova Fill plant. Employee James Richardson began the campaign and enlisted the assistance of Gunter who obtained the signatures of day-shift employees on union authorization cards. During the campaign, Gunter and two other employees had a conversation with Production Manager Hans Deligne in which Gunter explained that their primary reason for supporting the Union was to get Maintenance Superintendent Heinz Tews, who Gunter described as constantly threatening to fire or cut the pay of maintenance employees, off of their backs. During this conversation, Deligne stated that he would resolve the employees' problems if they would "help to turn the election . . . the company way." Gunter agreed to work on behalf of the Company against the Union and immediately ceased his union support. He made a sign stating "Vote No Union," which he put up in the shop and told fellow employees that Deligne felt he could resolve their problems without a union and that he should be given an opportunity to do so. Gunter continued to campaign against the Union until election day and served as the Company's observer at the election. The Union was defeated in the election.

Gunter's testimony concerning the union campaign, his actions during its course, and his reasons for acting as he did is uncontradicted. Although there are other aspects of his testimony discussed below, which I do not credit, I find that the foregoing events occurred as described by Gunter.

The General Counsel contends that after having secured Gunter's assistance in defeating the Union, Deligne failed to fulfill his promise to resolve the employees' complaints. As a result, sometime in December 1979, Gunter again began to speak out in favor of bringing the Union into the plant. It was because of this renewed prounion activity, the General Counsel contends, that Gunter was discharged a short time later.

Respondent's letter of January 29, 1980, informing Gunter of his discharge states in pertinent part:

> Since your employment, your attitude toward the company, its supervisors and practices has taken different courses at different times. At one time, you were strongly opposed to the company and its practices. You then changed your attitude and became very cooperative with the company and agreeable with its practices.
>
> It now appears that you have again changed your attitude by your actions toward management, and your constant complaining and criticism of the company would indicate that you are a very unhappy person.

While it is arguable that what is being referred to in the letter is Gunter's changing position with respect to his support for the Union, other factors convince me that Gunter's support for the Union was not a factor in his discharge.

The discharge on January 29, 1980, was 7 months after the union election. During the campaign, preceding the election, Gunter had switched his allegiance from the Union to the Company, encouraged other employees to vote against the Union, and had served as the Company's election observer. There is no evidence that Gunter was ever one of the leading union advocates at the plant or that, apart from soliciting signatures on authorization cards, he was particularly active on the Union's behalf before he switched his support to the Company. There is also no convincing evidence in support of the contention that Gunter's prounion activity increased noticeably just prior to his discharge. Gunter testified that he went to Deligne in December 1979 and told him that he had had adequate time to correct the problems and that Gunter felt a union was needed. Although he was not questioned

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it appears that Gunter's presentation of grievances resulted in the reduction of an employee's suspension in one case and the reinstatement of a discharged employee in another. There was no indication that Gunter was ever criticized or told that he had overstepped his authority by having participated in presenting these grievances to the Respondent. There was nothing other than his position as employee representative that would have involved him in these grievances.

[5] *N.L.R.B. v. Cabot Carbon Company and Cabot Shops, Inc.*, 360 U.S. 203 (1959).

[6] *South Nassau Communities Hospital*, 247 NLRB 527 (1980); *Easy-Heat Wirekraft, Division of Bristol Products, Inc.*, 238 NLRB 1695 (1978).

about this conversation, Deligne testified credibly that no one ever spoke to him after the election concerning Gunter's support for the Union. On the other hand, Deligne testified that he assumed from comments made to him by Gunter's coworkers to the effect that he "was on the rampage again," that Gunter was talking in favor of getting a union into the plant. According to Deligne, he heard such reports on several occasions going back to as soon as 4 weeks after the union election. Employee Thomas Frost testified that he went to work in the maintenance department at the Nova Fill plant in August 1979, and that Gunter began to talk to him about a union shortly after he arrived. He also testified that he has had conversations with three or four other employees about getting a union in the plant from the time he started work up until the time of the hearing. Although Frost testified that during a conversation in January 1980 Gunter had said he was going to work "extra hard" to get a union in, there is no evidence that Gunter at any time between the election and his discharge ever did anything more than discuss a union with other employees. It is not even clear in these discussions that Gunter was always necessarily in favor of a union.[7]

The evidence does not establish that Gunter's union activity was such that his discharge in January 1980 could be considered "a message" to other employees not to support a union or that union activity was a motivating factor in the Respondent's decision to discharge Gunter. I do not find that Gunter was discharged because of union activity.

In May or June 1979, Gunter was elected as the employee representative by the day-shift employees of the production and maintenance departments and served in that capacity until his discharge. It does not appear that the duties of the employee representatives were specifically delineated, but it is clear that Gunter took an expansive view of his role. In addition to his attendance at, and participation in, the monthly meetings with the owners and management, as discussed above, he also presented complaints and suggestions to Tews and Deligne and represented employees with grievances. Respondent's second-shift production superintendent, George Corbitt, Jr., testified that he had observed Gunter at employee representative meetings and that Gunter made more complaints and statements than other representatives. He stated that Gunter was "more vocal because to me he probably thought more of the employees" and described Gunter's attitude at the meetings as a "problem." Heinz Tews testified that Gunter often complained to him about the way he was directing employees in the maintenance departments. Hans Deligne also testified that Gunter complained to him about how hard Tews was working maintenance employees, showing favoritism toward certain employees, and his being unfair in the assignments of overtime.

The letter given Gunter at the time of his discharge refers only to his "attitude toward the company" as the basis for his termination. Complaints and criticism of the Company, if warranted, were obviously a part of the activities and responsibilities of the employee representatives and are activities protected under the Act. The Respondent has not offered any evidence which would establish that the complaints and criticism referred to in the letter were separate and apart from the complaints and criticism presented by Gunter in his capacity as an employee representative or that such complaints and criticism were completely lacking in foundation. Accordingly, I find that the General Counsel has made a *prima facie* showing sufficient to support the inference that Gunter's protected conduct as an employee representative was a motivating factor in the Employer's decision to terminate him.[8]

Under *Wright Line, supra*, the burden now shifts to the Respondent to demonstrate that Gunter would have been discharged in the absence of the protected conduct. The Respondent contends that Gunter was discharged because he had become increasingly difficult to get along with at work, which had caused his immediate supervisor to threaten to quit, and because he had threatened to beat up another supervisor at the plant.

At the outset, the Respondent is faced with the fact that its January 29, 1980, letter, informing Gunter of his discharge and purportedly outlining the reasons, makes no reference to any threat and speaks only in general terms about his "attitude" and "actions toward management." Hans Deligne, who made the decision to discharge Gunter, testified credibly that once he had reached this decision he waited a few days before implementing it and was deliberately vague in assigning the reasons therefor because he was afraid of Gunter's violent nature and feared that if Gunter related his discharge to a specific incident or individual, he would retaliate against the person or persons involved. Gunter, while drunk had attempted to beat up both Deligne and Tews at a Christmas party in 1978, he was known to have carried a gun at work, and he had told Deligne about pouring paint on the car of a neighbor he had had trouble with and about getting even with someone who had shot a relative of his. Under the circumstances, I find Deligne's explanation of why the discharge letter was worded the way it was to be credible and his actions in handling the discharge to be reasonable and prudent.

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[7] Henley Tatum, the first-shift production supervisor called as a witness by the General Counsel, testified that he had overheard Gunter making statements that a union was needed and, on other occasions, that a union was not needed and that he heard such statements within the last 2 months before Gunter was discharged. I found Tatum to be a credible witness and do not consider his statement in an affidavit given to a Board agent to the effect that he had heard Gunter speak in favor of a union during his last 2 months at the plant to be inconsistent with his testimony at the hearing. The affidavit does not say that he did not hear Gunter speak against the Union during that period.

The testimony of Kirk Swick, the first-shift production foreman called as a witness by the General Counsel, was that he knew Gunter was talking about a union within 2 or 3 months of his discharge but that he did not know, from what he had overheard, whether Gunter was for or against a union.

[8] In this regard, I do not find that Gunter's discharge was the result of his having complained about Heinz Tews or Hans Deligne at the employee representatives' meeting held on Friday, January 25, 1980. According to Gunter's testimony, he was asked by two employees to present their complaints against Tews at the meeting, and did so. He further testified that one of the owners, Abe Freeman, directed Deligne to personally investigate the compleint. Deligne and George Corbitt, who were present at the meeting, denied hearing Gunter make any such complaint. Thomas Frost, one of the employees who allegedly asked Gunter to present the complaint about Tews at the meeting, appeared as a witness at the hearing but was not asked about the incident. I do not credit Gunter's testimony which appears to have been fabricated in order to make it appear that this complaint resulted in his discharge 4 days later. There is nothing which would indicate that the complaint about Tews, if made, was any different than the complaints Gunter had been making about him all along, going back to before the union election.

Corbitt and Deligne testified that a criticism Gunter did voice at the January 25 meeting concerned Deligne and the way he was performing his job as production manager. Deligne denied that this criticism had any bearing on Gunter's discharge. In any event, I find, on the basis of the credited testimony of Elvis Pruitt, that the decision to discharge Gunter had been made prior to the time the employee representatives' meeting was held on the afternoon of January 25, 1980, because Deligne had told Pruitt about it that morning.

According to Deligne, he began to think seriously about terminating Gunter because of an incident involving Gunter and first-shift Production Supervisor Ray Morris. Gunter went to the parts room near Morris' office to get a gear for a machine he was working on and was observed by Morris crawling on his hands and knees and throwing things around. Morris asked employee Don Bryan whether Gunter was drunk or had been drinking and Bryan, in turn, told Gunter what Morris had asked him. Gunter encountered Morris outside the parts room and took exception to Morris' inquiry as to whether he was drunk. An argument ensued and Morris told Gunter to come into his office, where Deligne was present, "because he had heard enough." After entering Morris' office, the argument continued and intensified to the point where Gunter threatened to beat up Morris. George Corbitt, who was also present, stepped between Gunter and Morris. Things eventually calmed down and Gunter left after refusing to shake hands with Morris.[9] Deligne, Morris, and Corbitt remained in the office and Morris demanded that Deligne do something about Gunter, Morris having no authority over maintenance employees. Corbitt also questioned Deligne as to whether employees would be allowed to talk to supervisors in the manner Gunter had spoken to Morris. Deligne's response was to the effect that they should let things cool down.

The date of this incident has not been pinpointed. Corbitt and Deligne testified that it was a week before Gunter was terminated, while Morris placed it a approximately 2 weeks before. Elvis Pruitt testified that Gunter told him about the incident a week before his discharge and Morris mentioned it to him about 3 days before Gunter was terminated. I find on the basis of this testimony that the incident occurred approximately a week before Gunter was discharged.[10]

Deligne finally decided to discharge Gunter when Elvis Pruitt, Gunter's immediate supervisor, threatened to quit rather than to continue working with him. Pruitt had previously complained about Gunter to Deligne and Tews. Tews had suggested that Gunter be transferred from maintenance to production but Deligne would not do so. Pruitt, who I found to be a straightforward, convincing witness, testified that Gunter was a good worker, that he had no problems with Gunter personally, but that he was constantly needling and threatening to whip other maintenance workers so that nobody wanted to work with him.[11] This created problems for Pruitt in scheduling work and made working conditions such that he no longer wished to continue as maintenance supervisor. He had threatened to quit on several occasions due in part to the problems created by Gunter and in part because of the pressures of the job. The last time was within a week of Gunter's discharge when he told Tews and Deligne that he was "giving this foreman's job up because I can't put up with Dee Gunter anymore."

Gunter testified that Pruitt came to him immediately after he was notified of his discharge and told him he did not have anything to do with it, that he had signed the discharge letter only because Deligne wanted him to, and that Gunter should go to the Labor Board about it. According to Pruitt, after Gunter was discharged, he asked Gunter if he was "mad at him," Gunter said, "no," but turned to Deligne and Tews and said, "I'll be looking for you two." Sometime later when Gunter was picking up his toolbox he told Pruitt that he was thinking of getting a lawyer to do something about his discharge and asked Pruitt "do you blame me?" Pruitt responded, "Dee, I don't blame anybody for anything." I credit Pruitt's version of these conversations rather than Gunter's and find that Pruitt had threatened to quit as maintenance supervisor because of the problems Gunter was causing him. Rather than sympathizing with Gunter, as Gunter claimed, I find Pruitt's feeling about Gunter's discharge was evidenced in his response to Deligne upon being told that Gunter was to be let go. He stated, "the sooner, the better."

I find that Gunter's discharge was the result of his insubordinate conduct in threatening to beat up Supervisor Ray Morris and his conduct in the maintenance department which had driven Pruitt to the point of resignation and that he would have been discharged for these reasons even if he had not engaged in protected activities in his capacity as an employee representative. The General Counsel has described this case as one of "credibility" and contends that Gunter's testimony should be credited over that of the Respondent's witnesses. I am unable to credit Gunter's testimony concerning most of the significant matters for the reasons discussed above. While I agree that the Respondent's reasons for the discharge were not clearly articulated either in the letter of discharge or the affidavit Deligne gave the Board agent during the investigation of these charges, I believe the reasons for this have been satisfactorily explained and that there is other credible evidence establishing the factors leading to Gunter's discharge.

As noted above, the language in the discharge letter was purposely vague to lessen the possibility of retaliation by Gunter against specific individuals and also to avoid hurting Gunter's chances of obtaining new employment. As for Deligne's affidavit, several factors must be considered. Although he has lived in the United States since 1964, it is obvious that Deligne, who is a native of Germany, still has some problems in expressing himself clearly in the English language. Also, I believed his testimony that he did not spell out in detail the incident involving Gunter's threat to beat up Morris when he gave his affidavit because he did not want to ruin Gunter's record by stating that a threat to a supervisor was the reason for his dismissal.[12] In view of all of the foregoing facts, I find that the Respondent's discharge of Franklin Gunter did not violate the Act.

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[9] My findings concerning what happened in Morris' office are based on the credited testimony of Morris, Deligne, and Corbitt. I do not credit Gunter's version of this part of the incident in which he denied being angry or upset and denied threatening to beat up Morris.

[10] I do not credit Gunter's testimony to the effect that the incident occurred prior to Christmas 1979, over a month before his discharge. This was apparently intended to support Gunter's version of the incident in which he described himself as merely explaining to Morris that another employee was spreading a false report that Gunter was planning on beating up Morris at the Company's annual Christmas party. I find that testimony to be a complete fabrication.

[11] Pruitt later stated that one maintenance worker, Thomas Frost, had no problems with Gunter and did not complain about him.

B. *The Interrogation of Thomas Frost*

Thomas Frost, who worked with Gunter in the maintenance department during Gunter's last months with the Company, testified that during the month before Gunter was fired, on two or three occasions, Heinz Tews asked him "what's Dee doing?" and "what's Dee stirring up?"; "what's he doing?" and "what's he trying to stir up?" He testified that during the same period Elvis Pruitt would send him and Gunter out on a job and when Frost would return Pruitt would ask, "what's Dee up to?" or "what's going on?"

Frost also testified that on two or three occasions Hans Deligne asked him "Tom, what's Dee up to?" and "what's he stirring up now?" He stated that on one occasion Deligne came up to him while he was installing gears on a machine and asked, "Tom, what's Dee doing? What's he trying to do, get the Union stirred up again in here or what?" This, he said, occurred within 3 weeks of Gunter's termination.

Tews, Pruitt, and Deligne each denied asking such questions of Frost. The only conversation that was identified by Frost with any specificity was that with Deligne while Frost was working on a machine and Deligne mentioned the Union. There was, however, no mention of Deligne asking about a union in the affidavit Frost gave a Board agent on June 30, 1980. Frost's explanation that at the time he gave the affidavit he was a "company man" and that he was trying to be nice and was not going to say anything against the Company was neither credible nor convincing. I also doubt that the other conversations he allegedly had with Deligne, Tews, and Pruitt, which were not identified in any detail as to time or place, ever occurred. However, there was evidence that Gunter had failed to return promptly from work assignments and it is entirely possible that what Frost described were inquiries by Gunter's supervisors as to his whereabouts. I do not find that the evidence is sufficient to establish any unlawful interrogations of Frost.

CONCLUSIONS OF LAW

1. The Respondent, Steiner-Liff Textile Products Co., is an employer engaged in commerce within the meaning of Section 2(2),(6), and (7) of the Act.

2. The Union and the employee representatives of the Respondent's Nova Fill Division are both labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act in any respect alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[13]

The complaint is hereby dismissed in its entirety.

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[12] In this regard, there is evidence that Gunter had been a favorite of Deligne, who rehired him over the objections of other supervisors after Gunter had left the Company and was unsuccessful in starting his own business, because Deligne thought he "saw potential in the man" and that he "could make something out of him." Pruitt also testified that he never took any action against Gunter because he felt Gunter got special treatment from Deligne.

[13] In the event no exceptions ard filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

United Contractors Incorporated and JMCO Trucking Incorporated, Joint Employers *and* Chauffeurs, Teamsters and Helpers "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 30-CA-2885

January 15, 1982

SECOND SUPPLEMENTAL DECISION AND ORDER

On September 19, 1975, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding [1] finding, *inter alia*, that Respondents had violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by discriminatorily discharging employees Guy Bourdo, Milan Mix, and Percy Williams. The Board ordered that they be reinstated and made whole for any loss of earnings suffered by reason of the discrimination practiced against them. Thereafter, on June 23, 1976, the United States Court of Appeals for the Seventh Circuit issued its judgment [2] enforcing the Board's Order.

On September 29, 1978, following a backpay hearing, the Board issued its Supplemental Decision and Order fixing the amount of backpay owed to the discriminatees.[3] The General Counsel subsequently filed with the Seventh Circuit a petition for enforcement of the Board's Order. On February 1, 1980, the court [4] remanded the case to the Board for a new hearing on Respondent's contention that the irregular nature of its operations "justif[ies] a reduction of the back pay award." The General Counsel subsequently filed with the Seventh Circuit a petition for modification of the court's opinion. On April 15, 1980, the court denied the General Counsel's motion. Thereafter, on July 10, 1980, the Board accepted the court's remand and ordered that the record be reopened to allow the parties to introduce evidence on the remanded issue.

On January 13 and March 18 and 19, 1981, pursuant to notice duly served, a hearing was held before Administrative Law Judge Irwin H. Socoloff for the purpose of determining the amount of money due under the amended backpay specification. On June 25, 1981, Administrative Law Judge Socoloff issued the attached Second Supplemental Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Second Supplemental Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Second Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[5] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, United Contractors Incorporated and JMCO Trucking Incorporated, Joint Employers, Menomonee Falls, Wisconsin, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

SECOND SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: On September 19, 1975, the Board issued a Decision and Order in the above-entitled proceeding (220 NLRB 463), directing Respondent, *inter alia*, to take certain affirmative action to remedy the unfair labor practices therein found, including the reinstatement of certain individuals and payment to them of backpay. Thereafter, on June 23, 1976, the Court of Appeals for the Seventh Circuit issued its judgment enforcing the Board's Order (539 F.2d 713, cert. denied 429 U.S. 1061 (1977)). Subsequently, a controversy arose concerning the amount of backpay due to discriminatorily discharged truckdrivers Milan Mix, Guy Bourdo, and Percy Williams and the amounts required to be paid on their behalf to contractually established fringe benefit funds under the terms of the Order. Accordingly, a supplemental hearing was held before me on September 12, 1977, in order to resolve those issues and, thereafter, I issued my Decision, recommending that Respondent be ordered to make certain payments to Mix, Bourdo, and Williams, and to the fringe benefit funds. On September 29, 1978, the Board issued a Supplemental Decision and Order (238 NLRB 893) adopting my recommended Order which, in essence, awarded backpay to the discriminatees for the entire backpay period.

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[1] 220 NLRB 463.

[2] 539 F.2d 713, cert. denied 429 U.S. 1061 (1977).

[3] 238 NLRB 893.

[4] 614 F.2d 134, 137.

[5] Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

259 NLRB No. 143

On February 1, 1980, the Court of Appeals for the Seventh Circuit declined to enforce the Board's supplemental Order, holding that "the administrative law judge and the Board ignored uncontradicted evidence that the Board's backpay formula was inapplicable in this case" in that "economic factors may have prevented the discharged employees from working at JMCO during part of the layoff period" (614 F.2d 134). The court, noting evidence that work at JMCO was irregular and/or seasonal, and that "during slack periods driving was assigned to available employees according to seniority, regardless of whether the worker usually drove a truck, remanded the case to the Board for a new hearing, concluding (614 F.2d at 138):

> "[A]n employer may, without incurring back-pay liability, refrain from reinstating a discriminatorily discharged employee during a period when employment would not have been available for him even absent the discrimination." . . . The extent to which work at JMCO was seasonal is unclear. There is no doubt, however, that the work was irregular and that during slack periods newer employees were laid off. We remand this case to the Board for a new hearing on the company's contention that these factors justify a reduction of the back pay award.

On July 10, 1980, the Board accepted the court's remand and ordered that the record be reopened to allow the parties to introduce evidence on the remanded issue. Thereafter, the General Counsel moved to amend the backpay specification. That motion is hereby granted.

Pursuant to notice, a hearing in this matter[1] was held before me in Milwaukee, Wisconsin, on January 13, and March 18 and 19, 1981, at which the General Counsel and Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case, and from my observations of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

In his initial backpay specification, as amended on September 2, 1977, the General Counsel sought backpay awards for Mix, Bourdo, and Williams, covering the entire backpay period, based upon the average weekly earnings of those discriminatees during the months preceding and following the layoffs. Subsequent to the decision of the court, the General Counsel, as noted, amended his specification. The amended specification is predicated upon the irregular and/or seasonal nature of Respondent's business, as found by the court, and seeks backpay and fringe benefit contributions based upon the hours actually worked by replacement drivers during the backpay period as reflected in JMCO payroll records.[2] Accordingly, the amended specification assigns the earnings of the replacement drivers, Van Roosenbeek, Franz, DuQuaine, Welda, and Watson, to the discriminatees on the basis of seniority. Under this method of computation there were no weeks during the backpay period in which work was available for Williams and, consequently, backpay is not sought for him.[3]

At this juncture, the issue to be resolved is a narrow one. Respondent concedes that the amended specification properly assigns to the discriminatees, for backpay computation purposes, the hours worked by Van Roosenbeek, Franz, and Welda during the layoff period. Thus, Van Roosenbeek and Franz were hired as replacement drivers following the unlawful layoffs. Welda, a nonbargaining unit employee, has less companywide seniority than Mix or Bourdo. However, Respondent contends that the hours worked by the other nonunit employees, DuQuaine and Watson, are not properly assigned to the discriminatees since both DuQuaine and Watson have more companywide seniority than either Mix or Bourdo. This argument is premised upon Respondent's claim that for layoff purposes it historically followed a companywide seniority plan under which during slack periods it would assign truckdriving work to senior nonunit employees able to perform the job, while laying off more junior unit employees.

In its decision issued on July 30, 1980 (No. 79-2062), the Court of Appeals for the Seventh Circuit, in a case involving the same parties, rejected this very contention. There, the court, in enforcing a Board Order (244 NLRB 72 (1979)) which sought, *inter alia*, to remedy the subsequent illegal layoffs of Mix, Bourdo, and Williams, dismissed Respondent's argument that the layoffs were "caused by a lack of sufficient work and in accordance with a companywide seniority plan," holding:

> The timing of the layoffs and other testimony in the record supports the Board's inference of the illicit cause of the layoffs, and the employers' contention that the layoffs were caused by a lack of work and in accordance with the seniority plan is significantly undercut by testimony that during the period the bargaining unit employees were laid off, their trucks were driven by non-bargaining unit employees, at least one of whom had less seniority than Bourdo did. The employers' suggested interpretation of their seniority plan, one that would justify these layoffs,[7] is lacking sufficient evidentiary support in the record and would contravene a provision in the collective bargaining agreement between the parties that expired in May 1977.[8] In these circumstances, we believe the Board's inference of an anti-Union animus behind the layoffs is justified and supported by substantial evidence.

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[1] This case was consolidated, for purposes of hearing only, with Cases 30-CA-4253, 30-CA-4264, 30-CA-4437, and 30-CA-4485 involving the same parties.

[2] The revised specification takes into account that period in early 1975 when Bourdo, due to illness, was unavailable for work.

[3] Likewise, the amended specification does not seek fringe benefit contributions for Williams for the layoff period but, rather, only for the period prior to the layoffs during which Respondent unlawfully refused to make fringe benefit contributions.

> This court's prior decision in *N.L.R.B.* v. *United Contractors, Inc. and JMCO Trucking, Inc.* (No. 78-2609, 7th Cir. 1980) is not inconsistent with this determination. In that case, this court had before it the Board's back-pay computation that required the employers to pay for the entire period of the prior illegal layoffs of Bourdo, Williams, and Mix. The computation was based upon the average weekly hours employees had worked in the months preceding and following the layoffs, and the employers complained that this computation failed to take into account the "seasonal variation" in the employers' business that would have resulted in a decrease in the hours the employees actually would have worked in the layoff period. This court agreed with the employers' argument and held that the Board's computation should have taken into account the evidence of these slack periods. That holding is irrelevant to the present issue, however, for we do not interpret the Board's argument here to be that such slack periods did not exist, but rather that the present layoffs were not caused by the occurrence of these periods and were not in accordance with the actual seniority plan.
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>
> [7] Mr. Mews, JMCO president, testified that his interpretation of the seniority plan was that:
>
> > A man with one skill can have less seniority than someone else with less time on the job, if the person with less time on the job has a higher level of skill.
>
> [8] The provision read as follows:
>
> > The Employer . . . shall not direct or require its employees or persons other than the employees in the bargaining units here involved to perform work which is recognized as the work of the employees in said units. . . .
>
> The Board's order required the Company to honor and enforce the collective bargaining agreement expiring in 1977 "until a new agreement is reached."

The contract provision cited by the court has been in effect at all times material hereto. The clause, in full, provides:

> Work Assignments: The Employer hereby assigns all work involved in the operation of the Employer's truck equipment during the operation, loading and unloading thereof to the employees in the bargaining unit here involved. The Employer agrees to respect the jurisdictional rules of the Union and shall not direct or require its employees or persons other than the employees in the bargaining units here involved to perform work which is recognized as the work of the employees in said units. This is not to interfere with bona fide unions.

While there is record evidence that in the years preceding the unlawful layoffs of 1974 truckdriving work was at least occasionally performed by nonunit employees,[4] there is a lack of evidence demonstrating that that occurred during periods when unit employees were on layoff status. President Mews' testimony that Respondent has historically followed a companywide seniority plan, at least for layoff purposes, has not been supported by credible evidence showing that such a practice was in effect prior to the discriminatory layoff period.

Employee Frank Watson, a cement finisher and Respondent's most senior employee on a companywide basis, testified that Respondent has, indeed, maintained a companywide seniority system for layoff purposes. Watson, a qualified truckdriver, conceded that in the years preceding the discriminatory layoffs of 1974 he was laid off during the winter periods while Mix and Bourdo, with less companywide seniority, continued to drive. However, according to Watson, this occurred because he, Watson, would request a layoff each year in order to allow the unit drivers to continue to work.[5]

I found Watson to be a vague, argumentative, hostile, and evasive witness and, accordingly, I have accorded little weight to his testimony, particularly in light of certain credited, uncontradicted testimony of Bourdo. Thus, Bourdo testified that in the 1970 to 1974 period, during the fall and winter months while Watson was on layoff status, Watson would visit the jobsites and tell Mix and Bourdo: "You guys really got it good. I'm laid off and you guys are working." Such statements by Watson belie his claim that his layoff status was of a voluntary nature.

Respondent has again failed to demonstrate the existence of a companywide seniority plan under which, even absent the discrimination, Mix and Bourdo would have been laid off during the backpay period while nonunit personnel performed the customary work of those employees; that is, truckdriving. In reaching this conclusion, I rely upon the factors set forth by the Court of Appeals for the Seventh Circuit in its July 30, 1980, opinion; Respondent's practice prior to the discriminatory period of laying off during slack periods its most senior employee, Watson, a qualified truckdriver, while retaining the services of unit employees with less companywide seniority; and Respondent's use of Welda during the 1974-75 backpay period as a truckdriver, despite the fact that he enjoyed less companywide seniority than either Mix or Bourdo. I conclude that the amended specification seeking backpay based upon the hours actually worked by replacement drivers sets forth an appropriate measure of backpay.

Upon the foregoing findings and conclusions, and upon the entire record in this case, I hereby issue the following recommended:

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[4] Respondent's president, James Mews, testified that by its inaction the Union had acquiesced in a practice, contrary to the cited contractual provision, of assigning driving work to nonunit employees. However, there is no evidence that the Union became aware of such a practice prior to the Board hearings in the instant matter which commenced early in 1975. On cross-examination, Mews conceded that since that time the Union has consistently protested the making of such assignments. At one point during his testimony, Mews appeared to deny the existence of a driver's unit, contending that "everybody in our company does everything, so everybody is in every unit." This answer was in conflict with Mews' response to a March 28, 1980, interrogatory, in which he stated that Mix, Bourdo, and Williams were the only employees in the drivers unit.

[5] In 1974 Watson was recalled from layoff status for a period of 2 weeks, to drive a truck, at a time when Bourdo was ill and unavailable for work.

ORDER[8]

The Respondents, United Contractors Incorporated and JMCO Trucking Incorporated, Joint Employers, Menomonee Falls, Wisconsin, their officers, agents, successors, and assigns, shall make Milan Mix and Guy Bourdo whole by payments to them in the amounts set forth below, together with 6-percent interest thereon to be computed in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), less tax withholdings required by Federal and state laws:

Milan Mix	$2,169.15
Guy Bourdo	1,678.42

Respondents shall make payments on behalf of Milan Mix, Guy Bourdo, and Percy Williams to the Milwaukee Area Truck Drivers Health and Welfare Fund and the Central States, Southeast and Southwest Areas Pension Fund, in the amounts set forth below, plus lawful interest accrued to the date of payment:

	H & W Fund	*Pension Fund*
Milan Mix	$445.50	$519.00
Guy Bourdo	412.50	480.00
Percy Williams	100.65	118.95

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[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Carson International, Inc. *and* Hotel & Restaurant Employees and Bartenders International Union, AFL–CIO, Petitioner. Case 13–RC–15655

January 15, 1982

DECISION AND DIRECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the Petitioner's objections to an election held on January 19, 1981,[1] and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the Employer's exceptions[2] and brief, and hereby adopts the Regional Director's recommendations, with the following modifications.[3]

The election was based on a petition filed on December 23, 1980. Prior thereto, an earlier petition in Case 13–RC–15620 was filed on November 10, 1980, and withdrawn on November 21, 1980, by the Union. The only objection to which exceptions were filed alleges that when the Petitioner was distributing literature to employees, the Employer's supervisors took the literature away from the employees. It further alleges that supervisors retrieved union literature from nonwork areas. The Regional Director recommended that a hearing be directed on the issues raised by this objection.

The sole issue before us is whether the scope of the hearing should be extended to include the consideration of conduct which occurred prior to the filing of the petition in this case. The Regional Director concluded that it should be so extended because the critical period before the election began on November 10, 1980, the date of filing of the petition which was later withdrawn. The Employer contends that the critical period began on December 23, 1980, the date of the filing of the petition herein, and that the hearing should be limited to the issues raised by conduct which occurred during that period. We find merit in the Employer's contention.

In *Ideal Electric*,[4] the Board decided that the critical period during which conduct may be considered objectionable begins at the date of filing of a petition which culminates in an election. In adopting this rule, the Board adhered to the principle that equity and orderly administration require the establishment of a definite cutoff date applicable to the consideration of alleged objectionable conduct.[5] The Regional Director, however, would make an exception based, *inter alia*, on *Monroe Tube Company, Inc.*, 220 NLRB 302, 305 (1975).[6] We find no basis for an exception. In *Monroe Tube*, the union filed a petition on August 16, 1973, which was withdrawn on September 5, 1973, and refiled the following day. The Board allowed an exception to the *Ideal Electric* rule, finding that where the first petition was filed a short time prior to the second petition and a petition was on file at the time the alleged misconduct occurred, it was proper to begin the critical period at the filing of the first petition. Further, the conduct at issue had been found violative of Section 8(a)(1) in a complaint case which was consolidated with the representation case. Here, the first petition was filed 43 days before the filing of the second petition. Further, there was a hiatus of 31 days between the withdrawal of the first petition and the filing of the second petition. Thus, in contrast to *Monroe Tube*, where the second petition came immediately on the heels of the withdrawal of the first petition, there is a significant period during which the Board's processes were not involved. Moreover, no conduct has been found violative of the Act. In these circumstances, we see no reason to deviate from the *Ideal Electric* rule.

Indeed, we have applied the *Ideal Electric* rule in cases virtually identical to the one before us. In *R.*

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[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 73 votes for, and 482 against, the Petitioner; there were 11 void and 26 challenged ballots, an insufficient number to affect the results.

[2] In the absence of exceptions, we adopt, *pro forma*, the Regional Director's recommendations to overrule Objections 4 and 7 and to hold a hearing on additional alleged objectionable conduct referred to by the Regional Director in his report as "Additional Objections"; and his acceptance of Petitioner's withdrawal of Objections 1, 2, 5, and 6.

[3] The Employer's request for oral argument is hereby denied as the record, including the exceptions and brief, adequately present the issues and positions of both parties.

[4] *Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961), which reconsidered and modified the cutoff date for consideration of objectionable conduct in contested cases as previously established in *F. W. Woolworth Co.*, 109 NLRB 1446 (1954).

[5] See *R. Dakin and Company*, 191 NLRB 343 (1971), enforcement denied 477 F.2d 492 (9th Cir. 1973), and on remand 207 NLRB 521 (1973), accepting the court's decision as the law of the case.

[6] Enforcement denied on other grounds 545 F.2d 1320 (2d Cir. 1976). The Regional Director also cites *The Catholic Medical Center of Brooklyn and Queens, Inc., Mary Immaculate Hospital Division and St. Mary's Hospital Division* v. *N.L.R.B.*, 589 F.2d 1166 (2d Cir. 1978), on remand 245 NLRB 808 (1979), enfd. 628 F.2d 240 (2d Cir. 1980). That case, in which the employer refused to bargain to test certification, involved the filing and withdrawal of a petition prior to the filing of the petition which resulted in an election. In the underlying representation case the Board applied the *Ideal Electric* rule and refused to consider alleged objectionable conduct occurring prior to the filing of the operative petition. In reviewing the certification, the Second Circuit, without deciding the validity of the *Ideal Electric* rule in the usual case, directed the Board to consider evidence of objectionable conduct which occurred prior to the filing of the operative petition. The Board accepted the remand and followed the court's direction; however, it was clear that the Board was following the court's decision as the law of the case and was not establishing a rule of law to govern the disposition of future cases. Thus, the Regional Director's reliance on this case is misplaced.

259 NLRB No. 146

Dakin and Company, supra, the union filed three petitions: One on October 14, 1968, which was withdrawn on November 4; a second on November 4 which was withdrawn on November 8; and a third which was filed on December 5 and culminated in an election. The contention was made that where a number of petitions are filed *seriatim,* the cutoff date for consideration of objectionable conduct should be the date of the filing of the initial petition. The Board rejected this contention, noting the hiatus between the withdrawal of the second petition and the filing of the third petition. Emphasizing the considerations of equity and orderly administration underlying the *Ideal Electric* rule, the Board held that it would be destructive of those considerations to consider conduct allegedly engaged in before the operative petition.[7]

Accordingly, we shall apply the *Ideal Electric* rule and date the critical period from December 23, 1980, the date of the filing of the second petition. The hearing on Objection 3 is, therefore, limited to the considerations of conduct which occurred within the critical period as a basis for setting aside the election. As it is clear from the Regional Director's report that material and substantial issues of fact exist concerning the above critical period,[8] we hereby deny the Employer's request that the case be remanded to the Regional Director not for purposes of conducting a hearing but rather to determine whether improper conduct occurred during said period.

DIRECTION

It is hereby directed that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve issues raised by the Petitioner's Objection 3 as set forth in our Decision herein and by the allegation discussed in the Regional Director's report under the heading "Additional Objections."

IT IS FURTHER DIRECTED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the said issues. Within the time prescribed by the Board's Rules and Regulations, Series 8, as amended, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof on the other party and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the hearing officer.

IT IS FURTHER DIRECTED that the above-entitled case be, and it hereby is, remanded to the Regional Director for Region 13 for the purpose of conducting such hearing, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.

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[7] See also *Allied Foods, Inc.,* 189 NLRB 513 (1971), a test of certification case, enfd. 456 F.2d 1286 (5th Cir. 1972). There the Board found no merit in the employer's objections because they were based entirely on conduct which occurred prior to the filing of a third petition.

[8] Thus, the Regional Director stated that there was testimony that the Employer's supervisors took the Petitioner's literature away from employees as it was being distributed to them by the Petitioner, at times after the filing of the petition on December 23, 1980.

AMPAC, a subsidiary of Kane-Miller Corp. *and* Beef, Boners and Sausage Makers Union, Local 100, United Food and Commercial Workers Union *and* Jan Piton *and* Jesus Gonzalez *and* Joseph Wargacki. Cases 13-CA-19346, 13-CA-19724, 13-CA-19735, 13-CA-19641, 13-CA-19720, and 13-CA-19733

January 15, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 23, 1981, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions [2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, AMPAC, a subsidiary of Kane-Miller Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against our employees because they participate in a strike or engage in other protected concerted or union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under the National Labor Relations Act.

WE WILL offer to Stanley Karwaczka full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights, and WE WILL make him and employees Frank Sekula, Jesus Gonzales, Juan Perez, Warren Mills, Alfonso Pineda, Joseph Wargacki, and Stanislaw Krycinski whole for any loss of earnings or benefits they may have suffered as a result of their unlawful discharge, with interest.

AMPAC, A SUBSIDIARY OF KANE-MILLER CORP.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard for 10 days in December 1980 and in February and March 1981 in Chicago, Illinois. The original complaint in Case 13-CA-19346 issued on January 16, 1980, and alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Board Act, as amended, by making proposals during bargaining negotiations with the Charging Party Union which were manifestly unacceptable to it. Those proposals were identified as follows: A 94-cent-per-hour wage reduction with no claim of financial inability to pay and the elimination of the cost-of-living allowance clause, the arbitration clause, the union-shop provision, and the union dues-checkoff clause from the contract of the parties which was to and did expire on December 20, 1979.

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[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We adopt the Administrative Law Judge's conclusion that an altercation between Supervisor Mojica and Union Representative Ramirez did not constitute a violation of Sec. 8(a)(1) of the Act. However, we find it unnecessary to rely on his additional comment that, even if the incident had been found to be coercive, the time and events that have elapsed since the incident make it doubtful that a violation should be found and a remedy ordered.

[3] We find no merit in the General Counsel's or the Charging Party's exceptions to the failure of the Administrative Law Judge to provide certain additional remedies. While the General Counsel excepts to the failure to order "unconditional" reinstatement of certain discharged strikers who have, in fact, been reinstated, he does not contend thct their reinstatement remains other than unconditional and complete. We also deny the Charging Party's request for attorneys' fees, bargaining expenses, and other costs incurred. See *Wellington Hall Nursing Home, Inc.*, 257 NLRB No. 105, fn. 2 (1981), and cases cited therein.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

The complaint also alleges that Respondent, through statements by General Superintendent Albert Mojica, committed three violations of Section 8(a)(1) of the Act. An amendment to this complaint alleges that a strike by Respondent's employees on and after January 18, 1980, was an unfair labor practice strike. A second amendment, dated May 29, 1980, alleges that Joseph P. Carey, an attorney and an officer of Kane-Miller, was an agent of Respondent.

A consolidated complaint in Cases 13-CA-19724, *et al.*, which issued on June 2, 1980, alleges that Respondent violated Section 8(a)(5) and (1) of the Act by distributing letters to employees during the course of negotiations, describing Respondent's negotiating positions, and by encouraging the Union to engage in a strike. Also alleged as violations of Section 8(a)(5) and (1) of the Act are Respondent's failure, after February 25, 1980, to deduct and tender dues to the Union and its refusal to permit the Union to designate its own stewards and business representatives to administer a collective-bargaining agreement allegedly reached by the parties on that date. The consolidated complaint also alleges that Respondent violated Section 8(a)(1) of the Act by virtue of a physical assault by Mojica on a union business representative in the presence of employees and Section 8(a)(3) and (1) of the Act by discharging a number of employees for engaging in the strike.

The two outstanding complaints were further consolidated by order dated June 2, 1980. A third amendment to Case 13-CA-19346 was issued on July 2, 1980, alleging that Respondent violated the Act by placing advertisements in local newspapers "seeking employees as permanent replacements for its striking employees who were engaged in an unfair labor practice strike" and by failing, since on or about December 20, 1979, to deduct and tender dues deductions to the Union pursuant to an orally extended collective-bargaining agreement. This amendment also alleges that Respondent violated the Act since December 20, 1979, by ceasing to recognize the Union as bargaining representative.[1]

Respondent dutifully and timely filed answers to all the above documents disputing the substantive allegations therein. After the hearing in this case the parties filed briefs which were received on or about May 4, 1981.

Upon the entire record herein, the testimony of the witnesses and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Illinois corporation with plants and offices in Chicago, Illinois, is engaged in the slaughtering of hogs. During a representative 1-year period, Respondent purchased and received materials, valued in excess of $50,000, at its Chicago facilities directly from points outside the State of Illinois. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party Union (hereafter the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Refusal To Bargain*

1. The facts

a. *Introduction*

Respondent maintains two separate offices and plants in Chicago. One plant is located at 4277 South Racine Avenue; the other plant is located at 3946 South Normal Avenue. Respondent engages in the business of killing, cutting, and boning heavy hogs for sale to other firms which further process the meat. Although at one time nearly all of the commercial hog slaughtering in the United States was done in Chicago, Respondent is now the only entity in Chicago engaged in this business.

The purchase of livestock constitutes 58 percent of Respondent's cost of goods sold. The next largest factor is the cost of direct and indirect labor, which constitutes 5 percent of the total cost. Respondent has no control over the price paid for livestock, a commodity item; it does have some control over the cost of labor through the collective-bargaining process. When Respondent is able to achieve lower labor costs, there is more money available to compete in the marketplace for the purchase of livestock in a volume sufficient to operate its plants at optimum production levels. The meat industry, of which Respondent is a part, is a high volume industry with a typical return of profit on sales of about 1 to 2 percent.

In October 1978, and again a month or two later, officials of Respondent, including Lawrence Clark, Respondent's vice president, general manager, and chief executive officer, and Joseph P. Carey, Respondent's labor counsel, met with representatives of the Union, including Walter Piotrowski, the Union's secretary-treasurer. Clark told the union representatives that Respondent was losing money and asked the Union to agree to a waiver of the 34-cent wage increase due shortly thereafter to employees under the then-current collective-bargaining agreement and also two cost-of-living adjustments that were to become effective prior to the expiration of the agreement on December 19, 1979. Respondent produced financial statements in support of its request. Piotrowski denied the relief sought. Clark became quite upset and either he or Carey stated that Respondent would seek to obtain relief from what it believed were inordinately high wages in the next bargaining negotiations and that the Union could expect some "problems" when the current agreement expired.

b. *The negotiations*

Prior to the commencement of collective-bargaining negotiations for a new agreement in late October 1979, a

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[1] On September 4, 1980, another name was added to the list of employees allegedly unlawfully discharged for participating in the strike.

"management committee" comprising of certain of Respondent's representatives met to consider and adopt bargaining objectives in the forthcoming negotiations with the Union. The objectives were: (1) the reduction of labor costs through a "roll-back" of 94 cents in the wage rates existent at the time of expiration of the collective-bargaining agreement between the parties,[2] or, in the alternative, no increase in the level of wages in effect at the expiration of the current agreement; (2) elimination of the cost-of-living provision in such agreement; (3) substitution of an employer-sponsored pension plan for the existing union-sponsored multiemployer plan;[3] (4) substitution of Respondent's contribution to a union-operated clinic for an increase in health and welfare benefits for employees;[4] (5) elimination of the requirement to submit unresolved grievances to arbitration;[5] and (6) achievement of a "two-tier labor structure."[6]

On October 24, 1979, collective-bargaining negotiations between the parties commenced. The first and subsequent meetings through December 17 were each attended by Clark and Carey for Respondent and by Walter Piotrowski for the Union. In addition, Respondent and the Union were each represented in bargaining by a number of other individuals.

At the first bargaining session between the parties on October 24, Clark presented Respondent's proposals which incorporated, *inter alia*, the bargaining objectives formulated by Respondent's "management committee." Piotrowski objected to the proposed deletion of the arbitration clause in the old contract. Carey explained that arbitration was not guaranteed by statute and that Respondent did not mean "to undermine anyone's rights." Respondent's officials explained their position by referring to what they believed was the Union's uncooperative stand in failing to offer Respondent relief on wages the year before and its insistence on taking every case to arbitration. Piotrowski also objected to the proposed deletion of the existing union-security clause and dues-checkoff clause. Carey stated that Respondent was offering voluntary union membership rather than mandatory union membership and that its position on dues checkoff was prompted by the Union's position in involving Respondent in arbitration cases concerning employees who had engaged in criminal conduct. Piotrowski was told "that the obvious criminal aspects of [such] cases should have dissuaded [the] Union from pursuing them [so as thereby to relieve Respondent] of incurred arbitration expenses." Piotrowski defended the Union's position but Carey stated that the Union's "insistence [in] taking every case to arbitration, regardless of its merits, was a wrong way to solve union/management problems."

Respondent presented its wage proposal with a statement that it was not claiming inability to pay more than was offered. The Union proposed a general wage increase and a continuation of a cost-of-living clause. Respondent rejected these proposals. The parties reached agreement on several proposals including some of the Union's proposals.

At the second bargaining session, held on November 7, the Union accepted some 13 management proposals but objected to Respondent's proposal calling for a 94-cent reduction in hourly wages and a 2-year wage freeze. Clark stated that there were "plenty of people willing to work at these rates." At one point, Clark stated that "it was his responsibility to run the [Respondent's] business and because somebody in the past agreed to a contract injurious to the [Respondent's] best interest, he, as the responsible manager, had to correct it." Clark advised Piotrowski that "because my predecessor gave in easily, I must state again, this will not be the case with us. I have given you the reasons for the [Respondent's] request[s] and all we get is *NO*."

At this meeting, Respondent proposed a new pension plan to replace the multiemployer plan presently in existence. Respondent's officials stated that a company plan would ensure stability in employment and they would offer to match or improve existing benefits. Piotrowski promised to study the new plan. Thereafter the following exchange ensued as shown in the minutes of the meeting:

> Piotrowski said that [Respondent] threatened them with a strike and all that he is hearing are only negatives . . . . Carey interjected . . . that the [Respondent] did not threaten to strike, but [is] ready to take a strike . . . . Clark again repeated that the Union had better get used to hearing [a] tough stand by the [Respondent], jobs are not worth that much and he was not ready to pay for them . . . . Piotrowski said that the [Respondent's] employees are good and efficient and deserve better than what the [Respondent] is offering . . . . Clark [replied sarcastically], "I saw some of those good employees

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[2] At this point the amount of the last two cost-of-living adjustments had been determined to amount in the aggregate to 60 cents per hour. This amount, when added to the final wage increase of 34 cents per hour under the then-current agreement, made a total of 94 cents per hour by which Respondent's labor costs had increased since the time the Union's representatives had denied Respondent the relief requested in the meetings held in the latter part of 1978.

[3] In preparation for collective bargaining, Respondent consulted with an actuary and the individual responsible for the administration of the private pension plan of Kane-Miller Corp. Respondent decided that the pension contribution paid to the Union-sponsored plan would, if contributed to Respondent's own pension plan, result in a 70-percent increase in benefits for an employee retiring after 20 years' service.

[4] According to Respondent, only five to six employees utilized the clinic and other employees found it too crowded and too far distant from where they lived.

[5] Respondent's position was that it had been advised by the Union at some time during the contract term that every unresolved grievance would be taken to arbitration. Respondent believed that it was forced to defend personnel actions in cases it felt should not properly have been submitted to arbitration. The record shows that two arbitrations particularly rankled Respondent. The first involved the discharge of an employee in the summer of 1979. After Respondent submitted its evidence, the case was resolved by virtue of the resignation of the employee. The other case involved three individuals who were discharged in early 1979 after an undercover investigation which Respondent felt overwhelmingly showed their guilt on charges of fraud, theft, and other misconduct. The Union sought arbitration and a hearing opened in October 1979. Criminal charges were brought against two of the individuals for kidnapping a witness of Respondent who testified on its behalf, and they were arrested during the initial stage of the arbitration proceeding. Those charges are still pending as is the arbitration case.

[6] Clark testified that he learned that the Union had agreed to such a structure in the collective-bargaining agreements of other employers. Respondent sought the right to hire new employees at a wage rate almost $2 an hour less than that shown in the current collective-bargaining agreement between the parties.

> at [the] last arbitration hearing." [Following argument regarding the last arbitration case] Carey said that the Union's lawyer told him that he [had] suggested to . . . Piotrowski to take every grievance case to arbitration and that . . . Piotrowski is following this advice. . . . Piotrowski again responded [there were] grave legal consequences brought to bear upon the Union were they not to defend their members in all cases.

In the third bargaining session, held on November 8, Respondent proposed withdrawal from the Union's clinic and utilization of the monthly contribution for a new and improved employee health and welfare plan. Agreement was reached on guaranteed hours of work and seniority.

At the fourth bargaining session, held on November 14, a commissioner of the Federal Mediation and Conciliation Service appeared at the request of Respondent. Some agreements were reached but, at one point Piotrowski asked that Respondent reconsider its proposals concerning "wages, length of contract, union shop, check-off and arbitrations." He threatened that "if [Respondent] insists on all of these points, then [the Union] is ready for a strike. Thereafter, Piotrowski charged that Respondent's operation was comparable to that of other packers who paid relatively high wages. Clark replied, "You are wrong as hell, we are different, different as night and day. You better listen to what I am saying." Subsequently, Clark warned, "You still want to take, but this time we are not willing to give." After Piotrowski asked that Respondent "give us something," Clark pointed out that "I just [offered] you an increase in [health and welfare] and [p]ension." At the conclusion of the session, the commissioner summarized the positions of the parties and stated, "I trust, maybe, between now and next meeting . . . both parties could review their positions and come up with some movement, and not just going over the same thing."

On November 15, 1979, Respondent wrote the first of many letters to employees describing its negotiating positions and summarizing the negotiating sessions. There is no contention by the General Counsel that these letters were inaccurate or inherently unlawful. In the November 15 letter, for example, Respondent pointed out that it had offered a pension plan and a health plan to replace the existing union-sponsored plans which contained substantially greater benefits in its view than the Union's plans. Respondent also set forth its position on a rollback in wages, the elimination of a cost-of-living provision, union security, dues checkoff, and arbitration.

In the fifth and sixth bargaining sessions the parties reached some agreements. The parties discussed the pension issue. Although Respondent's plan offered $15 per year of credited service as opposed to the Union's plan of $9 per year of credited service, Respondent's plan offered no credit for past service. This meant that some employees with past service under the old plan would not have any past credits under Respondent's plan although they would retain credits under the Union's plan. Clark explained that Respondent's proposal to eliminate arbitration from the new agreement was based on the "bad experience" Respondent had had with arbitration in the then-current agreement. Clark also insisted that the wage rates paid by Respondent were much higher than were the rates for the same work performed under contracts maintained by the Union with other employers, particularly the so-called Association contract. Piotrowski disagreed and a long discussion followed concerning wage rates.

At one point in the sixth negotiating session Clark asked what it would take to reach an agreement. Piotrowski replied, "dues checkoff, union shop and arbitration." Piotrowski was asked whether the Union would consider concessions to Respondent in regard to wages if the latter would withdraw its proposals concerning dues checkoff, union shop, and arbitration. Piotrowski answered no. Piotrowski stated that there would be no meaningful negotiations unless there was agreement on "dues checkoff, union shop and arbitration." Respondent's officials replied that its proposal to eliminate these features was based on the Union's willingness to defend "gangsters and thieves" and asked that certain pending arbitration cases be dropped. Respondent had also objected to the Union's failure to accommodate Respondent when it wished to exchange an existing contractual holiday for one during the Pope's visit to Chicago. The Union apparently declined the offer.

At the seventh negotiating session on November 26, 1979, the Union withdrew a number of its own economic and noneconomic proposals and Respondent agreed to the Union's 21-cent-per-hour night-shift premium proposal. At the eighth session on November 29, Respondent proposed a wage progression scale for newly hired employees with a starting rate of $4.50 per hour. The Union countered with one starting at $5.10 per hour together with any further increases negotiated by the parties. At this point the major unresolved issues included pensions, wages, dues checkoff, union security, arbitration, and continuation of the union clinic.

At the ninth bargaining session held on December 10, Clark stated that if a settlement were not reached "there will be no extension of contract or retroactive pay." The parties continued discussing wage rates and exchanged views as to whether the wage rates paid by Respondent were too high in relation to other jobs covered by other union contracts. At the close of the meeting, Carey asked Piotrowski to give some thought prior to the next bargaining session to "Clark's [proposed] trade of his proposal of compulsory union membership, dues checkoff and arbitration for the wage rollback and the elimination of COLA."

The minutes of the 10th bargaining session, held on December 12, show that a representative of the Union's International, United Food & Commercial Workers International Union, AFL-CIO (hereafter called International Union), appeared for the first time in the negotiations between the parties. After discussion of the outstanding unresolved issues, which resulted in no significant changes in position, Clark restated Respondent's position that there would be no extension of the present agreement following its expiration on December 19 and no retroactive pay. Thereafter, he observed that an impasse had been reached, which left both parties free to exercise their "lawful weapon options." Clark also stated that Respondent had the right to continue to operate and hire permanent replacements in the event of a strike.

At the 11th bargaining session, held on December 17, another representative of the International Union, Clayton Sayles, was present. At the outset, the parties reviewed the unresolved issues remaining in the negotiations. The Union conditionally withdrew a number of its proposals and Clark objected to the conditional nature of the withdrawal. Clark also stated that in "check[ing] with his legal counsel . . . Carey [he, Clark] was advised . . . that the [Respondent] can act unilaterally to implement its wage cut proposal, upon expiration of [the] contract. [Respondent's] position [is] that come Thursday morning, December 20, 1979, the wage roll-back will go into effect." Thereafter, Sayles inquired whether Respondent intended to implement unilaterally its other proposals on December 20, to which Clark replied, "No, just the 94 cent wage rollback." Sayles next inquired whether the Union could assume that Respondent would permit employees to continue to work following the expiration of the collective-bargaining agreement between the parties on December 19. Carey responded that, upon the expiration of the agreement, "conditions still exist." However, he advised there would be "no contract extension."

On December 18, Clark wrote Piotrowski a letter which was delivered to him at 9:40 a.m. In the letter, Clark stated:

> Because of the holiday season and contrary to our position at last night's bargaining session [Respondent] has changed its mind. The 94 cents/hour rollback will be postponed pending further negotiations.
>
> There will be no cut in pay [on December 20].

On December 18, Charles Hayes, a vice president of the International Union and regional director of its region 12,[7] the geographic jurisdiction of which includes the Union, contacted Carey to arrange a luncheon meeting with Clark. It was agreed that the three would meet on December 19 at Chez Paul Restaurant in Chicago.

On December 19, Clark, Carey, Hayes, and Sayles met for lunch at Chez Paul Restaurant. Hayes asked what could be done to reach a settlement in the current collective-bargaining negotiations between the parties. Clark explained he "could not live" with the high wage rates that Respondent had to pay its bargaining unit employees because the jobs involved were simply not worth such rates. He further explained that the Union had been successful in negotiating high wage rates with certain Chicago meat processors who were not in the slaughtering business, unlike Respondent. Clark stated that his predecessors with Respondent "gave away too much" when they agreed to the same high wage rates and that applicants for employment who had worked for nearby employers who slaughtered beef and lamb were paid substantially lower wage rates under contracts where Local 55, another local of the International, was the bargaining representative. Clark suggested that, if Hayes was really interested in reaching a settlement, he, in his position, could "switch the [Respondent] from Local 100 to Local 55 and he would be under less pressure to raise our rates in comparison to these [meat] processors in town." Hayes indicated he had no authority to do this, although the International Union's president did, and he suggested a meeting with Harry Poole, an executive vice president of the International Union.

After a short break, Hayes announced that he had arranged for a meeting to be held in Washington, D.C., on January 8, 1980, to permit discussion of Clark's proposal. Hayes also indicated that he had phoned Piotrowski to cancel the scheduled bargaining session following the luncheon meeting that day and "that the negotiations were going to be moved to Washington, D.C. to see if we could not reach an agreement there." Hayes added that Piotrowski would not be present at the Washington meeting.

In the course of conversation during the luncheon meeting, Hayes also said that he was aware that the agreement between Respondent and the Union was to expire at midnight and that Respondent had rescinded its position on the 94-cent-per-hour rollback. He inquired about Respondent's intention to pay the "holiday pay coming up." In response, Carey stated that all working conditions would remain unchanged following expiration of the agreement between the parties but, because the agreement was not extended, union security, dues checkoff, and arbitration of new grievances would not be continued. Hayes specifically asked if Respondent would continue to check off dues on January 1. Carey responded that checkoff cards become invalid at the expiration date of a contract and that, under Section 302 of the Taft-Hartley Act, such cards were not valid after such date.[8]

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[7] In this capacity, Hayes is responsible for the administration of his region while directing a staff of six International representatives, including Sayles. Among Hayes' duties are the negotiation of collective-bargaining agreements and the "policing" of such agreements.

[8] The above is based primarily on the credible testimony of Clark whose recital of the events of the December 19 meeting was clear and detailed. Hayes' version is not inconsistent with Clark's except in one respect. Hayes testified that "Charlie [presumably Carey or Clark] told me that [Respondent] would be prepared to extend the contract based on my request, but not sign an extension, contingent upon a meeting being scheduled in Washington . . . ." Clark specifically denied that Respondent agreed to such an extension and I credit Clark. First of all, the alleged extension makes no sense in the context of the bargaining positions of the parties and what happened in subsequent meetings. Respondent had made clear in prior bargaining sessions that the current agreement would not be extended. Secondly, even Hayes' account implies that Respondent was only "prepared" to extend the contract depending on the outcome of the meeting in Washington. There was no *quid pro quo* for the extension and it is implausible that Respondent would agree to such an extension without some significant concession such as an agreement to forgo the strike which loomed on the horizon. Finally, I observed in the demeanor of Hayes and in the way he testified a less coherent witness and one whose recitation of facts and memory for details was not as clear as Clark's. It seems to me that Hayes may have confused Carey's remarks about what was to happen at the expiration of the current agreement. For example, on cross-examination, he admitted that Carey told him that it was the policy of his company not to make dues-checkoff deductions in the absence of an extension of the contract and that "they were not going to make the dues deductions . . . and that they would let things remain, the status would remain until after we had a meeting in Washington." In short, nothing in the record either directly or indirectly supports Hayes' testimony that Respondent agreed to an extension of the old agreement.

On January 8, 1980, Clark, Carey, Hayes, and Poole met at the headquarters of the International Union in Washington, D.C. Clark explained that Respondent's wage rates were too high and that Respondent "just couldn't live with those rates." Clark suggested that, as a means of resolving the "differences" that existed between Respondent and Local 100, "we be put in Local 55." Poole flatly rejected this suggestion and added that he would not set a precedent by "switching companies from one local to another." Poole also stated that he did not think the wage rates paid by Respondent were too high.

On January 16, 1980, Clark, Carey, Hayes, and, possibly, Sayles met in advance of the 12th bargaining session held later that day between Respondent and the Union. In their meeting, Hayes stated that Piotrowski desired that, in the bargaining session to follow, Respondent offer a 1-year contract that would extend the expired agreement without change. Clark refused because Respondent wanted a new agreement with a 2-year term and because Piotrowski's suggestion did not comport with Respondent's bargaining objectives. Respondent's officials made clear that they would not sign a contract with a cost-of-living clause and without a cut in wages. Hayes warned that the Union was preparing for a strike vote.[9]

The minutes for the bargaining session show that Hayes and Sayles were both present, as well as one of the Union's attorneys. Clark began by relating that, since the last bargaining session held on December 17, 1979, he and Carey had met with representatives of the International Union in Chicago on December 19, and in Washington, D.C., on January 8. He stated a new proposal for an agreement. Respondent offered to continue the existing union-security and dues-checkoff provisions, to retain boning incentives as in the expired agreement, and to maintain wage rates under the expired agreement without change over a new agreement with a 2-year term. This represented a change from Respondent's position in prior bargaining sessions, wherein Respondent had rejected inclusion of dues checkoff and compulsory union membership in a new agreement while offering to increase boning incentives. Respondent had withdrawn its wage rollback proposal after the last bargaining session. Respondent's proposal also included all its previous positions such as pension, health plan, and the elimination of the arbitration clause.

Piotrowski responded that it was difficult to accept the 2-year wage freeze and the elimination of the Union's pension plan and the Union's clinic. International Representative Hayes stated that the Union could not agree to a 2-year contract without economic improvements and stated that this was a "gut" issue. The Union also responded that the arbitration position of Respondent was unacceptable. Hayes stated that the Union did not condone criminal activities but that the Union did not want to sit in judgment of members when considering their cases for arbitration. Hayes stated that "the union does not want to be judge and jury."

Later in this bargaining session, the Union countered that it was willing to accept a 1-year extension of the then-expired agreement with the retention of the Union's pension program, arbitration provision, and clinic. Following consideration of the Union's revised demands, Clark stated that Respondent would agree to a new agreement over a 2-year term with a wage reopener to determine second year wage rates, but Respondent's remaining proposals were basically unchanged from the preceding offer. Following the last change in Respondent's bargaining stance, Clark warned:

> [I]f this proposal fails to persuade you to sign the contract, we will maintain this position, even if it takes a strike to do it, as you have this right to do, but we will continue to operate and have a legal right to hire permanent replacements for anyone and everyone who strikes.

In response to Respondent's most recent offer, Piotrowski said he would place it before the Union's membership for a vote in a meeting on January 17. He said also he would phone Clark the following day to tell him the results of the meeting.

By letter dated January 17, 1980, Clark described to employees Respondent's proposal which he believed had been accepted by the Union in a 2-year contract. In that letter he detailed the contract stating that the employees would continue their same wage rate for 1 year and would be entitled to keep whatever union benefits they had already earned in past years. However, no new pension contribution would be made to the union pension fund. The letter also indicated that, on or about October 19, 1980, hourly wages for the second year of the contract would be discussed at the bargaining table.

The contract proposal was rejected and, on January 18, 1980, the Union commenced a strike at Respondent's facilities.

c. *The strike settlement and the agreement of February 28, 1980*

The minutes for the 13th bargaining session held on February 4, 1980, show that Sayles and an attorney for the Union were among those present. At the outset, Clark stated that the bargaining session scheduled for January 30 was canceled because of court proceedings held that day. Clark also complained about alleged misconduct on the picket line. The parties exchanged counterproposals but there was no agreement. Piotrowski ended the meeting by accusing Respondent of not bargaining in good faith.

On February 11, Clark, Carey, Hayes, and Sayles met again at Chez Paul Restaurant. Initially, they discussed the work stoppage then more than 3 weeks in progress. Clark again mentioned the possibility of "switching" Respondent from Local 100 to Local 55. Hayes reiterated that the International Union's president, Wynn, was the only one who had authority to do this, and that he was then attending a convention in Florida. Hayes suggested a meeting with Wynn "to see if we couldn't work out an agreement." Hayes left to phone Wynn and, when Hayes returned, he said that Wynn had agreed to a meeting in

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[9] Hayes did not dispute Clark's testimony on this point although his version did not mention the 1-year extension of the old contract.

Florida on February 13. Hayes also said he wanted Poole and Piotrowski present at this next meeting.

On February 13, Clark, Carey, Hayes, Sayles, Poole, Piotrowski, Wynn, and Jay Foreman, an executive vice president of the International Union, met in Wynn's suite at the Doral Hotel in Miami Beach, Florida. The Union's work stoppage was discussed, as were the respective positions of the parties in bargaining at that time. Also discussed by Clark was the possibility of a "switch of jurisdiction from Local 100 to Local 55." Wynn responded that he had heard Piotrowski was a good administrator and union leader, and that he saw no reason for such a switch which could, in any event, set an undesirable precedent. Wynn suggested that the parties attempt to reach a settlement with him. Wynn stated that he was not opposed to Respondent substituting its pension plan for that of the Union, and that he did not care if Respondent discontinued contributions to the union-sponsored clinic. However, he said there were "certain things" he wanted included in a new agreement between the parties, such as arbitration, union security, and checkoff.[10]

On February 21, Clark, Carey, and Hayes met again at Chez Paul Restaurant in Chicago. By this date, Respondent had replaced a significant number of striking employees and was operating both of its plants. Hayes said he wanted to "salvage the operations." He expressed concern that the bargaining unit would soon be lost since he had heard there was an "imminent back-to-work movement" among employees "on the [picket] line" and he did not wish to see this happen. He inquired whether it was possible to "work out a contract." Clark then proposed the following as alternatives to reaching a settlement: (1) A 1-year contract without a wage increase, cost-of-living adjustments, compulsory union membership, checkoff, or arbitration; or (2) a 2-year contract with region 12 of the International Union or its Local 55 that would include compulsory union membership, checkoff, Respondent's pension plan, and increased health and welfare benefits in place of a contribution to the union-sponsored clinic. Hayes saw a possibility of settlement and suggested another meeting with Wynn, who Hayes said had the authority to conclude a new agreement.[11]

On February 25, Clark, Carey, Hayes, Wynn, and William Orwell, another International Union vice president, met again in Wynn's suite at the Doral Hotel in Miami Beach, Florida. Clark reiterated the alternative proposals outlined to Hayes in Chicago a few days earlier. Wynn, who had been told by Hayes that the Union's situation was "almost a lost cause," said he was prepared to agree to a settlement in order to "salvage matters." After Wynn rejected Clark's proposal for a 1-year agreement, Wynn proposed a settlement in a contract over a 2-year term with: Wages "frozen" the first year and a wage reopener to establish wage rates the second year; a union-shop provision; a new employer-sponsored pension plan; increased health and welfare benefits in the place of contributions to a union-sponsored clinic; and a "two tier" wage structure.[12] Furthermore, Wynn stated that, in order to resolve the strike between Respondent and the Union and for the purpose of effectuating a settlement, the new agreement was to be "a joint contract with Local 100 and the International Union," with the latter to become "solely responsible for the administration of the contract." Wynn added that he did not want reference to the International Union shown on the face of the new agreement. Instead, he suggested that an appendix be affixed to the back of such agreement, which would be executed on behalf of the International Union. According to Clark, Wynn also stated that, if Respondent experienced difficulty with the new agreement, Wynn should be informed and Respondent could "switch jurisdiction" from Local 100 to another, although probably not Local 55. Clark stated that Wynn's proposal was satisfactory to Respondent as a basis for settlement of a new collective-bargaining agreement.[13]

Thereafter, a strike settlement agreement, dated February 25, 1980, was concluded to permit striking employees to return to work following Respondent's dismissal of the strike replacements hired since the inception of the Union's work stoppage several weeks earlier. Respondent preserved the right to discipline or discharge employees who engaged in strike misconduct. The terms of the agreement provided that the Union's strike against Respondent was to end on March 1, at 12:01 a.m.[14]

On February 28, Clark, Carey, Hayes, and Piotrowski met in Hayes' office where a new collective-bargaining agreement was executed for a term effective March 1, 1980, to December 19, 1981. The signers of this agreement were Clark, on behalf of Respondent; Hayes, on behalf of the International Union; and Walter Piotrowski, on behalf of the Union. The agreement expressly identified the parties as Respondent and the International Union "with its subordinate body, Local 100, Beef Boners and Sausage Makers Union (see attached Appendix A), hereinafter collectively referred to as the Union." Before the agreement was executed, Piotrowski had some second thoughts or reservations about the agreement. Hayes testified that Piotrowski's reservations dealt with that portion of the agreement and its appendix which stated that the agreement would be administered by the International Union. According to Hayes, he told Piotrowski that if he did not want to execute the agreement "along these lines" he did not have to do so. According to Clark, Hayes told Piotrowski if he did not sign he "might as well go back on strike again." Piotrowski acquiesced and executed the new agreements.

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[10] The above is based on the credited testimony of Clark. Hayes' testimony on this meeting was rather conclusory but was compatible with Clark's version.

[11] In his testimony Hayes failed to mention any meeting on February 21, nor did he deny that such a meeting had occurred.

[12] Basically, this involved less pay for newly hired employees, who would thereafter never progress to the higher wage rates paid more senior employees. As a consequence, while new hires were to enjoy the same wage increase due other employees, there would thereafter always exist a spread in the wage rates between newly hired employees and other employees.

[13] The above is again based on the credited testimony of Clark. Hayes' version is again conclusory but not significantly in conflict with that of Clark. Hayes testified as follows:

> Mr. Wynn said at that meeting that he was prepared in order to salvage what I had pictured to him to be almost a lost cause, he was prepared to execute an agreement with AMPAC along in conjunction with the local union, providing for, on behalf of the local union, I forget, either in conjunction with or on behalf of the local union, that would enable us to continue to operate, but he was not going to remove the members from that local into another local union.

[14] The strike settlement agreement also contained a provision ending Respondent's participation in the union-sponsored pension plan to which it had been committed during the previous contract. Respondent agreed to make a final contribution of over $15,000 to the plan to fulfill its entire liability to the plan for past benefits for its employees.

Attached to the new collective-bargaining agreement between Respondent and the Union was a single page captioned "Appendix A," which was made effective February 25. The appendix was executed on behalf of Respondent by Clark, and on behalf of the International Union by Hayes. In pertinent part, the appendix recited that it was a "[S]upplemental Agreement" and:

> WHEREAS [Respondent] and the International Union have, after Collective Bargaining, executed a Collective Bargaining Agreement;
>
> WHEREAS, the International Union's subordinate body, Local 100 . . . is also a party to said Collective Bargaining Agreement:
>
> NOW THEREFORE, the International Union and [Respondent] agree:
>
> 1. That notwithstanding that Local 100 is also a party to the above mentioned Collective Bargaining Agreement, the International Union will be solely responsible for the administration of [such] Agreement.
>
> 2. That in the event that it becomes necessary for the International Union to delegate routine items of such administration to staff representatives of Local 100, the International Union will give advance notice to the Respondent of that fact, stating the nature of such delegation and the probable duration of such delegated items.
>
> 3. The notice required by Section 8(d) of the National Labor Relations Act for the collective bargaining that will occur . . . incident to the wage reopener, will be filed by the International Union, who will actually conduct such Collective Bargaining with [Respondent] and who will not delegate such responsibility to Local 100.

A day or so after the execution of the new collective-bargaining agreement and its Appendix A, the Union held a membership meeting at which Hayes was also present. He explained the content of the new agreement to the membership. He also read the content of Appendix A, and this was followed by his explanation of its content. He finished by recommending that the membership adopt and ratify the new agreement and Appendix A. Thereafter, Hayes' remarks were interpreted to the membership in the Polish and Spanish languages for the benefit of the members present who understood only one or the other of these languages. Subsequently, a vote was taken, which resulted in a majority of the members present voting to accept the new agreement, including Appendix A.[15]

d. *Dealings under the agreement of February 28*

On March 24, 1980, Hayes wrote Clark to relate that there were several grievances that required discussion "in compliance with Paragraph 2 of Appendix A of the existing agreement between [the] International Union and its subordinate body, Local 100." In his letter, Hayes designated Joseph Piotrowski and John Lassiter, officers of the Union, to represent the Union in the discussion of such grievances. Hayes also designated them "to make visitation to the plants at regular weekly intervals in order to fulfill the wishes of our members."

On March 27, Clark replied to Hayes' letter, indicating that the designation of more than one agent "was unnecessary and inappropriate." It was Respondent's position that the Union had only utilized one servicing representative to visit the plants in the past.[16] Clark also pointed out that there was an adequate number of the Union's stewards in Respondent's plants so that any need for Polish and Spanish interpreters was satisfied.[17] In conclusion, Clark noted that Hayes had named Joseph Piotrowski and Lassiter as servicing representatives, but that Respondent would agree only to the designation of Lassiter "since Joseph Piotrowski is unacceptable by reason of his behavior."

On March 28, Hayes wrote to Clark, stating that he was in "total disagreement with your interpretation of Paragraph 2, Appendix A of the existing agreement." He went on to protest that Clark had no right to select union representatives and he made the additional designation of Rueben Ramirez "so that we will have at least two representatives at all times to meet with the Company."

At some point, during this period, Clark and Hayes met and discussed the matter of servicing representatives for purposes of contract administration at Respondent's plants. In this connection, Clark said that he, of course, could not tell Hayes whom he could select to service such plants. However, Clark sought to persuade Hayes that he not insist on Joseph Piotrowski "because of the bad experience [Respondent] had with [him] in the past on handling grievances and arbitrations; it was hard to do business with him." Clark also sought to persuade Hayes not to designate Ramirez. In doing so, Clark referred to an altercation that had occurred between Ramirez and Albert Mojica, Respondent's general superintendent, during the recent strike. Clark expressed the view that it would be unwise to permit Ramirez into the plants because Labor Board and criminal charges had been filed over the altercation and some were still pending. Clark stated that, under the circumstances, Ramirez and Mojica would not "get along" in the plants "with these charges over their heads" when "[t]hey would have to interact daily."

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[15] At some point during the final negotiations which led to the agreement of February 28, 1980, Hayes expressed misgivings to Clark that such agreement failed to contain a provision for arbitration. Clark assured Hayes that Respondent would be willing to submit disputes with the Union to arbitration on an *ad hoc* basis.

[16] Joseph Piotrowski testified that he was the servicing representative on behalf of his Union for Respondent's two plants since 1972. He was the only representative until about 1978 when he occasionally took Reuben Ramirez, who speaks Spanish, along with him to the plants. Piotrowski also occasionally brought along Lassiter or appointed him to service the plants if he was unavailable.

[17] In 1980 there were two stewards (one Spanish speaking) at the Normal Avenue plant and four stewards (one Polish and one Spanish speaking) at the Racine Avenue plant.

According to Clark, Hayes was not completely satisfied with Respondent's position, but he agreed that only Lassiter would be the servicing representative. Hayes did not dispute this testimony nor did he testify about any conversations he may have had with Clark about the problem of servicing representatives from March to September 1980. Clark subsequently conferred with Lassiter about his role as servicing representative. Clark assured Lassiter of Respondent's full cooperation in the performance of his duties. He was promised access to either of Respondent's plants "at any time," in the same manner as had servicing representatives in the past. Lassiter was also told that if he required an interpreter one would be provided him. Lassiter accepted the offer but stated that he would first deal with Spanish- and Polish-speaking stewards.

Lassiter testified that from the date—sometime in April—when he took over as servicing representative until early September 1980, when a new agreement with the Union was reached and Ramirez and Piotrowski took over as servicing representatives, he "had no problems" in servicing the needs of employees. He also had no problems with obtaining interpreters when they were needed.

On March 13, 1980, Clark wrote Hayes that checkoff authorization cards given to him that day were "invalid" because they named the Union as recipient of the moneys checked off. Clark reminded Hayes that, under Appendix A of the then-current collective-bargaining agreement, the International Union was "solely responsible" for the administration of such agreement. Further, Clark wrote that Respondent would only check off dues "to your office" and that:

> New authorization cards must be obtained which designate Region 12 of the International Union, in order for the check off authorization to be effective. How Region 12 disperses the funds is, of course, none of [Respondent's] affair.
>
> Please instruct the officers and agents of Local 100 concerning the effect of Appendix A because thus far they are attempting to operate . . . as if Appendix A does not exist.

On April 17, 1980, Hayes wrote Clark requesting and authorizing him to deduct dues in accordance with checkoff authorizations on behalf of the Union. He also asked that the dues be sent to the Union. In reply, Clark wrote Hayes that it remained Respondent's position that:

> Section 302 of the Taft-Hartley Act must be strictly construed and therefore only the labor organization that is "solely responsible for the administration of the Collective Bargaining Agreement" is legally empowered to be the designee of such an authorization card and the recipient of funds therefrom. Therefore, I once again seek to persuade you to obtain authorization cards which designate only the International Union, whereupon [Respondent] will promptly remit such funds directly to your organization. You have then merely to endorse the check to Local 100.

Although Clark expressed Respondent's willingness to check off dues to the International Union pursuant to proper authorizations from employees, the International Union refused to provide Respondent with checkoff cards for this purpose. Respondent was provided only with cards naming the Union as recipient of the dues. The International Union also advised Respondent that it "had a problem, that [it] did not have any procedure that was set up for accepting these dues."

On July 1, 1980, Walter Piotrowski, on behalf of the Union, wrote its members requesting that they pay their monthly union dues directly to Local 100 inasmuch as Respondent had refused to "honor the dues check-off authorization cards which were signed by such members and furnished to [Respondent]." On July 14, Clark wrote employees that, while the collective-bargaining agreement with the Union required union membership, the Union had no authority to demand the discharge of any employee for failure to pay dues—only the International Union had such authority in accordance with Appendix A of the agreement. Clark told employees that the only reason why dues were not being deducted from the pay of employees was because Respondent believed that applicable law required dues authorizations to be directed only to the International Union.

e. *Negotiations for a new agreement*

On July 31, 1980, Hayes notified Clark by letter of his desire to reopen the existing collective-bargaining agreement in regard to the subject of wages, only. On August 4, 1980, Clark wrote employees and stated that there had been a dispute with the Union concerning dues checkoff, which had placed the International Union "in the middle of this dispute," and that the latter wanted Respondent to resolve its "differences" with the Union to permit dues to be checked off "directly to Local 100, and Appendix A of our present contract can also be made unnecessary." Clark also stated that: "In an effort to settle this dispute and to take . . . Hayes out of the middle, I have suggested to both . . . Hayes and Local 100 that [Respondent] open early negotiations, not on the wage reopener that is scheduled for October 1980, but for a new contract that will run from now until December 19, 1982."

On August 8, 1980, International President Wynn wrote Carey that Wynn had learned that Respondent and the Union were soon to commence collective-bargaining negotiations for a new collective-bargaining agreement. He stated that, if a new agreement was not reached, the present one would remain in full force and effect for its term; but that if a new agreement was concluded and ratified, the parties to it would be only Respondent and the Union, and that Appendix A of the current agreement would be stricken in its entirety and all reference to the International Union deleted. In closing, Wynn assured Carey "that in the light of the foregoing conditions the International Union agrees to the International's deletion from the contract."

On August 11, collective-bargaining negotiations for a second new collective-bargaining agreement between Respondent and the Union commenced. On August 13, after 3 days of negotiations, the parties concluded a settlement for a new agreement effective for the period from September 1, 1980, to December 19, 1982. The second new agreement was executed only by representatives of Respondent and the Union on September 2, 1980. As a part of this newest agreement, there was a provision for the checkoff of union dues and initiation fees to the Union where an employee provided Respondent with a proper authorization form for such payment.

After the second new collective-bargaining agreement became effective around September 1, the Union designated Joseph Piotrowski and Ramirez its servicing representatives in Respondent's plants. From September onward, both Joseph Piotrowski and Ramirez have been the Union's servicing representatives in such plants.

In October, following the execution of the second new collective-bargaining agreement on September 2, Respondent began again to check off union dues from the paychecks of employees and remit such dues directly to the Union. Then or shortly after Respondent began to check off such dues, the amount of moneys checked off was doubled to twice the normal monthly amount. It was agreed by Respondent and the Union that the checkoff of double dues each month would continue for a period of about 6 months, at which time the Union would have received moneys in an amount equal to that which it would otherwise have received pursuant to checkoff during the period that Appendix A was viable. The General Counsel concedes that Respondent "has in fact made up dues payments from March 1 through August 1980."

2. Discussion and analysis

Section 8(a)(5) of the Act, read together with Section 8(d), requires an employer to bargain in good faith with the union representing its employees. Each party to the collective-bargaining process must make "a serious attempt to resolve differences and reach a common ground." *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 486, 487, 488 (1960). While one party may not approach the bargaining table with a closed mind, neither is he bound to yield any position fairly maintained. "Nor may the Board . . . directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements," for the Act does not regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 402, 404 (1952), affg. *American National Insurance Co.* v. *N.L.R.B.*, 187 F.2d 307 (5th Cir. 1951). *N.L.R.B.* v. *Herman Sausage Co., Inc.*, 275 F.2d 229, 232 (5th Cir. 1960).

Applying these principles to the facts of this case, I find that the General Counsel has not proved by a preponderance of the evidence that the prestrike bargaining positions and conduct of Respondent showed a desire not to reach agreement or to bargain in bad faith in violation of the Act.

The General Counsel points particularly to three of Respondent's bargaining positions to support his contention of unlawful conduct: The rollback of wages together with the elimination of any cost-of-living adjustments; the elimination of mandatory union security and union dues; and the elimination of any arbitration provision. These positions cannot, however, be viewed in isolation. They must be considered in light of Respondent's explanations for its positions, its conduct on other issues, the Union's responses, the evolution of Respondent's positions, and its willingness to vary its positions. For example, Respondent proposed increases in health and pension benefits which were ultimately accepted by the Union. These increases, together with Respondent's agreement to the Union's proposed night-shift premium, offered employees some benefits to be weighed against the loss of a cost-of-living adjustment and the wage rollback. Of course, the wage rollback was subsequently modified and no cutback in wages took place. Even so, Respondent's position on wages was fully explained. The Union had refused to grant relief to Respondent the year before negotiations began when Respondent was in fact losing money. Because of the Union's failure to cooperate at that time, Respondent sought to recoup the same amount through a wage rollback in negotiations even though the next year it did not plead a loss in earnings. Respondent has convincingly shown that its profit margins are precarious and dependent to some extent on controlling labor costs. It also took the position that it was paying its employees too much money in comparison to the jobs they were doing and what other comparable employers with union contracts paid. These views were expressed to the Union and the issue was thrashed out at the bargaining table. The Union felt so strongly that it called a strike and, after the strike, signed contracts to resolve the dispute. Nothing that Respondent did or said at the bargaining table with respect to the wage issue would justify overturning the results of free collective bargaining.

Nor were Respondent's other positions improperly motivated or unyielding. In early December 1979, at the ninth bargaining session, Respondent suggested a trade to the effect that, if the Union agreed to Respondent's wage proposal, Respondent would agree to the withdrawal of its proposals for the elimination of compulsory union security, dues checkoff, and arbitration. Thereafter, on January 16, 1980, at the 12th bargaining session, Respondent again indicated its willingness to accept compulsory union security, dues checkoff, and retention of boning incentives as they appeared in the then-expired agreement, if the Union would agree to maintain the wage rates then in effect in an agreement for a term of 2 years. When the Union demanded an extension of the expired agreement for 1 year, Respondent reoffered its prior proposal but with a wage reopener in the second year. The Union rejected this as well as Respondent's other proposals. In these circumstances, it is clear that Respondent, while firm on its desire to hold down wages, was willing to yield, particularly on arbitration, union security, and dues checkoff, in order to reach agreement. Respondent's positions on each of these other issues were explained to the Union. It explained its reluctance to agree to these provisions because of its perceived view that the Union had been uncooperative in granting wage relief and in proceeding to arbitration on cases without merit. Nevertheless, it offered to yield on these issues if the Union would agree to its modified wage proposal. The Union declined. Even after the strike commenced, Respondent sought to vary its proposals and, of course, Respondent pursued a settlement of the strike and an agreement with the Union's parent—and ultimately with the Union alone—which contained dues-checkoff and union-security clauses. Respondent's efforts in this respect belie any contention that it was not seeking an agreement or was not bargaining in good faith.

In view of my findings set forth above, I also reject the contention of the General Counsel that Respondent bargained in bad faith by encouraging the Union to strike and by sending letters to its employees setting forth its bargaining positions. The minutes of the bargaining sessions show that both parties were flexing their economic muscles. Union Representative Walter Piotrowski warned of a possible strike ahd Respondent, through its chief negotiator, Clark, indicated that Respondent was willing and prepared to take a strike. Nothing in Respondent's conduct and statements evidenced bad-faith bargaining or a cast of mind against reaching agreement. The same can be said for the contents of the letters to employees. Since none of Respondent's bargaining positions or tactics was unlawful, its representation of its bargaining positions to the employees fairly reflected hard but lawful bargaining. It can aptly be said here, as in *W. G. Best Homes Corporation*, 253 NLRB 912, 921 (1980), that "what emerges from this extensive record is a test of economic strength between Respondent and [the Union] . . . . In that contest it is not the function of the Board to assist one to the detriment of the other."[18]

The General Counsel also alleges that Respondent engaged in bad-faith bargaining by refusing to abide by an alleged extension of the expired bargaining agreement and by withdrawing recognition from the Union. As I have indicated, I do not credit the testimony of Hayes that Respondent agreed to extend the old contract. The expired contract was not extended. Thus, the failure of Respondent to continue the union-security and dues-checkoff provisions of the expired contract was not unlawful.

Nor did Respondent ever decline to recognize the Union or withdraw recognition from the Union. The General Counsel alleges in his brief that Respondent "sought to avoid its bargaining obligation with Local 100" by entering into "Appendix A." This contention is ludicrous. The evidence clearly shows that International representatives, including Hayes, injected themselves into the negotiations before the strike. They participated in efforts to settle the strike and to salvage the jobs of employees who had been replaced; and they effectuated an agreement under somewhat unorthodox circumstances. However, the Union acquiesced in the participation of the International as well as all of the efforts of the International to reach an agreement with Respondent. The agreement provided not only for the end of the strike but also for a lump sum payment by Respondent to the Union's pension fund for past service credits for some of its employees. The agreement signed by all parties, including the Union, stated that the agreement was between Respondent and the International Union "with its subordinate body [the Union]" and specifically referred to Appendix A which was signed only by the International. Appendix A specifically states that the International "will be solely responsible" for the administration of the agreement notwithstanding that the Union "is also a party" to the agreement. Piotrowski, on behalf of the Union, was fully aware of the significance of Appendix A when he signed the agreement on February 28, 1980. And the membership of the Union was fully aware of the significance of Appendix A because at a meeting wherein they ratified the agreement both the agreement and Appendix A were read to them and explained to them by Hayes, the International representative. The Union not only acquiesced in the International's commendable and valuable participation in the negotiations but ratified the fruits of that participation. In these circumstances, I reject any contention that Respondent violated the Act by entering into the February 28, 1980, agreement with the International and the Union or that Respondent at any time withdrew recognition from the Union.

The General Counsel also alleges that, in applying Appendix A, Respondent violated the Act in two respects, first by refusing to check off dues to the Union and insisting instead that they be checked off to the International, and, secondly, by objecting to the designation of two union officials to police the agreement.

As shown above, the International designated three officials of the Union, Joseph Piotrowski, Reuben Ramirez, and John Lassiter, as servicing representatives for the purpose of policing the agreement. Respondent objected to Piotrowski and Ramirez. It objected to Piotrowski because of what it perceived a lack of cooperation on his part in the past, particularly in submitting cases to arbitration which Respondent thought should not have been submitted. Despite this objection, Joseph Piotrowski was apparently permitted to act as a union representative in the interviews of employees who were suspended for misconduct after the strike. Respondent objected to Ramirez because he would be dealing with Mojica and the two had recently been involved in an altercation which had spawned Labor Board and criminal charges. Respondent thought that the two could not work together on grievances. Respondent also took the position, which is supported by the record, that only one servicing representative was utilized in the past.

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[18] The Charging Party asserts that Respondent's position in successfully pressing for its own pension plan rather than the Union's multiemployer plan was evidence of bad-faith bargaining. This specific allegation was not part of the complaint, and, despite some evidence on the point, was not fully litigated. Respondent was not on notice that it was required to defend its position on pensions and did not organize its presentation to meet such an allegation. Even on the merits, however, the Charging Party's assertion is unavailing. First of all, the pension issue cannot be considered in isolation from Respondent's other positions and conduct. But even focusing only on the pension issue, Respondent bargained in good faith. Respondent's pension proposal called for greater benefits than under the Union's plan. Respondent was also entirely within its rights in arguing that a corporate-sponsored plan would encourage loyalty and discourage turnover. Although Respondent's plan of necessity could not fund all past credits earned, the admittedly young work force—the average age was 35—would have an excellent opportunity to cash in on the better retirement benefits offered by Respondent. The Charging Party argues that those employees with less than 8 years' service—of which there were admittedly "quite a few"—lost pension benefits. Perhaps they did. The record is not clear on this point although presumably they will retain the credits they earned under the Union's plan and may build on them if in the future they become employed under the Union's plan. But Respondent agreed in the strike settlement agreement, which was, of course, part of the negotiations, to pay a lump sum settlement to vest those employees with 8 years' service or more in the Union's plan. This is not the conduct of a bad-faith bargainer. Indeed, Respondent's conduct with respect to the pension issue—although keyed to its self-interest—was sufficiently beneficial for employees that it reflects on the good faith of Respondent and its willingness to grant economic benefits in exchange for some "take aways." The Union's position on this issue, in contrast, seeks to have the Government rescue it from a deal made at the bargaining table which it now finds embarrassing.

The uncontradicted testimony of Clark is that Hayes, while at first objecting to Respondent's position on Ramirez and Piotrowski, acceded to Clark's position that only Lassiter should be designated as servicing representative. Since Hayes had the sole authority to administer the contract under Appendix A, he was authorized to agree with Clark's position as he did. Thus, whatever would be the situation had Respondent *insisted* over Hayes' objection upon the exclusion of Ramirez and Piotrowski, there could be no violation of the Act where, as here, Hayes *agreed* to such exclusion.

Respondent's reason for excluding Ramirez was reasonable and proper in the circumstances. Its exclusion of Piotrowski, on the other hand, was not rationally based. There was no arbitration provision in the contract and thus he would not be in a position to force arbitration in unmeritorious cases as Respondent feared. However, Hayes may have been convinced by Clark that Piotrowski's presence at the plant might cause bad feelings which he wished to avoid, particularly since the parties would shortly have the opportunity to reopen the agreement. In any event, Hayes did agree to the exclusion of Piotrowski. The exclusion of these two officials did not adversely affect the representation of the employees herein. Lassiter was provided with sufficient stewards who spoke both Polish and Spanish to police the agreement. And Respondent did not object to the individuals who were designated as stewards. Lassiter testified he had no problems in the several months that he was the servicing representative. This situation obtained until September 1980 when Appendix A was superseded by an agreement which specifically provided for administration by the Union. At that point both Ramirez and Piotrowski were designated and acted as servicing representatives. Thus, even if, in the unique circumstances of this case, Respondent had technically violated the Act by not accepting the designation of Piotrowski and Ramirez, there was no adverse impact on employee rights in the short period that they were not servicing representatives and no remedial order is required at this time.

The General Counsel also alleges that Respondent violated the Act by failing to honor dues-checkoff cards signed by employees on behalf of the Union and insisting instead that they designate dues to be paid to the International. This issue too turns on the unique circumstances of this case. Respondent took the position that Appendix A of the agreement of February 28, 1980, required that the dues be tendered only to the International and that Section 302 of the Act, which prohibits the transfer of funds from an employer to a union except under certain circumstances, precluded the payment of dues directly to the Union. Respondent suggested that the International could transfer the dues to the Union but that the authorizations would have to name the International and the moneys would have to be paid directly to the International.

The General Counsel argues that Respondent's reading of Section 302 to preclude the payment of dues to the Union is erroneous and that an employer may check off dues and make payments to a union "even in the absence of a contract" where the employees designate the union as the recipient of the dues payment. The General Counsel cites Section 302(c)(4) of the Act which states that the section is not applicable "with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, that the employer has received from each employee . . . a written assignment which shall not be irrevocable for a period of not more than one year, or beyond the termination date of the applicable collective bargaining agreement whichever occurs sooner."

The question presented by the General Counsel's allegation is an interesting one but hardly worth its litigation in the circumstances of this case. The checkoff provision of the February 28, 1980, agreement refers to a form authorization which was attached to the agreement as Appendix B. That form specified the designee as the Union, not the International. The International also insisted that it desired the dues to be paid to the Union directly. In these circumstances, Respondent probably should have acquiesced and paid the dues directly to the Union notwithstanding the thrust of Appendix A, namely, that the International was to have sole responsibility for administering the agreement. However, in view of the unique arrangement surrounding the agreement of February 28, 1980, and the application of Appendix A, Respondent's insistence that the dues be remitted directly to the International did not constitute bad-faith bargaining, particularly in light of the eventual resolution of this issue. The dispute as to which entity would be the nominal representative in the administration of the contract was resolved in September. Today, dues are being checked off directly to the Union. All back dues for the period from March through September 1980 have been paid. There is no need for the Labor Board to concern itself with an academic question such as is presented by the General Counsel. Accordingly, I shall dismiss this allegation of the complaint as well.[10]

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[10] The parties have made much of a separate allegation in the complaint that Attorney Joseph Carey was an agent of Respondent. The reasons for this high pitched conflict are beyond the scope of this proceeding since such a finding has no practical significance. Carey was an agent of Respondent insofar as his statements are binding on Respondent in connection with the substantive allegations of the complaint. However, neither Carey nor Kane-Miller—of which he is an officer—is named as an individual respondent. Nor does the General Counsel seek an order against Carey or Kane-Miller. The entire conflict is much ado about nothing and I suggest that the parties forget about it.

B. *The Status of the Strike*

It is clear from the evidence that the employees and the Union decided to strike because of the bargaining positions and posture of Respondent. I have found that Respondent's bargaining positions and posture before the strike of January 18, 1980, did not constitute bad-faith bargaining within the meaning of Section 8(a)(5) and (1) of the Act. Accordingly, the strike herein was an economic rather than an unfair labor practice strike.

C. *The Discharge of Striking Employees for Alleged Picket Line Misconduct*

In the course of the strike, Respondent received information about the possible misconduct of some striking employees while they were on the picket line. As a result of initial reports focusing on individual named employees, a number of them were suspended pending a further investigation into the alleged acts of misconduct. The notices of suspension, dated March 7, 1980, informed employees that they would be interviewed as part of the investigation and asked them to consult their union representative.

Following Respondent's investigation into the alleged strike misconduct, which included holding interviews with and taking affidavits from witnesses and other employees, Respondent afforded each of the 10 accused employees an opportunity to be heard. At these interviews, representatives of the Union and the International Union were present. A translator was provided where needed. Notes were taken by Clark's secretary which were thereafter transcribed for review by Clark. In these interviews, the accused employees were asked whether there were any witnesses that they desired Respondent to contact in the investigation. Where names were mentioned, Respondent interviewed those witnesses and notes were also taken of those interviews.

After reviewing all the notes of the interviews and as a result of Respondent's investigation, Clark concluded that 10 employees, all of whom had previously been suspended, should be discharged for strike misconduct. On March 25, 1980, these employees were notified of Respondent's decision by letter.

On March 24, 1980, Hayes submitted a "formal grievance" on behalf of the employees who had not been reinstated after the strike. On April 3, 1980, Respondent answered the Hayes letter by referring to a conference between Lassiter and Albert Mojica on the matter. Respondent stated that the 10 employees were discharged for strike misconduct. Respondent also stated that five of the employees were being reinstated pending a determination by the Labor Board as to whether their discharges were unlawful. Later Respondent decided similarly to reinstate two other employees. Only three of the discharged employees—L. V. Thomas, Jan Piton, and Stanley Karwaczka—were not reinstated.

Although Respondent submitted the documentary evidence it relied on in discharging all 10 employees in this proceeding, Respondent has not contested the General Counsel's allegations with respect to the 7 employees allegedly discharged for misconduct who were eventually reinstated. All seven of these employees took the witness stand. They testified that they engaged in the strike and picketing and they denied engaging in the alleged misconduct which led to their discharge. No witnesses were presented in this proceeding to rebut their testimony and the documentary evidence is insufficient to counter their denials that they engaged in misconduct. Accordingly, Respondent's discharge of these employees was improper since they did not in fact engage in the strike misconduct for which they were terminated. See *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

The evidence concerning the remaining three employees whose discharges are at issue is discussed below:

L. V. Thomas

On the morning of February 21, Amedo Orlino, a strike replacement at the Normal Avenue plant, appeared at the plant to report for work. As he got off a bus near the plant, he encountered two black men. One approached Orlino from the front, attempted to block him from proceeding toward the plant entrance, and asked Orlino where he was going. Orlino answered that he was going to work. As Orlino was speaking, he was struck from behind on the back of the head. The blow caused Orlino to stagger. He turned, looked behind him, and saw the face of his assailant whom he identified as L. V. Thomas.[20]

After he was hit, Orlino ran for the plant entrance, but the other man continued to obstruct his way. Orlino ran in another direction until he saw another employee he knew, Miguel Ramirez, in the front seat of a car approaching the plant. Ramirez, who had seen Orlino being struck, corroborated Orlino and identified Thomas as the assailant. He asked the driver of the car to stop and Orlino got into the rear seat. The car then proceeded to the plant entrance and Orlino got out.

Later that day, Orlino was X-rayed and was released from a local clinic. He then went back to the plant, punched out, and went home. Orlino testified that he did not know, nor could he identify, the second man because he focused primarily on the man who hit him. He had both men in his sight even after he reached the plant entrance because they followed the car the short distance from the point of the attack to the plant entrance.

As a consequence of Orlino's report of the incident of February 21, Thomas was suspended by Respondent. Thereafter, Thomas was afforded an interview by Respondent. In the interview, Thomas was asked if he had "anyone you want us to contact in your behalf." Thomas answered that he did not. However, at the hearing, Thomas testified that he was with Earl Warfield, another striker, the day that Orlino was hit and that Warfield told Thomas, at that time, that he, Warfield, had "slapped" Orlino. He also testified that Warfield again admitted, on March 3, the first day the employees came back to work after the end of the strike, that he had hit

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[20] Orlino identified Thomas from identification card photographs shown to him during the investigation of this incident by Respondent. He also identified Thomas in person through a one-way mirror, presumably at the time of the interviews. At the hearing, Orlino again identified Thomas as his assailant by reference to the latter's identification card photograph.

Orlino. Warfield told him, "L.V. there is the guy that I slapped." According to Thomas, there were two or three people present when this was said. Thomas also testified to two other times when Warfield mentioned that he, Warfield, had hit Orlino, the last time being in the office of Thomas' attorney, where Warfield appeared pursuant to Thomas' invitation. Yet, Thomas never told Respondent of Warfield's alleged admissions even though Thomas admittedly had knowledge of them when interviewed by Respondent following his suspension, and even though he told Clark he had no witnesses to support his denial that he had struck Orlino.

Earl Warfield, who is 6 feet tall and weighs about 230 pounds, testified that he had been on picket duty with Thomas one morning when he approached Orlino who was going to work. Warfield advised Orlino that there was a strike and asked that he not report for work. According to Warfield, Orlino shifted his weight to his left foot and Warfield thought that Orlino was about to give him a karate kick. Then, according to Warfield, he put out his hand and brushed Orlino's shoulder.

Warfield testified that he told Thomas, on February 21, the day of the incident, that he had simply brushed Orlino's shoulder or "put him off balance." He testified that he spoke to Thomas about the Orlino incident one more time after Thomas was discharged but did not elaborate on the details of that conversation. Later, Thomas asked Warfield to go to his attorney's office and tell her that Thomas did not hit Orlino. Warfield identified a sworn affidavit he gave to Thomas' attorney on June 14, 1980, in which he stated that he had "shoved Orlino in the face" after arguing with him about the strike and "being frustrated at what he was saying . . . ."[21] In another sworn affidavit given to Respondent's counsel on February 13, 1981, a week before he testified, he stated that: "At no time during the period of the strike did I hit anyone. At no time did I tell Thomas I had hit a man." He admitted at the conclusion of his testimony that he was trying to help Thomas.

In rebuttal, Orlino denied that Warfield, a fellow employee and a "friend," had ever pushed him in the shoulder or the face. Orlino also testified that counsel for Respondent had brought him and Warfield together the prior week, at which time Orlino denied in the presence of Warfield that he had ever been touched by him.

I find that Thomas did strike Orlino as Orlino testified. Orlino was an honest and reliable witness. He was corroborated by another employee witness whose testimony was also reliable and straightforward. The testimony concerning the size of Thomas as compared with Warfield is insignificant. Nor is it significant that Ramirez thought that Thomas was the smaller of the two men and Orlino thought him to be the larger of the two. First of all, Thomas is 5 feet 8 inches tall. He is taller than Orlino who is 5 feet 5 inches tall and could well have been viewed by Orlino as "large" or larger than the second man. Secondly, and more importantly, I do not believe that Warfield was the other man. Warfield's testimony was completely unreliable. He told different people different stories and his prehearing affidavits conflicted not only with his testimony but also with each other. His whole testimony was motivated by a desire to help Thomas whose job was on the line. Moreover, Thomas himself was an unreliable witness. He allegedly knew about Warfield striking Orlino prior to the interview in which he was permitted to give his side of the story but he clearly stated he had no witnesses to offer in his defense and he never mentioned the Warfield "alibi" to Respondent. In these circumstances, I find that Thomas engaged in strike misconduct which clearly justified his discharge by Respondent.

Jan Piton

On January 18, 1980, the first day of the strike, George Schiller, Respondent's controller, was asked to go from the Normal Avenue plant to the Racine Avenue plant, about 2 miles distant. Schiller drove to the Racine plant with two other passengers, James Dillon, Respondent's chief accountant, who sat in the front seat, and James Gutsell, who sat in the rear seat.

When Schiller and his passengers approached the entrance of the Racine Avenue plant in Schiller's car, they observed some 50 to 60 pickets around the gate. Another car in front of Schiller's was permitted into the plant by the pickets without incident. However, as Schiller drove up to the entrance gate, his car was surrounded by pickets who proceeded to "bang" on the car while yelling and screaming obscenities at Schiller and his passengers. The pickets forced Schiller to stop his car and they opened the front doors. As this occurred, one of the pickets "took a swing at [Schiller], hit the back of [his] head and grabbed [his] coat." Schiller then slowly moved his car forward. The man who hit Schiller held on to his coat until the forward progress of Schiller's car forced the man to release him.

This entire incident was observed by then Sergeant Brad Douglas Muirhead, Jr., a field supervisor employed by Wackenhut Security Agency. At the time, Muirhead was inside the plant entrance about 6 or 8 feet from the gate. From this vantage point, Muirhead saw pickets pound Schiller's car and heard them yelling obscenities at the occupants. He also observed one picket open the door on the driver's side, throw a punch at Schiller and pull him by the collar and the hood of his coat while attempting to drag him from his car before letting go. Shortly after the assault on Schiller, Muirhead had a conversation with Carey, the attorney for Respondent, who inquired whether Muirhead had seen what had occurred. A few days later, Muirhead was shown some photographs for the purpose of identifying the person who had hit Schiller. After viewing a number of photographs in Clark's office, Muirhead identified Jan Piton as the assailant.

Piton denied that he had ever stopped a car or hit or attempted to pull a driver out of a car under the circumstances testified to by Schiller and Muirhead, although he admitted he was picketing at the Racine Avenue plant on the first day of the strike.

In the course of Respondent's investigation into the incident involving Schiller, Piton was interviewed by

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[21] Prior to being shown the content of his affidavit, Warfield insisted that he had told Thomas' attorney that he "shoved [Orlino] in the shoulder."

Clark. Piton refused to divulge to Clark the names of any witnesses he contended were available to support his denial that he had hit anyone or pulled anyone out of a car. Piton testified that he did not do so because he was told not to by a union representative. At the hearing, however, Piton named three witnesses, including Raul Sanchez, a fellow employee, who could corroborate his denial. None of these named employees was mentioned in the pretrial affidavit given by Piton to the Labor Board.

Sanchez, a union steward, was subpenaed by Respondent from Guadalajara, Mexico, and interrogated regarding the attack on Schiller. Sanchez testified that Piton stopped the car which Schiller was driving, the door opened, and Piton "had the arm of [Schiller]." He testified that he did not know if Piton hit Schiller, but he saw Piton try to pull the "driver out of the car."

The testimony of Muirhead and Sanchez is mutually corroborative insofar as they identified Piton as the person who stopped Schiller's car and attempted to pull him out of it. Sanchez, a friend of Piton's, did not see a blow struck but Muirhead did and, in this respect, he corroborates Schiller who could not identify his assailant. Dillon also testified. He generally corroborated Schiller, but he could not see what was happening on Schiller's side of the car because the door was being opened on his side of the car. I viewed all of these witnesses as reliable and their testimony cumulatively establishes that Piton did strike Schiller and attempt to pull him out of his car while Schiller was driving. Piton's testimony is not credible. He was not corroborated even though he named some people who allegedly could have testified on his behalf. One of those, Sanchez, actually contradicted Piton. Piton's conduct was serious. He not only struck an individual but interfered with a moving vehicle. In these circumstances, I find that Respondent properly discharged him for engaging in strike misconduct.

Stanley Karwaczka

On January 18, 1980, the first day of the strike, truckdriver George Mollet sought to deliver a trailer load of boars to Respondent's Normal Avenue plant between 10 and 11 a.m. As he approached the plant entrance with his tractor-trailer, he observed a number of pickets in front of the gate. Mollet stopped his tractor-trailer. A number of pickets gathered in front of the tractor and around the side yelling to Mollet not to enter the plant. One of the pickets walked by the driver's side of the tractor-trailer and, some seconds later, Mollet heard a "loud pop." Mollet got out of his cab and inspected his tires, believing one of them may have blown out. Mollet noticed that the air hose was disconnected from the tractor-trailer. After connecting the air hose, which took him a few seconds, Mollet reentered his cab and drove off. He returned and entered the plant, without incident. Mollet could not identify the person who disconnected the air hose although he noticed a man wearing a green jacket walking past his tractor-trailer just before he heard the pop. There was no damage to the truck.

The above events were witnessed by some of Respondent's employees who were looking out of a second floor window onto Normal Avenue. One, Henrietta Stashwick, had her head out an open window watching the pickets when Mollet's tractor-trailer first appeared. She observed the striking employees gather around it after it was stopped and saw a man in a green jacket position himself between the tractor-trailer, where he "put out his arm" and retracted it. She testified that she recognized the man in the green jacket and she called out his name.

In her direct testimony, Stashwick identified the man in the green jacket as "Joseph Wargacki," another employee who was discharged for alleged misconduct but later reinstated. She was adamant on this point. After cross-examination, Respondent's counsel stated that he believed that her identification was incorrect. The prior witness, Karwaczka, was brought into the courtroom, with the agreement of counsel for the General Counsel and after Stashwick gave a general description of the man she observed which fit that of Karwaczka. Stashwick attributed her admitted error to being "extremely nervous." I doubt this explanation. She seemed very confident in identifying Wargacki and only appeared nervous when she changed her testimony.

In a pretrial affidavit given about these events on January 18, 1980, Stashwick simply mentioned that she saw a man in a green jacket "reach between the cab and the trailer and pull something out." She did not mention Karwaczka by name. One of the office employees present with Stashwick, Joan Miller, testified that Stashwick mentioned Karwaczka's name later in the day. She did not hear Stashwick call out any name at the time the incident occurred.

Karwaczka testified that, on January 18, he appeared at the Normal Avenue plant around 5:15 a.m. and that he left to go home around 9:30 a.m., after receiving his paycheck from a supervisor. He denied that he had disconnected the air hose on any tractor-trailer that day. Also, while Karwaczka admitted to owning a green jacket, he asserted it was inside the locker room of the Normal Avenue plant on January 18, and that he had worn a black leather jacket on that day.

Richard Backert, superintendent of the Normal Avenue plant, testified that he distributed paychecks at that location between 10 a.m. and noon, and that Karwaczka was one of the striking employees to whom he gave a check during that period. He also testified that Karwaczka wore a green jacket. Backert noted Karwaczka particularly since Backert had earlier heard in the office that Karwaczka was "the guy that pulled the thing off the truck" earlier that morning. Backert also testified that he was involved about a week later in opening the lockers of about 180 striking employees to make such lockers available for strike replacements. When the lock on Karwaczka's locker was clipped and the locker contents inventoried, according to Backert, there was no green jacket inside the locker. However, he does not recall whether Karwaczka's personal belongings were ever returned to him.

I do not believe that Karwaczka was the person who disconnected the air hose on the morning of January 18. Karwaczka's denial seemed to me to be credible. He was a candid witness who was not impeached on cross-examination. Respondent's evidence to the contrary is flimsy. The two office personnel who observed the incident and testified herein were speculating on the identity of the person who disconnected the air hose. The reports on this entire incident, which was one of several that occurred on this, the first day of the strike, were fraught with confusion and uncertainty. Stashwick did not even identify the person in the green jacket in an affidavit given the very day of the incident and, at the hearing, she confidently identified a person other than Karwaczka before correcting herself. Miller relied on what others had told her and Backert had likewise heard from unidentified office personnel that Karwaczka had been involved in the incident. All had participated in investigations and interviews by Respondent which had focused on Karwaczka and which solidified their identifications prior to the hearing herein. Moreover, I do not believe that Backert could have remembered what Karwaczka wore on January 18 when he was one of numerous employees given a check or what was not in his locker when he cleared it out as he did the lockers of 180 other employees. Nor can I be confident that Backert was entirely sure of the time when the checks were distributed so as to place Karwaczka on the premises at the time of the air hose incident. If, as he testified, Backert knew, prior to giving Karwaczka his check, that he had been identified as having disconnected an air hose, it is reasonable to assume that Backert would have mentioned it to him at the time. He did not. In all the circumstances, I find that the identification by Respondent's witnesses of Karwaczka as the person who disconnected the air hose is too speculative for me to base a finding and I therefore credit Karwaczka's denial that he was involved in the incident.

In any event, even if, contrary to the above analysis, I were to find that Karwaczka did disconnect the air hose, the incident is not significant enough to justify his discharge. There was no damage to the truck, it took seconds to reconnect the air hose, and the truckdriver was not impeded from eventually entering the plant. The discharge of a striker in these circumstances would give the impression that the employer was so interested in curtailing the right to picket and strike that he was willing to punish employees for minor incidents to that end. I therefore find that Respondent violated the Act by discharging Karwaczka for alleged misconduct while he was engaged in protected concerted activity.

D. *The Alleged 8(a)(1) Violations*

Two current employees, Rudolfo Martinez and Willie Griffin, testified in support of the allegations in the General Counsel's complaint that Albert Mojica threatened and interrogated employees. The evidence shows that, during negotiations, Respondent sent letters to employees describing the negotiations and setting forth Respondent's positions. Mojica testified that there were many times when he had conversations with employees about the status of negotiations.

Employee Martinez testified that, on or about December 12, 1979, his immediate supervisor, Bals Gonzales, told him that Mojica wanted to see him in his office. When he got there, Mojica asked him why the employees did not form their own union. He also "understood" Mojica to suggest that if the employees left the Union they would not have their pay reduced by 94 cents. Mojica also told Martinez that replacements would be hired for employees who went on strike. Martinez also testified that he did not mention this conversation to his fellow employees. Griffin testified that, on or about the same day or a day later, he was called into Mojica's office by Mojica himself. Mojica asked Griffin what he thought about the Union and whether he would rather have a voluntary union rather than a "mandatory one like you have now." Griffin said he liked the one he had at present. On cross-examination, Martinez admitted to bringing up the matter of the 94-cent rollback himself. He also admitted he was very "mad" at Mojica for having fired his brother, sometime earlier.

Mojica testified that Martinez came to his office on or about December 13, 1979, with questions about a letter of that date distributed to employees about the negotiations. Gonzales testified that Martinez approached him with questions about the letter and, as a result, he referred Martinez to Mojica. Mojica met with Martinez. He had the December 13 letter in front of him and he answered Martinez' questions about the 94-cent rollback. They discussed other issues including the possibility of a strike. Mojica denied asking that the employees form their own union or threatening to reduce wages unless the employees rejected the Union. He also denied questioning Griffin as the latter testified. According to Mojica, he saw Griffin outside his office reading Clark's letter. Mojica asked Griffin if he had any comments or questions and Griffin said he had none. Mojica denied that he invited Griffin into his office or that he had inquired whether Griffin liked a voluntary or mandatory union.

I credit Mojica's account of both conversations. His testimony was candid and included meaningful detail, particularly the fact that these employees had just received a letter from management which may have prompted some questions. Griffin testified on cross-examination that he may have seen and read the December 13 letter. Gonzales corroborated Mojica that Martinez had some questions about the letter and that he referred him to Mojica. Martinez himself testified he raised the issue of the 94-cent rollback. The testimony of Griffin and Martinez was devoid of context and not as clear or as detailed as that of Mojica and Gonzales. In addition, Martinez seemed to have a personal grudge against Mojica for firing his brother. Accordingly, I credit Mojica and Gonzales and I shall dismiss the allegations that Respondent violated Section 8(a)(1) of the Act by Mojica's remarks on December 12 or 13, 1979.

The General Counsel also alleges as unlawful "help wanted" advertisements placed by Respondent in the Sunday Sun-Times edition of January 20, 1980, the Chicago Tribune edition of January 21, 1980, and in certain Spanish and Polish language newspapers on or about such dates seeking replacements for striking employees. These advertisements read basically as follows:

> **LABORERS**
>
> Wanted for meat packing plants. Immediate openings. $8.31/hr. base labor rate. These employees will be permanent replacements for striking employees.

Since the strike herein was not an unfair labor practice strike and since, neither in the advertisements nor at any time, did Respondent threaten to deprive unfair labor practice strikers of their rights under the Act, the advertisements were not coercive or in any other manner unlawful. I shall therefore dismiss the allegation that the advertisements were violative of the Act.

The General Counsel also alleges that, on the day the strike ended, Albert Mojica assaulted a union representative, Reuben Ramirez, on public property in the presence of a number of picketing employees. The evidence presents two competing views, each held strongly by the antagonists and witnesses on their behalf. A fair reading of the evidence reveals that, in the early morning hours of February 28, Mojica arrived at the picketers' station across the street from the Racine Avenue plant with Raul Sanchez, an employee and a union steward. Sanchez, who had been drinking with Mojica earlier in the evening, invited Mojica to have a drink there. Mojica accepted and had a few drinks with the strikers. Sometime later, Ramirez appeared and told Mojica to leave. An argument ensued between the two men, which included some pushing and shoving, over whether Mojica belonged at the site. Mojica insisted that he had been invited. At one point following some shoving, Mojica grabbed Ramirez' cap and threw it into a fire barrel. At another point, Mojica struck Ramirez. Mojica and two other employee witnesses testified that Mojica patted Ramirez "lightly" on the face in an attempt to calm Ramirez. Ramirez and his two witnesses, one, another representative of the Union, testified that the slaps were more substantial. Frankly, I am unable to determine whether the slaps were substantial or who started the shoving and pushing.

I do not believe that the evidence set forth above is sufficient to establish a violation of the Act. Mojica was invited to the strikers' station which was on public property and engaged in an altercation with Ramirez who had come onto the scene in an attempt to eject him. I cannot conclude that Mojica was the aggressor nor can I conclude that any employee would have been restrained from engaging in protected activity by Mojica's conduct. From my observation of the witnesses and their demeanor I believe the fight involved the personalities of the participants as much as any disagreement over the labor dispute. No employees could have believed that they would be subjected to assaults from Mojica for striking or otherwise engaging in union activities. Nor was there any evidence that any employees were or could have been coerced by what transpired. I shall therefore dismiss this allegation of the complaint.[22]

CONCLUSIONS OF LAW

1. By discharging employees Frank Sekula, Jesus Gonzales, Juan Perez, Warren Mills, Alfonso Pineda, Joseph Wargacki, Stanislaw Krycinski, and Stanley Karwaczka, Respondent violated Section 8(a)(3) and (1) of the Act.
2. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
3. Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Since all the discriminatorily discharged employees except one have been reinstated and there is no evidence or contention that they have not been properly reinstated, I shall order the reinstatement only of employee Stanley Karwaczka to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights. Karwaczka and the seven other discriminatorily discharged employees shall be made whole for any and all losses of earnings caused by their unlawful discharges. The amounts due to these employees shall be computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).[23]

Upon the foregoing findings of fact and conclusions of law, I hereby issue the following recommended:

ORDER[24]

The Respondent, AMPAC, a subsidiary of Kane-Miller Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they participate in a strike or engage in other protected concerted or union activity.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Stanley Karwaczka full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights, and make him and employees Frank Sekula, Jesus Gonzales, Juan Perez,

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[22] Even if I were to credit Ramirez' testimony in its entirety and if I were to conclude that Mojica's conduct "coerced" or "restrained" employees, I doubt very much if it would effectuate the policies of the Act or promote labor peace to make findings of a violation on this issue and to issue a remedial order. Over a year has passed since the confrontation. Memories are hazy as to exactly what happened, and, at present, Ramirez is acting as a servicing representative and presumably dealing with Mojica on an amicable basis.

[23] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[24] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Warren Mills, Alfonso Pineda, Joseph Wargacki, and Stanislaw Krycinski whole for any loss of earnings or benefits they may have suffered as a result of their unlawful discharge in the manner set forth in the "Remedy" section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for its examination and copying, all payroll and other records necessary or useful in order to analyze and determine the amount of backpay due under this Order.

(c) Post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix."[25] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaints be dismissed insofar as they allege violations not found herein.

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[25] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Edward J. DeBartolo Corporation *and* James S. Deka. Case 8–CA–11546

January 18, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 18, 1980, Administrative Law Judge Jennie M. Sarrica issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith, and to revise her recommended Order.

With respect to the Administrative Law Judge's finding that Respondent violated Section 8(a)(3) of the Act by suspending and discharging Charging Party James Deka, Respondent in its exceptions asserts, *inter alia*, that the Administrative Law Judge has misconstrued the record, and that Deka had emerged as "the chief suspect for the Frabotta break-in" before any organizing activities occurred that could have come to the attention of Respondent. We find merit in Respondent's contentions.

Respondent owns and/or operates a number of shopping malls. The events in the instant case involve members of Respondent's security force at a large mall. The security force personnel possess public police powers on the mall property and hold commissions as special police officers of the neighboring village.

On the morning of November 10, when Lieutenant Frabotta, arriving for duty on the day shift, unlocked and entered his office, he found a "voodoo doll" pierced with pins and marked with his badge hanging from a sprinkler fixture by a string around the neck. A spray-painted black rose was placed on Frabotta's desk, and pinned to his hat was a piece of paper with the printed message "ANY TIME WE WANT." When Respondent's investigation disclosed that Deka had been seen with the doll in the guards' locker room, and had obtained a black rose a day or so before the incident, Respondent on November 14 notified him by memo that he was to "be in the Chief's office at 9 a.m. on the 15th." At that meeting, Deka admitted having the doll in the guards' locker room, but said that he had found it there and thought it was "funny." He also admitted purchasing a black rose, but contended that he had bought it as a joke to take to a going away party for a friend the previous week. He then went out to his car and returned shortly with a black rose.[2] Deka attempted to explain the suspicion that he was involved on the ground that it was "common knowledge" that he hated Frabotta. Mall Manager Petrie and Security Chief Gregorcic then suspended Deka indefinitely, pending a review of the matter with Respondent's new corporate head of security (Dierker) who was away at the time, and whom Petrie had been unable to reach by telephone. Dierker, Gregorcic, and Petrie met on Friday, November 18, reviewed the events and evidence obtained, and scheduled a hearing for Deka for 11 a.m. on Monday, November 21. Deka was notified Friday afternoon of the proposed meeting. Late that night, he delivered a note stating that he would not be able to attend the meeting "as his lawyer was unable to attend with him," and further stating that he "would contact Respondent on Monday afternoon to set up a new appointment."

Deka did not attend the Monday meeting; instead, he telephoned and talked with Petrie about 11:45 a.m. When Petrie told him he should have attended the meeting, Deka responded that "he had his rights." Petrie said they did not include working for Respondent, and told Deka he was terminated. Deka asked "who his lawyer should contact," and Petrie told him.

The Administrative Law Judge's conclusion that Deka was discharged for union activity appears premised on her findings (1) that Deka solicited signatures on authorization cards on November 14, (2) that he first learned he was a suspect in the "doll" incident while soliciting signatures, and (3) that this activity occurred before he was notified that he was to be at the meeting on the morning of November 15 which resulted in his suspension. We conclude, however, that the record as a whole does not support such an analysis.

Following discovery of the doll and the black rose on November 10, Deka was one of the employees who attended a meeting at employee Garbo's house on Sunday, November 13, at which the initial decision was made to "go ahead to find out how to organize" a union. Employee Hess subsequently contacted Union Representative Wet-

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[1] We do not adopt the Administrative Law Judge's references to Captain Grandberry's discussing *personnel* matters with James Deka. Rather, the record indicates that Grandberry at times discussed *personal* problems with Deka.

[2] Deka's testimony does not explain why he still had the rose in his car almost a week later. The testimony of former employee Prohonic, which the Administrative Law Judge finds "unreliable" (see ALJD, fn. 15), provides an explanation. See fn. 5 *infra*.

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trick, and Deka, Hess, and Snyder thereafter met with Wettrick and obtained authorization cards.[3] The Administrative Law Judge states that the employees met with Union Representative Wettrick on the morning of November 14 (Monday), that Deka solicited signatures on cards later that day, and that on the evening of November 14, *before* Deka's suspension, Hess placed signed union cards in Deka's locker. However, the testimony of Union Representative Wettrick, not treated by the Administrative Law Judge, indicates that the above sequence of events could not have occurred. Thus, Wettrick testified that he received the call from one of the employees at his office on a business day, that he was not in the office on Sunday, and that the employees did not have his home telephone number. He further testified that he first met with the employees either the day after, or 2 days following, the initial telephone contact.[4] Assuming the earliest sequence of events consistent with Wettrick's testimony, i.e., that Wettrick received the telephone call on the first business day after the employees decided to contact the Union, and that he met with the employees and provided them with authorization cards on the earliest day thereafter, Deka's first solicitation of signatures on those cards would not have occurred until the afternoon of November 15—*after* he had been suspended.

Similarly, with respect to the Administrative Law Judge's statement concerning Hess' placing signed union cards obtained by him in Deka's locker on the evening of November 14, Hess' own testimony was that, on the first day they received the cards from Wettrick, he, Hess, forgot to bring them in, and did not bring in any cards or solicit signatures himself until the day after that. Hence, even if the meeting with Wettrick had occurred on November 14, the Administrative Law Judge's finding would not be consistent with Hess' own testimony. While the Administrative Law Judge states that Deka first learned he was a suspect while soliciting signatures on cards on November 14, we find that the record supports Respondent's exception to the effect that Deka himself changed his testimony and conceded that he knew he was a suspect at least 1 or 2 days before that.[5]

In regard to the Administrative Law Judge's inference of animus by Respondent to the security employees' organizing, it should be noted that although such discussions had apparently been occurring on a sporadic basis for several months, and were known to Respondent, there is no other indication of actual retaliation by Respondent against known union adherents; e.g., Hess or Martin. Indeed, it seems that Deka was considered by fellow employees, and apparently by management, as being opposed to unionization prior to the doll incident. On November 21, the Union requested recognition for the security force and, although Union Representative Wettrick testified that the Union was not eligible for Board certification, recognition was voluntarily granted by Respondent. We note further that other employees of Respondent at this location were also represented.

We conclude, contrary to the Administrative Law Judge, that the record demonstrates that Deka had emerged as a suspect in the doll incident,[6] and was suspended for that reason, before Respondent knew of any union activity on his part, and that his subsequent discharge was an integral part of that disciplinary process,[7] unrelated to any union activity in which he may have engaged.

Accordingly, we shall dismiss the 8(a)(3) allegation of the complaint herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Edward J. DeBartolo Corporation, North Randall, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs 1(b) and 2(a) and (b) and reletter the remaining paragraphs.

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[3] There had been a prior meeting at Garbo's house that apparently did not involve discussion of unionization. The Administrative Law Judge states that Deka attended both—as he testified. We note, however, that Hess, one of the longtime prounion activitists, testified that Deka did not attend the earlier meeting at Garbo's. In view of the result reached *infra*, we find it unnecessary to resolve this conflict.

[4] In response to cross-examination by the General Counsel, Wettrick testified that his meeting with the other employees "could have happened the next day after" he was first contacted. The Administrative Law Judge noted on the record that Wettrick referred to his log when testifying.

[5] Deka changed his testimony on rebuttal and, consistent at least in part with testimony by former employee Prohonic, conceded that Prohonic had told him, probably on Saturday (November 12), that he was a suspect in the voodoo doll incident.

Respondent had excepted, *inter alia*, to the Administrative Law Judge's refusal to accept the testimony of officer Prohonic. In view of our disposition of the 8(a)(3) allegation herein on other grounds, we find it unnecessary to rule on this matter, although we note that Deka modified his own testimony following Prohonic's appearance as a witness, and that a careful reading of Prohonic's testimony together with the record as a whole indicates it is not as internally contradictory as the Administrative Law Judge's Decision suggests.

[6] We emphasize that the question involved here is not one of Respondent's demonstrating Deka's actual participation in placing the voodoo doll in Frabotta's office, but rather the evidentiary circumstances in the relevant time frame and whether these established a reasonable basis for discharging Deka.

[7] Nor do we adopt, on this record, the Administrative Law Judge's apparent suggestion that Mall Manager Petrie's involvement here in the disciplinary process with respect to security personnel constituted disparate treatment.

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their union activities or threaten them with discharge for seeking union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to engage in self-organization, to form, join, or assist Private Police and Security Guards Local Union No. 57, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in activities together for the purpose of collective bargaining or other mutual aid or protection, or to refrain from the exercise of any or all such activities.

EDWARD J. DEBARTOLO CORPORATION

DECISION

STATEMENT OF THE CASE

JENNIE M. SARRICA, Administrative Law Judge: This is a proceeding under Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, hereinafter referred to as the Act. Based on charges filed on November 29, 1977,[1] a complaint was issued on January 13, 1978, presenting allegations that Edward J. DeBartolo Corporation, hereinafter referred to as Respondent, committed unfair labor practices within the meaning of Sections 8(a)(1) and (3) and 2(6) and (7) of the Act. Respondent filed an answer denying that it committed the violations of the Act as alleged. Upon due notice, the case was heard before me in Cleveland, Ohio, on June 5 and 6, 1978. Representatives of all parties entered appearances and had an opportunity to participate in the proceeding.[2]

Based on the entire record, including my observation of the witnesses, and after due consideration of briefs and arguments, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, an Ohio corporation, is engaged in the management and operation of shopping centers and/or shopping malls, including the Randall Park Mall in North Randall, Ohio, the facility involved herein. During the year preceding issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $100,000 of which $25,000 or more is derived from retail enterprises, including Higbee's, Halle's, The May Company, and Sears. Annually, said retail enterprises receive gross revenues in excess of $500,000 and purchase goods and/or services valued in excess of $50,000 directly from points located outside the State of Ohio.

Respondent admits and I find that it is now, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

Respondent admits and I find that Private Police and Security Guards Local Union No. 57, AFL–CIO, hereinafter referred to as the Union, is now, and has been during all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Admissions*

Respondent admits and I find that at all times material herein the following-named individuals occupied the positions set forth opposite their names and were agents of Respondent, acting in its behalf, and were supervisors within the meaning of Section 2(11) of the Act.

Frank Tolar—	Lieutenant, Security Department
Charles Marshall—	Supervisor, Maintenance Dept.
James Frabotta—	Lieutenant, Security Department
Lloyd Grandberry—	Captain, Security Department
Richard Dierker—	Director of Corporate Security
Scott Petrie—	General Manager of Randall Park Mall
Louis Gregorcic[3]—	Chief, Security Department

Respondent further admits and I find that, on or about November 15, the Respondent indefinitely suspended the employment of James S. Deka, the Charging Party herein, and that, on or about November 21, Respondent terminated the employment of Deka by discharging him and at all times since has failed and refused to reinstate him to his former or substantially equivalent position of employment.

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[1] All dates are in 1977, unless otherwise indicated.

[2] Certain errors in the transcript are hereby noted and corrected.

[3] With respect to Gregorcic, Respondent avers in its answer that he is no longer employed by Respondent.

In its answer, Respondent denied all remaining allegations contained in the complaint, and at the hearing Respondent denied those allegations added by amendment to the complaint at the hearing.

B. *The Issues*

1. Whether Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating, threatening, suspending, and discharging its employees because of their union activity and/or protected concerted activity.

2. Whether Respondent suspended and discharged employee James S. Deka in violation of Section 8(a)(3) of the Act.

C. *Deka's Employment History*

James S. Deka was employed by Respondent from July 19, 1976, until November 21, 1977, as a patrolman in the security force. During the period of his employment Deka never received any oral or written warnings or suspensions except for those immediately preceding his discharge. His last four performance evaluations reveal that his superiors considered him to be an excellent and "all around fine officer," and Deka was complimented by two of his superiors for excellent performance on the job.

Deka was a personal friend of Captain Lloyd Grandberry. Deka testified that during August, while he was the manager of the baseball team, he told Grandberry and Chief Louis Gregorcic that he did "not believe in the union." Also during August or September, Deka spoke to Grandberry on his own initiative about the "gripes of the men" and how they felt about Lieutenant James Frabotta, Grandberry, and other superiors, and that they were talking about getting a union. He identified the fellow patrolmen involved in the latter activity. At that time, Grandberry told Deka he had already heard about the patrolmen's interest in a union. Although his relationship with Gregorcic was not comparable to that with Grandberry, Deka also informed Gregorcic of "what was going on with fellow officers."

D. *The Union Activity*

Two meetings concerning the mutual interests of patrolmen employed by Respondent were held at the home of Patrolman Salvatore (Tory) Garbo. Deka attended both. Notice of these meetings was posted on the blackboard, located in the locker room and used by Respondent to announce meetings on anything pertaining to the security department. However, they were not identified as union meetings. The second of these meetings was held on November 13. At this meeting employees decided to find out how to organize and Patrolman James M. Hess, a former member of the Union, was designated to contact Union Representative Wettrick and set up a meeting with some of the patrolmen, on behalf of the group. Such a meeting was held on the morning of November 14, at a local restaurant known as Manners of Valleyview. Present, in addition to Hess and Wettrick, were two patrolmen, Victor Snyder and Deka. Wettrick gave these individuals union authorization cards to have signed. That day and the following day Deka took the cards with him to work and solicited signatures of fellow patrolmen. Most of this activity took place in Respondent's locker room. Additionally, on the evening of November 14, Deka, who attended the police academy where Gregorcic was an instructor, took the cards with him to class,[4] where he continued active solicitation.

E. *The 8(a)(1) Allegations*

It is alleged in the complaint that Respondent violated Section 8(a)(1) of the Act by each of the following incidents involving conduct of Grandberry: (1) In his office in August or September, Grandberry threatened Deka with discharge or other reprisals by telling him that employees who engaged in union activity or protected concerted activity would be discharged; (2) in mid-November Grandberry made a similar threat to Sergeant Frederick D. Martin, Jr., by telling him that Respondent's security guards would lose their jobs if they chose the Union as their collective-bargaining representative; and (3) sometime in early to mid-December, Grandberry threatened employees with unspecified reprisals by stating to Garbo, "I want you" and another named employee "to stop the Union. You're both good patrolmen. I'd hate to lose you."

Deka testified that in August he went to Grandberry's office to inform him that "the guys" were dissatisfied and that the word was out "that they were going to get a union" if things were not straightened out, to which Grandberry replied that he had a "s— list" and "whoever was starting a union, they were going to get rid of." Grandberry asked Deka for the names of the individuals involved and Deka named two patrolmen, Hess and Sergeant Crowley.

With respect to this allegation, Grandberry testified that, in addition to his work for Respondent, he is a police officer in the nearby village of Woodmere. He was on vacation from November 9 to November 22. Grandberry recalled that before he left for vacation he was aware of talk of union organizing among the security force. He explained that he "heard scuttlebutt of attempts to bring a union in" and "the way they [the security guards] talked, he could hear," but he never joined in their conversations. Grandberry's office is located by the squadroom next to that of Frabotta. Grandberry admitted that Deka was a close friend and that they conversed nearly every time they met; that Deka kept him informed as to what was going on in the department; and, that he discussed personnel problems with Deka. Grandberry also testified that there has been frequent union talk among the security force since the mall opened. However, he denied that Deka ever mentioned any specific union activity to him, and asserted that Deka was never mentioned to him as one who was active in bringing in the Union.

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[4] Upon the basis of a card majority following an appropriate demand, Respondent extended recognition to the Union on November 23, and at the time of the hearing bargaining was in progress.

I do not credit Grandberry's denial that Deka ever mentioned specific union activity to him. Clearly, at that time, Deka was engaged in keeping superiors informed of occurrences among the security force. The familiarity of the relationship between Deka and Grandberry, which included personnel matters normally kept confidential as between supervisors and employees, plus Deka's declared union opposition and confessed attempts to foster consideration of employee gripes prior to November 9, supports a conclusion that he reported to Grandberry, and possibly to Gregorcic, everything he learned of union and concerted activity among the security force. For purposes of my credibility determination, I place no significance in testimony that before Grandberry went on vacation on November 9, General Manager Scott Petrie instructed supervisors not to hold any conversations with employees about the Union and that Petrie issued such orders to supervisors not only after the Union made its claim but whenever the Union was mentioned throughout the period since the mall opened. The issue is not what orders were given to supervisors, but rather what the individual supervisors said and did.[5]

Martin testified that sometime during early to mid-November, before Deka was discharged, and while Martin was in Grandberry's office, the latter stated that if the employees "got a union in they would be fired" and on another occasion Grandberry made the same statement in the presence of Garbo.

Grandberry could not recall having conversations with one or more of the security guards or specifically with Martin and/or Garbo about what would happen if the Union organized the security force. He did recall that someone asked his opinion of unions, and he stated that law enforcement and unions did not mix.

Garbo testified that he had several conversations with Grandberry wherein the Union was the subject, some of which were in the presence of Martin and one in the presence of Snyder. In one such conversation Grandberry expressed his wish that the employees would not "get a union in," and stated his fear that "we would all be fired, including himself, if a union did in fact organize." On one occasion in early December, Grandberry asked Garbo and Snyder to "try to keep the Union from coming in."[6] Grandberry mentioned that the security guards could be replaced with the police department.

Grandberry denied that he tried to talk any of his patrolmen out of joining the Union. He could not recall a December conversation with Garbo and Snyder, and denied that he told anyone he wanted them to try to keep the Union out or that they would be fired if they brought the Union in.

I am not convinced that Grandberry took a hands-off position and do not credit his denials. His admissions, together with the pattern of conduct attributed to him by three witnesses, whose testimony gives no indication that it was contrived, convince me that he did engage in such conversations with members of the security force. I credit the testimony of Deka, Martin, and Garbo as to the conversations with Grandberry. But for the statements made to Martin and Garbo, one might be inclined to view statements made to an employee such as Deka, who was engaged in reporting on the activities of other employees including union matters, as having slight, if any, coercive impact. However, in the total context, I find each of the foregoing, including statements made to Deka, constitutes interference, restraint, and coercion and that Respondent thereby violated Section 8(a)(1) of the Act.

Further allegations of 8(a)(1) violations involve conduct of Lieutenant Frank Tolar in his office in the following incidents: (1) on November 14, interrogating Deka by asking him how many cards he had gotten signed by other employees; and (2) on November 18, interrogating Hess by asking him, "How is the Union going?"

Deka testified that, before the second meeting of patrolmen on November 13, he had occasion to enter Tolar's office concerning some reports. On this occasion Tolar stated: "I hear the guys are having a meeting." Deka replied: "Well, the guys are thinking about a union." Tolar stated he thought "it was a good idea" and he wished he could sign. On the evening of November 14 or early on November 15, before Deka's suspension, patrolmen Snyder and Hess had placed the signed union cards obtained by them from fellow employees in Deka's locker. Deka was checking the number of signed cards when Tolar asked him how many had signed. Deka told Tolar: "Just about everybody in the department."

Hess testified that he stopped in Tolar's office to speak with him at which time Tolar asked how the Union was going and Hess responded that it was going fine. Tolar then asked whether there was any way he could join. Hess responded, "Not right now," and Tolar said, "Okay."

The evidence presented reveals that Tolar, who was the immediate supervisor of patrolmen working on whatever shift he was scheduled to take, occupied an office about 15 feet from the patrolmen's locker room, which also housed the records office. Consequently, Tolar was frequently in and out of the locker room during his shift as his work involved handling the records. In his previous employment, Tolar was a union member.

Tolar testified that in early November there was a lot of talk and rumors about a union. Patrolmen talked with him. Additionally, he could overhear their conversations. He testified that "We had heard from everyone of them about it and either they talked to me directly, or in passing in a conversation, or whatever. But I can't say specifically this guy, this guy and this guy." Tolar could not remember specific conversations with particular patrolmen concerning union activity and union meetings. He did recall seeing a posting on the locker room blackboard of a notice for a union meeting but could not recall whether it specifically designated that it was a *union* meeting. He stated that in his recollection this occurred after the organizing was "out in the open," but could not fix the date or state whether this was before or after the Union's recognition demand.

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[5] See *Vegas Village Shopping Corporation*, 229 NLRB 279, 283 (1977).

[6] As Respondent extended recognition to the Union on November 23, either the time factor in this testimony is in error or Grandberry was without personal knowledge of the fact of recognition which is a distinct possibility in view of the circumstance set out in the testimony. Apparently as an explanation of why Snyder did not testify to corroborate his recollection, Garbo testified that Snyder was delayed in returning from his vacation because his car broke down somewhere in Virginia or West Virginia.

Additionally, Tolar testified that his superiors brought to him information concerning the organizing activities of the patrolmen but claimed that he would not respond to such information and refused to reply to any comments about union activity. Tolar testified that Deka had been mentioned as being a patrolman supporting the Union before his suspension. Tolar admitted that he may have had a conversation with Deka about the time of the posted union meeting and that he may have also had a conversation with Deka regarding union cards. Tolar further testified that he probably held a conversation with Hess in which he asked how the Union was going and "he probably told me." However, Tolar denied that he asked Hess whether he could join. Tolar admitted that from his conversations with employees he had a pretty good knowledge of who was strong for the Union.

Clearly, Tolar was sympathetic to employees' efforts to organize and not only made this fact known but also, by his silence on the subject when it was brought up by his superiors, tried to protect their efforts. While asking active employee organizers how many signed cards they had, and how things were going in their organizing efforts, is generally the type of interrogation viewed as violative of Section 8(a)(1) of the Act, I find in Tolar's conduct an absence of any reasonable inference of coercive interrogation. On the contrary, the circumstances would indicate encouragement. Even if Tolar did ask whether he could join (and I do not find this to be so as in all other respects he was an unusually candid witness and there is no reason to reject his denial), I do not believe that in the circumstances it would further the policies of the Act to find an 8(a)(1) violation based on such an inquiry.[7] Accordingly, I shall recommend dismissal of allegations of unlawful conduct based on statements made by Tolar.

It is alleged that on November 25, at Jake's Delicatessen at the Randall Park Mall, in North Randall, Ohio, Charles Marshall, the maintenance department supervisor, unlawfully interrogated Hess about the union activity, sympathies, and desires of himself and other employees. Hess testified that on the day after Thanksgiving he was having lunch at Jake's Delicatessen when he was joined by Marshall. The latter asked Hess whether there was any truth to the rumor that the security guards were forming or had formed a union. Hess told Marshall that the rumors were true, that they were trying to form a union. Marshall's response was that he thought it was "great." Marshall then proceeded to relate an experience he had at his former employer where he had formed a union, and outlined for Hess, step by step, what the security guards would have to do, and the procedures to follow, including advice that if they experienced any kind of harassment to notify the National Labor Relations Board. Hess further testified that the maintenance department is presently represented by a union and that it has a collective-bargaining agreement covering those employees. Hess also testified that to the best of his knowledge, at the time of his conversation with Marshall, the Union had already requested recognition as representative of the security guards. Marshall did not testify.

In this situation, as in those conversations involving Tolar, I am convinced that to find a violation would not reflect the intent or further the purposes of the Act.[8] Accordingly, I shall recommend dismissal of the violation of the 8(a)(1) allegation which is based on the conversation between Hess and Marshall.

It is alleged in the complaint that, sometime in late November, Frabotta, while driving in a police cruiser with an employee, unlawfully interrogated him by asking whether he had been contacted by the Union, and if it was Deka or another employee who had contacted him. In its answer, Respondent denies the manner and form of this allegation, averring that Frabotta conversed with a patrolman after Deka had been discharged and the charge herein had been filed, and that he only inquired whether Deka was active in organizing for the Union as Deka claimed. It is further alleged that, on or about December 3, Frabotta engaged in a conversation with an employee in the patrolmen's locker room and during that conversation unlawfully (a) interrogated the employee by asking him, "What do you know about this Union?" and "Have you checked it out?" and (b) impliedly threatened the employee with discharge or other unspecified reprisals, and intimidated, coerced, and restrained him by stating, "You ought to stay out of this Union mess. You're new."

Frabotta, who at the time of the hearing was employed full time on the State of Ohio police force, testified that the conversation in the squad car referred to in the complaint was between himself and Snyder. As noted above, Snyder had not returned from vacation at the time of the hearing. Frabotta testified that he had previously verified with Snyder what had been said in that conversation, and that it was as follows: "Frabotta asked Snyder who had approached him about the Union, Hess or Deka, and Snyder replied that it was Deka." Frabotta was unable to testify whether by that time he had learned that Deka had filed a charge with the Board. Admittedly, Frabotta was not seeking the information in order to ascertain the validity of the representation claim or preparation of Respondent's defense to the charge. Frabotta stated that he had just learned from Gregorcic that the latter had been told by a student at the police academy that Deka was actively involved in union organizing.

Patrolman John William Brandow III, who at the time of the hearing was a full-time police officer on the force of the village of Hiram, Ohio, and who was newly employed by Respondent on October 31, 1977, was the employee involved in the locker room conversation which took place around December 3. On that occasion Frabotta asked Brandow what he knew about the Union and who had approached him about the Union. Brandow told Frabotta that he knew nothing about the Union and that nobody had approached him. Frabotta stated that unions did not belong in police work. In that conversation Frabotta in effect asserted that Deka was going to look bad when this union mess came out in court, explaining that he meant Deka had perjured himself before the National Labor Relations Board by telling them he was fired for bringing the Union in. Frabotta asserted this was not true, that there were other reasons Deka was fired. Frabotta also told Brandow that because the latter was new on the force he ought to stay out of the Union, asserting that "the trouble-makers were bringing the Union in, and this was to protect them because they weren't doing their job."

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[7] See *Audiovox West Corporation*, 234 NLRB 428, 433–434 (1978).

[8] See fn. 7, *supra*.

Frabotta testified that he asked Brandow if anyone had approached him about the Union just to make conversation. Brandow responded that they had. Frabotta asked, "What are you going to do?" Brandow asked, "What would you do?" He told Brandow he did not have to do anything, then added, "I wouldn't get involved." Frabotta also admitted discussing Deka and stating that Deka was lying when he claimed he was fired because of union activity. Frabotta recalled that basically he told Brandow, "Do what's best for you. Don't feel pressured by anyone . . . ."

Clearly, either version of the Brandow conversation constitutes unlawful interrogation as does the admitted questioning addressed to Snyder. Both instances are violative of Section 8(a)(1) of the Act,[9] and I so find.

F. *The 8(a)(3) and (1) Allegations*

As noted above, it is admitted in the answer that Respondent, on November 15, indefinitely suspended the employment of Deka and, on November 21, discharged or terminated his employment, and has since failed and refused to reinstate him. Respondent denies the allegation in the complaint that these employment changes were for unlawful reasons. Respondent asserts that Deka's suspension and subsequent discharge were for cause based entirely on discipline, unrelated to any union or concerted activity by Deka.

The incident precipitating the sequence of events which assertedly culminated in Deka's discharge on November 21 occurred on November 10. On that morning, when Frabotta walked into his office he found a voodoo doll, bearing his badge number, pierced with pins, and hanging by its neck from the ceiling sprinkler fixture. Soon thereafter, he discovered on his desk a black rose and a printed note, which read "Any time we want," pinned to his hat which was placed on his outbox by the door.[10] Frabotta had entered his office with a key and had not noticed any irregularity in the lock. On examination of the door and lock, nothing evidencing a break-in was apparent that had not been seen previously as a result of prior break-ins.[11]

According to Frabotta, he was very disturbed by the symbolic message as well as the written one, and considered the incident as one conveying a personal threat of bodily harm, so he spoke to Grandberry about it when the latter came in for his check that day[12] and, since Gregorcic was not on duty at that time, Frabotta began an investigation of the incident on his own authority. A check with the florist at Alexander's Flowers, located in the mall, revealed that an employee had painted a rose black for Deka a couple of days before.[13] Also in talking with Martin, Frabotta learned that Deka had been observed several days earlier in the patrolmen's locker room examining a voodoo doll. Frabotta solicited a statement from Martin regarding this observation, and also wrote up a report of his own observation and investigation of the incident and left the report and statement for Gregorcic.[14]

Deka was off duty on November 9 and 10. He learned that management suspected him of involvement in the voodoo incident while he was soliciting signatures on union cards. At that time, Martin told him an investigation was being conducted. Later when he reported to the dispatch center on the night of November 14, Deka was handed a memorandum dated November 15, stating, "Be in the Chief's office at 9 a.m. on 15th."

Deka met with Scott Petrie, general manager of Randall Park Mall, and Gregorcic on November 15 at 10 a.m. Gregorcic asked whether Deka knew the reason he was summoned. Deka replied that he did not. Gregorcic stated that Frabotta had made a complaint against Deka that he had put the voodoo items in Frabotta's office, and that they knew he had bought the black rose at Alexander's. Deka admitted he had bought a black rose for a party and asserted that he still had the rose. Deka was then told they had somebody who said they had seen Deka with a voodoo doll. Deka explained that he had found the doll on the locker room floor and had shown it to Martin, commenting he thought it was funny, and then placed it on the table.[15] Deka was asked whether he knew who had done it. Deka disclaimed knowledge. Petrie then stated he wanted to see the rose Deka had purchased.[16] Deka went to his automobile and brought back the dried up black rose.[17] Deka was asked to wait in the outer office. According to Petrie, he and Gregorcic attempted to reach Richard Dierker, Respondent's director of corporate security, to confer but were unable to reach him.[18] Deka was again summoned and told by Petrie that they were suspending him pending investigation. Deka asked for, and received, the suspension in writing.

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[9] See *Central Cartage, Inc.*, 236 NLRB 1232, 1253 (1978); *Calcite Corporation*, 228 NLRB 1048, 1055–56 (1977).

[10] Frabotta testified that when he entered his office he saw the hanging doll; he left his office for a few minutes and when he returned "someone" had taken the doll down. It was at that time he went to his desk, discovered the rose and then the note.

[11] On one of the previous occurrences, Frabotta's hat was missing. The flattened badge from the hat was later received through the mail by Chief Gregorcic. On other occasions only papers on his desk were disturbed. Because of these latter occurrences, Martin affixed a device to the door to determine whether the door was the source of entry and the device was discharged that night. The locks on the office doors of Frabotta and Gregorcic were then changed and Martin put a screw into the doorframe, placed so as to prevent anyone from slipping a thin blade behind the doorframe to open the lock.

[12] As noted, *supra*, Grandberry's vacation began on November 9. Grandberry testified that he did go to the mall for his check on November 10, but did not testify with respect to any conversation with Frabotta, and left the impression that he was on vacation and knew nothing about the voodoo doll and black rose incident.

[13] Deka testified that he had purchased a black rose at that shop on November 8, assertedly to take to a party at the police academy on November 8 or 9. Frabotta claimed he learned through inquiry that Deka had been seen the previous day in the vicinity of Alexander's Flowers. However, he could not recall who told him this, and the investigation file does not reflect that Frabotta had any such lead.

[14] Frabotta's testimony would indicate that he did all of this on that first day. However, Martin's statement is dated November 11, at 2:05 p.m., and Frabotta's report is dated November 13, Sunday. It recites the content of Martin's statement as well as the information obtained from Alexander's Flowers, and a comment that Gregorcic had accompanied him to Alexander's on November 11. There is no testimony that Frabotta made more than one report. It is therefore unclear just what, if anything, concerning this incident Frabotta left for Gregorcic to see when the latter reported to duty on November 10 or 11. There is undenied testimony that officials did not believe Deka had placed the items in Frabotta's office but that Deka had knowledge which he would disclose if he personally were charged as the perpetrator.

According to Petrie, he and Gregorcic later discussed the matter with Dierker who told them to get more evidence. Five statements were obtained from different patrolmen between 1:56 and 4:15 p.m. on November 15. One patrolman related that he had seen a white box on the table in the locker room. None of the others offered any evidence, reciting only that each had not seen such a white box. A second statement was taken from Martin at 6:58 p.m. on November 17, in which he added that he had seen Deka place the doll on the table, and that after the Frabotta office incident Deka had displayed to him a black rose which Deka claimed to have purchased at Alexander's for a party. Martin was later approached for still another statement but refused, declaring that he would not permit them to put words in his mouth.

On Friday, November 18, after 2 p.m., Petrie, Gregorcic, and Dierker met and discussed the results of the investigation. Even though the supplemental investigation admittedly added no confirming evidence, according to Petrie, they agreed on a "feeling" that "Deka was involved" because the evidence was "too coincidental." Also according to Petrie, at that time the three agreed to discharge Deka for his implication in the voodoo incident and all that remained was "a matter of timing." Petrie added that Gregorcic and Dierker agreed at that time to set up a meeting for Monday morning, November 21, for the purpose of discharging Deka. Dierker testified that the Monday morning meeting was set to give Deka a hearing and to obtain more facts or comments regarding the incident. Gregorcic testified that, on November 18, he and Petrie were of the opinion that, if nothing favorable to Deka arose out of the Monday meeting, there was a good chance that Deka would be terminated. Gregorcic wrote the memorandum to Deka dated November 18, setting forth the meeting time and date.

The week of Deka's suspension happened to also be his week to drive in a ride-sharing agreement among patrolmen to and from the police academy classes. On Friday evening, November 18, Deka arrived at the mall to pick up his passengers, and while waiting in his automobile he was approached by Frabotta who handed him an envelope. It contained an interoffice memorandum from Gregorcic dated November 18, advising that arrangements had been made for a meeting between Dierker, Gregorcic, and Deka in the conference room at 11 a.m., on Monday, November 21. The notice did not state the purpose or subject of the meeting. While at the academy, Deka called his lawyer and, thereafter, drafted a letter to Gregorcic advising that his lawyer was unable to be present at the appointed time and requesting another date and time. Deka hand-delivered the letter to Frabotta to deliver to Gregoric and slipped a copy of the letter under Dierker's office door.

According to Petrie, between 7 and 9 p.m. on November 18, he received a call from Gregorcic stating a letter had been received from Deka advising that he could not be at the scheduled meeting because his lawyer would be unable to attend with him due to another commitment. At 10 o'clock that evening, Petrie received a second call from Gregorcic relating information of Deka's involvement in union activity, specifically, that Deka was reportedly talking with a union official.

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[15] Daniel Prohonic, a police officer of Regional Transit, the county bus service which transverses Randall Park Mall, during the relevant period, worked for Respondent as a part-time security patrolman. Presented as a witness for Respondent, Prohonic testified that he saw the doll 5 days to a week before the voodoo incident when Deka joined him at a mall restaurant and brought forth from a bag the doll and a package of pins and told Prohonic the name of the store where Deka had purchased these items. Prohonic asked Deka what he was going to do and Deka said he was going to hang it in Frabotta's office. Prohonic further testified that on the same day or on the day following the discovery of the doll and rose Prohonic suggested that Deka "lay off" Frabotta to which Deka replied that Frabotta could not touch him, that he had purchased two black roses and had one in the car and in case they asked him he could produce a rose. Prohonic also testified that he never related any of the foregoing to any of his superiors before Deka's discharge. Then Prohonic changed his testimony to state that he did tell Martin within a day after the incident that he had seen Deka putting pins in the doll. Also, he engaged in an argument with Garbo as to whether the incident should have been perpetrated. Prohonic then testified that he told Frabotta on the day of the incident who had bought the doll and what transpired in the restaurant. Frabotta did not ask him for a written statement at that time. At another point, Prohonic testified that Frabotta did ask him to give a statement regarding the incident but he did not do so because "people . . . Dierker and Frabotta . . . weren't around when I needed to turn it in." And at still another point, Prohonic testified that he was not asked for a statement "until this year" which would be well after the relevant period. Again, Prohonic explained he "tried to stay out of it." Then Prohonic testified he first learned of the hearing in which he was testifying the preceding Wednesday when he encountered Dierker at the mall and was invited into Dierker's office. Dierker asked Prohonic whether the latter had told Frabotta he "knew who had the doll" to which Prohonic replied "yes"; Dierker asked Prohonic whether he had told him (Dierker). Prohonic said, "yes"; Dierker stated that it must have slipped his mind. When asked when he told this to Dierker, Prohonic stated, "It was earlier this year, the same time I told Lt. Frabotta." Then Prohonic testified that at that time they were talking about Martin's testimony and Prohonic said, "Well, you still have me." Frabotta said, "Well, what about you?" Prohonic said, "I know Deka bought the doll," and reminded Frabotta he had so informed Frabotta of this in the flower shop on the day the voodoo items were discovered. Frabotta told Prohonic that he did not remember Prohonic talking to him. According to Prohonic, Frabotta seemed surprised. There was considerably more of this type of internal contradiction, but the foregoing is sufficient to present the unreliability of Prohonic's testimony without concern for specific denials.

[16] In his Board statement, Petrie had stated that prior to the November 15 meeting he knew from Martin's statement that Deka had said he was going to use the rose for a party. The statement of Martin with that information was not taken until 6:58 p.m. on November 17. Petrie then changed his testimony to indicate that on November 15 his only knowledge of Deka's connection with the November 10 incident was Martin's statement regarding the doll. Yet that statement had been submitted with Frabotta's report of Deka's having purchased a black rose at Alexander's.

[17] Deka explained he had taken the rose to a party at the police academy for a "going away party" given there for one who was being sent to the penitentiary. There was no followup investigation on this claim although further statements were solicited from other patrolmen that afternoon and many of the officers were connected with the academy.

[18] There is testimony that there had been a discussion of the matter the previous day and a tentative decision to suspend Deka pending investigation.

No reply was made to Deka's November 18 letter and no attempt was made to contact him between the time of its receipt and the hour set for the meeting. On Monday morning, Petrie left word at his office that he was to be notified if Deka showed up for the meeting. Having heard nothing by Monday morning, Deka called Dierker to verify that the latter had received his letter. At that time Deka inquired when Dierker could set up a new appointment. Dierker told Deka that he had nothing to do with it and that Deka should talk to Petrie. Deka attempted to do so but Petrie was not available. Deka left his phone number. Petrie did not try to return Deka's call. Petrie claimed that Dierker never told him of Deka's call to Dierker that morning.

At 11:45 a.m., Petrie called Deka and asked why Deka was not at the meeting. Deka explained he had supplied Gregorcic and Dierker with advance notice, together with the reason. Petrie informed Deka that he had been given an opportunity by the director of corporate security to have a meeting and he should have attended. Deka told Petrie he felt that he was being harassed and wanted his lawyer with him if they were going to make any charges against him. Petrie informed Deka that his lawyer had not been invited, declaring, "I said I wanted you at that meeting."[19] Deka claimed he had rights, which Petrie denied and advised Deka that he was discharged. Deka asked who his lawyer should contact and Petrie advised Deka it would be the legal department in the home office. After the conversation, Petrie wrote the discharge letter which Deka received by mail the following day. The reason stated therein for Deka's termination was "for failure to comply with an order by the Director of Security at Randall Park Mall."

Frabotta, who is no longer employed by Respondent, testified that, when his hat was taken from his office and destroyed in October 1977, and when papers on his desk were disturbed in November 1977, prior to the voodoo doll and black rose incident, no investigation was conducted although from all appearances his door lock had been tampered with. These were not unnoticed incidents for it was Gregorcic who received Frabotta's hat badge through the mail. Both Dierker and Petrie claim responsibility for ordering the investigation of the voodoo doll and black rose incident. I discredit both in this respect.

Dierker testified that, when he came to work on the morning of November 10, he was met by Frabotta who exhibited to him the items found in Frabotta's office that morning, and Dierker directed Frabotta to institute an investigation and to use any member of the department[20] to see what evidence they could accumulate.[21] According to Dierker, Frabotta reported back to him by supplying his own statement and that of Martin. Factually, Frabotta's report was made to Gregorcic, and Frabotta made no mention in his testimony of any such contact with Dierker, either initially on November 10, or ultimately by way of a report. It is highly unlikely that Frabotta would have forgotten the immediate involvement of such a top company official or that in such a situation he would have waited until November 13 to submit his report of the incident to his superior, Gregorcic, when he had Martin's statement dated November 11 and the information in his own statement was obtained on November 10 and 11. Frabotta did testify that it was Dierker who wanted a second statement from Martin, which Martin gave at 6:58 p.m. on November 17. Frabotta testified he never understood why Dierker wanted this second statement. I am convinced that Dierker did not enter the picture until November 15.

Petrie also claimed credit for instituting the investigation of the voodoo doll and black rose incident. He testified that the matter first came to his attention on November 11, when he was informed of it by a maintenance man. Petrie recalled that he went to Gregorcic to ask what had happened. He was told that Frabotta's office had been broken into and the voodoo items placed there with the note. Petrie related that he inspected the door and observed that the wood around the latch looked "chewed" and several scratches appeared on the metal column around the door latch.[22] According to Petrie,

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[19] It is noted that Gregorcic's memorandum notice of the meeting gives no indication that Petrie was to be involved in this meeting. It reflects "cc: Mr. Dierker" only. Nor is there any indication to whom Petrie may have made this comment before this telephone conversation. Admittedly, it was never previously communicated to Deka.

[20] Prohonic testified that on the November 10 when the stores opened he accompanied Frabotta to Alexander's Flowers where Frabotta questioned the clerk on duty. Frabotta made no mention of having any assistance in the investigation. For reasons related in fn. 15, *supra*, I do not credit Prohonic's testimony in any respect as I find it totally unreliable.

[21] Dierker is a retired Cleveland Police Department officer. At the time of his retirement, Dierker was the officer in charge of internal security which dealt with matters such as police corruption. After his retirement, he was employed by Respondent as a consultant. This status was changed to full employment on October 23, as director of corporate security for Respondent. Dierker's office was not located at Respondent's corporate headquarters, but was located at the mall. His position was above that of Mall Manager Petrie on matters relating to security.

Dierker testified that he ordered the investigation because he viewed the incident as going beyond a practical joke and felt that disciplinary action should be taken. With respect to his own efforts to investigate, Dierker testified he did not attempt fingerprinting because the doll had been handled by too many people and the rose would not respond to the chemicals used in the fingerprinting process. Dierker claimed he did take the note to the police scientific laboratory where the handwriting expert declined to make an analysis. No verification of this step was presented, nor was an explanation given as to why the note did not lend itself to fingerprinting. His testimony stands without corroboration or documentation.

[22] Although it is admittedly not normal procedure for Petrie to become involved in investigations, Petrie testified he found such action warranted on this occasion for three reasons: (1) an officer was being harassed; (2) the discipline of the department was involved; and (3) breaking and entering is a criminal offense. This attempted justification is in stark contrast to the record of prior breaking and entering incidents referred to in footnote 10, *supra*, none of which drew Petrie's attention or concern, and all of which were known to both Frabotta and Gregorcic at the time of this incident. Petrie claimed to have asked certain questions of either Frabotta or Gregorcic at the time. If this were the case it would seem strange that they would not remember to testify to this part of the investigation. If this occurred at all, there is no explanation why they would not have told him that the observable markings evidencing a break-in were the result of prior incidents and preexisted this one. Also, one might note, in contrast to this supposed justification for intervention into security department investigations, the number of other criminal offenses set forth as the basis for other discharges of security officers, *infra*, none of which reflect involvement by Petrie even though three involved theft

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Deka's name was first brought up when Martin stated he had seen Deka in possession of the doll with pins in it and upon receiving that information he and Gregorcic decided to have Deka come to the office on November 15 for an interview.[23] Deka was advised of this by memorandum drafted by Gregorcic. As a copy of the memorandum was not presented in evidence, there is no documentation to establish Petrie's involvement in the investigation up to this point in time. Since Deka received the notice of the meeting on the evening of November 14, and Frabotta's report is dated November 13, the evidence suggests Monday, November 14, as the earliest date on which it was decided to conduct the interview with Deka on November 15. Considering all of the relevant evidence, I am convinced that Petrie did not become involved in the voodoo investigation until after Deka's participation in contacting the union representative and his active solicitation of union authorization cards on November 14.

According to Dierker, he made the decision to discharge Deka for failure to respond to an order to attend a meeting. He does not indicate that this was ever communicated to anyone. According to Petrie, prior to his phone call to Deka on November 21, Dierker and Gregorcic had already decided on November 18 to discharge Deka because of their belief that he was involved in putting the voodoo doll and black rose in Frabotta's office. Petrie testified that this incident could be considered a violation of four of Respondent's rules of conduct for its security officers warranting suspension.[24] However, as Deka's failure to attend the meeting was a final act of breach of those rules which was cause for suspension pending a hearing, namely, "willful disobedience of an order lawfully issued to him by a superior officer," Petrie discharged Deka and in the official notice he listed only that action as the cause of discharge.

Petrie testified that it was not the practice of the Company to discharge a patrolman before he had been suspended, and the action taken after suspension depended on the circumstances of each case and on the work record of the employee. He personally does not generally play any part in disciplining or discharging security department employees. An exception, other than the case involving Deka, occurred when he gave a sergeant the option of resigning or being discharged after suspension for incompetency and neglect of duty, in a situation where he personally was the complaining official concerning neglect which affected the tenants' operations, and the officer's record revealed a history of five warnings and complaints by four different superior officers within a 3-month period. Petrie then explained that he was the one to call Deka and discharge him because he had become involved by attending the meetings.

The actions taken with respect to other security officers, either discharged or given the opportunity to resign in lieu of discharge during the period reasonably contiguous to the discharge of Deka, were without the intervention of Petrie, and their personnel records reveal that disciplinary letters and memoranda, complaints of neglect of duty or misconduct, and suspensions were in many cases numerous preceding discharge action. Most of the offenses were of a nature serious to society, such as sabotage of communications, false fire alarms, and criminal conduct including theft of property, carrying a concealed weapon, arrests by neighboring police departments, and revocation of the required deputy commission. In this latter situation, the patrolman was given a desk job for a period of time before termination steps were taken.

A review of Deka's personnel file reveals that he had never received any warning slips and no disciplinary action before the immediate suspension and discharge, and that he had no absences or tardiness. It also revealed that he consistently received above average or excellent job performance ratings. Petrie could not recall, but did not deny, that Deka also received from Petrie special praise for his performance relating to duties assigned involving official escort for visiting dignitaries. Also prior to the voodoo incident, Gregorcic had recommended Deka highly to a neighboring police department where Deka was seeking employment. Admittedly, Deka's record was not reviewed or considered in the decision to discharge him.

The reason stated in the termination letter as the cause for discharge, differing in concept from that given verbally, is, at best, a stretching of the circumstances to fit a rule. "Willful disobedience of an order lawfully issued by a superior officer," it would seem, must contemplate something in the nature of an order. The memorandum notice of the November 21 meeting is certainly not presented in the form or nature of an order, and when Deka gave advance notification that the "arrangement" mentioned in the memorandum did not comport with his convenience and gave the reason why, the least that could reasonably be expected is that he would be notified that he was not being given a choice as to the date or time of the meeting and despite his stated reasons he would be expected to attend the meeting as originally set. A lack of such a normal response tends to indicate an intent to take a secretive course hoping to create an incident to use as a pretext for discharge.

A significant reason for this approach may well rest in the timing of two phone calls by Gregorcic to Petrie, on the night of November 18. In the first, Gregorcic relayed to Petrie the receipt and content of Deka's letter in response to the Gregorcic memorandum of that date. In the second call Gregorcic reported information he had just obtained regarding union activity. Gregorcic testified that at or about 10:20 p.m. two fellow Bainbridge

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from stores and mall property over which as mall manager Petrie had direct responsibility. Additionally, the money stolen from the purse of Gregorcic's secretary while it was in Gregorcic's office did not precipitate an investigation.

[23] It is noted that both Martin's statement about seeing Deka with the doll and Frabotta's investigation report relating that Deka purchased a black rose from Alexander's were both in Frabotta's investigation report dated November 13. That document reflects that Deka's name was revealed to Frabotta at the flower shop. This part of Frabotta's investigation preceded Martin's statement.

[24] The rules enumerating specific causes for suspension pending a hearing identified by Petrie as having been violated by the voodoo incident are: disrespect shown to a superior officer in the department; any other just and reasonable cause; for conduct unbecoming an officer and a gentleman; and for conduct subversive to the good order and discipline of the department.

police officers who had just attended the police academy relayed to him information they had obtained at the school. These officers informed Gregorcic that Respondent was about to "be hearing from the Union,"[25] and that Deka and Hess were involved. Gregorcic testified that he communicated this information of Deka's union activity to Petrie because he felt it might have a bearing on the meeting they had scheduled to be held with Deka on Monday.

Although this is claimed as the first specific knowledge by superior officers of Deka's personal involvement in the Union, the record requires a contrary conclusion. Supervisor Tolar testified that Deka was mentioned as being one of the patrolmen supporting the Union prior to Deka's suspension. In fact, after the union activity "came out in the open," i.e., posting of notice of meetings at Garbo's home, in November, "all patrolmen were aware of it, and everyone was aware of it." Indeed, his superiors may have passed this information back to him from some other sources. Tolar himself had seen Deka counting the signed authorization cards in the patrolmen's locker room, and Deka had informed him that most of the patrolmen had signed. Grandberry testified that, before he went on vacation November 9, he was aware of activity among the men on the security force directed to "bringing a union into the Security Department," because he could hear the patrolmen talk. Frabotta's office was next to Grandberry's near the squadroom and undoubtedly he too could hear the same talk. Frabotta admitted that he first heard about the union activity in November before the voodoo doll incident. Gregorcic admitted that he was in his office regularly during this period and that he conferred with Frabotta every day that the latter was on duty. He talked to Frabotta "off and on" about rumors of union activity, and may have discussed meetings at patrolmen's houses with Petrie during this period. He did talk to Petrie about the fact that the patrolmen "were unhappy" or "had problems." Gregorcic also admitted that he could have told Petrie the patrolmen were talking about a union, and "it could be" that Petrie told him, "Don't worry, they're just talking." After being prompted by his own affidavit, Petrie admitted that he had previously received reports from Grandberry and Gregorcic of one or more union meetings at Garbo's home, and that in those reports supervisory officers gave names of individual patrolmen who were involved in union activity. It is noted that Deka attended both meetings at Garbo's home. Further, Petrie related that Gregorcic relayed to him information gained from the police academy that Deka was involved in the union organizing and was reported as talking with union officials. Nor was Dierker remote from such knowledge. The record reveals that, while he was still a consultant to Respondent, Dierker was invited to attend a meeting at patrolman Garbo's home to discuss problems at Randall Park Mall, but he declined to attend.

The foregoing reveals that all of the evidence Respondent ever obtained connecting Deka to the voodoo incident was within the knowledge of Respondent's chief of the security department by November 11, 1 day after the incident. Yet it was not considered serious enough to produce a written report, until Deka attended the meeting at Garbo's home where it was decided to seek out the Union. Only then, on November 13, was the incident significant enough to record in a report by Frabotta. Nor was it significant enough to take any disciplinary action on, until Deka openly undertook solicitation of signatures on union authorization cards on November 14. This brought forth a prompt suspension meeting on the morning of November 15 without one iota of additional incriminating evidence. Deka was the patrolman who was obtaining most of the signatures. His removal from the proximity of other patrolmen, by suspension, should have put the brakes on the organizing drive. However, he continued his employee contact by driving fellow patrolmen to the police academy where he continued his organizing efforts. This was followed by the scheduling of a meeting for November 21, still without a thread of added evidence[26] with respect to the voodoo incident.

The confusion among the principal representatives of Respondent in the discharge of Deka as to when the discharge decision was made, by whom, and for what reason, indicates that resolution of the voodoo incident was not the primary subject of interest or the cause for the discharge. Rather, it was being utilized to coerce Deka into inaction in his organizing efforts. Had they fully intended on November 18, when the November 21 meeting was set up, to discharge Deka at that time for his involvement in the voodoo incident (concerning which they had no more evidence than they had before Deka emerged as the leading union organizer), surely there would have been some clear understanding as to the grounds they would use, or some effort to formulate the charges against him. There is not even agreement among them as to whether this was to be a hearing, a further questioning, or a pronouncement of their discharge decision, which obviously was not even clear to them.

When Deka requested a change in the meeting date and Respondent's officials, almost simultaneously, learned of the impending representation demand and the success of Deka's organizing efforts, I am persuaded that, knowing the weaknesses in their voodoo charge, Dierker and Petrie maneuvered Deka back and forth between them so as to create a new and single so-called violation of the rules which they could use as a discharge pretext.

I find that Dierker and Petrie collaborated in a decision to discharge Deka in retaliation for his successful organizing effort and seized upon his failure to attend the scheduled meeting as a pretext to conceal their unlawful motive. Accordingly, I find that Respondent suspended Deka on November 15 and discharged him on November 21, 1977, because of his protected union activity and that it thereby violated Section 8(a)(3) and (1) of the Act.

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[25] The Union's letter demanding recognition is dated November 21.

[26] It is not to be believed that an experienced internal security officer of Dierker's stature would have been so inadequate to the task of checking such obvious leads as Deka's story of a party at the police academy where many of Respondent's officers attended and where officers attending from two neighboring towns also worked with two of Respondent's supervisory officers (Gregorcic at Bainbridge and Grandberry at Woodmere), if the real interest had been the solving of the voodoo mystery.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Conclusions of Law

1. Edward J. DeBartolo Corporation is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Private Police and Security Guards Local Union No. 57, AFL-CIO, at all times material herein, has been and is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their union activities and threatening to discharge employees seeking union representation and by suspending and discharging an employee in retaliation for engaging in protected Section 7 rights, Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act.

4. By suspending and discharging James S. Deka for engaging in union activity, and by thereafter failing and refusing to reinstate him, Respondent has discriminated against employees with respect to hire, tenure, and terms and conditions of employment and has thereby engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(3) of the Act.

5. The aforesaid unlawful conduct constitutes unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in, and is engaging in, certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action deemed necessary to effectuate the policies of the Act. Having found that Respondent unlawfully suspended and discharged James S. Deka in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be required to offer him immediate and full reinstatement to his former position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered by him as a result of its discrimination against him, by payment to him of money equal to that which he normally would have earned, absent the unlawful discharge, with backpay and interest computed under the established standard of the Board in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[27]

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[28]

The Respondent, Edward J. DeBartolo Corporation, North Randall, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in interrogation of its employees concerning their union activities and threats of discharge for seeking union representation.

(b) Suspending and discharging an employee in retaliation for engaging in protected Section 7 rights.

(c) In any like or related manner interfering in its employees' exercise of their rights to form, join, or assist Private Police and Security Guards Local Union No. 57, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer James S. Deka immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole in the manner set forth in "The Remedy" section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its office in Randall Park Mall, North Randall, Ohio, copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps have been taken by Respondent to comply herewith.

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[27] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[28] In the event no exceptions are filed as provided by Sec. 102.46 of Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[29] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

United States Gypsum Company *and* United Paperworkers International Union, AFL-CIO, CLC. Cases 5-CA-12049 and 5-CA-12517

January 20, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 25, 1981, Administrative Law Judge Arthur Leff issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs. The General Counsel and Respondent also filed answering briefs to each other's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge's findings, conclusions, and remedy in connection with his finding that Respondent violated Section 8(a)(5) and (1) of the Act by refusing since March 18, 1980, to meet and bargain with the Union as the exclusive bargaining representative of its employees in the appropriate unit. Our discussion below is, therefore, limited to the allegation dismissed by the Administrative Law Judge that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily terminating the employment of James E. Carter on or about August 8, 1980, because of his membership in and activities on behalf of the Union.

As more fully described by the Administrative Law Judge, the credited record evidence surrounding the incident that led to Carter's discharge is as follows: On Thursday, July 31, plant engineer Lammeree told Carter that a part needed to repair forklift truck 16 would arrive at Respondent's plant at or about 2:30 or 3 p.m. on Friday, August 1, and that Carter should expect to stay on to install it even if it meant working overtime. On August 1, Carter worked all day without taking a break repairing the engine on forklift truck 4 and by 3 p.m., his normal quitting time, had successfully completed that job. After showing Lammeree the work he had done on forklift truck 4, Carter left the shop to punch out shortly after 3 p.m.

About the same time, Sam Bianco, who had been sent to another city to pick up the electric harness needed to repair forklift truck 16, returned to the shop. Lammeree approached Carter and told him that the part had arrived and that he wanted Carter to install it. Carter told Lammeree that he had already done a full day's work, that he had an appointment to keep, that Lammeree had another mechanic there who could do the job, and that he should have the other mechanic install the electric harness. Lammeree attempted to accommodate Carter by asking Bianco to install the harness. Bianco said that he doubted that he could perform the work. Lammeree related his conversation with Bianco to Carter and instructed Carter to remain overtime and perform the work. Carter again told Lammeree that he could not stay because he had an important appointment to keep. Contrary to Lammeree's instruction, Carter left the plant.

The applicable legal issues have been framed aptly by the Administrative Law Judge. Thus, he found that Carter refused to work overtime contrary to his supervisor's instructions and in violation of Respondent's mandatory overtime rules, and that such insubordinate behavior constituted legitimate grounds for dismissal. Noting that no employee of Respondent had been discharged previously for violation of this rule, the Administrative Law Judge described the issues here as whether Respondent would have meted out the ultimate disciplinary penalty to Carter but for his union activities. Stated another way, he asked whether the discharge penalty constituted discriminatory disparate treatment. We agree with the Administrative Law Judge's finding that legitimate grounds for the discharge of Carter exist here and with his framing of the issue to be decided. We disagree, however, with his assessment of the applicable record evidence and his conclusion.

The Administrative Law Judge found that Respondent has no fixed policy regarding the degree of discipline for violating its mandatory overtime rule or other rules. He reasoned that Respondent was free, therefore, to base the severity of the discipline on its assessment of the seriousness of the misconduct, so long as no considerations unlawful under the Act played a role. He found that Carter's refusal to work overtime represented gross misconduct and insubordination. In so finding, he relied primarily on his findings that it was of critical importance to have forklift truck 16 in operation as

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[1] The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

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soon as possible, that Carter was made aware of the importance of this work the preceding day, and that he was the only mechanic capable of performing the necessary work. The Administrative Law Judge also found that the General Counsel failed to establish that Carter's discipline constituted disparate treatment.

The General Counsel's evidence of disparate treatment consisted of the testimony of several employees as well as certain "contact reports" subpenaed from Respondent that related to all incidents in which employees had been brought up by their supervisors on charges for refusing to work overtime or similar conduct in the 3 preceding years.

The credited and uncontradicted testimony of employee Gene Praeger is that there had been a number of occasions, including one occasion when two of the large and one of the smaller forklifts were down, when he refused Lammeree's demand to work overtime and had walked off the job without having any disciplinary action taken against him. Each time Praeger had stated that he had a reason, without specifying what it was, for not being able to work overtime.

The credited testimony of John Campbell is that he had been given a 3-day disciplinary suspension for refusing to work overtime in May 1977 after he was instructed by his supervisors to work overtime 10 minutes before the regular quitting time. On a subsequent occasion Campbell was given only a warning when he again refused to work overtime.

The four contact reports (apparently all there were) were submitted by Respondent pursuant to a subpena from the General Counsel. In three instances, an employee who had refused to work overtime and had walked off the job, contrary to his supervisor's instructions, was simply given a warning. The fourth contact report, dated April 20, 1980, involved an employee, Frank Bowerson, who had called his supervisor to request permission not to report for work that day because he wanted to take a trip with his father. Bowerson's request was denied on the ground that there was no one available to replace him, but he stayed out anyway and was given only a 1-day suspension.

The Administrative Law Judge found that Praeger's refusals to work overtime were not comparable to Carter's refusals because Praeger's refusals were always with at least the tacit acquiescence of his supervisor. He distinguished Campbell's discipline from Carter's on the basis that Campbell was given only 10 minutes' advance notice and there were other employees available to do the work. As to the contact reports, the Administrative Law Judge refused to give them any weight because they do not contain all the relevant facts surrounding the various incidents.

The standard used by the Administrative Law Judge to evaluate the evidence of disparate treatment presented by the General Counsel was unduly restrictive. It was not incumbent on the General Counsel to show an identical situation with a diametrically opposite result. Instead, it was the General Counsel's burden to show a pattern of treatment by Respondent of employees who have refused to work overtime that is clearly at odds with the treatment of Carter.

The evidence of disparate treatment presented by the General Counsel must be evaluated within the framework of the undisputed evidence that Respondent has no fixed policy governing the degree of discipline to be imposed for the violation of the mandatory overtime rule. The absence of any such policy is significant because the record evidence shows that employees have violated the mandatory overtime rule on numerous occasions but no employee who has violated the rule had been discharged before Carter. Thus, even before we compare the circumstances present in the refusal to work overtime shown by the General Counsel's evidence with Carter's refusal, it is plain that Respondent has not strictly enforced its mandatory overtime rule and that where it had enforced this rule a warning or lesser discipline has been meted out. It is against this background that the Administrative Law Judge's handling of the individual incidents of refusal to work overtime must be evaluated.

That Praeger's refusals to work overtime were always with at least the tacit acquiescence of his supervisor pales in significance when it is considered that Praeger refused to work overtime on numerous occasions but received no discipline on any occasion. Similarly Campbell did not receive any discipline, but only a warning when he refused to work overtime on a second occasion after his earlier 3-day suspension. Hence, the General Counsel has shown that sometimes, even for repeated violations of the mandatory overtime rule, employees had escaped discipline entirely. This is in stark contrast to Carter's discharge for his first offense of this kind.

Nor do we discount the "contact reports," as the Administrative Law Judge did, because they do not contain all the relevant facts surrounding the various incidents.[3] Indeed, it is significant that

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[3] It may be disputed as to who had the burden of filling in the details. Arguably, the General Counsel could have called the employees who were the subject of the reports or the officials of Respondent who prepared the reports to fill in the details. We find, however, that the reports

Continued

these reports were from Respondent's own records. It would be one thing if the General Counsel had predicated his case solely on these records. But these records plainly show three additional instances where an employee has refused to work overtime and walked off the job, contrary to the supervisor's instructions, with no discipline but only a warning. At minimum, they represent additional evidence as to Respondent's past treatment of first offenders. And the contact report on Bowerman shows that his requested permission not to report for work was denied on the ground that no employee was available to replace him. Although the Bowerman incident does not involve the mandatory overtime rule, it does reveal Respondent's reaction to an employee who refused to work when he was denied permission to take off because no employee was available to replace him. Unlike the Administrative Law Judge, we find that these contact reports deserve to be weighed in determining whether Carter's discharge represented discriminatorily motivated disparate treatment and support the General Counsel's contention.

In addition to the foregoing evidence of disparate treatment, it also is plain that the manner in which Respondent arrived at its decision to discharge Carter is inconsistent with its past practice. Thus, there was no prior investigation or effort to ascertain Carter's version of the events even though Carter was initially suspended pending an investigation. Nor did Respondent review Carter's personnel file. It was Respondent's normal procedure, however, to investigate and review an employee's records before meting out discipline.[3] In this connection, Respondent offered no explanation for its failure to follow its normal procedures.

Even if we were to agree with the Administrative Law Judge's resolution of this allegation, we would disagree with his rationale for excusing Respondent's failure to follow its normal procedures or its failure to explain its actions. The Administrative Law Judge excused Respondent's failings "in light of Respondent's grievance procedure which gave Carter the opportunity, which he did not choose to utilize, of presenting his version to Del Gaudio . . . ." This approach effectively punishes Carter for Respondent's failure to follow its own procedures. But that aside, this rationale cannot be accepted here where Respondent insisted not only that Carter leave the Company's property at once but also threatened to call the police if Carter ever set foot on company property again. These statements were made by Respondent, not in the heat of the events on August 1, but at the time Respondent notified Carter on August 4 that he was being discharged.

Aside from the evidence of disparate treatment and failure to follow normal procedures in arriving at the Carter discipline decision, there is other evidence that undermines any finding that Respondent would have discharged Carter in the absence of his union activities. For example, the record shows that Carter was a skilled forklift mechanic with 7 years of satisfactory performance;[4] that Carter not only played a leading role in the Union's organizing campaign,[5] but also served as chairman of the employees' bargaining committee; and that Respondent was overtly hostile to the Union. Finally, it cannot be overlooked that Bianco, who was assigned to maintain forklift truck 16, was available on August 1, did complete the repair work, and had forklift truck 16 in full operating condition within 2 hours.[6]

In sum, we find that the General Counsel has established that Respondent's discharge of Carter constituted discriminatorily motivated disparate treatment and that Respondent failed to show that it would have discharged Carter in the absence of his protected activities. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. United States Gypsum Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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contain sufficient facts to demonstrate Respondent's treatment of employees who have violated its mandatory overtime rules. For that reason and because the reports were part of Respondent's own records and are used to formulate a basis for personnel action (see fn. 3, *infra*), we have considered them here.

[3] Two weeks after Carter's discharge, employee Peter Borm was discharged for refusal to work overtime. The record shows not only that Borm had been warned previously that he would be discharged for future attendance problems, but also that Borm was allowed to give his version of the events and his personnel file was reviewed before Del Gaudio made the decision to discharge Borm. This treatment of Borm contrasts starkly with Carter's treatment.

[4] Carter was congratulated by his foreman as the only employee to move from Class C to Class A mechanic within a 2-year period.

[5] That Respondent recognized Carter's role in the organizing campaign is evident from the remarks of Carter's foreman, Tracy, to employee Bianco to the effect that Carter was instrumental in organizing the Union and bringing it into the plant.

[6] Respondent contended that the repair of forklift truck 16 was of critical importance and that Carter was the only employee capable of repairing it. Although Bianco expressed reservations about his ability to perform the work, he did perform the work and the truck was available on the weekend that preceded the decision to discharge Carter. Respondent's further assertion that it had to call an outside contractor to work on forklift truck 16 because of Carter's refusal to work overtime is tempered by Bianco's testimony (ALJD, sec. III,3,1, at fn. 11) as well as record evidence that Respondent used outside mechanics on many occasions.

We mention Bianco's completion of the repair work not for the purpose of excusing Carter's refusal to work overtime but because it is relevant to the circumstances facing Respondent at the time it decided to discharge Carter. In short, the repair of forklift 16 may well have been of critical importance, but it was performed by the employee who Carter insisted could do the work and these circumstances tend to bring this incident closer to those described by Praeger.

2. United Paperworkers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union at all times since February 15, 1979, has been, and now is, the exclusive collective-bargaining representative of all employees in the following unit appropriate for purposes of collective bargaining:

> All production and maintenance employees, including quality control department employees and plant clerical employees employed by Respondent at its Baltimore, Maryland, location, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By refusing since March 1980, to meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit described above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By discharging or otherwise discriminating against James E. Carter because of his interest in, or activity on behalf of, the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, we shall order it to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

We shall order Respondent to cease and desist from failing or refusing to bargain concerning rates of pay, wages, hours of employment, and other terms and conditions with the Union as the exclusive representative of the employees in the appropriate unit. Upon request by said Union, we shall order Respondent to meet and bargain with the Union concerning such terms and conditions of employment and, if an agreement is reached, embody such understanding in a written agreement.

We also shall order Respondent to offer immediate and full reinstatement to James E. Carter, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of his unlawful discharge by Respondent. Backpay with interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)[7]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United States Gypsum Company, Baltimore, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively concerning rates of pay, wages, hours of employment, or other terms and conditions of employment, with United Paperworkers International Union, AFL-CIO, CLC, as the exclusive representative of its employees in the following appropriate unit:

> All production and maintenance employees including quality control department employees and plant clerical employees employed by Respondent at its Baltimore, Maryland, location, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Discharging or otherwise discriminating against employees because of their interest in, or activity on behalf of, a labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively with the above-named labor organization as the exclusive bargaining representative of the employees in the above-described bargaining unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a written signed agreement.

(b) Offer James E. Carter immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of his unlawful discharge by Respondent in the manner set forth in the section herein entitled "The Remedy."

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[7] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Baltimore, Maryland, plant copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER ZIMMERMAN, concurring in part and dissenting in part:

For the reasons set forth by the Administrative Law Judge, I would find that the General Counsel has failed to establish that the discharge of employee James E. Carter was discriminatorily motivated. Therefore, I would dismiss the allegation that Carter's discharge violated the Act.

I agree with my colleagues, however, that Respondent violated 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union after March 18, 1981.

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT by failing or refusing to bargain with the United Paperworkers International Union, AFL-CIO, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain through representatives of their own choice, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any and all such activities except to the extent permitted by Section 8(a)(3) of the Act.

WE WILL NOT discharge or otherwise discriminate against employees because of their interest in, or activity on behalf of, a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act, as amended.

WE WILL bargain collectively, upon request, with United Paperworkers International Union, AFL-CIO, CLC, as the exclusive representative of all our employees in the bargaining unit described below, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including quality control department employees and plant clerical employees employed by the Employer at its Baltimore, Maryland, location, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL offer James E. Carter immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered by reason of our unlawful discharge of him, with interest.

UNITED STATES GYPSUM COMPANY

DECISION

STATEMENT OF THE CASE

ARTHUR LEFF, Administrative Law Judge: Upon charges filed by the above-named Union, in Case 5-CA-12049 on March 24, 1980, and in Case 5-CA-12517 on August 14, 1980, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued separate complaints against United States Gypsum Company, herein called Respondent. The two cases have been consolidated for purposes of hearing. The complaint in Case 5-CA-12049 was issued on May 1, 1980. As amended at the hearing, it alleges in substance that since March 18, 1980, Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing and refusing to meet and bargain with and withdrawing recognition from the Union as the certified majority representative of its employees in an appropriate bargaining unit. The complaint in Case 5-CA-12517, issued on September 18, 1980, alleges in substance that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily terminating the employment of James E. Carter on or about August 8, 1980, because of his membership in and activities on behalf of the Union. Respondent filed an answer to each of the complaints denying the commission of the alleged unfair labor practices. The hearing in this consolidated proceeding was held before me at Baltimore, Maryland, on October 27 and 29, 1980. Briefs were filed by the General Counsel and by Respondent on December 27, 1980.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation, is engaged in its Baltimore, Maryland, location in the manufacture, sale, and distribution of various products, including gypsum wallboard. During the past year, a representative period, Respondent purchased and received directly from points outside the State of Maryland for use at its Baltimore location products valued in excess of $50,000, and also sold and shipped from that location to customers located outside the State of Maryland products valued in excess of that amount. The complaint alleges, Respondent admits, and it is found that Respondent is engaged in commerce within the meaning of Section 2(5) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Paperworkers International Union, AFL-CIO, CLC, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Respondent's Refusal To Bargain*

1. The relevant facts

On February 15, 1979, the Board, in Case 5-RC-10590, certified the Union as the collective-bargaining representative of Respondent's employees in the following unit found to be appropriate for the purposes of collective bargaining: All production and maintenance employees, including quality control department employees and plant clerical employees employed by Respondent at its Baltimore, Maryland, location, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

Respondent and the Union held their first negotiating meeting on June 15, 1979, and some 17 additional meetings thereafter. Their last meeting was held on January 31, 1980. James A. DelGaudio, the works manager at Respondent's Baltimore location, was Respondent's chief negotiator. John H. O'Brien, an International representative of the Union, was the chief negotiator for the Union. Apparently, very little progress toward reaching an agreement was made by the parties during the 18 bargaining sessions that were held.

On February 12, 1980, 12 days after the last meeting, O'Brien addressed a letter to DelGaudio in which he asked DelGaudio whether he was ready to meet again with the Union and, if so, to let him know on how many days and for how many hours he would be prepared to conduct meetings during the next month. DelGaudio replied by letter, dated February 15, 1980, in which he expressed his willingness to continue negotiations and suggested February 22 as the next meeting date, if convenient to O'Brien. By letter dated February 18, 1980, O'Brien informed DelGaudio that the suggested date was not convenient to him. In his letter, O'Brien further informed DelGaudio that he would be out of the city on a special International union assignment and on vacation from February 26, 1980, through March 16, 1980, and requested that DelGaudio prepare and supply him with a schedule of negotiating dates between March 17, 1980, and April 15, 1980. On February 15, 1980, DelGaudio, in a letter to O'Brien, stated that he had no objection to setting up an advance schedule of multiple meeting dates, but suggested that O'Brien call him when he returned to town so that they might discuss a selection of dates in a more definite manner.

Upon his return to town on March 17, 1980, O'Brien called DelGaudio. DelGaudio was not available that day, but returned O'Brien's call the following morning. There are discrepancies between the respective accounts of O'Brien and DelGaudio as to what was said in their telephone conversation that morning. Based upon my evaluation of the testimony given by each of them and my general impression of their overall credibility as witnesses, I believe, and find, that their conversation was substantially as follows: O'Brien told DelGaudio that he wanted to set up a schedule for further bargaining meetings between Respondent and the Union, and asked DelGaudio to let him know the dates on which he was prepared to meet with the Union and the number of hours that he was willing to allocate to each meeting. DelGaudio replied that he would not at that time stipulate to any further bargaining meeting dates because he wanted first to consult with Respondent's attorneys to obtain their legal advice on the question of whether the Union still occupied a representative status. He told O'Brien that, since writing to him last, he had received comments from employees that they no longer wanted the Union in the plant, and in that connection added, "Furthermore, the employees don't want your big fat ass around here anymore—Even one of your committeemen told me that."[1] O'Brien asked what committeeman had made that remark, but DelGaudio refused to tell him. O'Brien then stated that he intended to get in touch with the Federal Mediation and Conciliation Service so that a mediator could set the meeting dates and assist in the negotiations. DelGaudio rejoined that if that was what O'Brien wanted to do it was all right with him. At that point O'Brien hung up the phone.[2]

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[1] The quoted statement is based on credited testimony given by O'Brien that was not specifically disputed by DelGaudio at the hearing.

Immediately after his March 18 telephone conversation with DelGaudio, O'Brien notified the Federal Mediation and Conciliation Service that the Union and Respondent appeared to have reached an impasse in their negotiations, and requested the appointment of a mediator to help the parties resolve their differences. W. J. Dick was designated by the FMCS to act as the mediator in the dispute.

On March 21, Dick telephoned DelGaudio. He informed DelGaudio that he had already spoken with O'Brien and that he was now touching base with DelGaudio to set up mutually agreeable future bargaining meetings. DelGaudio, according to his testimony, informed Dick that he was not refusing to meet with the Union. But he nevertheless declined to agree to any further meeting dates. He told Dick that he had received comments raising the question of whether the Union still had the support of employees in the plant and that he wanted to discuss that question with Respondent's attorneys and have it resolved before responding to the request for further meetings. Dick left his telephone number with DelGaudio and told DelGaudio to be sure to inform him if he decided to meet with the Union. Later that day, Dick telephoned O'Brien and reported to him that DelGaudio had refused to set any future bargaining dates and the reasons that DelGaudio had given for taking that position.

O'Brien testified that he assumed from what Dick told him, as well as from his telephone conversation with DelGaudio on March 18, that Respondent did not intend to engage in any further bargaining with the Union and, therefore, on March 24, 1980, filed the Union's refusal-to-bargain charge in this proceeding.[3]

DelGaudio had no further communication with O'Brien after their telephone conversation on March 18, nor did he have any with the FMCS mediator. DelGaudio testified that on March 26 or 27, after having received a copy of the Union's refusal-to-bargain charge, he consulted with counsel for Respondent, was advised by counsel that Respondent was still under a continuing obligation to bargain with the Union and, in light of that advice, decided that he would again meet with O'Brien for further contract negotiations. He did not, however, inform O'Brien of that "decision." According to DelGaudio, he did not do so because he expected that O'Brien would call him if O'Brien wanted to set a date for a further meeting. I find it difficult, however, to reconcile DelGaudio's testimony in that respect with his admission elsewhere in his testimony that he inferred from the Union's unfair labor practice charge that O'Brien had concluded that Respondent was refusing to meet with the Union. I am satisfied from all the evidence that DelGaudio did not again communicate with O'Brien because he did not wish to set up further bargaining meetings with the Union.

Respondent introduced into evidence two petitions, one dated April 18, 1980, and the other April 23, 1980, containing the apparent but unauthenticated signatures of 67 employees in the bargaining unit in which the signers of the petitions declared that they no longer wished to be represented by the Union. At that time, according to DelGaudio, there were approximately 105 employees in the bargaining unit. DelGaudio testified that he found the first petition on his desk when he came to work on the morning of April 22, 1980, and the other on his desk the following morning. According to DelGaudio, he had no idea how the petitions were circulated or by whom, nor did he know who had placed them on his desk. As appears from DelGaudio's unchallenged testimony, following the receipt of the aforesaid petitions, Respondent, through counsel, notified the Union that it was withdrawing recognition of the Union as the bargaining representative of its employees.

2. Analysis and concluding findings

The facts found above are sufficient in my opinion to support the complaint's allegation that Respondent has failed and refused since March 18, 1980, to meet and bargain with the Union in violation of its statutory obligation to do so.

It is to be observed, to begin with, that Respondent makes no claim that prior to its receipt on April 22, 1980, of the first of the two employee petitions adverted to above, it had a reasonably grounded good-faith doubt of the Union's continuing majority status that would have justified it in withdrawing recognition from the Union.[4] To the contrary, Respondent concedes that, prior to the date of its receipt of that petition, it was under a statutory obligation to meet and bargain in good faith with the Union.

As shown above, it is undisputed that Respondent never complied with the Union's requests for the setting of further bargaining dates after March 17, 1980, initially made by O'Brien in his February 14 letter to DelGaudio, and repeated by him in his March 18 telephone conversation with DelGaudio. It similarly failed and declined to honor the like request of the FMCS mediator made on March 21, 1980.[5] The fact that DelGaudio in his re-

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[2] O'Brien's testimony differs from the findings made above in that he initially testified that DelGaudio stated that he was not going to meet with the Union again. On cross-examination, however, O'Brien acknowledged that DelGaudio may not have made that statement *in haec verba*, but explained that that was the way he interpreted DelGaudio's remarks. DelGaudio's testimony differs from the findings made above principally in this respect: According to his version, their conversation ended with the understanding that O'Brien would also seek legal advice and speak to his "people" about the situation and, after doing so, "we would get back" to DelGaudio. I do not credit DelGaudio's testimony in that respect. There is no reference to any such expressed or implied understanding in a memorandum of his conversation with O'Brien that DelGaudio says he prepared shortly after the conversation occurred. His testimony to the foregoing effect, moreover, is inconsistent with an admission later made by him that it was "never stipulated" in his telephone conversation with O'Brien that O'Brien was to call him again to follow up his (O'Brien's) request for bargaining dates.

[3] The charge alleges, in pertinent part, that since the date of certification, Respondent "refused to bargain in good faith, and as late as 3/21/80 by notification from FMCS to UPIU—continues to refuse to meet and refuses to bargain in good faith."

[4] Cf. *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1483 (1965).

[5] The Board has held that a union's utilization of an FMCS mediator to reinstitute bargaining is sufficient to warrant an 8(a)(5) finding for refusal to meet, even in the absence of a specific request by the union. See *Inter-*

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sponse to these requests did not expressly declare in so many words that Respondent would no longer meet and bargain with the Union does not, of course, preclude a finding of a refusal to bargain. A refusal to meet and bargain, though not expressed, may be inferred from other circumstances. The actions of an employer, or more precisely in this case its inaction, may speak louder than its words. In the instant case, I think that such an inference is clearly warranted from Respondent's subsequent continuing disregard of the requests made of it by the Union and the mediator to set up further meeting dates for the conduct of further negotiations. Respondent's continuing obligation to meet and bargain with the Union was, of course, not affected by the refusal-to-bargain charge that was filed by the Union on March 24. The filing of that charge neither precluded further bargaining nor excused Respondent of its failure to cooperate with the Union in setting up further meeting dates for the continuation of negotiations.

Respondent contends that, when DelGaudio spoke to O'Brien on March 18 and to the mediator on March 21, he was justified, in the light of the comments he had been receiving about antiunion sentiment in the plant, in withholding the scheduling of any further negotiating sessions with the Union until he had an opportunity to obtain legal advice from counsel as to whether, in Respondent's words, "he could in fact, continue to bargain." In view of subsequent events, DelGaudio's good faith in asserting this as his reason for not then complying with O'Brien's and the mediator's request for further meeting dates is open to question. However, assuming *arguendo* that DelGaudio's initially asserted reason for deferring such compliance was a valid and justifiable one, the same cannot be said of his continued failure, after having been advised by counsel on March 26 or 27 of Respondent's continuing obligation to bargain, to notify the Union that Respondent was now ready and willing to stipulate with it on a mutually satisfactory date for the resumption of negotiations. For reasons previously indicated, I am unable to credit DelGaudio's explanation that he refrained from contacting the Union to set up a further bargaining meeting because he expected O'Brien to contact him if he wanted a further bargaining meeting. O'Brien had already made clear to DelGaudio in his February 14 letter and in the March 18 telephone conversation that the Union did want further meetings with Respondent. And the unfair labor practice charge filed by the Union on March 24 made it unmistakably clear that the Union considered Respondent derelict in not having met its earlier request for such meeting dates. For like reasons, I am unable to agree with Respondent's further argument that the burden was on the Union to contact Respondent, rather than the other way around, and that no 8(a)(5) violation may be found in this case because of the absence of evidence of any subsequent union request for bargaining and of a refusal of such a request by Respondent. Here the Union had already made its request for further meeting dates, and Respondent, according to its own position, had simply deferred responding to that request until it had an opportunity to consult with counsel. In these circumstances, I believe it apparent that it was incumbent on Respondent to contact the Union after receiving the legal advice it claimed it needed, and not for the Union to continue to press Respondent for a response to its outstanding request. Respondent's failure to do so unmistakably evidences an unwillingness on its part to meet and bargain with the Union and is supportive of an inference to that effect.

Accordingly, I conclude and find that Respondent, by refusing to meet and bargain with the Union since March 18, 1980, violated Section 8(a)(5) and (1) of the Act.

Absent Respondent's continuing unlawful refusal to bargain, as just found, I would have viewed the employee petitions, which were received by Respondent on April 22 and 23, 1980, and which were apparently signed by a majority of the unit employees, as having provided Respondent with a sufficient basis for doubting the Union's continuing majority status and, therefore, sanctioning its withdrawal of recognition from the Union after its receipt of those petitions. However, I consider Respondent's prior unlawful refusal to bargain on March 18 continuing thereafter without interruption as an unfair labor practice of a sufficiently serious nature to taint the employee petitions and to preclude Respondent from relying upon them as a basis for withdrawing recognition from the Union.[6] Accordingly, and in line with well-established Board precedent in situations of this kind,[7] I find that Respondent violated Section 8(a)(5) and (1) of the Act, not only by its continuing refusal since March 18, 1980, to meet and bargain with the Union, but also by its affirmative withdrawal of recognition of the Union as well.

B. *The Alleged Discriminatory Discharge of James E. Carter*

1. The relevant facts

James E. Carter was employed by Respondent for a period of more than 7 years prior to his discharge on August 4, 1980. He started as a Class C mechanic, advanced to a Class A mechanic in less than 2 years, and during his last 4-1/2 years worked as a mobile mechanic. Respondent does not question his skill as a mechanic. Nor does it make any claim that his overall work record was unsatisfactory. The only reason given by Respondent for his discharge is that he refused on August 1, 1980, to obey a supervisor's order to work overtime on a specific job. Carter was the first employee ever dis-

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stcle Paper Supply Company, Inc., 251 NLRB 1423 (1980). And see also Sec. 204(a)(2) and (3) of the Labor Management Relations Act, 1947. The Supreme Court in *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956), equated the statutory duty under Sec. 204(a)(1) of the Act with the duty to bargain in good faith under Sec. 8(a)(5) and 8(d). The duties under Sec. 204(a)(2) and (3) are similarly equatable with the bargaining obligations of an employer under Secs. 8(a)(5) and 8(d).

[6] Although the parties were apparently still far apart in their negotiations, it cannot be presumed that, even if Respondent after March 18 had bargained in good faith with the Union under the aegis of a mediator, no agreement would have been reached. Nor can it be presumed that if such good-faith bargaining had occurred, even without a contract being reached, a majority of the unit employees would nevertheless have determined to discontinue their support of the Union.

[7] See, e.g., *Guerdon Industries, Inc. Armor Mobile Homes Division*, 218 NLRB 658, 660-661 (1975).

charged by Respondent for refusing to work overtime, although shortly after the filing of the charge in the instant case Respondent did discharge another employee for that reason. The General Counsel does not dispute that Carter refused to work overtime on August 1, but contends that Respondent would not have discharged him for that reason had it not been motivated to do so because of his union activities.

Carter had played a leading role in the organizational campaign that led to the Union's certification on February 15, 1979, as the collective-bargaining representative of Respondent's production and maintenance employees at its Baltimore plant. He served on the Union's organizing committee and was one of the two employees most instrumental in obtaining union designation cards from employees. Following the Union's certification, he served as the chairman of the employees' bargaining committee, and in that capacity participated in all of the 18 bargaining sessions that were held prior to Respondent's unlawful refusal to meet and bargain further with the Union, as found in the preceding section of this Decision. Prior to that time, also, the Union had filed on Carter's behalf two unfair labor practice charges, one alleging a discriminatory 3-day suspension resulting from his attendance at the representation hearing, and the other alleging a discriminatory refusal to promote and transfer him to a more desirable position. Both of these charges, however, were either dismissed or withdrawn. Carter's leadership role in organizing the Union was admittedly well known to Respondent's management. About 6 months prior to Carter's discharge, Fred Tracy, who was Carter's foreman, in a conversation with a new employee (Sam Bianco) about the Union, pointed to Carter who was then leaving the room and remarked, "That's the nigger that got the Union organized, him and a guy named Buck."

As a mobile mechanic, Carter's job function was to service Respondent's forklift trucks and maintain them in a state of repair. At the time material herein, another mobile mechanic, Sam Bianco, who had been with Respondent a relatively short time and was not as skilled as Carter, also performed the same functions. When there was extra work to be done, as was often the case, Respondent would utilize outside mechanics on a contract basis. Respondent had 11 forklift trucks, 6 small ones and 5 large ones. Separate trucks were specifically assigned to Carter and to Bianco for routine servicing, but either of them could be called upon to perform work on a truck assigned to the other when circumstances so required. The large trucks were needed for certain essential plant operations that could not be performed by the smaller trucks. The absolute minimum number of the larger forklift trucks needed for full plant operations was three.

On Thursday, July 31, Respondent was confronted with the following situation with respect to its large forklift trucks. Two of the large trucks, Truck No. 4 (which was routinely serviced by Carter) and Truck No. 16 (which was routinely serviced by Bianco) were nonoperational. Truck No. 4 had been out of commission for some time with serious engine and transmission problems. Truck No. 16 had become inoperable on Tuesday of that week with a burnt-out electric harness. Of the remaining large forklift trucks, one had trouble with its brakes—after an hour or two of service, it had to be shut off to allow the brakes to cool off. The other two trucks that were operational also had defects that made their continued use without breakdown uncertain. Respondent's operations are conducted on a 24-hour-a-day, 7-day-a-week basis, and Respondent was anxious to get one of its big trucks that had been out of use back into operation by the weekend.

On Tuesday, July 29, when the electric harness on Truck No. 16 burned out, Respondent ordered a new harness from a local Hyster dealer, but found when it arrived on Thursday that it was not suitable for that truck. At the instruction of Plant Engineer William Lammeree, Carter attempted to replace the burnt-out electric harness on Truck No. 16 with the harness from Truck No. 4, but found that it could not be used on that truck. Later that day, Lammeree had a telephone conversation with a Hyster parts dealer in York, Pennsylvania, who told Lammeree that he could obtain a suitable harness, but that it would not be available at his shop until 1 p.m. on Friday. Lammeree told the York dealer that he would have one of Respondent's employees pick it up at that time. Carter was present during Lammeree's telephone conversation with the York dealer. Following that conversation, Lammeree told Carter that the harness would arrive at Respondent's plant at or about 2:30 or 3 p.m. on Friday and that Carter should expect to stay on to install it even if it meant working overtime. Carter did not say anything and gave no indication at that time that he would not be able to work overtime on Friday.[8]

On August 1, Carter worked all day without taking a break repairing the engine on Forklift No. 4, and by 3 p.m., his normal quitting time, had successfully completed that job. Truck No. 4, however, was still not in an operable condition because oil had started to leak out of the transmission due to a faulty job that had been performed by an outside contractor. After showing Lammeree the work he had done on Truck No. 4, Carter left the shop to punch out shortly after 3 p.m.

At or about the same time, Sam Bianco, who had been sent to York to pick up the electric harness, returned to the shop. Lammeree approached Carter, who was then in the process of punching out, and told him that the harness had arrived and that he wanted him to install it.

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[8] The foregoing findings are based on Lammeree's credited testimony which was corroborated by Wilbur D. Lane, Respondent's service department superintendent, who was also present when Lammeree had his conversation with the York dealer. Carter admitted that he was present during this telephone conversation and that he assisted him in identifying the type of harness that was needed. His testimony was inconsistent, however, concerning as to whether he was told he would be expected to work overtime. Initially, he testified that nothing was said to him on that subject. Later, he admitted that Lammeree did tell him that day before Lammeree made his call to the York dealer that it might be necessary for him to work overtime on Friday, but he testified that this had reference to the completion of his work on the engine of Truck No. 4, the job to which he was assigned on Friday, and had nothing to do with the installation of the harness on Truck No. 16. As the specific subject under consideration at that time involved obtaining a harness for Truck No. 16, and Carter earlier that day had performed related work on that truck, I find Lammeree's version more plausible. Lammaree, by his overall testimony, impressed me as a forthright and careful witness.

Carter told Lammeree that he had already done a full day's work; that he had an appointment he wanted to keep; that Lammeree had another mechanic there who could do the job; and that he should have him install the harness. Lammeree, in an attempt to accommodate Carter, spoke to Bianco about installing the harness, but was told by Bianco that he doubted that he would be able to perform that work correctly, explaining that he had had a similar job assignment once before but had been unable to complete it without Carter's aid. Lammeree then went to the locker room where Carter was in the process of changing his clothes, informed Carter what Bianco had said to him, and told Carter to come back to the shop and meet him at the forklift truck. Carter did come back to the shop. Lammeree again instructed him to stay overtime to install the harness, stating that he was needed for that purpose. Carter inquired whether he would receive report-in pay for punching back in (4 hours' guaranteed pay). Lammeree told him he would not.[9] Carter then again told Lammeree that he could not stay on as he had an important appointment he wanted to keep. Lammeree again instructed Carter to remain and perform the job, but Carter refused and left the plant. According to a written report of the incident, submitted by Lammeree to his supervisor and received in evidence without objection by the General Counsel, Carter, before leaving, complained about the way the Company treated its employees and also stated that he did not care if the Company suspended him for a day or a week for leaving.[10]

After Carter left, Bianco remained in the shop to install the harness. Bianco, who is still in Respondent's employ and who impressed me as an honest witness, testified that he completed his work on the installation of the wiring harness ard had the truck in full operating condition by 5:30 p.m. that day. I credit his testimony.[11]

Immediately following Carter's refusal to work overtime, Lammeree reported his version of the incident to his immediate supervisor, Engineering Superintendent Barry Sharesky, and also to Personnel Superintendent James Booth. The incident was then reported to Workers Manager James DelGaudio, the only person authorized to discharge empoyees. Lammeree recommended that Carter be immediately suspended pending further investigation as to why Carter had refused to stay overtime to work on the truck. His recommendation was approved by DelGaudio. Lammeree telephoned Carter that evening and told him not to come to work the next day (Carter was scheduled to work that Saturday) and not to return to the plant until further notified.

On Monday, August 4, 1980, Carter was summoned to the plant for a meeting with Lammeree and Personnel Superintendent Booth. Booth told Carter that they were making Lammaree his supervisor so that Lammeree could inform him of the decision that had been reached concerning the disciplinary action to be taken against him. Lammeree then informed Carter that he was being terminated for gross misconduct and insubordination in refusing to obey Lammeree's instruction to work overtime on the No. 16 forklift the preceding Friday. Booth then told Carter that Lammeree and the assistant personnel manager would accompany Carter to the shop so that he could get his tools and other personal belongings; that Carter was then to leave the company property at once; and that they would call the police if he ever set foot on company property again.[12]

The decision to discharge Carter was made by DelGaudio. DelGaudio admittedly did not receive any recommendation from anyone below him that he take that action. Lammeree's only recommendation was that Carter be suspended pending investigation. Contrary to the usual practice, no independent investigation was conducted by the department superintendent and no effort was made to obtain Carter's version of the incident before the discharge decision was made. DelGaudio, when asked, was unable to say why the usual procedure was not followed in Carter's case. He did explain, however, that Respondent has a grievance procedure that allows an employee against whom disciplinary action is taken by a foreman to take up and discuss any complaint he may have with the department superintendent and then the works manager. Carter's testimony shows that he was aware of that procedure. His explanation for not requesting a meeting with DelGaudio was that he thought it would be useless, and particularly so since he had been told that the police would be called if he ever set foot on the premises again.[13]

DelGaudio's testimony indicates that in arriving at his decision to discharge Carter, he did not bother to review Carter's personnel record to determine whether Carter had ever been previously disciplined or warned for refusing to work overtime (in point of fact, Carter had not). Nor did he take into account Carter's length of service, competency as an employee, past work record, and other matters that normally would be considered in determining whether discharge action is warranted. When asked what considerations he did take into account, DelGaudio testified as follows:

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[9] According to Carter's undenied testimony there had been occasions in the past prior to the advent of the Union when he and other employees were allowed report-in pay when called back to work after they had punched out even though they were not still on plant premises. Under Respondent's then-current policy, however, employees were not entitled to report-in pay if called back to work while still on plant premises. During the negotiations, the Union had sought to have Respondent change its policy in that respect.

[10] The findings in this paragraph are based in the main upon the credited testimony of Lammeree. Carter's testimony does not differ substantially from Lammeree's except in two respects. Lammeree's testimony makes no mention, one way or the other, about Carter stating on Friday that he had an important appointment he wanted to keep. Lammeree also testified that he could not recall Carter saying anything about call-in pay. Carter's testimony with respect to these two items was corroborated by Bianco and is credited.

[11] Respondent asserted at the hearing that because of Carter's failure to work overtime, it became necessary for Respondent to call in an outside mechanic to check and service the truck. According to the documentary evidence introduced by Respondent to support that assertion, the only work done by the outside mechanic was the straightening out of two wires and the replacement of a voltage regulator, a part that Bianco credibly testified he had alreaqy replaced.

[12] Following Carter's discharge, Respondent utilized outside mechanics on a contract basis for a period of aoout 2 to 3 weeks to perform the work that Carter normally would have performed.

[13] Carter's testimony shows that he did thereafter talk to Bianco on the telephone, but did not ask for a meeting with DelGaudio.

> I reviewed the entire incident with Mr. Lammeree, Mr. Lammeree's supervisor and Mr. Booth. I weighed all the facts that were presented to me. The decision to discharge from the facts presented to me were that Mr. Carter was made aware 24 hours ahead of time that he would have to work on this particular job. At that time he gave no indication that he would not be able to work. It was an absolute necessity that that piece of equipment be running and Mr. Carter was the only one who could do the job. Mr. Lammeree, his supervisor, instructed him to do that job and in spite of this, Mr. Carter refused to work the overtime and walked off the job.

DelGaudio testified that in view of Respondent's mandatory overtime policy he considered Carter's refusal to obey Lammeree's instructions in these circumstances to be gross misconduct and insubordination warranting discharge.

The record shows that Respondent has a mandatory overtime policy under which employees may be required to work overtime without their consent when directed to do so by their supervisors. That policy, however, has not been strictly applied. Thus, when an employee is told to work overtime by his supervisor and presents a reason for not being able to do so, the supervisor will normally try to get another employee to perform the overtime work or make some other accommodation to take care of the situation. Prior to the August 1 incident, Carter himself on a number of occasions had requested to be relieved of overtime work because of other things he had to do, and his requests had been granted. Gene Prager, a mechanic presently employed by Respondent, who had serviced forklifts under Lammeree's supervision for about a year until he was transferred to another position, testified without contradiction that there had been a number of occasions, including one occasion when two of the larger and one of the smaller forklifts were down, when he had refused Lammeree's demand to work overtime and had walked off the job, without having had disciplinary action taken against him. His testimony indicates, however, that each time he had stated that he had a reason, without specifying what it was, for not being able to work overtime. He also conceded that he was never faced with a situation where he had walked off the job after his supervisor had instructed him to remain regardless of his reason for not wanting to do so. Concerning his own understanding of Respondent's mandatory overtime policy, Carter testified as follows:

> Q. Mr. Carter, you know you could be disciplined for refusing to work overtime, correct?
>
> A. If on any job, if a person came up, a supervisor came up and told you you had to work over and you just like that say no, and then walk out, sure that's grounds for disciplinary action.

Carter also testified that:

> If you were told to work over, it was considered mandatory if the supervisor told ahead of time.

DelGaudio admitted that he was not personally aware of anyone in the history of the plant who, prior to Carter's discharge, had ever been terminated for refusing to work overtime. In May 1977, one employee, John Campbell, had been given a 3-day disciplinary suspension for refusing to work overtime.[14] So far as this record shows, Campbell was the only employee prior to Carter's discharge against whom any disciplinary action (excluding warnings) had been taken for refusing to obey a supervisor's order to work overtime. The General Counsel subpenaed from Respondent its documentary records (contact reports), covering the 3-year period prior to Carter's discharge relating to all incidents in which employees had been brought up by their supervisors on charges for refusing to work overtime or similar conduct. He introduced into evidence four such contact reports, seemingly all that there were. Three of these contact reports related to incidents that occurred prior to September 1979 when DelGaudio became the works manager. In each of them the employee involved was simply given a warning for having refused to work overtime and walking off the job, contrary to his supervisor's instruction. The fourth contact report, dated April 20, 1980, involved an employee, Frank Bowerson, who had called his supervisor to request permission not to report for work that day because he wanted to take a trip with his father, was denied such permission on the ground that there was no one available to replace him, but stayed out anyway. The employee was given a 1-day suspension.

Following Carter's termination, Respondent did discharge an employee (Peter Born) for refusal to work overtime. That discharge occurred on August 21, 1980, about 10 days after the filing of the unfair labor practice charge in this case. Born was discharged for leaving his job at his regular quitting time because he wanted to pick up his wife at her place of work.[15] Born, it appears from his personnel file, had on a prior occasion been warned that he would be discharged for future attendance problems. His personnel file was reviewed by DelGaudio before he made his discharge decision. DelGaudio admittedly did not even refer to Carter's personnel file. Moreover, Born, prior to his discharge, was contacted by his department superintendent and allowed to give his version of the events, a practice that DelGaudio admitted was normally followed, but was not in Carter's case.

2. Analysis and concluding findings

On the facts of this case, I believe it clear enough that Carter's refusal to work overtime, contrary to his supervisor's instruction and in violation of Respondent's mandatory overtime rule, constituted insubordinate conduct on his part for which he could have been legitimately disciplined. Prior to Carter's discharge, no employee had been discharged by Respondent for violation of that rule. The question left to be decided, as I see it, boils down to this: Would Respondent have meted out that ultimate disciplinary penalty to Carter but for his union activities? Basically, although perhaps not entirely, it is the General Counsel's position that Respondent's discharge of Carter was violative of Section 8(a)(3) and (1) because it constituted discriminatorily motivated disparate treatment of him. Respondent, on the other hand, argues that the General Counsel has failed to make even a *prima facie* showing to support an inference that Carter's union activities were a motivating factor in its discharge decision; that no adverse inference based on disparate treatment is justified by the evidence in this record; and that, in view of the circumstances involved in Carter's refusal to work overtime, Respondent would have discharged Carter even in the absence of his union activities.

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[14] Campbell was called as a witness by the General Counsel. His testimony discloses that he had been instructed by his supervisor to work overtime 10 minutes before his regular quitting time, that he had refused to do so stating that he had to pick up his wife at her job, and that he had rejected the department superintendent's suggestion that he return to work after driving his wife home. On a subsequent occasion when Campbell had again refused to work overtime and had walked out, he was only given a warning.

[15] Born's reason for refusing to work overtime appears to be similar to the one given by John Campbell who, as earlier noted, was given a 3-day suspension and on a subsequent occasion only a warning for again refusing to work overtime. The Campbell incidents occurred before DelGaudio became works manager.

There are undoubtedly circumstances present in this case that may give rise to a suspicion that Carter would not have been discharged but for the prominent role he had played in the Union's organizational and other activities at Respondent's plant prior to Respondent's refusal to bargain. More suspicion, however, is not enough to support an 8(a)(3) allegation. The law requires supporting evidence of a substantial nature. Although my conclusion in this respect may not be free from doubt, I am not convinced that the evidence in this case is sufficiently substantial to support a finding of discriminatorily motivated disparate treatment, or to support an 8(a)(3) violation finding on any other ground.

It is noted, to begin with, that the evidence in this record that might support an inference of antiunion motivation is weak at best. Such an inference may possibly be drawn from Respondent's unlawful refusal to bargain and the derogatory remark made by Foreman Tracy to Bianco about 6 months before Carter's discharge. But whatever force that evidence might otherwise have is largely diminished in this case by other considerations. Thus, there is no indication that Respondent engaged in any independent 8(a)(1) violations since the advent of the Union on Respondent's scene. What is more important, the record reveals nothing of significance in the timing of Carter's discharge. So far as appears from this record, neither the Union nor Carter had engaged in any union activities at Respondent's plant since Respondent's withdrawal of its recognition of the Union, some 5 months before Carter's discharge. And in view of the pendency of the unfair labor practice case based on the 8(a)(5) charge, and the likelihood that it would be fought by Respondent, if it lost, up through the court of appeals, there was little prospect at the time of Carter's discharge of any revival of the Union's activity at Respondent's plant for a considerable time to come. It is also worthy of note in that connection, although alone by no means controlling, that although Respondent was admittedly aware of Carter's prominent role in union activities for 2-1/2 years prior to his discharge, there is nothing in this record to show that any unlawful discriminatory action was taken against him during that period.

As noted above, the major question here is not whether Respondent had a legitimate basis for disciplining Carter for his refusal to work overtime—clearly it had—but whether the discharge penalty meted out to him for that offense constituted discriminatory disparate treatment. Respondent, so far as this record shows, had no fixed policy with regard to the degree of discipline, if any, that was to be imposed on employees for violating its mandatory overtime or other rules. It was free to base the severity of its discipline upon its assessment of the seriousness of the misconduct involved, so long as it did not take into account considerations that were unlawful under the Act.

In the case of Carter, it cannot be said that Respondent had no justifiable reason, at least from its point of view, for regarding Carter's refusal to work overtime on August 1, 1980, as gross misconduct and insubordination. Respondent considered it of critical importance to its operations to have the electric harness installed in forklift Truck No. 16 as soon as possible. Its fleet of large trucks was in bad condition, with two trucks completely down, one operable only part of the time, and the others in danger of breaking down. If Truck No. 16 were not repaired and another truck were to break down it would have resulted in a curtailment of Respondent's weekend operations. Carter, as his own testimony shows, was made aware by Lammeree the preceding day of the importance of having one of the disabled trucks brought into operable condition by Friday afternoon. He was given 24 hours' advance notice that he would be required to work overtime on Friday, August 1. He was also aware, after Bianco expressed uncertainty as to his ability to install the electric harness, that he (Carter) was the only mechanic available at the time to perform the job. Nevertheless, he refused to work overtime and walked off the job, contrary to his supervisor's direct instructions and in violation of Respondent's mandatory overtime rule.

The law is clear that, prior to drawing an adverse inference based on disparate treatment, a basis for comparing the underlying incidents must be established. *Soldier Creek Coal Company, a Division of California Portland Cement Co.*, 243 NLRB 456, 462 (1980). With the aim of establishing disparity of treatment, the General Counsel called two witnesses, John Praeger and John Campbell, and also introduced into evidence four contact reports from Respondent's personnel records covering the 3-year period prior to Carter's discharge. As appears from the findings made above, although Praeger testified that while working as a mobile mechanic under Lammeree he had refused to work overtime on a number of occasions without being disciplined therefore, he admitted that he had never been faced with a situation, such as was true in Carter's case, where he was expressly directed by his supervisor to work overtime regardless of his stated reason for not wanting do so. In short, Praeger's testimony discloses that his refusals were always with at least the tacit acquiescence of his supervisor, and, therefore, not comparable to Carter's refusal here in question.

Campbell's refusal to work overtime, for which he received a 3-day disciplinary suspension, differs from Carter's, in that Campbell was given only 10 minutes' advance notice and there were others available to do the work, as well as for other reasons indicated in the footnote set out above relating to his suspension. The contact reports in evidence, to which reference has been made above, show that prior to the time DelGaudio became works manager three employees were simply warned for refusing to work overtime, two because they did not want to stay beyond their regular quitting time, and one because he had a part-time job to go to.[16] The contact reports in evidence upon which the General Counsel relies to show disparate treatment do not contain all the relevant facts surrounding the various incidents involved such as: whether or not the employee given the warning had received advance notice that he would have to stay over; whether or not others were available to do the overtime work he was instructed to perform; and whether or not the overtime work was considered critical to plant operations. The contact reports in evidence, therefore, do not provide a sufficient basis for comparison with Carter's situation to support a finding that Respondent's discharge of Carter constituted disciminatory disparate treatment. I so find.

In reaching my conclusion that this record does not support an 8(a)(3) finding, I have not ignored the General Counsel's further argument that Respondent's precipitous action in discharging Carter, without any prior investigation or effort to ascertain Carter's version of the events and without so much as reviewing Carter's personnel file, constitutes evidence of pretext. But in the light of Respondent's grievance procedure which gave Carter the opportunity, which he did not choose to utilize, of presenting his version to DelGaudio, I do not think that the absence of a prior investigation and deviation from other normal procedures is enough in this case without proof of disparate treatment to support an inference that Carter's discharge was unlawfully motivated. Were I sitting on this case as an arbitrator, I might well have viewed the discharge discipline meted out to Carter for his refusal to work overtime, his first offense of that kind, as too harsh a penalty, considering his admitted skill as a mechanic and his 7 years of apparently satisfactory service as an employee. But under the applicable evidentiary standards and principles of law by which I am bound, and notwithstanding the circumstances giving rise to suspicion, I am impelled to conclude that on the record made in that case the General Counsel has not met his burden of establishing by a fair preponderance of credible evidence that Respondent would not have discharged Carter for his insubordinate refusal to work overtime, but for his union activities.

Accordingly, I shall recommend dismissal of the complaint's 8(a)(3) and (1) allegations in Case 5-CA-12517.

CONCLUSIONS OF LAW

1. United States Gypsum Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Paperworkers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union at all times since February 15, 1979, has been, and now is, the exclusive collective-bargaining representative of all employees in the following unit appropriate for purposes of collective bargaining:

> All production and maintenance employees, including quality control department employees and plant clerical employees employed by Respondent at its Baltimore, Maryland, location, excluding office clerical employees, professional employees, guards and supervisors as defined by the Act.

4. By refusing since March 18, 1980, to meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit described above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not, as alleged in the complaint in Case 5-CA-12517, engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices proscribed by Section 8(a)(5) and (1) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom, and from any like or related unfair labor practices, and that it take the affirmative action provided for in the recommended Order below, which I find necessary to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

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[16] As noted above, the other contact report, relating to an occurrence after DelGaudio became works manager, did not involve an overtime situation.

Boston Insulated Wire & Cable Co. *and* General Teamsters, Chauffeurs, Warehousemen & Helpers of Brockton & Vicinity, Local Union No. 653, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 1-RC-17136

January 20, 1982

DECISION AND CERTIFICATION OF REPRESENTATIVE

By Members Fanning, Jenkins, and Zimmerman

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held February 26, 1981,[1] and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief[2] and hereby adopts the Regional Director's findings and recommendations.

We agree with the Regional Director that the Petitioner made no material misrepresentations which warrant setting aside the election. We also find, for the reasons set forth below, that the electioneering conducted by the Petitioner's agents during the balloting was insufficient to warrant an inference that it interfered with the exercise of the employees' free choice.[3]

The balloting took place in a room, herein the polling place, located on the ground floor of the Employer's Building #2. The entrance to the polling place was approximately 10 feet up a corridor[4] from a set of glass-paneled doors opening to the Employer's parking lot. Through these doors, a person standing in the parking lot could view the corridor, the entrance to the polling place, and parts of the polling place itself. The Employer presented evidence that, during the balloting, agents of the Petitioner passed out a campaign leaflet and spoke to employees as they entered both the main entrance to the building and the glass-paneled doors on their way to vote or work. The Employer also presented evidence that, as the line of employees waiting to vote backed up to the glass-paneled doors, which were closed, the Petitioner's agents peered through the doors and continued to pass out literature and talk to entering employees.

It is the Board's province and duty to safeguard its electoral processes from conduct which inhibits the free exercise of employee choice. In carrying out this duty, "the Board is extremely zealous in preventing conduct which intrudes upon the actual conduct of its elections." *Claussen Baking Company*, 134 NLRB 111 (1964). Thus, the Board prohibits electioneering "at or near the polls."[5] And, as means of enforcing this ban against electioneering, the Board will set aside an election on the basis of any prolonged conversations between a representative of a party to the election and employees waiting in line to vote, without inquiring into the nature of the conversation itself, *Milchem Inc.*, 170 NLRB 362 (1968).[6] Such prohibitions, of course, are not required by the Act. Rather, they have been devised by the Board under its authority to regulate its own election procedures and serve to eliminate the unfair advantage gained by last-minute electioneering and pressure as well as to minimize the distraction and interference which result therefrom. As the Board stated in *Milchem*, "[t]he final minutes before an employee casts his vote should be his own, as free from interference as possible."

Nevertheless, the Board does not apply its "no electioneering" rules to set aside elections whenever electioneering takes place "at or near the polls," regardless of the circumstances. While the Board seeks to establish election conditions as ideal as possible, "elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards."[7] A representation election is often the climax of an emotional, hard-fought campaign and it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls.[8]

When faced with evidence of impermissible electioneering, the Board determines whether the conduct, under the circumstances, "is sufficient to warrant an inference that it interfered with the free

259 NLRB No. 149

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[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 69 for and 66 against, the Petitioner. There were no challenged ballots.

[2] The Employer has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and positions of the parties.

[3] Our determination herein is based on the evidence presented by the Employer during the investigation of the objection, which we have assumed to be true and which has not been disputed. A hearing is, therefore, unnecessary.

[4] At the opposite end of the corridor, a stairway leads to the main entrance of the building.

[5] *Claussen Baking Company, supra.*

[6] The Employer does not contend that the election herein should be set aside on the basis of the strict *Milchem* rule, though it does argue that the *Milchem* principles should be applied here.

[7] *The Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954). While *Liberal Market* involved the effect of antecedent conduct upon a Board election, the standard is equally applicable to allegations of improper electioneering.

[8] Courts have recognized that the Board has "broad discretion in creating and enforcing standards to ensure fair elections." *Hall-Brooke Hospital v. N.L.R.B.*, 645 F.2d 158 (2d Cir. 1981). See also *N.L.R.B. v. Vista Hill Foundation*, 639 F.2d 479 (9th Cir. 1980); *N.L.R.B. v. Campbell Products Department*, 623 F.2d 876 (3d Cir. 1980).

choice of the voters."[9] This determination involves a number of factors. The Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering,[10] and whether it is conducted by a party to the election or by employees.[11] The Board has also relied on whether the electioneering is conducted within a designated "no electioneering" area[12] or contrary to the instructions of the Board agent.[13]

Under the circumstances of this case, we find the evidence of electioneering presented by the Employer insufficient to warrant an inference that it interfered with the exercise of the employees' free choice. It is undisputed that the electioneering was conducted away from the polling place and was not directed at employees waiting in line to vote. The area immediately outside the glass-paneled doors had not been designated a "no-electioneering"[14] area and the electioneering did not violate any instructions by the Board agent. Most significantly, voters standing in line to vote were separated from the electioneering by the set of doors, which remained closed during the balloting. Thus, while the entrance to the polling place was only 10 feet from the glass-paneled doors and, at times, the line of voters backed up to those doors, the voters, once in the corridor, were insulated from the electioneering. Accordingly, we shall overrule the objection and certify the Petitioner.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for General Teamsters, Chauffeurs, Warehousemen & Helpers of Brockton & Vicinity, Local Union No. 653, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

> All production and maintenance employees employed by the Employer at its Plymouth, Massachusetts location excluding quality control employees, technical employees, office clerical employees, guards and supervisors as defined in the Act.

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[9] *Star Expansion Enterprises*, 170 NLRB 364, 365 (1968). Of course, conduct which violates the strict *Milchem* rule is found to constitute *per se* interference with the free choice of the voters.

[10] See *Cabs Housekeeper Service, Inc.*, 241 NLRB 1259 (1979). See also *Harold W. Moore d/b/a Harold W. Moore & Son*, 173 NLRB 1258 (1968). Even the Board's strict *Milchem* rule does not apply to any "chance, isolated, innocuous comment or inquiry" between a party to the election and a voter.

[11] In regulating the conduct of elections, the Board has long distinguished between the conduct of parties to the election and the conduct of employees. See, generally, *Orleans Manufacturing Co.*, 120 NLRB 630 (1958). Thus, the *Milchem* rule applies only to prolonged conversations between parties to the election and voters. See *N.L.R.B. v. Campbell Products Department, supra* and *N.L.R.B. v. Slagle Manufacturing Company*, sl. op. #80-1088 (10th Cir. 1981). This distinction has been applied to other types of electioneering as well. *Niagra Wires, Inc.*, 237 NLRB 1347 (1978). Third-party conduct must be "so disruptive" as to require setting aside the election. *Robert's Tours, Inc.*, 244 NLRB 818 (1979).

[12] *Marvil International Security Service*, 173 NLRB 1260 (1968); *Cabs Housekeeper Service, Inc., supra.*

[13] *Star Expansion Enterprises, supra.* The electioneering herein was not of such a nature or extent that it was brought to the attention of the Board agent.

[14] The Board has found the absence of a designated "no electioneering" area to be significant. *Sewanee Coal Operators' Association, Inc.*, 146 NLRB 1145 (1964). As the Board stated in *Marvil International Security Service, Inc., supra.*

> [T]he establishment of an area in which electioneering is not permitted must in the first instance be left to the informed judgment of the Regional Director and his agents conducting the election. They are on the scene and familiar with the physical circumstances surrounding the location of the polls.

Amalgamated Clothing and Textile Workers Local Union 148T, AFL–CIO–CLC (Leshner Corporation) *and* Deborah Susan Blaydes. Case 9–CB–4312

January 20, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 8, 1981, Administrative Law Judge Elbert D. Gadsden issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We disagree with the Administrative Law Judge's conclusion that the Respondent violated Section 8(b)(1)(A) by failing to represent fairly employee Deborah Blaydes.

On April 18, 1979, Blaydes was involved in separate physical altercations during worktime—one with employee Charlene Lewis, the other with employee Connie Butterly. All three employees were fired pursuant to an employer rule against fighting. Thereafter, Blaydes and Lewis filed grievances.

The Administrative Law Judge found that, at the first-step grievance meeting, Plant Manager Paul Moritz stated that the Employer was willing to reinstate Blaydes but not Lewis. The record indicates that the Employer's position was based on its belief that Blaydes had not been the aggressor in either fight and merely had defended herself. The Administrative Law Judge also found that the Respondent's officials, particularly Mary Shirley, financial secretary, responded to the Employer's "offer" by insisting that it was company policy to discharge all employees involved in a fight or none and, therefore, both grievants should be reinstated or neither. At the second grievance meeting, Moritz again stated that the Employer would reinstate Blaydes, but not Lewis, whom Moritz termed a "troublemaker." The Respondent's representatives again insisted that both grievants or neither be reinstated. Because Lewis could not attend the second-step meeting, a third meeting was held so that she could give her version of the events. During that meeting, George Meyer, the Respondent's business representative, requested that both Blaydes and Lewis be reinstated, with Mary Shirley adding that the Employer should reinstate both grievants if it were going to reinstate one. Harold Carpenter, plant supervisor, replied that he would have brought Blaydes back but that "now" he would "have to take it to the Company." Subsequently, the Respondent was notified in writing that both grievances were denied. The Respondent did not process either grievance to arbitration.

The Administrative Law Judge concluded, without supplying a rationale, that the Respondent's refusal to accept the Employer's "offer" to reinstate Blaydes, but not Lewis, and its "squeeze play" of insisting that both employees be reinstated or neither constituted a breach of its duty of fair representation to Blaydes. He further concluded that, having rejected the Employer's "offer," the Respondent's failure to take Blaydes' grievance to arbitration was arbitrary and likewise a breach of its duty of fair representation.

A union breaches its statutory duty of fair representation when its conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory, or in bad faith.[1] There is no evidence or contention that the Respondent's actions regarding Blaydes' grievance were the result of bad faith or hostility toward Blaydes. Nor is there any evidence of disparate treatment. To the contrary, the Respondent, in processing the grievances, argued that both Blaydes and Lewis should be reinstated. Finally, it cannot be said that the Respondent, having decided to process the grievances, did so in a perfunctory manner, for it actively advocated its position. The only issue in this case, therefore, is whether the Respondent, by taking the position that it took and then abandoning Blaydes' grievance short of arbitration, acted arbitrarily. Contrary to the Administrative Law Judge, we find that it did not.

There is nothing in the record to indicate that the Respondent's position that both Blaydes and Lewis be reinstated or neither was anything other than a good-faith, honest attempt to secure the reinstatement of both grievants. The Respondent also owed a duty of fair representation to Lewis. We see no reason why its duty to represent Blaydes fairly and act as her advocate required it to accept the Employer's offer to reinstate Blaydes at the expense of Lewis' continued employment.[2] The

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[1] *Truck Drivers, Helpers, Taxicab Drivers, Garage Employees and Airport Employees Local Union No. 335, affiliated with International Brotherhood of Teamsters, Warehousemen and Helpers of America (Monarch Institutional Foods)*, 229 NLRB 1319 (1977), affd. 597 F.2d 388 (4th Cir. 1979).

[2] The Employer's "offer" to reinstate Blaydes was, by its own terms, conditioned upon the Respondent's acceptance of its refusal to reinstate Lewis. At no time did any employer representative offer to reinstate

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Board has held that a union "has a wide range of discretion in serving the unit it represents"[3] and the Respondent's response to the Employer's "offer," a response which sought to obtain the reinstatement of both grievants, certainly falls within that discretion. The Respondent's position was based on the Employer's policy of discharging all employees involved in a fight, or none, and, therefore, it cannot be said to be arbitrary or based on irrelevant considerations. Moreover, while the position taken by the Respondent resulted ultimately in the denial of Blaydes' grievance, it is only through hindsight that the Respondent's good-faith attempts to secure the reinstatement of both Blaydes and Lewis can be called into question.

Nor did the Respondent's failure to arbitrate Blaydes' grievance violate its duty of fair representation. Contrary to the Administrative Law Judge, the mere fact that the Respondent refused to accept the Employer's offer to reinstate Blaydes but not Lewis did not obligate it to process Blaydes' grievance to arbitration. Rather where, as here, a union undertakes to process a grievance but decides to abandon the grievance short of arbitration, the finding of a violation again turns on whether the union's disposition of the grievance was arbitrary or motivated by ill will or other invidious considerations.[4] There is no evidence that the Respondent's failure to invoke arbitration was based on animosity, discrimination towards Blaydes,[5] or irrelevant considerations. Also, the record establishes that, following the denial of the grievances, a discussion on their merits took place during the Respondent's July 1979 union meeting.[6] Thus, this is not a case where a union, having undertaken to process a grievance, abandoned it without reason or merely at the whim of someone exercising union authority.[7] We therefore find that the Respondent did not arbitrarily dispose of Blaydes' grievance and shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

DECISION

Statement of the Case

Elbert D. Gadsden, Administrative Law Judge: Upon unfair labor practice charges filed in Case 9-CB-4312 on August 6, 1979, by Deborah Susan Blaydes, an individual, herein called Blaydes or the Charging Party, against Amalgamated Clothing and Textile Workers Local Union 148T, AFL-CIO-CLC, herein called Respondent, a complaint was issued by the Regional Director for Region 9 on behalf of the General Counsel on April 25, 1980.

The complaint alleges in substance that in each of three separate grievance meetings Respondent refused to accept Employer's offer of reinstatement of the Charging Party because Respondent desired Employer to reinstate other discharged employees along with the Charging Party, and Employer refused to reinstate the other dischargees; and that Respondent refused to process to arbitration a grievance concerning the discharge of the Charging Party, pursuant to provisions of the collective-bargaining contract with Employer. By these acts and omissions, the complaint alleges that Respondent failed to represent the Charging Party, for reasons which are unfair, arbitrary, and invidious, thereby resulting in a breach of the fiduciary duty owed employees it represents; and that by such acts and omissions, Respondent has restrained and coerced its employees in the exercise of their protected Section 7 rights, in violation of Section 8(b)(1)(A) of the Act.

The hearing in the above matter was held before me in Cincinnati, Ohio, on April 13 and 14, 1981. Briefs have been received from counsel for the General Counsel and counsel for Respondent, respectively, which have been carefully considered.

Blaydes without adding that the Employer would not reinstate Lewis. In his brief to the Administrative Law Judge, the General Counsel, relying on the testimony of Plant Supervisor Carpenter, contended that the "offer" to reinstate Blaydes was, in fact, unconditional. While Carpenter testified that the Employer, by its "offer," was willing to reinstate Blaydes and continue processing Lewis' grievance, he also testified that, "When they said all or none, we said if we couldn't take just her [Blaydes] back, we would take none." Of course, the Employer did not need the Respondent's approval before it could unilaterally reinstate Blaydes without reinstating Lewis. However, even assuming that the Employer intended its "offer" to be unconditional, it was not stated in those terms.

[3] *Ohio Valley Carpenters District Council, Local Union No. 415, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Cincinnati Fixtures, Inc.)*, 226 NLRB 1032 (1976); *Truck Drivers, Helpers, Taxicab Drivers, Garage Employees and Local Union No. 355, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Monarch Institutional Foods), supra.* See, generally, *Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953).

[4] *Local 417, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Falcon Industries, Inc.)*, 245 NLRB 527 (1980).

[5] The Respondent also failed to take Lewis' grievance to arbitration.

[6] Business Agent Meyer, then Grievance Chairman Magnolia King, Financial Secretary Mary Shirley, and employee Barbara Grubb, all testified that, following the discussion, the membership voted not to invoke arbitration. Meyer further testified that the discussion included the likelihood of winning an arbitration. On the other hand, Bea Miranda, the Respondent's president at the time, testified that, although the grievances were discussed at the July meeting, no vote or action was taken. The Administrative Law Judge made no finding on the extent of the discussion or on whether a vote was taken. Nevertheless, it is the General Counsel's burden to prove that the Respondent acted arbitrarily. Since the record establishes that, at a minimum, some discussion on the merits of the grievances preceded the Respondent's failure to invoke arbitration, we cannot find that the Respondent acted arbitrarily or without reason.

[7] *Local 417, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Falcon Industries, Inc.), supra.*

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

Findings of Fact

I. JURISDICTION

At all times material herein, Employer Leshner Corporation, herein called Employer, an Ohio corporation with an office and place of business in Hamilton, Ohio, has been engaged in the manufacture of textile products.

During the past 12 months, a representative period, Employer, in the course and conduct of its business operations, purchased and received at its Hamilton, Ohio, facility products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Ohio.

The complaint alleges, the Employer admits, and I find that Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Amalgamated Clothing and Textile Workers Local Union 148T, AFL-CIO-CLC, herein called Respondent or Union, is now and has been at all times material herein a labor organization within the meaning of section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

At all times material herein, Respondent, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive bargaining representative for purposes of collective bargaining with respect to rates of pay, wages, hours, and other terms and conditions of employment, of all employees of Employer in the following unit:

> All employees in the Old or South Plant in Hamilton, Ohio with the following exceptions: superintendents, foremen, office employees, and watchmen.

At all times material herein the following-named persons occupied the positions set opposite their respective names, and are now, and have been, agents of Respondent within the meaning of Section 2(13) of the Act: Jerilene Miller, steward; Mary Shirley, steward; Bea Miranda, president; Meg King, chief steward; and George Meyer, business agent.

At all times material herein, Respondent and Employer have maintained and enforced a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of the employees in the unit described above, which agreement includes, *inter alia*, a grievance and arbitration procedure.

The parties herein stipulated that George Meyer is a joint board manager for Respondent and Local 2297; that Respondent, Local 148T, and Local 2297 have the same mailing address: 215 West Wyoming Avenue, Cincinnati, Ohio, and the same telephone number: 761-1797.[1]

B. *The Propriety of Notice of the Charge Upon Local 148T*

The parties herein stipulated that on August 6, 1979, Charging Party (Blaydes) filed a charge against Amalgamated Clothing and Textile Workers Local 2297, AFL-CIO-CLC, and that a copy of said charge was served by registered mail on August 6, 1979. Thereafter, the charge was dismissed by the Regional Director for Region 9 on September 24, 1979, because he concluded that the burden of establishing a violation of Section 8(b)(1)(A) of the Act could not be sustained, and a complaint was not issued. This determination was appealed by Charging Party and sustained. Consequently, a complaint was issued on April 25, 1980, alleging that Local 2297 violated Section 8(b)(1)(A) of the Act by failing to fairly represent the Charging Party (Blaydes) in processing her grievance in reference to her discharge.

An amended complaint was issued on January 19, 1981, correcting the name of Respondent Union to Amalgamated Clothing and Textile Workers Local 148T, AFL-CIO-CLC, and containing the identical allegations set forth in the original complaint. At the hearing herein, the parties stipulated that George Meyer is the joint board manager and business agent for Respondent (Local 148T) and Local 2297; and that Respondent and Local 2297 have the same mailing address, and the same telephone number but separate and distinct bargaining agreements, covering different units of employees of Employer. Nonetheless, counsel for Respondent argues that neither a charge nor an initial complaint was ever filed against Local 148T, but rather, Local 148T was served with an amended complaint without having first been served with a charge addressed to it. or an original complaint. Therefore, counsel for Respondent contends that Local 148T was not properly served according to Board rules, and that the amended complaint herein should be dismissed.

However, the record shows that Meyer testified and counsel for Respondent acknowledged at the hearing that Respondent knew that the charge herein was intended for Respondent (Local 148T); that upon receipt of the charge, George Meyer made arrangements for certain officers of Respondent to meet with the Board agent investigating the charge; and that some of Respondent's officers gave statements to the investigating Board agent. It is also observed by me that the record does not show that Respondent objected to service of the charge or the initial complaint herein prior to service of a copy of the amended complaint. In fact, in paragraph 1 of its answer to the initial complaint, Respondent admits to service of the charge. It is apparent, however, that although Respondent denied such service in its answer to the amended complaint, such denial was not filed until sometime after January 14, 1981, subsequent to some of the investigations to which Manager Meyer assented and with which he cooperated.

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[1] The facts set forth above are undisputed and are not in conflict in the record.

Counsel for Respondent renewed its motion for dismissal of summary judgment at the hearing based upon his argument heretofore alluded to.

However, in view of the fact that Manager Meyer accepted a copy of the charge served upon him, admitted that he knew it was intended to be against Local 148T, whom he also represents, and thereafter made arrangements for, and cooperated with a Board investigation of Local 148T officials, pursuant to said charge, I conclude and find that Respondent (Local 148T) was not misled either by the substance of the charge, or by the fact that it was mistakenly addressed to Local 2297. Respondent was not prejudiced by the charge because the allegations contained therein were identical to the allegations in the amended complaint. Although the amended complaint was labeled "amended," it was amended to reflect only Respondent's correct title, not its address or the substance of the allegations. Thus, for all practical purposes, Respondent received a copy of the original complaint bearing its correct name, for which it knew the charge and the original complaint were intended.

For the foregoing reasons, I further conclude and find that the mere technical misnomer of Respondent in the charge and original complaint herein is not a sufficient ground for the dismissal of the amended complaint, pursuant to Section 10(b) of the Act. *American Geriatric Enterprises, Inc., and its wholly-owned subsidiary Hamilton Medical Convalescent Center, Inc.*, 235 NLRB 1532 (1978), and *Ross Sand Company, Inc. d/b/a Rosco Concrete Pipe Co., Inc.*, 219 NLRB 915 (1975). I also find that, since Respondent had actual notice of the charge (Meyer knew the charge was for Local 148T), said charge and amended complaint were validly and timely served within the meaning of Section 10(b) of the Act. *Peterson Construction Company, Inc.*, 106 NLRB 850 (1953), and *American Steamship Company, a subsidiary of General American Transportation Corporation*, 222 NLRB 1226 (1976).

Accordingly, counsel for Respondent's motion to dismiss the complaint, or for summary judgment, is hereby denied.

C. *An Altercation With Some Physical Contact Between Two Employees During Working Time*

Dischargee Deborah (Debby) Blaydes was employed by Respondent on April 18, 1978, until April 24, 1979. During working time on April 24, 1979, Blaydes testified that they had an extra girl that night and she worked on the assembly line as usual whenever they had an extra girl. She was assigned there by Steve Gay, supervisor of her shift. Another girl was assigned to be relief girl, which involved relieving girls at their work station in order to permit them to go to the restroom or for other personal reasons. Blaydes said one girl hollered back to her for relief, and she went to the girl and told her that she was not relieving and that she would have to wait for the girl who was relieving. Thereafter, Connie Butterly hollered at her, saying Linda had to go to the restroom. Blaydes said she told her that she was not relieving, that Lisa Haddock was, and that she had already sent a message to that effect to Linda. About 10 or 15 minutes later, Blaydes said a spot was coming through on the material and she went to talk to the machine operator about it. Connie Butterly told her again that Linda had to go to the restroom. Blaydes said she told her she was not doing it and that she had sent word by Butterly's husband that she was not relieving. The testimony in this regard is rather conflicting, however, it appears that Butterly told Blaydes not to use her husband as her personal slave or as her messenger boy and, according to Union President Bea Miranda, Connie Butterly told her Blaydes said, "She would take her husband up to the hayloft and show him a good time." Other witnesses testified Blaydes told Butterly "F—— you, and the broom you rode in on." Blaydes testified she could not recall what the conversation was between herself and Connie Butterly at this juncture.[2] Nevertheless, Butterly's husband was a machine operator and he was the one who was supposed to come and get the relief girl whenever one of the employees wanted to go to the restroom.

Butterly left her machine and grabbed Blaydes around the neck, proceeding to choke and scratch her about the neck and face. Machine operator Keith came over and commenced pulling Butterly off Blaydes. The record shows from all testimonial accounts that Blaydes simply tried to block and pull the hands and arms of Butterly in an effort to avoid being hurt, without retaliating in any way with physical force. Subsequently, Supervisor Steve Gay assigned her to a machine and dryer, and another girl continued to serve as relief girl.

Fifteen minutes prior to the end of her shift, Blaydes testified she went to the restroom and, as she was leaving there, Charlene Lewis hollered to her, requesting to be relieved. Lewis continued to holler at her, and Blaydes said she continued walking without responding. Then, Lewis said something to her and she (Blaydes) turned around and made a reply which she cannot now recall, but adding that she did not want to hear what Lewis had to say. Blaydes said she returned to her work station. Lewis stopped her machine and came to her work station and grabbed her around the neck. All testimonial accounts of record clearly show that, while both Lewis and Butterly, respectively, attacked Blaydes by grabbing her around the neck, choking her, scratching her around the neck and face, and/or pulling her hair, Blaydes did not at any time retaliate against them physically. Blaydes simply tried to defend herself by holding the hands and arms of Butterly and Lewis.

The testimonial accounts nevertheless show that, during their altercation, Blaydes told Butterly and Lewis, "F—— you, and the broom you rode in on."[3]

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[2] Although Blaydes said she did not recall telling Butterly, "F—— you," or the remarks in reference to taking Butterly's husband up in the hayloft, I nevertheless credit Miranda's testimony because I was persuaded by her demeanor as well as the unobjected to testimonial reports of participants in the grievance meetings that Blaydes made such a remark, as well as telling Butterly, "F—— you, and the broom you rode in on." Moreover, Blaydes did not categorically or convincingly deny she made the former remarks.

[3] Although Blaydes impliedly denied that she used such language, I was persuaded by her demeanor while testifying, as well as by the consistent testimonial accounts of what transpired in the grievance meetings,

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Blaydes also testified that Supervisor Gay was one of the persons who separated her and Lewis, and she asked him if she was going to be fired and Gay said he did not know, he would have to talk with management. On the next day, April 25, 1979, Supervisor Gay gave her a written warning and advised her she was fired. Charlene Lewis and Connie Butterly were also fired on the same day.

D. *Grievance Committee Meetings and Union Membership Meeting in Reference to Dischargee Deborah Blaydes' Grievance*

A composite of the essentially corroborated testimonial accounts of what was discussed, and what was generally understood and agreed upon during three grievance committee meetings and two union membership meetings, with respect to the grievances filed by Deborah (Debby) Blaydes and Charlene Lewis, is as follows:

Present at the *first*-step grievance committee meeting in or about early May 1979 were: Paul Moritz, plant manager, Supervisor Steve Gay, for Employer, union officials Bea Miranda, Jerilene Miller, and Mary Shirley, for the Union, and grievant Deborah Blaydes. After Blaydes told her version of the April 24 incidents, as she previously testified herein, Supervisor Steve Gay said his investigation of the incidents indicated dischargee Connie Butterly had attacked Blaydes and the former acknowledged she was in the wrong.

A concensus of the grievance committee, as did a consensus of members at a May union meeting, concluded that dischargee Butterly was the aggressor in the incident between Blaydes and Butterly; that dischargee Charlene Lewis was the aggressor in the incident between Blaydes and Lewis; and that Blaydes was passive and only defensive in blocking or trying to remove the hands and arms of Butterly, and later, the hands and arms of Lewis from around her neck, in an effort to prevent them from choking her, scratching her face and neck, or pulling her hair. It was the view of the grievance committee that Blaydes had been assaulted by Butterly and Lewis, respectively, and that Blaydes did not retaliate, and therefore, should not have been fired.

Plant Manager Moritz then offered Blaydes her job back and Mary Shirley said it was company policy to discharge both or all employees involved in a fight. Moritz nevertheless again offered Blaydes her job or stated he wanted to reinstate her. Mary Shirley said, "No," the Company had to take both Blaydes and Butterly back, or neither one. Charlene Lewis was not present and the committee wanted to hear her version of the incident, so the meeting was adjourned.

Present at the *second*-step grievance committee in or about late May 1979 were: Plant Manager Paul Moritz, Plant Supervisor Harold Carpenter, and Second Shift Supervisor Steve Gay, for Employer; Business Agent George Meyer, Bea Miranda, Mary Shirley, and Meg King, for the Union; floorlady Kathy Heatherly, and grievant Deborah Blaydes. Bea Miranda announced that Charlene Lewis would not be present because she was in the hospital. Blaydes was asked to tell her story and she did, essentially as she testified in this proceeding. Supervisor Gay told his story, essentially as he did in the first grievance meeting. A concensus of the committee again concluded that Butterly was the aggressor and Lewis was the aggressor, respectively, in each instance with Blaydes, who was the passive victim in each attack.

Thereafter, Plant Manager Paul Moritz said he would reinstate Blaydes to her job, but not Charlene Lewis, because she was a troublemaker. Plant Supervisor Harold Carpenter said he thought both Blaydes and Lewis should be reinstated. Mary Shirley said both should be reinstated or neither, in accordance with company policy. Business Agent Meyer said he could not make a decision until he heard Lewis' version of the incident. Thereupon the meeting was adjourned.

Present at the *third*-step grievance meeting on or about June 7, 1979: Business Agent George Meyer, Bea Miranda, Jerilene Miller, Meg King, and the testimony is conflicting as to whether Mary Shirley was present, for the Union. Plant Supervisor Harold Carpenter and Plant Manager Paul Moritz were present for Employer, and grievant Charlene Lewis. Grievant Blaydes was asked to leave before the meeting started because the committee had already heard her version. Lewis told her version of the incident which was essentially the same as Blaydes' testimonial account herein. The concensus of the committee was the same as it was in the two prior grievance meetings, with respect to what each dischargee did. Business Agent Meyer asked to have Blaydes reinstated to her job and Mary Shirley said, "If you're gonna bring one of them back, bring 'em both." Carpenter said he would have brought Blaydes back but now he would have to take it to the Company (Employer). The meeting was adjourned. Subsequently, Carpenter did advise the Union, in writing, pursuant to its request, that both grievances (Blaydes and Lewis) were denied by Employer.

There was a union membership meeting in early July 1978, and Deborah Blaydes, Mary Fields, Bessie Markham, George Meyer, Mary Shirley, and Bea Miranda were present. Blaydes told Shirley she (Shirley) cost her (Blaydes) her job. An argument ensued between Blaydes and Shirley and Blaydes got angry and left the meeting. Before leaving, she asked Meyer was the Union going to process her grievance to arbitration and Meyer said he did not know. Since the Union was advised by Employer (Carpenter) that the grievances (of Blaydes and Lewis) were denied, no action was taken by the Union to process Blaydes' grievance to arbitration, pursuant to the contract. In reference to the grievances, Mary Shirley and Meg King testified that *the job of the Union is to try to have the discharged employees reinstated.*

Supervisor Carpenter testified that the Union never contacted him about taking Blaydes' grievance to arbitration. He further testified undisputedly that Blaydes' grievance was denied. It was determined at the last grievance meeting that the Union would not allow Employer to reinstate Blaydes without reinstating Lewis and Butterly, and "I had no alternative but to deny the griev-

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that Blaydes did use the above language towards Butterly and Lewis. Consequently, I discredit Blaydes' denial and credit the testimony that she used said language.

ances of all three dischargees." Carpenter continued to testify in this regard as follows:

> Q. What do you mean by you had no alternative?
>
> A. Well, the Union says we either take none or all. We wasn't going to take them all, so we denied the grievance and didn't take anybody. . . .
>
> Q. Now, you have mentioned the fact that you had no alternative in view of what we have discussed here, you had no alternative but to fire all three. What do you mean you had no alternative? What would prevent you from reinstating?
>
> A. Not to hire her.
>
> Q. What do you mean, you had no alternative?
>
> A. In other words, the union said take them all or none.
>
> Q. Yes?
>
> A. We were willing to take Debby back. When they said all or none, we said if we couldn't take just her back, we would take none.
>
> Q. Was there anything that would prevent you from taking Debby back?
>
> A. We'd have more problems with the union.

Additionally, according to the undisputed testimony of Carpenter, Employer's policy simply says, "all parties involved in a fight will be discharged." He said, "It does not say, all or none may be kept or rehired."

Analysis and Conclusions

Section 8(b)(1)(A) of the Act provides, in part as pertinent herein, as follows: "It shall be an unfair labor practice for a labor organization or its agents—to restrain or coerce employees in the exercise of the rights guaranteed in section 7."

In construing the application of Section 8(b)(1)(A) of the Act, the U.S. Supreme Court and the Board have held that a union with "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members, without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca et al. v. Sipes*, 386 U.S. 171 (1967), and *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962).

In the instant case, it is unequivocally clear from the uncontroverted evidence of record that, in each of the three grievance committee meetings, Employer was of the view that Deborah Blaydes was the passive victim of the attacks of Butterly and Lewis, and thereupon offered to reinstate Blaydes but not Charlene Lewis. Butterly did not pursue a grievance, so some members of the Union (Mary Shirley) insisted that Emloyer reinstate Blaydes and Lewis, or neither.

Although it was established that Employer had a policy which provided that all employees involved in a fight will be discharged, the word "fight" was not defined and the policy did not prescribe conditions upon which Employer would retain or reinstate an employee who was involved in a fight. Notwithstanding the absence of such a definition, the evidence is clear that, at least with respect to Deborah Blaydes, Employer does not equate a passive victim of an attack with physical force as an employee involved in a fight. Even if Blaydes' foul language to Butterly and Lewis actually provoked them, words alone do not constitute an assault. Moreover, such words cannot be asserted in self-defense to justify physical attack upon a person.

Employer's view of Blaydes' part in both incidents is consistent with the common understanding of the word "fight"—to take part in a physical struggle,[4] as distinguished from "altercation"—an angry or heated argument.[5] Apparently Blaydes and Lewis were discharged before all of the details of each incident were known by Employer. However, the record shows that after Employer was satisfied that Blaydes was a passive victim in both episodes, it immediately applied its policy with a construction that a passive nonretaliating victim was not what it meant by being involved in a fight. Nevertheless, some union members (Shirley and King) ignored Employer's construction of its policy and its decision to reinstate Blaydes, and continued to maintain that Blaydes was involved in two fights and insisted that Employer reinstate Blaydes and Lewis, or neither of them.

When Employer learned that some union members of the grievance committee were not relenting to Employer's offer to reinstate Blaydes, but not Lewis, it gave in to the Union's alternative and did not reinstate Blaydes or Lewis. As Plant Supervisor Harold Carpenter testified, Employer did not want to have problems with the Union so it opted not to reinstate either employee.

At the July union meeting, Blaydes asked Business Agent George Meyer whether her grievance was being processed to arbitration pursuant to the arbitration provision of the contract. Meyer replied he did not know, he would have to think about it. Blaydes' grievance was not processed to arbitration in accordance with the arbitration provision of the contract, and Respondent is not shown to have made an effort to do so. Consequently, under the foregoing circumstances, I find the evidence sufficient to support a conclusion that Respondent refused to accept Employer's offer to reinstate Blaydes. Its failure to process her grievance to arbitration was therefore arbitrary conduct, having a coercive and restraining effect upon the exercise of employees' rights protected by Section 7, and in violation of Section 8(b)(1)(A) of the Act.

Additionally, I find that Respondent's failure to process Blaydes' grievance to arbitration, and its "squeeze play" of insisting Employer reinstate Blaydes and Lewis, the established aggressors, or neither of them, constituted a breach of Respondent's fiduciary duty to fairly represent Blaydes, in violation of Section 8(b)(1)(A) of the Act.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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[4] "Webster's New World Dictionary" (2d Ed. 1972).

[5] "Webster's New World Dictionary," *supra*.

Having found that Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent has restrained and coerced its members by repeatedly and arbitrarily refusing to accept Employer's offer to reinstate dischargee Deborah Blaydes, unless Employer also reinstate dischargee Charlene Lewis, or neither employee, and finally to further process Blaydes' grievance to arbitration; that Respondent also further coerced its members by breaching its fiduciary duty fairly to represent her, all in violation of Section 8(b)(1)(A) of the Act, the recommended Order will provide that Respondent cease and desist from engaging in such unlawful conduct, and that it promptly request Employer to reinstate Deborah Blaydes to her former position or, if such position no longer exists, to a substantially equivalent position, or, if Employer refuses to reinstate Blaydes, Respondent should request Employer to process a grievance over said employee's discharge and pursue such grievance in good faith and due diligence, including permitting Blaydes to have counsel or other representative of her own choosing during such grievance arbitration proceeding, and reimburse Blaydes for the reasonable cost thereof, and Respondent shall make Blaydes whole for any loss of earnings she may have suffered as a result of her discharge on April 25, 1979, until such time as Blaydes is reinstated by Employer, or said employee obtains other substantially equivalent employment.

Upon the basis of the above findings of fact and upon the entire record of this case, I make the following:

CONCLUSIONS OF LAW

1. Leshner Corporation, Employer herein, is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Local Union 148T, AFL-CIO-CLC, Respondent herein, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By repeatedly and arbitrarily refusing to accept Employer's offer to reinstate dischargee Deborah (Debby) Blaydes, and failing to process her grievance to arbitration, Respondent violated Section 8(b)(1)(A) of the Act.

4. By repeatedly and arbitrarily failing to process dischargee Deborah (Debby) Blaydes' grievance to arbitration, Respondent breached its fiduciary duty fairly to represent Deborah (Debby) Blaydes, in violation of Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Worksman Trading Corporation *and* Local 29, Retail, Wholesale Department Store Union, AFL-CIO. Case 29-CA-8163

January 20, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On July 15, 1981, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief,[1] and has decided to affirm the rulings, findings,[2] and conclusions [3] of the Administrative Law Judge and to adopt his recommended Order.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Worksman Trading Corporation, Ozone Park, New York, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge any of our employees because of their activities on behalf of Local 29, RWDSU, AFL-CIO, or to discourage any employee from joining or supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under the National Labor Relations Act.

WE WILL offer to Robert Thomas, Juan Rivera, Joseph Lomuscio, Tyrone Townsend, and John Dantzler their jobs back and pay them all moneys they lost, plus interest, because of their unlawful layoff on July 14, 1980.

WORKSMAN TRADING CORPORATION

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: On July 18, 1980, Local 29, Retail, Wholesale Department Store Union, AFL-CIO (herein called the Union), filed the unfair labor practice charge in this case, pursuant to which the General Counsel of the National Labor Relations Board was authorized to investigate the Union's contentions therein that Worksman Trading Corporation (herein called Respondent) violated the National Labor Relations Act, as amended (herein called the Act). On September 10, 1980, the General Counsel issued a complaint against Respondent alleging, among other things, that it violated Section 8(a)(1) and (3) of the Act by having discharged five of its employees because of their activities on behalf of the Union and in order to discourage the employees of Respondent from joining or supporting the Union. Respondent filed a timely answer. The pleadings, together with stipulations received at this hearing, placed in issue the alleged discriminatory discharges of those five employees. The hearing was held before me on April 27, 28, and 30, 1981, in Brooklyn, New York.

Upon the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the oral arguments made by the parties at the close of the hearing and of the brief filed by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish and I find that Respondent is an employer engaged in commerce within the meaning

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[1] The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

[2] Although alleged discriminatee Robert Thomas was told by the Respondent's vice president, Marc Woodsman, that the Respondent would promote him to "supervisor" of shipping and receiving, there is no contention and no evidence that Thomas was a statutory supervisor.

[3] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

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of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent manufactures industrial and recreational bicycles. In 1980, it produced approximately 8,000 bicycles, 95 percent of which were made pursuant to special orders. Until late 1979, Respondent was located in a small plant in Brooklyn, New York. With assistance from the Urban Development Corporation, it relocated to a much larger facility in the borough of Queens, New York. The move was completed by January 1, 1980.

Irving Worksman owns 80 percent of the stock of Respondent. The remainder is divided evenly between his son Mark and another individual. Respondent is also owner of half of the stock of Precision Carting Company and had leased space to that company in 1980. The remaining stock in Precision Carting is owned by an individual, Dan Rossi—the Union's surprise witness at the hearing, as discussed below.

In the summer of 1980, Respondent had about 38 production and maintenance employees, none of whom were represented for collective-bargaining purposes by any labor organization.

The evidence offered by the General Counsel in his case-in-chief to establish that five employees were discriminatorily discharged was circumstantial in nature. The rebuttal evidence offered by Respondent raised relatively minor credibility issues. Virtually at the end of the case, however, the Union called as its only witness, Dan Rossi, part owner of Precision, as noted above. Rossi testified, as discussed in detail below, that he had a conversation with Respondent's officials shortly before the five discriminatees in this case were discharged and that he was told then of their intention to terminate the employment of those individuals because of their support for the Union. Rossi's testimony came as a surprise. Respondent then presented witnesses in its efforts to establish that Rossi was carrying out a threat to blackmail them. A major credibility issue was thereby presented. That matter is reviewed in detail, *infra.*

B. *The Discharges on July 14, 1980, and the Related Circumstances*

1. The work histories of the alleged discriminatees

The General Counsel called each of the five alleged discriminatees as witnesses. The first, Robert Thomas, testified as follows. He was hired on December 4, 1979, and assigned to Respondent's assembly department. After Christmas, he was moved to its shipping and receiving department. At that time, there were two other employees in the shipping and receiving department besides himself. By May 1980, Thomas was the only one regularly assigned to the shipping and receiving department. Of the other two employees who had been there, one had been transferred to the purchasing department and the other had left Respondent's employ. At one time, Plant Manager Donald Feis informed Thomas that Respondent was going to hire a supervisor for that department and also another helper.

The second alleged discriminatee was Juan Rivera. He testified that he had been hired in June 1979 as an assembler, that he received a raise in late 1979, and that he received another one a couple of weeks before he was discharged on July 14, 1980, as related below.

The third alleged discriminatee, Joseph Lomuscio, was hired by Respondent on December 3, 1979, and also was assigned to the assembly department. He received a $10 raise after he was employed for a month and he received a second raise in late April 1980.

The fourth alleged discriminatee, Tyrone Townsend, was hired by Respondent on March 18, 1980. He spent his first 5 or 6 weeks working in the tire department and then was transferred to the spray department.

The fifth alleged discriminatee, John Dantzler, was hired by Respondent as a welder.

2. The union activity

Robert Thomas testified for the General Counsel that he telephoned the Union's office in June 1980 and that, on the day after he called there, a representative from the Union, Al Green, came to see him while he was at work at Respondent's plant. According to Thomas, Respondent's president, Irving Worksman, came over to them while they were talking and Green began talking with Worksman as they left Thomas' work station. Thomas did not testify as to what, if anything, he heard them say to each other. Green did not testify at the hearing. Irving Worksman testified on other matters and made no reference to any discussion with Green.

Thomas testified also that he obtained union authorization cards from a leadman employed by Respondent who had been a member of the Union at one time. Thomas passed out those cards to a number of employees. The testimony of each of the other four alleged discriminatees indicates that they signed authorization cards for the Union in June 1980.[1]

Later in June 1980, one of the Union's business representatives, Joe Pave, met with Respondent's vice president, Mark Worksman, and asked that he recognize the Union as the bargaining agent for its production and maintenance employees. On Tuesday, July 8, according to alleged discriminatee Robert Thomas, Respondent's vice president, Mark Worksman, told him that he would be hiring two employees for the shipping and receiving department and that Thomas would be their supervisor. Mark Worksman represented Respondent at the hearing before me and also testified for Respondent. He did not controvert that aspect of Thomas' testimony.

Also, on July 8, the Union filed a petition in Case 29-RC-5038 whereby it sought an election among Respondent's production and maintenance employees. A copy of that petition was served by registered mail on Respondent. It was received by Respondent's president, Irving Worksman, on Monday, July 14. At the end of that workday, all five alleged discriminatees in this case were notified that they were laid off under the circumstances disclosed below.

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[1] The testimony thereon is not especially precise but the significance is clear. For example, one of the alleged discriminatees testified he received a card one day, was asked to sign it and gave it back later that day.

3. The discharges on July 14

Robert Thomas testified that he had been paid on the Friday of the preceding week in accordance with Respondent's normal practice and that nothing occurred on that Friday to suggest that he would be laid off on the next workday. On Monday, July 14, he worked again without incident until around 3:20 p.m. At that point, he was told by Respondent's plant manager, Donald Feis, that he was laid off. Thomas testified that he asked Feis why he was laid off and that Feis was at first hesitant and then mumbled something to the effect that business was slow. Thomas testified that, about 10 minutes later, he asked Respondent's vice president, Mark Worksman, why he was laid off. According to Thomas, Worksman stated that the reason was Thomas' ineffectiveness as a manager. Thomas testified that also present at that time were Respondent's president, Irving Worksman, coworker Willie Kennedy, and possibly another coworker, Timmy Murphy.

Thomas received a paycheck on Monday, July 14. That paycheck was for the day he worked during the preceding week and reflected also that he had received a wage increase for the hours worked that preceding week. Thomas testified that, in June 1980, he had asked Respondent's vice president, Mark Worksman, for a raise that he had expected to receive earlier that month and that Worksman told him then that he would be getting that raise.

The second alleged discriminatee, Juan Rivera, testified as follows as to his layoff. Respondent's plant manager, Donald Feis, told him on the afternoon of July 14, that he was terminated and he asked Feis why. Feis responded that he did not know. He then asked Feis to go to the office to get something in writing so that he would be able to file an unemployment claim. Feis went to the office and came out and told him not to worry about any such paper and that he was laid off because Respondent was overstaffed. Rivera received his pay for 2 days he worked in the preceding week and also for accrued vacation pay. Rivera had received a raise in pay just several weeks before he was terminated on July 14.

Alleged discriminatee Joseph Lomuscio testified that he was with Juan Rivera when Respondent's plant manager, Feis, told them that they were laid off. His account essentially parallels Rivera's. Lomuscio testified that his work had been praised on occasion by Feis and that another employee, Angelo Malafakis, was the least senior employee in Respondent's assembly department, where Lomuscio had worked.

Alleged discriminatee Tyrone Townsend testified that he saw the shop manager, Donald Feis, give Robert Thomas a paycheck on July 14 and he heard that Feis had told Thomas that he, Townsend, had to go. Townsend testified that he was thus laid off and that shortly afterwards he told Lomuscio and Rivera of his layoff. He testified that he, Lomuscio, and Rivera then spoke to Plant Manager Feis, and that Feis told them he had no idea what was going on. Townsend testified also that Feis went inside the office and asked for "pink slips" for Lomuscio, Rivera, and himself, and that Feis came out a few minutes later and said that they did not need pink slips to collect unemployment insurance as everything would be taken care of.

The last alleged discriminatee, John Dantzler, testified as follows respecting his layoff on July 14. He had worked through his lunch hour that day and finished work around 2:50 p.m. He came to the timeclock to punch out and noticed that his card was not in the time rack. He then went to the main office to see his supervisor and was told by one of the Worksmans to wait outside because the supervisors were having a meeting. About 10 minutes later, the meeting ended and his supervisor, Tossils, approached him and told him that he had to be laid off. Dantzler asked him why and Tossils responded that he did not know. Dantzler asked Tossils why he was being laid off as there were three others with less seniority than he in the welding department. Tossils responded that he did not know. Respondent did not call Tossils to controvert Dantzler's account.

C. *The Representation Case Proceedings*

As noted above, the Union had filed a petition to represent Respondent's employees. Respondent received that petition on July 14, 1980. On July 21, a hearing was held in that case. The transcript in that proceeding was received in evidence in the instant case. It discloses that Respondent's representative at that proceeding, its vice president, Mark Worksman, took the position that the five alleged discriminatees in this case had been "permanently discharged." The transcript of that representation case proceeding also discloses that Respondent sought to exclude the approximately six employees on its payroll who were actually performing work for Precision Carting Company, the firm jointly owned by Respondent and Dan Rossi. Further processing of the petition in that representation case has been blocked by reason of the matters involved in the instant case.

D. *Reasons Proffered by Respondent for Terminating the Employment of the Five Alleged Discriminatees*

Respondent contends that it had been overstaffed since December 1979, that that fact was readily evident since January 1980, and that the five discriminatees in this case were discharged as part of a long-term plan to alleviate its overstaffing problem. Respondent introduced various exhibits to establish that the national bicycle manufacturing business had been, by early 1980, in a downturn and that the projected outlook then for the bicycle business generally was not favorable. Testimony was offered by several of Respondent's witnesses that they had commented at various times to Respondent's Vice President Mark Worksman that Respondent's production and maintenance work force was overstaffed. One of those witnesses indicated that he so told Mark Worksman even before Respondent relocated its plant from Brooklyn to Queens in late 1979. Several employees testified that an individual named Robert Steinburger had observed the operations in detail in the plant around April 1980. They testified that Steinburger had told them that he was there to familiarize himself with the bicycle manufacturing operations as he was going to Israel to manage a similar facility being established there apparently by Respondent. Respondent's vice president, Mark Worksman, testified that Steinburger told him that Respondent would do well to reassign five employees classified as floaters to permanent departmental assignments. Mark Worksman was so informed sometime around June 1980, according to Worksman's testimony.

Mark Worksman testified further that he met with the Union's business representatives in late June, as stated above, to discuss the Union's initial demand for recognition. Worksman testified that, also in late June, a meeting was held in his office among management personnel to discuss various problems. Worksman testified that he could not recall whether that management meeting occurred before or after his meeting with the union representative. Worksman testified that present at the management meeting were himself, his father, Irving Worksman, Sales Manager Wayne Sosin, Plant Manager Donald Feis, and the individual referred to earlier, Robert Steinburger. Mark Worksman testified as follows respecting the matters discussed at that meeting. Sosin began it by commenting on the industry forecast for the ensuing 6 months. Then Plant Manager Feis talked about material handling problems. Robert Steinburger suggested that Respondent was overstaffed and indicated that there were floaters who were working in excess capacity with no specific jobs. Irving Worksman indicated how important it was to cut down expenses and to be more conservative. There were discussions about the excessive heat loss in the building, that real estate taxes were high, and that overhead cost had to be cut. An understanding was reached that Mark Worksman and Plant Manager Feis would later set up a plan of action respecting what Worksman termed "the floater elimination" and that a long-term plan would be prepared for the following 6 months involving the discharge of from 7 to 10 employees. Mark Worksman stated in the meeting that "the Urban Employment people were going to become full wage people [and Respondent's] wage costs are going to go up."

The references to "full wage" pertains to the arrangement whereby the Urban Development Corporation subsidized the wages of some new employees during their initial training period. When such an employee works beyond that period, his wages are paid in their entirety by Respondent and he is then referred to by Respondent as a "full wage earner."

The testimony of Mark Worksman suggests that he considered the status of the alleged discriminatees and others in considering the matter of "overstaffing." At one point, he testified that, after that management meeting, he met with Plant Manager Feis but did not discharge any employees then as he had "some moral obligation to the city for some of the [employees]." It was not made clear to me why that concern vanished by July 14 or that the representation petition filed on July 8 had nothing to do with it. I was also confused by Respondent's evidence respecting its view as to the status of the alleged discriminatees as "full wage earners." Respondent's evidence initially indicated that their status as such had been reviewed in early July 1980 by Mark Worksman and that the payroll records considered by him then reflected that Joseph Lomuscio and Juan Rivera had become "full wage earners" on June 6, 1980, that John Dantzler would become a "full wage earner" on July 3, and that Robert Thomas would become one on July 3 and Tyrone Townsend on July 10. When Mark Worksman's testimony indicated that Rivera never had been employed under the plan Respondent had with the Urban Development Program, exact payroll data was procured at the hearing. Those records disclosed that Lomuscio became a full wage earner on March 6, 1980; Thomas became a full wage earner on March 25, 1980; Dantzler on April 7, 1980, and Townsend on July 1, 1980. Rivera was never employed under the plan Respondent had with the Urban Development Corporation; he was at all times in Respondent's employ a "full wage earner."

Worksman testified that he and Plant Manager Feis met sometime after the July 4 holiday to carry out the decisions reached at the management meeting discussed above. Worksman testified that, in his meeting with Feis, he informed him of the Union's demand for recognition and that the purpose of their meeting was in part to "get our act together" in the event the Union "came in." Worksman's testimony indicated that he and Feis reviewed various records and that they at that time had a written list containing the names of seven employees. Worksman testified that he knew that five of those people had to be discharged and he wanted to consider how best to do it. He testified that he discussed in detail with Feis the reasons why the names of those seven employees were on that list. Worksman testified that that list was considered over the following weekend and that on Monday, July 14, he and Feis met again and decided that they were going to discharge five employees and that Feis was responsible for discharging those employees. Mark Worksman testified that he held that meeting on July 14 with Plant Manager Feis after the coffeebreak which takes place around 10:20 a.m. Later in his testimony, Mark Worksman testified that, during the weekend preceding July 14, he himself had made the ultimate decision to discharge the five employees involved in this case.

Plant Manager Feis testified as follows respecting the discharge of the five employees in this case. The discussions he had with Mark Worksman about selecting employees to be terminated started in May or June 1980. On the weekend of the 4th of July vacation, he learned from talking with Mark Worksman that Respondent was going to lay off five, six, or seven people and he, Feis, gave Mark Worksman a list of nine people that he thought should be laid off. He initially did not recall exactly when he was told by Mark Worksman which five employees were to be laid off and when he was so told. He estimated that he was told on the day before the employees were actually laid off the names of those employees. Later, he testified that he had "probably" been told their names on the Friday preceding the layoff on July 14. He then testified that he learned the identity of the five when Mark Worksman told him on Monday, July 14, to lay off those employees. He testified that

Mark Worksman told him then that the reason for the layoffs was that Respondent was "overstaffed." He informed Tyrone Townsend, Juan Rivera, and Joseph Lomuscio when they were together at the timeclock of their layoff. He told him that the reason was overstaffing. When one of them asked him for a pink slip, he went back into the office to get one. He then talked to the bookkeeper and then came back to the employees and told them that they did not need any pink slips. The meeting he had with Mark Worksman on July 14 occurred at "9:00 o'clock or something," and that it was held before the coffeebreak.

Wayne Sosin and Irvin Worksman, sales manager and president, respectively, of Respondent, testified for Respondent at the hearing but did not make any reference to meetings with Mark Worksman or Danny Feis respecting the layoff or termination of the five employees in the instant case or of any other employees for "overstaffing."

Respondent placed in evidence charts to show that its overall productivity has remained stable, despite a reduction in personnel.

E. *Offers of Reinstatement by Respondent*

Respondent offered evidence which indicated that its vice president, Mark Worksman, discussed with several of the alleged discriminatees their reinstatement to employment with Respondent. It appeared that those discussions were held in January 1981. One of the alleged discriminatees testified that he was told that he could have his job back and several weeks backpay provided this case was withdrawn. Respondent's vice president, Mark Worksman, testified that he had contacted the five alleged discriminatees and had met with four of them. He testified that he took the initiative in this regard based upon his discussions with an agent at the Regional Office of the Board after he had made inquiry as to how best to "settle" the issues arising out of this case. Worksman's subsequent testimony clearly indicates that the discussions he had in January 1981 were all in the nature of settlement discussions.

At the hearing, I had overruled the General Counsel's general objection to Respondent's efforts to adduce testimony respecting reinstatement offers as the complaint in this case alleges that Respondent had failed to reinstate the alleged discriminatees. As the testimony that was developed at the hearing subsequent to that ruling discloses that the discussions between Mark Worksman and the alleged discriminatees were essentially settlement negotiations, they are not properly part of the record. I shall therefore on my own motion strike them from the record.[2]

F. *The Surprise Testimony of Dan Rossi*

As noted above, Dan Rossi was half owner of Precision Carting Company; Respondent owned the other half of its stock. Precision leased space at Respondent's plant and fabricated metal vending carts there. Its approximately six employees were listed on Respondent's payroll and were supervised directly by Rossi.

At the conclusion of Respondent's case, the General Counsel advised that he had no rebuttal witnesses. Counsel for the Union then called Rossi as a witness. As it turned out, Rossi's testimony was not in the nature of rebuttal evidence but rather it related to Respondent's alleged antiunion motivation in discharging the five employees in this case.[3] Rossi testified that, before the five employees in this case were discharged by Respondent in July 1980, he was approached by Mark Worksman and Irving Worksman and shown a list of seven names. He testified that Mark Worksman told him then that they had satisfied themselves as to the identities of the seven employees who were union supporters and stated that five of those employees worked for Respondent and the other two worked for Precision Carting Company. Rossi testified that Mark Worksman told him that he intended to discharge the five employees working on Respondent's operations and asked him to discharge the two performing work for Precision Carting. Rossi stated that he informed them that he would not discharge any of his employees. Rossi identified the five names listed on the sheet of paper he was shown by Mark Worksman in the summer of 1980 as the names of the five alleged discriminatees in this case.

Mark Worksman and Irving Worksman denied in essence having discussed the termination of the five employees in this case with Rossi. Respondent proffered testimony that, earlier on the day of the hearing, Rossi had had conversations with Respondent's Sales Manager Sosin, and its president, Irving Worksman, relative to a dispute existing between them as to the amount of moneys due Rossi by Respondent and as to Respondent's obligation, if any, to furnish Precision Carting Company with certain parts, particularly wheels. It appears that Respondent's lease of part of the premises to Precision Carting was canceled sometime after the five employees involved in this case had been discharged and that certain of its equipment was removed from the premises of Respondent. Of course, the relevant issue in this case is not the merit, if any, of Precision Carting's claims against Respondent, but rather the nature of the discussions between Rossi and Respondent's officials on the day of the hearing. In particular, Respondent contends that Rossi indicated to its officials sometime during the last day of the hearing that, unless Respondent gave in to his demand, he would fabricate testimony which would hurt Respondent in the instant case. Rossi testified that he had discussions with Respondent's representatives on the day of the hearing in an effort to resolve the particular matters involving Precision Carting and Respondent. The evidence is uncontroverted that it was Respondent's sales manager, Sosin, who took the initiative in meeting with Rossi on that day. He invited Rossi to lunch and suggested that Rossi contact Respondent's president, as Rossi did. Sosin asked Rossi to leave the hearing room and, in effect, not to testify.

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[2] *Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO (Altemose Construction Co.)*, 222 NLRB 1276, fn. 1 (1976). Cf. *Charles H. McCauley Associates, Inc.*, 248 NLRB 346 at fn. 2 (1980).

[3] The circumstances under which Rossi's account came to the attention of counsel for the Union are set out in the record. Those events and related matters warranted a full explication of the issue and the parties were given the opportunity to develop the issue completely.

It is uncontroverted that Rossi and Respondent were unable to resolve the differences between them. Rossi denied that he in any way sought to blackmail Respondent by threatening to give testimony adverse to Respondent in the instant case. He testified instead that he was present at the hearing because he had heard that the name of Precision Carting Company was mentioned on a number of occasions, as indeed it was, and that he wanted to see for himself what significance such references had with respect to the matters between Precision Carting and Respondent. He testified that he learned while attending the hearing that it involved the alleged discriminatory discharges of the five individuals in this case and he testified that he could not in good conscience leave the hearing without stating what he knew.

Rossi identified also the two employees of Precision Carting who he states were named by Mark Worksman in July 1980 as the "Union troublemakers." Those employees were John Modicowitz and Jose Lopez. He acknowledged that Respondent in fact had hired those two employees within the month preceding the date of the hearing in this case and that one of those had since left Respondent's employ.

G. *Analysis*

Many significant points in this case are not in genuine dispute. Thus, the evidence is uncontroverted that one of the alleged discriminatees, Robert Thomas, initiated contact with the Union and obtained authorization cards from them which he helped pass out. All five of the alleged discriminatees signed cards on behalf of the Union in June 1980. Later that month, Respondent's vice president had a breakfast meeting with Joe Pave, a representative of the Union during which the Union sought recognition from Respondent as bargaining agent for the production and maintenance employees of Respondent. The Union filed a petition for an election on July 8 which was served by registered mail on Respondent and received by it on July 14. At the end of that workday, the five alleged discriminatees in this case were told they were laid off under circumstances as to which there is general agreement. Other areas of testimony are in dispute and will be discussed herein.

In their closing arguments, the General Counsel and the Union observed that the preponderance of the evidence in this case requires a finding that Respondent discharged the five alleged discriminatees because of their activities on behalf of the Union. That contention is offered on two bases. The initial theory of the General Counsel is that the totality of the circumstantial evidence in this case impels a finding that these employees were discriminatorily discharged. The General Counsel, as does the Union, separately contends that the direct testimony of surprise witness Rossi respecting Respondent's antiunion motivation should be credited and, on that basis too, they assert that the violation must be found.

Respondent contends that it was at all times motivated solely by economic considerations, that its decision to cut back the size of its work force was due to the fact that it was "over staffed" and that that determination has clearly been supported by its subsequent productivity records which indicate that Respondent has been able to produce as many bicycles per employee as it had prior to the reduction in force.

I credit Rossi's testimony that he was told by Mark Worksman that Respondent intended to get rid of the five individuals named in the complaint in this case as the "Union troublemakers." Respondent suggests that his testimony should not be credited on the grounds that it was but a vindictive act on Rossi's part, resulting from Respondent's refusal to capitulate to Rossi's demands on its separate dispute with Rossi. While I have some reservations that Rossi acted entirely out of unselfish considerations, I am satisfied that he is not so foolish as to risk a citation for perjury to obtain some measure of revenge against a former business associate. In assessing whether Rossi was involved at the hearing in an effort to blackmail Respondent, as has been asserted, I have to take into account also that the evidence discloses that it was Respondent who took the initiative in arranging a meeting with Rossi on the day of the hearing and that it was Respondent's sales manager who suggested to Rossi that he should leave the hearing without testifying. In making the foregoing credibility resolution, I note also the improbabilities and the inconsistencies in Mark Worksman's account respecting the reasons for the termination of the five individuals in this case. The confused testimony as to exactly when and how Respondent selected those employees for layoff raises considerable doubt in my mind as to its veracity. Some of the inconsistencies are small but nonetheless revealing. Thus, Plant Manager Feis stated that he first learned of the decision to terminate the five individuals after he had given a list of nine names to Mark Worksman. Worksman made no reference to such a list but instead indicated that he himself had made up a list of seven names. Feis stated that he learned for the first time on the Friday before the Monday, July 14, of the identity of the five to be laid off and then modified that answer to state that he was told of the names of those five on the morning of July 14 around 9 a.m., *before* the coffeebreak. Worksman's testimony respecting the details as to selection of the five employees for discharge was most convoluted. Without belaboring it, I note that he finally said that the decision to terminate the five employees was announced to Feis on July 14, *after* the coffeebreak. His effort to convince me that he made the decision to discharge the five employees in this case before Respondent was aware that the Union had filed a representation petition was a failure. I also find most unconvincing and confusing Mark Worksman's testimony respecting his statement, on the one hand, that he did not take immediate action in early July to reduce the work force because he felt a moral responsibility to the city under the Urban Development Program. His testimony suggested that he wanted to wait until the employees involved had at least completed their training programs. As it turned out, several of the discriminatees named in the complaint had as of then long since completed their training programs and had been "full wage earners" for several months. In its brief, Respondent pressed its view that the five employees were laid off because of overstaffing. The short answer to this is that Respondent had continued to hire employees long after it states it had become aware in January 1980 that it was overstaffed. For that matter, one of the very employees alleged as a discriminatee was hired in March 1980. I find no merit in Respondent's defense and conclude instead that the reasons it offered for the discharges of the five individuals in this case were pretextual.

In view of the activities of these five employees for the Union, the fact that Respondent was aware of the Union's activity, the timing of their discharges in relation to the filing of the Union's petition, the vacillating explanations given them on July 14 and the other circumstances (including the fact that several of the discriminatees received wage increases shortly before their layoff and that all were laid off without warning on the first day of the week), the pretextual nature of the reasons given by Respondent for having terminated those employees, and the credited testimony of Rossi, I conclude that those five employees were discharged because of their activities on behalf of the Union and because Respondent sought to discourage its employees from joining or supporting the Union.[4]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By having discharged the five employees named in the complaint in this case and by thereafter having failed and refused to reinstate them to their former positions of employment, because they engaged in activities on behalf of the Union and because Respondent sought thereby to discourage its employees from joining or supporting the Union, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act and Respondent has discriminated against its employees to discourage their activities for and membership in the Union and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that Respondent unlawfully discharged the five employees named in the complaint, I shall recommend that it be ordered to offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings and other benefits. Their loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest thereon as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact and conclusions of law, upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Worksman Trading Corporation, Ozone Park, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging any of its employees because of their activities on behalf of Local 29, Retail, Wholesale Department Store Union, AFL-CIO (herein called the Union), or to discourage its employees from joining or supporting the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action, which I find is necessary to effectuate the policies of the Act:

(a) Offer to Robert Thomas, Juan Rivera, Joseph Lomuscio, Tyrone Townsend, and John Dantzler immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, and make them whole for all losses of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in New York, New York, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous

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[4] This finding is obviously factual. Insofar as pertinent decisions set out appropriate guidelines, I have considered and compared them—e.g.—*American Spring and Manufacturing Co., d/b/a American Chain Link Fence Co.*, 255 NLRB 692 (1981); *Highway Express, Inc.*, 255 NLRB 668 (1981); and *Midwest Stock Exchange, Incorporated, et al.* v. *N.L.R.B.*, 635 F.2d 1255 (7th Cir. 1980), enforcement denied 244 NLRB 1108 (1979).

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein, shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

St. Elizabeth Community Hospital *and* Hospital and Institutional Workers Union, Local 250, SEIU, AFL-CIO. Case 20-CA-13574

January 20, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 15, 1981, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding.[1] Thereafter, Respondent and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommendation.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts the recommendation of the Administrative Law Judge and hereby orders that the original Order in *St. Elizabeth Community Hospital*, 237 NLRB 849 (1978), be, and it hereby is, reaffirmed.

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[1] The Board's original Decision and Order in this proceeding is reported at 237 NLRB 849 (1978).

[2] In adopting the underlying Decision, we note a recent court opinion in accord with the result reached herein. *N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981), enfg. 251 NLRB 1477 (1980).

DECISION ON REMAND

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: On August 24, 1978, the National Labor Relations Board issued its original Decision and Order in this proceeding granting the General Counsel's Motion for Summary Judgment.[1] The Board found that Respondent St. Elizabeth Community Hospital had committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, herein the Act, by refusing to bargain with the Charging Party, Hospital and Institutional Workers Union, Local 250, SEIU, AFL-CIO. Thereafter, Respondent petitioned the United States Circuit Court of Appeals for the Ninth Circuit for review of the Board's Order and the Board's cross-petition for enforcement.

The court of appeals, in its *per curiam* opinion issued August 21, 1980, Judge Sneed dissenting,[2] remanded the case to the Board for consideration of Respondent's first amendment challenge to the Board's assertion of jurisdiction in light of the Supreme Court's decision in *N.L.R.B. v. Catholic Bishop of Chicago*.[3]

Accordingly, the remand was heard before me on May 14, 1981, in San Francisco, California. Upon a review of the entire record, the proceedings, and briefs filed by the General Counsel and Respondent, I make the following:

I. BACKGROUND

The facts relating to the nature of Respondent's business are not in dispute. Respondent is a California nonprofit corporation, licensed as an acute care hospital, servicing the community of Red Bluff, California. The corporation is owned and operated by the Omaha (Nebraska) Provinciate of the Sisters of Mercy, a pontifical order of the Roman Catholic Church.[4] The Omaha Provinciate operated 14 health care facilities in the western portion of the United States. Nationally, the order operates, through other provinciates and mother houses independent of the provinciates, some 100 hospitals. Respondent's California corporate charter sets forth two purposes of the corporation. Its specific and primary purpose is to "own, operate and manage a charitable hospital . . . ." Its other general purpose is to operate the hospital "in compliance with the objectives and philosophy" of the Sisters of Mercy. Furthermore, the charter sets forth some limitations on the nature of the medical services to be performed. It prohibits "any direct abortion or any other medical or surgical services or procedures in conflict with the officially adopted policies of . . . the moral teachings of the Roman Catholic Church." It concludes, stating that the hospital will endeavor to provide medical assistance to "all persons regardless of race, color or religious affiliation."

The corporate charter also provides that Respondent's board of directors be composed of 50 percent Sisters of Mercy or mercypersons.[5] All of the directors are selected and approved by the Omaha Provinciate. They usually come from the local community. They are not required to be Roman Catholics but must follow the corporate charter and enforce the philosophy of the hospital. The title to the real property on which the hospital is located rests with Respondent Corporation.

The hospital currently employs approximately 250 employees. Four of these individuals are members of the order. One of these is Director Barry's assistant; the other three are associated with the pastoral care department. The purpose of that department is to provide spiritual assistance to patients and staff as needed. This includes a continual effort on their part to keep the spirit of Christian brotherhood alive as it relates to providing patient care.

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[1] 237 NLRB 849 (1978).

[2] 626 F.2d 123.

[3] 440 U.S. 490 (1979).

[4] Unlike other orders of the Catholic Church, a pontifical order reports directly to the Pope, not indirectly through an Archdiocese.

[5] A mercyperson is an individual who is not a member of the order, but who has embraced the philosophy of the Sisters. R. Michael Barry, the hospital's administrator is a mercyperson and he, together with the four members of the order who are assigned to Respondent, sit on its board of directors.

259 NLRB No. 156

As in all Catholic hospitals, Bibles, crucifixes, and other religious symbols can be found throughout. The hospital has a chapel which is used by Catholic priests for religious services such as communion. Clergymen of the other faiths use it as well. When not in use, it is open to patients.

All hospital meetings open with a prayer and a prayer is said twice daily over the hospital's public address system. Hospital employees are not required to participate in these ceremonies, although some do. Furthermore, the pastoral care department may ask the assistance of an employee to ready the chapel for a religious service. That duty is, however, not mandatory and may be refused. In that circumstance, naturally, the department relies on employees who are willing to perform that task. An employee may, however, be required to awaken, dress, and otherwise prepare a patient for a religious service.

Respondent observes religious holidays in the sense that they are celeberated; in addition, Respondent's employees receive seven paid holidays per year: all are Federal holidays, including Christmas.

Consistent with the teachings of the Catholic Church, and with its corporate charter, Respondent declines to provide birth control services and assistance and will not perform abortions in circumstances where the procedure is not medically indicated. In addition, of course, it will not engage in the practice of euthanasia, which in any event is prohibited by state laws governing homicide.

Respondent, like all hospitals in the State, is regulated by the State Department of Health and is annually licensed by it. If it, or any other hospital, wishes to increase the number of beds by constructing a hospital addition or wishes to provide new equipment involving substantial cost, it must demonstrate the community's need to a local board and then obtain the approval of the Department of Health. It is exempt from Federal income taxation. It does not receive any public grants, although some patients pay their fees through Federal, state, or county medical assistance programs.

In conclusion, it is fair to say that Respondent, as operated by the Sisters of Mercy, is a health care institution which attempts to combine medical science with that teaching of Christ encouraging the healing of the sick. As the General Counsel concedes, the Sisters of Mercy "try to inculcate into each employee the idea that service to the patients is service to the Lord." Both employees and patients are given statements of Respondent's philosophy to that effect. Thus, while Respondent's employees are not required to be Roman Catholics and are not required to participate in religious activities, nonetheless they are held to a standard of conduct which is measured by the Sisters' perception of "Christian morality." This concept appears to be somewhat fluid in application for as Sister Mary Kieran Harney, a director, said, the hospital would frown on an employee espousing philosophies contrary to those of the church while at work, implying that for the most part such conduct would be ignored if it occurred outside the hospital. Nevertheless, it appears that the hospital could become concerned about the lifestyles of epmployees when they are not at work. She cited an occasion where a managerial employee at another hospital was asked to resign because he engaged in wife swapping, conduct not meeting the Christian morality standard.

With regard to Respondent's ability to engage in collective bargaining, Administrator Barry testified that he could see a potential for conflict if the hospital negotiated an agreement containing a "just cause" clause governing the discharge of employees. He suggested that Church doctrine and the just cause concept would become antagonistic in the event an employee was discovered performing prohibited tasks such as providing birth control devices or performing abortions. In examining this hypothetically, while I do not wish to predict the future, it appears to me that his concern is factually unwarranted. An employer may, of course, choose not to engage in a certain type of business, as Respondent has here. It deliberately chooses not to engage in birth control assistance or abortions. The fact that its refusal is based on religious grounds appears to me to be of no significance, for a hospital may also choose not to perform other types of medical services, whether for religious reasons or simply because it deems them to be good business. In the event that an employee engaged in prohibited business, it seems unlikely that an arbitrator would find his subsequent discipline not to be for just cause. In any event, the probability of such an incident is very low indeed, particularly as there are other hospitals in the community which provide the services in question.

II. THE SCOPE OF THE COURT'S REMAND ORDER

This case was originally decided by the Board in summary judgment proceedings; accordingly, no testimony or documentary evidence was then adduced. Respondent had raised its first amendment challenge to the Board's jurisdiction during postelection procedures. The Board rejected it as not timely, but the court, in denying enforcement of the 8(a)(5) order which followed, held it was. The court's remand requires the Board to consider this case "in light" of *N.L.R.B.* v. *Catholic Bishop of Chicago, supra*. It did not specifically discuss the applicability of the 1974 health care amendments to the Act, particularly Section 2(2) and (14).

When the Congress was considering that particular amendment, it was aware that religious institutions operated a large number of hospitals in the United States, and, in fact, considered exempting one or more religions from the amendment's coverage in order to avoid a conflict with those churches' religious doctrines.

The court did not discuss the congressional intent with respect to Section 2(2) and (14), although it may have done so by implication as its order requires the Board to deal with the constitutionality of the Act insofar as it is applied to this Respondent. *Catholic Bishop*, of course, was not decided by the Supreme Court until 1979 some 5 years after the passage of the health care amendments. Moreover, *Catholic Bishop* dealt with educational institutions rather than hospitals and nursing homes. The Court held that since the Act did not specifically authorize coverage of parochial schools, the Board's exercise of jurisdiction over them was erroneous.

Because of the differing natures of the two types of institutions, it appears appropriate to deal with the applicability of the 1974 amendments before addressing any constitutional question. Such analysis is clearly consistent with the Court's order to consider the matter in light of *Catholic Bishop*.

III. THE HEALTH CARE AMENDMENT OF 1974

In *Mid American Health Services, Inc.*, 247 NLRB 752, 753 (1980), the Board set forth the history of the 1974 health care amendments and concluded they constituted a clear congressional mandate to assert jurisdiction over church-operated health care institutions, in that instance an arm of the Seventh Day Adventist Church. In that case, the Board said:

> The health care amendments, *inter alia*, removed the preexisting jurisdictional exemption accorded nonprofit hospitals by Section 2(2) of the Act.[6] Given earlier Board determinations,[7] the repeal of the exemption for nonprofit hospitals in effect brought all privately owned health care institutions within the Board's legal jurisdiction. The Seventh Day Adventist Church, throughout the amendment process, opposed repeal of the exemption, on grounds which included those constitutional claims advanced in this proceeding. Thus, the church advocated an amendment which would have maintained a jurisdictional exemption for any hospital which "opposes unionization because of historically held religious teachings or tenets."[8] No such amendment was introduced by any member of the Congress. Senator Ervin did introduce[9] a proposed proviso to the new Section 2(14) of the amendments (setting forth the definition of a "health care institution") which would have maintained a jurisdictional exemption for hospitals "owned, supported, controlled or managed by a particular religion or by a particular religious corporation or association." The Ervin amendment was rejected by the Senate.[10] This legislative history, when coupled with the enactment by Congress of other legislation specifically directed toward the problem of potential conflict between an employee's religious beliefs and collective-bargaining responsibilities,[11] removes, in our judgment, any doubt that the Congress clearly intended the Act to apply to health care institutions operated by religious institutions in general and the Seventh Day Adventist Church in particular.

In *Catholic Bishop*, the Supreme Court held that the Board did not have jurisdiction over the parochial schools in question because there was no showing of a specific congressional intent to mandate their coverage under the Act. Here, as the Board has held, such an intent is present. Reviewing the congressional record relating to the 1974 health care amendments, see the General Counsel's Exhibit 2, it is quite clear that Congress had the opportunity to specifically exclude religiously operated hospitals from the Act's coverage, but declined to do so. Therefore, the conclusion is inescapable that Congress intended those hospitals to be covered by the 1974 amendments. To that extent, therefore, *Catholic Bishop of Chicago* is distinguishable.

IV. THE CONSTITUTIONAL ISSUE

Under normal circumstances, there is a philosophical question regarding whether or not an administrative agency, such as the Board, should attempt to detemine the constitutionality of its own act. Indeed, the Board in *Mid American Health Services, Inc. supra*, stated that it would follow the congressional mandate and leave to the courts the "final determination concerning the constitutionality of that mandate . . . ." This, however, is not the normal case. The court of appeals has specifically directed the Board to determine whether or not the assertion of jurisdiction over Respondent is constitutional.

While Respondent acknowledges there is no doctrine of the Roman Catholic Church which, *per se*, condemns unionization of its employees or precludes bargaining with a union which is the exclusive representative of its employees,[6] it nonetheless asserts that the Board's assertion of jurisdiction would foster excessive entanglement between the Church and the State in the person of the Board. It reaches this conclusion by asserting that the religious environment of the hospital necessarily leads to a substantial potential for government entanglement with the affairs of the Church. The General Counsel disagrees, based on the evidence which he contends "fails to establish that the assertion of jurisdiction . . . would impair the ability of Respondent or the Sisters of Mercy to practice their religion or that the assertion of jurisdiction would infringe on their constitutional rights under the establishment clause or the free exercise clause of the First Amendment."

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[6] Prior to the health care amendments, Sec. 2(2) provided, in relevant part, that: "The term 'employer' . . . shall not include . . . any corporation or associtition operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual."

[7] See *Butte Medical Properties, d/b/a Medical Center Hospital*, 168 NLRB (1967) (proprietary hospitals); *University Nursing Home, Inc.*, 168 NLRB 263 (1967) (proprietary nursing home and related facilities); *Drexel Home, Inc.*, 182 NLRB 1045 (1970) (nonprofit nursing homes and related facilities).

[8] See, generally, "Hearings on S. 794 S. 2292 Before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 93d Cong., 1st sess." 483–547 (1973) (hereinafter Senate Hearings).

[9] 120 Cong. Rec. S.6950 (daily ed., May 2, 1974).

[10] 120 Cong. Rec. S.6963–64 (daily ed., May 2, 1974).

[11] Sec. 19, added to the Act by the health care amendments, states:

> Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which had historically held conscientious objections to joining for financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501 (c)(3) of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund choosen by the employee.

Indeed, Sec. 19 closely resembles another proposal submitted to Congress in 1973 by the Seventh Day Adventist Church itself. See Senate Hearings, *supra*, fn. 8 at 409–510. In *Catholic Bishop of Chicago, supra*, the Supreme Court characterized Sec. 19 as "reflecting congressional sensitivity to First Amendment guarantees."

[6] Indeed, the Church officially encourages labor unions as a responsible means of implementing social justice in the workplace. Whether that encouragement is directed at itself as an employer is unclear. See "The Condition of Labor," Encyclical of Pope Leo XIII (1891), reprinted in "Four Great Encyclicals: Labor, Education, Marriage, the Socialist Order," Paulist Press, New York, New York (undated).

In *Lemon* v. *Kurtzman*, 403 U.S. 602 at 612-613 (1971), the Supreme Court established a three-pong test to determine the constitutionality of church-government relationships: First, the statute must have a secular legislative purpose. Second, the law's principal primary effect must be one that neither advances nor inhibits religion. Finally, the statute must not foster "an excessive entanglement with religion."

The first two tests are not at issue here. The legislative purpose of the Act, as amended, is a secular one: promotion of industrial peace in the health care industry. Further, the primary purpose of the law is to grant certain industrial rights to employees and employers; thus, it in no way advances or inhibits religion. The question, therefore, is whether the Act's assertion of jurisdiction will foster excessive entanglement between Church and State.

The Supreme Court has held that total separation of Church and State is not possible in an absolute sense.[7] To determine the extent of the entanglement, it said, there must be an examination of the character and purpose of the church-related institution affected, the nature of the intrusion, and the resulting relationship between the government and the religious authority.[8] In *Lemon*, the Court observed that "parochial schools involve substantial religious activity and purpose." The Court also noted that the teachers had been directed to follow a specific policy of proselytizing. It quoted a school handbook for teachers which said, "Religious formation is not confined to formal courses; nor is it restricted to a single subject area" and concluded that teachers were to stimulate interest in religious vocations and missionary work. Finally, the Court said that church "[d]octrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine."[9] The hospital here has given no similar instructions to its employees. The Court further observed in *Lemon* that the state activities there in question required the state annually to oversee the salary supplements and textbook purchasing programs under scrutiny. This ongoing relationship created an impermissible excessive governmental entanglement in the affairs of the church-operated schools.

In *Catholic Bishop of Chicago, supra*, as in *Lemon*, the Court was again concerned with religion and the State, this time in the context of regulation of employee representation through the Board. But it must be remembered that *Catholic Bishop*, dealt with parochial school systems, having an educational purpose through which religious doctrine can easily be taught, rather than as here, a hospital whose primary purpose is medical care and whose religious purpose is more neutral than that of a parochial school. But the Court did not decide *Catholic Bishop* on "excessive entanglement" grounds. Indeed it did not decide any constitutional issue. Instead it held that, as noted, the Congress had never specifically intended, in passing the National Labor Relations Act, for the Board to assert jurisdiction over parochial schools, a holding of statutory construction. However, the case has been read to be broader than that and it appears from its decisional language, that the court of appeals, in this remand, is concerned with the constitutional tension which Respondent sees between the Act and the first amendment, not statutory construction.

To put this alleged tension in perspective, I believe it is wise to recall first the constitutional underpinning of the National Labor Relations Act, as well as to note some subsequent constitutional developments. In its original decision holding the Act constitutional the Supreme Court said:

> in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.
>
> *That is a fundamental right.* Employees have as clear a right to organize and select their representatives for lawful purpose as the Respondent has to organize its business and select its own officers and agents. [Emphasis supplied.][10]

Subsequent to that decision the Supreme Court and various circuit courts of appeal further clarified the declaration of the fundmental right of employees to organize, finding it implicit in the first amendment's free assembly language. *Thomas* v. *Collins*, 323 U.S. 516 at 432 (1944); *Shelton* v. *Tucker*, 364 U.S. 479 at 485-487 (1960); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); *American Federation of State, County and Municipal Employees* v. *Woodward*, 406 F.2d 137 (8th Cir. 1969). These cases do no more than hold that the right of employees to self-organization is constitutionally protected. They do not go on to say that the right to organize includes other rights such as mandating employer recognition, collective bargaining, or striking. Those rights are legislatively granted through regulatory enactments such as the Act. Thus the Act has a clear constitutional foundation, even if that foundation is limited in scope. It cannot be said, therefore, that the Act is simply an exercise of the general legislative power. It is more than that. Consequently when the Act and a constitutional right such as freedom of religion become opposed, great care should be taken to protect both interests.

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[7] *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736 at 746 (1976).

[8] *Lemon* v. *Kurtzman*, *supra* at 615.

[9] *Id.* at 616-619.

[10] *N.L.R.B.* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1 at 33 (1937).

Undoubtedly, the test set forth in the Court's decision in *Serbet* v. *Verner*, 374 U.S. 398 at 403 (1963), will be helpful in avoiding unnecessary infringement of either right.[11] There the Court held that constitutional rights may suffer an "incidental burden" if a "compelling state interest" in regulating other subjects can be shown. It has long been held that certain conduct, though impelled by religious beliefs, may be regulated or even prohibited because of such a compelling interest. *Reynolds* v. *United States*, 98 U.S. 145 (1878); *Cantwell* v. *Connecticut*, 310 U.S. 296 at 303–304 (1940); *Braunfeld* v. *Brown*, 366 U.S. 599 at 603–604 (1960); *Cap Santa Vue, Inc.* v. *N.L.R.B.*, 424 F.2d 883 (D.C. Cir. 1970).

The issue then is whether or not the Act is a legislatve expression of a "compelling state interest." On the basis of the congressional debate over the 1974 health care amendments, as well as awareness of our national history of labor strife leading first to the passage of the Wagner Act, followed by subsequent amendments, one must conclude that that it is. Cf. *Jones & Laughlin Steel Corp.*, *supra*. Having reached that conclusion, all that needs be done is to determine if the Board's regulation of that interest will involve it is "excessive" or only "incidental" entanglement in religion as described in *Lemon* v. *Kurtzman*, *supra*.

Based on the facts adduced at the hearing, I find that the risk of entanglement is slight and at worst can only be incidental. That conclusion, it seems to me, is consistent with the District of Columbia Circuit's decision in *Cap Santa Vue, Inc.* v. *N.L.R.B.*, *supra*, which presented a conflict even greater than that suggested here. There, the owners of two nursing homes were practicing members of the Seventh Day Adventist Church which, unlike the Roman Catholic Church, actually has a doctrine which in effect prohibits its members from joining or bargaining with labor unions. The Court held, nonetheless, that the nursing homes were obligated to recognize and bargain with the labor union which the Board had certified as the majority representative of their employees. It held that the certification in no way impeded the right of the Seventh Day Adventist owners to hold to their beliefs and ordered them to comply with the Act's secular purpose. The court in *Cap Santa Vue* foresaw no significant intrusion on the owner's religious beliefs. The intrusion was, therefore, only incidental.

The only factor distinguishing that case from this is that the nursing homes there did not make the "excessive entanglement" argument which the hospital is making here. Even so, the only entanglements envisioned by the hospital are the following:

> 1. It is conceivable the Hospital might discharge an employee for failing to meet "Christian morality" standards but the Bord might deem those standards a pretext if changes were brought under Section 8(a)(1) or (3) of the Act.
>
> 2. Assuming the Hospital negotiated a collective bargaining contract with the Union containing a requirement that employees be discharged only for "good cause," it is conceivable that an employee could be discharged for participating in birth control and/or abortion procedures using hospital premises. Since those procedures are prohibited by the Church, the Hospital surmises that an arbitrator might require it to reinstate such an individual.

With regard to the latter circumstances, as I have earlier alluded in the factual section of this Decision, it is highly unlikely that an arbitrator would reach such a decision, particularly in view of the corporate charter's specific prohibition. Moreover, the hospital's concern is only speculation. It may well negotiate a collective-bargaining contract covering such misconduct and it is certainly premature to assume that the Union would disregard such policies. With regard to the first concern, again, the matter seems entirely speculative and an unlikely scenario. Certainly it would not involve ongoing scrutiny by the Board which can act only when charges are filed. Even then the Board would have to respect the argument. If it did not, review of alleged Board abuse is available in the courts of appeal. Even if that constituted "entanglement," it would not be "excessive." Accordingly, I conclude that in the circumstances of this case the Board's exercise of jurisdiction is appropriate.

To reiterate, even though the hospital is church-related, its primary purpose is the delivery of medical care. There is little, if any, sectarian mission outwardly manifested in the hospital's purpose; indeed, the sectarian mission of the teaching of Christ regarding healing is carried out by example, not deliberate education. Therefore, I conclude that the right of employees to select and be represented by collective-bargaining agent will not interfere with the free exercise of religion or tend to establish a religion. Most importantly it will not result in excessive governmental entanglement in the Catholic religion, for there will be no intimate, continuing relationship between the Board and Respondent.[12]

CONCLUSIONS OF LAW

1. Respondent St. Elizabeth Community Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and a health care institution within the meaning of Section 2(14) of the Act.

2. Hospital and Institutional Workers Local Union No. 250, SEIU, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The assertion of jurisdiction by the Board over Respondent will not cause the Board to become excessively entangled in the affairs of Respondent insofar as it is a religious institution and therefore will not infringe upon the free exercise of the religious beliefs of its owners.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, pursuant to the remand orders of the United States Court of Appeals for the Ninth Circuit and the Board, I

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[11] Similarly, see *NAACP* v. Button, 371 U.S. 415 at 448 (1963).

[12] This can be contrasted to the state health department's close regulation of the hospital, regulation to which it does not object.

recommend that the Board reaffirm the remedial order it issued in *St. Elizabeth Community Hospital*, 237 NLRB 849 (1978).

Lion Uniform, Janesville Apparel Division *and* Oil, Chemical and Atomic Workers International Union, AFL-CIO. Cases 10-CA-12938, 10-CA-13089, and 10-CA-13284-2

January 21, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 5, 1981, Administrative Law Judge J. Pargen Robertson issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed cross-exceptions and a brief in support thereof and in opposition to the General Counsel's and the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lion Uniform, Janesville Apparel Division, Lake City, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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[1] The General Counsel in effect has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We do note, however, that Respondent sold its Lake City, Tennessee, facility in September 1979 not in September 1978 as noted by the Administrative Law Judge.

[2] In affirming the Administrative Law Judge's conclusion that the strike in this proceeding has not been shown to have been an unfair labor practice strike, we do not rely on his comments that certain prior unlawful conduct of Respondent had been cured at the time the strike began by a then-outstanding settlement agreement. Rather, we agree that any unfair labor practices that were found were not sufficiently shown to have motivated the strike.

We further find it unnecessary to pass on Respondent's contention that the Administrative Law Judge was barred from considering the legality of its January 5, 1978, decision not to return its fire coat work to its Lake City, Tennessee, plant since we agree in any event with the Administrative Law Judge's conclusion that this action did not violate Sec. 8(a)(5) of the Act.

259 NLRB No. 142

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard on September 8, 9, 10, and 11, and October 14 and 15, 1980, in Clinton, Tennessee. The charge in Case 10-CA-12938 was filed on July 19, 1977, and was amended on August 3 and 17, 1977. The charge in Case 10-CA-13089 was filed on September 19, 1977. The charge in Case 10-CA-13284-2 was filed on November 30, 1977, and amended on January 30, 1978. An order consolidating cases, complaint, and notice of hearing issued in Cases 10-CA-12938 and 10-CA-13089 on November 17, 1977. Subsequently, on February 9, 1978, a complaint issued in Case 10-CA-13284-2 along with an order consolidating cases and notice of hearing as to all three of the above-mentioned cases.[1] Pursuant to those complaints, a hearing was held before Administrative Law Judge Michael O. Miller on May 15 and 16, 1978, in Clinton, Tennessee. On June 8, 1978, Administrative Law Judge Miller issued a Decision and Order approving a settlement agreement. The General Counsel took exception to Administrative Law Judge Miller's Decision. On February 11, 1980, the National Labor Relations Board issued an order reversing the Administrative Law Judge and remanding this matter to the Regional Director. On May 8, 1980, the Regional Director issued a notice of hearing pursuant to which this matter was heard.

Upon the entire record,[2] my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Charging Party, and Respondent, I hereby make the following findings:

A. *Background*[3]

During the spring and summer of 1977 Respondent's employees[4] engaged in a union organizational campaign.

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[1] Although the three captioned cases were consolidated on February 9, 1978, the Regional Director elected not to consolidate the complaints. That procedure necessitates action which unnecessarily complicates isolation of litigable issues. It is necessary to review each separate complaint and answer in order to completely isolate and consider the issues. Such a process appears to violate the spirit and, perhaps, the letter of Rule 8(e) and (f) of the Federal Rules of Civil Procedure.

[2] In accord with discussions during the hearing herein, I have based my findings of fact on both the record developed in the hearing before me and the exhibits received by both Administrative Law Judge Miller and me.

[3] Respondent admitted the commerce allegations in the complaint. On the basis of that admission, I find that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Respondent also admitted, and I find, that the Charging Party (Union) is and has been at all times material herein a labor organization within the meaning of Sec. 2(5) of the Act.

In the absence of opposition to Respondent's motion to correct the transcript, that motion is hereby granted.

[4] During the hearing, the parties stipulated, and I find, that the below-described unit constitutes an appropriate bargaining unit and is the unit for which the Union was ultimately certified as bargaining representative:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Lake City, Tennessee plant, including the leadman and plant clerical employees, but excluding office clerical employees and professional employees, guards and supervisors as defined in the Act.

On July 14, 1977, the Regional Office conducted an election to determine if Respondent's unit employees desired to be represented by the Union. The Union prevailed in that election and was certified by the Regional Director as bargaining unit representative on August 26, 1977. On October 6, 1977, that certification was sustained by action of the Board.

The complaint alleges and Respondent admits that it engaged in numerous actions in violation of Section 8(a)(1) of the Act during its employees' union organizing campaign. However, Respondent denies allegations that it engaged in other 8(a)(1) violations as well as 8(a)(3) and (5) allegations which allegedly occurred at various times after the election.

On October 12, 1977, the unit employees struck Respondent's Lake City, Tennessee, facility. The General Counsel alleges that that strike was caused and prolonged by Respondent's unfair labor practices and is therefore an unfair labor practice strike.

At the time of its employees' strike, Respondent's production at its Lake City facility was limited to the production of firemen's clothing.[5] On October 24, 1977, Respondent removed its firemen's clothing production from its Lake City facility to a facility it owned in Beattyville, Kentucky. The General Counsel alleges that by moving its facility from Lake City without first negotiating with the Union, Respondent violated both Section 8(a)(3) and (5) of the Act.

By telegram dated October 23, 1977, Respondent advised the Union that its removal of fire coat production from Lake City was temporary. However, the Union received another telegram from an agent of Respondent indicating that the removal of the firemen's clothing production line was necessitated by the need to expand Respondent's facilities.

During October 1977 the parties began collective-bargaining negotiations. Negotiation sessions were held on October 25, November 1, 2, and 28, December 15 and 16, 1977, and on January 4, 5, 6, 23, and 24, March 21, May 24, and September 14, 1978.

By letter dated January 5, 1978, Respondent advised the Union that it had tentatively decided to leave the firemen's clothing production line at Beattyville. However, Respondent advised the Union that jobs would be available at Lake City for employees who desired to end the strike.

On May 16, 1978, the Union advised Respondent that it was ending the strike and offering, on behalf of unit employees, to return to work unconditionally.

Between May 31 and June 20, 1978, all striking employees were offered reinstatement by Respondent at its Lake City facility.

On September 28, 1978, Respondent sold its Lake City facility to FMK. The General Counsel did not contend that Respondent engaged in illegal activity by selling the Lake City facility.

By letter dated August 29, 1980, Respondent offered all employees engaged in the strike during October 12, 1977, through May 16, 1978, the opportunity to move to Beattyville with moving expenses, to make fire coats.

B. *Findings*

1. The preelection 8(a)(1) violations

The complaint in Cases 10-CA-12938 and 10-CA-13089 alleged, and Respondent admitted, the matters set forth below.[6] On the basis of the allegations and admissions, I find that the following activity occurred as alleged and that all the following constitute separate 8(a)(1) violations:[7]

(a) Respondent, by its following-named supervisors and agents, on or about the dates following their names, in and about the vicinity of its plant, interrogated its employees concerning their union membership, activities, and desires: Plant Manager Ray Roaden, May 23, June 10, 17, and July 7, 12, and 13, 1977; and Supervisor Faye McGee, May 27 and June 23, 1977.

(b) Respondent, by its following-named supervisors and agents, on or about the dates following their names, in and about the vicinity of its plant, threatened employees that selection of the Union as their collective-bargaining representative would be futile by telling the employees that Respondent would not negotiate with the Union, that Respondent would never have a union at its plant, and that the Union could not solve the employees' problems: Owner Clarence Lapedes, May 5 and June 1, 1977; Vice President Sydney Burns, July 7, 1977; and Plant Manager Ray Roaden, May 18, 23, 25, June 6, and July 12, 1977.

(c) Respondent, by its following-named supervisors and agents, on or about the dates following their names, in and about the vicinity of its plant, threatened its employees with discharge if they joined, or engaged in activities on behalf of, the Union: Plant Manager Ray Roaden, July 13, 1977; Supervisor Faye McGee, July 13, 1977; and Employee Lena Miles, May 27, 1977.

(d) Respondent, by its following-named officers, supervisors, and agents, on or about the dates following their respective names, in and about the vicinity of its plant, threatened its employees that Respondent would close its plant if the employees selected the Union as their collective-bargaining representative: Owner Clarence Lapedes, May 5 and June 1, 1977; Plant Manager Ray Roaden, May 18, 25, 27, June 1, and July 11, 12, and 13, 1977; Employee Lena Miles, May 27, 1977; and Supervisor Faye McGee, July 7, 1977.

(e) Respondent, by its following-named supervisors and agents, on or about the dates following their names, in and about the vicinity of its plant, promised its employees employment for themselves and the relatives of its employees if its employees rejected the Union as their collective-bargaining representative: Plant Manager Ray Roaden, June 17, 1977; Supervisor Fay McGee, May 30, 1977; and employee Lena Miles, May 27, 1977.

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[5] Firemen's clothing includes several items which make up firemen's coats and trousers. On occasion "firemen's clothing" is referred to as "fire coats."

[6] Respondent argued that the Regional Director erred by setting aside a prior settlement agreement on November 14, 1977. The settlement agreement was approved on August 28, 1977. In view of my findings herein that Respondent engaged in violative conduct on August 31 and October 12, 1977, I find no basis to rescind the Regional Director's November 14 action.

[7] In that regard, Respondent admitted that as to these proceedings all the persons named in this section were either supervisors and agents or agents at material times.

(f) Respondent, by its supervisor and agent, Plant Manager Ray Roaden, on or about July 11, 1977, in and about the vicinity of its plant, solicited its employees to influence other employees to vote against the Union.

(g) Respondent, by its following-named officers' supervisors, and agents, on and about the dates following their respective names, in and about the vicinity of its plant, threatened its employees that Respondent had canceled its plans for plant expansion and installation of air-conditioning in its plant because of their membership in, and activities on behalf of, the Union: Owner Clarence Lapedes, May 5, 1977, and Supervisor Faye McGee, July 14, 1977.

(h) Respondent, by its supervisor and agent, Supervisor Faye McGee, on or about July 7, 1977, in and about the vicinity of its plant, threatened its employees that Respondent would withhold wage increases from its employees because of their activities on behalf of the Union.

(i) Respondent, by its supervisor and agent, Plant Manager Ray Roaden, on or about July 11, 1977, in and about the vicinity of its plant, promised its employees that Respondent would establish a grievance committee if its employees rejected the Union as their collective-bargaining representative.

2. The contested 8(a)(1) allegation

The complaint in Case 10-CA-13284-2 alleged that Respondent's Lake City plant manager, Ray Roaden, threatened employees with discharge if they supported or engaged in activities on behalf of the Union.

Lynda Strong testified that she was employed by Respondent at Lake City on October 12, 1977, when she and other employees went out on strike. As the employees walked out, Strong had a conversation with Plant Manager Roaden. Strong testified that she was asked by Roaden to return to work under the same working conditions. However, Strong testified that none of the employees wanted to go back in and that after the employees refused to go back in, Roaden "told us we were fired. The final thing he said, we were fired."[8]

I find no reason to discredit the testimony of Strong. She impressed me as a candid, straightforward witness. Respondent offered evidence that it was unaware of the whereabouts of former Plant Manager Ray Roaden. Roaden did not testify. Therefore, I credit the testimony of Strong, and find that Roaden told her that the employees were fired upon their refusal to return at the beginning of the strike. I find Roaden's statement was precipitated by Respondent's employees' strike activity and constitutes a threat in violation of Section 8(a)(1) of the Act.[9]

3. The alleged unilateral changes of August 31, 1977

The General Counsel alleged that Respondent's Plant Manager Roaden instituted numerous unilateral changes during an August 31 speech to the employees.

Former employee Doris Swatzell testified that Roaden called a meeting on August 31, 1977, and "he told us you will, he said we weren't to be talking anymore, we were going to cut out going to the restroom, there would be no more being absent one or two days a week, no more being late and that he intended to give warning slips for this." Swatzell went on to testify that prior to the August 31 meeting none of the rules mentioned by Roaden had been in effect nor had they been enforced. On cross-examination Swatzell admitted that she used the bathroom at times when she was not permitted to, but that she did not receive a warning.

Former employee Cleta Long testified about Roaden's speech: "Mr. Roaden said that we had a work stoppage and he said that there was too much talking and too much going to the bathroom, too much walking around pretending to be working when we wasn't and he said that we were going to make fire coats if he had to work us 10 and 12 hours a day, seven days a week, and if he had to he would put on a night shift and we would train them." According to Long, Roaden also told them: "And he said that he had quit making coffee because he wasn't collecting enough money to pay for it and until he decided, we got together and decided, that he would make more coffee and that he was going to be watching us and if he gave out warning slips, if we got three warnings we would be fired. And he said he wasn't going to put up with being late, being absent and that when we missed a day, we had to come into his office and if our excuse was o.k. with him we could go back to work and if it wasn't, we would be fired." Long testified that none of the rules mentioned by Roaden in that speech had been brought to the attention of the employees prior to that day. Long admitted on cross-examination that rules similar to those mentioned by Roaden during the August 31 speech may have been posted in the plant prior to the time of the employees' union activity.

Former employee Lynda Strong also testified concerning Roaden's speech. Strong testified: "Mr. Roaden called us all together and he told us that we would not be allowed to go to the bathroom except, you know, except once in between breaks. He told us we were engaged in a work stoppage, that we would not be able to take vacation when we were supposed to." Strong also testified: "If we were absent, now I remember him saying something about our department being tardy, if we were tardy or absent we had to go into the office and see him before we went out on the floor. . . . He said he was going to start issuing warnings. . . . We were not to place our lunch orders anymore." Strong testified that employees would place lunch orders by calling restaurants outside the plant. On cross-examination Strong admitted that Respondent had posted work rules on the employee bulletin boards prior to the time the employees commenced their union activity.

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[8] The General Counsel did not allege that Respondent actually discharged any striking employees.

[9] *Eastern Smelting and Refining Corp.*, 237 NLRB 1312 (1978).

Respondent witness Thelma Wilson, a former employee, testified that Roaden's August 31 speech was precipitated by a slowdown by Respondent's employees. Wilson testified that the employees stayed in the bathroom and that "there was one girl in particular, she always took a nap on the floor." Wilson testified that Roaden, during his August 31 speech, told the employees that the slowdown "had to be stopped because they couldn't put out any work because they were spending to much time in the bathroom and killing too much time." Wilson testified that Roaden did mention rules during that speech, but the rules he referred to were the same rules which had been posted in the plant prior to the commencement of union activities.

Respondent also called former Supervisor Faye McGee. McGee also testified that there was a slowdown among the employees during August 1977. She testified that "the girls were staying in the bathroom too much and they were just wasting too much time and not putting out enough work." McGee testified that there was a bad "decrease in production." McGee testified that Roaden's address to the employees was because of the slowdown. McGee identified Respondent's rules which were, according to her, posted prior to the employees' union activity. She testified that those rules were in force and were enforced before August 31, 1977.

No evidence was offered to rebut the testimony of Wilson and McGee that some of the employees engaged in a slowdown in production during August 1977. However, there was also no evidence which rebutted testimony of Swatzell, Long, and Strong evidencing that Roaden's remarks demonstrated an intent to engage in stricter enforcement of work rules. Additionally, there was no rebuttal of testimony that certain aspects of Roaden's remarks transcended the established rules. In that regard, it is unrebutted that Roaden announced that Respondent would no longer make coffee for the employees and that employees would not be permitted to continue placing lunch orders from outside restaurants.

Those items are the type which the Board has traditionally found to impact employee working conditions and, therefore, constitute mandatory subjects of collective bargaining.[10] The alleged slowdown had apparently gone on for a couple of weeks at the time of Roaden's speech. There was no showing that emergency action was required or that any other circumstances existed which prevented Respondent from taking the time to notify the Union of its problem and contemplated action. Therefore, I find that Respondent informed its employees on August 31 that work rules would be more strictly enforced and that the employee privileges of having coffee and placing lunch orders through outside restaurants were being removed. Respondent took those actions without notifying and bargaining with the Union as the employee's exclusive collective-bargaining representative.[11]

4. The October 24 transfer of the firemen's clothing line to Beattyville, Kentucky

The complaint alleged that Respondent violated Section 8(a)(3) and (5) by unilaterally moving its firemen's clothing product line from Lake City to Beattyville on October 24 and thereby abolishing the jobs of various employees.

The evidence in regard to Respondent's move is not in conflict. Respondent offered evidence that it purchased a facility in Beattyville, Kentucky, shortly before the July 14, 1977, election. However, that purchase flowed from management action which started several years before the actual purchase. The evidence, which was not rebutted, was convincing that Respondent was engaged in plans to purchase a facility which would ultimately house the firemen's clothing production, before its Lake City employees started their union campaign.

Although Respondent was also considering the option of expanding its Lake City facility, the unrebutted evidence demonstrated that that option would have involved substantial costs. That cost would have been reflected both in the cost of constructing an additional facility at Lake City and the cost of financing that construction.[12] The evidence demonstrated that there were no existing facilities at Lake City which were available for Respondent's expansion.

When the Lake City employees struck on October 12, Respondent had not commenced any operations in Beattyville. The evidence reflected that because of the strike, Respondent was unable to continue production in Lake City. Therefore, on October 24 Respondent started to move its machinery and work in process to Beattyville.

At the time of its move, and for the prior 2 years, Respondent's only production in Lake City involved firemen's clothing. Following its October 24 move, Respondent resumed firemen's clothing production in Beattyville.

Respondent did not afford the Union an opportunity to negotiate before the October 24 move. Respondent sent the following telegram on October 23, which was received by the Union on October 24:

> NOTICE IS HERE WITH EXTENDED TO YOU THAT BECAUSE OF THE WORK STOPPAGE AND OUR CRITICAL NEED TO MANUFACTURE FIRECOATS, LION UNIFORM, JANESVILLE APPAREL DIVISION WILL BEGIN MANUFACTURING FIRECOATS ELSEWHERE ON A TEMPORARY BASIS. WE ARE HOPEFUL THIS SENSELESS WORK STOPPAGE WILL END SO THAT LION UNIFORM CAN RESUME OPERATIONS IN LAKE CITY. FURTHER, CONTINUED UNLAWFUL CONDUCT IN THE FACE OF A COURT RESTRAINING ORDER WILL FORCE US TO EXAMINE THE POSSIBILITY OF A SUIT FOR DAMAGES

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[10] *Ford Motor Company (Chicago Stamping Plant),* 230 NLRB 716 (1977); *Womac Industries, Inc.*, 238 NLRB 43 (1978).

[11] *Pak-Mor Manufacturing Company,* 241 NLRB 801 (1979); *Fry Foods, Inc.*, 241 NLRB 76 (1979).

[12] The evidence reflected that an additional 20,000-square-foot facility at Lake City would cost $334,500. However, the contractor retained to consider Lake City expansion recommended removal of the old facility and construction of a new 40,000-square-foot facility which would cost $600,000. The Beattyville facility which Respondent purchased contained 53,000 square feet and cost Respondent $400,000. The $400,000 was financed at a lower interest rate than any available at Lake City.

> AGAINST OCAW. SYDNEY BURNS, VICE PRESIDENT OF MANUFACTURING.

However, confusion resulted from a second telegram sent to the Union on October 24. Richard DuRose admitted that his telegram, which was sent at a time when he was unaware of Sydney Burns' telegram, resulted in possibly misleading the Union. His wire read:

> THIS IS TO INFORM YOU THAT LION UNIFORM IS TRANSFERRING ITS JANESVILLE MFG FROM ITS LAKE CITY, TENNESSEE PLANT TO OTHER PLANTS BECAUSE OF THE INCREASE IN BUSINESS IN THAT LINE OF GOODS AND THE LACK OF ROOM TO EXPAND. WE WILL BE TRANSFERRING OTHER WORK TO LAKE CITY IN THE FUTURE TO CONTINUE EMPLOYMENT FOR ANY WHO SO DESIRE. RICHARD A. DUROSE, ATTORNEY FOR LION UNIFORM.

Nevertheless, unrebutted evidence indicates on several occasions between October 24, 1977, and January 5, 1978, Respondent advised the Union that its October 24 move was temporary. John Williams, the Union's district director, admitted that Respondent "had told us consistently that they were going to return the firecoats back to Lake City." Respondent's attorney, DuRose, testified:

> Mr. Williams made a comment to me that he didn't want to spend a lot of time negotiating this contract because the company didn't have any jobs for the people and I said no, I didn't know how he got that idea but said that what happened was that the company—he was referring to the fact that the machinery had moved out of the Lake City plant—I told him that that was only because the company had some customers that were in urgent need of these fire coats they made at the plant and I explained to him that the company originally, when the strike first started, the company originally thought that they could use supervisors, and as I recall there were a number of employees that didn't join the picket line, that came in to work, and the company originally felt that the supervisory staff and the employees that came in to work, they could fill that order, but, uh, and I told Mr. Williams that it quickly became apparent that we couldn't do that and the reason for that is that the employees were prevented from coming in to work by the pickets.
>
> Mr. Williams indicated that he knew that was so, he either said something—I know at least that he and the committee smiled about that. I think they were proud of the fact that they had been able to keep the employees out.
>
> I said that as soon as the strike was ended, that we would bring the equipment back and we would open up the plant again.

Unrebutted evidence also demonstrated that the October 24 move was precipitated by the strike. That evidence proved that the move was not planned until around October 21. Respondent's former warehouse manager at another of its plants, Don Meadows, testified that he assisted in the move from Lake City to Beattyville. According to Meadows' testimony, the move was disorganized, unplanned, and chaotic. Meadows testified that he was prevented from moving everything by Respondent's vice president, Sydney Burns, who told him that they would be moving back to Lake City.

The record provided no basis on which I could find Respondent violated Section 8(a)(3) or (5) by its October 24 move. The evidence clearly reflected that Respondent was prevented from continuing production by its employees' strike. The evidence also demonstrated that as to the firemen's clothing production, time was of the essence. According to unrebutted testimony, and documentary evidence, Respondent had fallen behind on its fire coat production schedule and was receiving customer complaints about its delay in supplying those garments. Those facts clearly support Respondent's contention that it faced serious customer losses if it permitted the strike to stop production. Therefore, I find that Respondent proved that the move was temporary and was necessitated by business reasons brought on by its employees' strike.[13]

There was no evidence offered demonstrating that Respondent's move to Beattyville transcended the "reasonable measures necessary in order to maintain operations in such circumstances." *Empire Terminal Warehouse Company*, 151 NLRB 1359 (1965). Despite Respondent's apparent union animus as evidenced by its illegal antiunion campaign, the record shows that Respondent engaged in good-faith negotiations with the Union beginning in October 1977. Moreover, when the strike ended, Respondent reinstated the striking employees and announced to its employees that it denounced actions which did not fully respect the employees' rights to associate with the Union. Furthermore, following its move, Respondent continuously took the position in its discussions with the Union that it would provide work for the employees at Lake City.

I find that this case falls within the scope of the rule announced in *Empire Terminal Warehouse Company, supra*, which held that similar conduct by an employer does not constitute violative action.[14]

In reaching this conclusion I am bothered by evidence which tends to show that Respondent was motivated by its employees' union activities. In May 1977, Respondent's owner threatened employees that it would close the plant and cancel expansion plans because of the union activities. Those threats would have been persuasive if Respondent had either closed the plant or canceled expansion activity without the intervention of other motivating events. However, the evidence failed to show that Respondent either closed the plant or canceled actual expansion activity. Although expansion was considered, Respondent never undertook such activity and its studies showed Lake City expansion would have been unduly expensive. Moreover, Respondent's alleged illegal activity came at a time when any other action or inaction could have endangered its continued viability.

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[13] See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[14] The *Empire Terminal Warehouse Company* case involved temporarily subcontracting work rather than temporarily relocating work. However, in other respects the issues are similar. See also *W. R. Grace & Co., Construction Products Division*, 230 NLRB 617 (1977); *General Electric Company*, 240 NLRB 703 (1979).

5. The January 5, 1978, letter

The General Counsel also alleged that Respondent violated Section 8(a)(5) by moving the firemen's clothing product line from Lake City to Beattyville, Kentucky, on January 5, 1978.[18] In support of its position, the General Counsel cited *Townhouse T.V. & Appliances*, 213 NLRB 716 (1974). I find the facts here are not similar to those in *Townhouse.*

On January 5, 1978, Respondent delivered the following letter to the Union:

> In order to save its fire coat and other Lake city business during your strike, the Company moved the production elsewhere. The move presented many difficulties and cause a considerable interruption in the supply of garments to its customers.
>
> Production of fire coats, etc., is now proceeding, although demand is making it difficult to meet schedules.
>
> The Company has tentatively concluded that it cannot run the business risks of attempting to relocate the fire coat and other Lake City production back in Lake City again. This tentative conclusion is based purely on very serious business problems—the interruption which would occur if machinery and materials had to be relocated, the risk of loss in transit, the risk of higher production costs in reassembling and possibly retraining a work force in Lake City, and the further delays in shipment to customers which would occur if anything went wrong in starting up again at Lake City.
>
> We are prepared to discuss any aspect of this matter, including the tentative conclusion itself, in good faith.
>
> The Company does plan to resume production, but of other products, at Lake City, when the strike is over.

The General Counsel contends that the above letter evidences an 8(a)(5) violation. I find that the evidence does not support that allegation.

The Union's director, John Williams, testified that there was no bargaining on Respondent's tentative decision to keep the firemen's clothing at Beattyville. However, other evidence which was unrebutted demonstrates that the Union was offered the opportunity to negotiate on Respondent's tentative decision.

The January 5 letter (above) states that Respondent was prepared to discuss its tentative decision to keep the firemen's clothing line in Beattyville. Respondent's vice president, Jan Spornhauer, testified that Respondent's attorney, Dean Denlinger, tried to explain to the Union during the January 5 negotiating session why Respondent felt it could not return the fire coats to Lake City,[19] but that John Williams said he "didn't want to listen to [Respondent's] reasons and that he wanted the fire coats back at Lake City as a matter of principle." Spornhauer went on to testify that "Sydney Burns said that Lion was 120 days behind schedule, and that the return of fire coats production back to Lake City would cause an economic hardship to Lion Uniform."

During the hearing Respondent offered substantial evidence in support of its tentative decision to keep the firemen's clothing production in Beattyville. That evidence demonstrated that a consulting firm advised Respondent in 1973 that the Lake City facility was too small to continue as a facility for the manufacture of fire coats. When Respondent purchased the Beattyville facility in July 1977, it anticipated that eventually all its fire coat production would be at Beattyville. The Beattyville facility is substantially larger than the facility at Lake City—53,000 square feet versus 16,000 square feet.

Although, according to Respondent, the October 1977 strike required a premature transfer of fire coats to Beattyville, that transfer was temporary. However, as time passed the operation at Beattyville became more and more efficient until it reached the point in January 1978 where it became apparent from an economic standpoint, that it would be more disadvantageous to move back to Lake City than to stay in Beattyville.

In that regard, Respondent offered unrebutted testimony proving that the move back to Beattyville would involve substantial costs. In order to maintain fire coat production at the level maintained at Beattyville during January, Respondent would have to expand its Lake City facility. The cost of such an expansion, plus the cost associated with another move and delay associated with retraining personnel because of innovations in the manufacturing process since the strike started, would be considerable.

Furthermore, according to Respondent, a return to Lake City would again aggravate the delay of supplying fire coats to customers with a probable result that other customers would be lost.

The evidence demonstrating that the manufacture of fire coats required a great deal of floor space and that Lake City was too small to continue to serve as the exclusive facility for fire coat production was persuasive. Furthermore, no effort was made to rebut that evidence other than to show that Lake City had served as the exclusive fire coat facility before the strike. I find that fact insufficient to overcome the other evidence.

Before the strike Respondent has no facilities larger than Lake City available for fire coat production. Respondent had just purchased the Beattyville facility and, according to its version of corporate planning, the fire coat production was to be transferred to Beattyville in due course.

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[18] Respondent's only move from Lake City to Beattyville actually occurred around October 24, 1977, as shown above. In the instant allegation the General Counsel is addressing Respondent's decision to keep the fire coats at Beattyville.

[19] The General Counsel argues that Respondent's January 5 letter presented the Union with a *fait accompli.* However, it is important to note that the employees at Lake City were on strike from October 12, 1977, to May 16, 1978. On January 5, 1978, Respondent had no reason to believe that the employees would have returned to work regardless of whether fire coat work was available. Therefore, I find no support for the General Counsel's contention that Respondent's January 5 notice did not afford the Union an opportunity to negotiate before the move to Beattyville became permanent. If the Union had elected to negotiate and those negotiations had been sucessful, there remained more than ample time to return fire coat production to Lake City.

Therefore, as to the process under which I must consider Respondent's defense, it is apparent that during January conditions had changed substantially from those which existed before the strike. There was the intervention of the purchase of the Beattyville facility. In considering that fact, I am aware that the General Counsel did not allege anything improper in the Beattyville purchase. Moreover, no evidence was offered which reflected upon Respondent's proof that the Beattyville purchase had its genesis long before the commencement of union activity.

Therefore, I must consider that on January 5 Respondent found itself faced with the possibility of removing the fire coats from a facility of sufficient size back into the Lake City plant which was too small.

According to Respondent's evidence, January 1978 presented a dilemma. A move back to Lake City would necessitate either the enlargement of the Lake City facility or splitting the fire coat production between two plants—Lake City and Beattyville.

Respondent offered substantial evidence proving that both the above alternatives would result in severe economic hardship to such an extent that the election of either alternative over retaining the fire coats in Beattyville would endanger the economic viability of Respondent. In that regard, Respondent proved that it considered expanding the Lake City facility during early 1977.[17] Unrebutted testimony demonstrated that Respondent continued to explore expansion possibilities until May 1977, when it discovered that it would be unable to finance expansion costs at an acceptable interest rate.

Therefore, in January 1978 Respondent was faced with the prospect of effectuating a business decision which it had rejected less than a year earlier as being unsound. Moreover, added costs would have been incurred in January, in order to dispose of the Beattyville facility and retrain Lake City employees. Additionally, the move back would result in additional delays in production with the possible loss of more customers.

As to the second alternative, producing fire coats at both Lake City and Beattyville, Respondent demonstrated that option would result in duplication of costs to such an extent that it would constitute an inefficient operation.

None of Respondent's evidence regarding the business bases for its January 5 decision was rebutted.

Therefore, I find that the General Counsel failed to offer substantial evidence in support of its allegation that Respondent violated Section 8(a)(5) by failing to negotiate regarding return of the firecoats to Lake City.[18] The evidence does show that Respondent did in fact offer to negotiate about that decision and, moreover, Respondent amply demonstrated that its tentative decision of January 5 was based upon business reasons rather than reasons which may be violative of the Act.[19]

6. The unfair labor practice strike

The law shows that strikes which are caused or prolonged by the employer's unfair labor practices are unfair labor practice strikes. There appears to be no significant issue here regarding the character of the October 12, 1977, strike since, as I find below, all unit employees were properly reinstated. Nevertheless, the issue was joined. On the basis of the record I am unable to conclude that the strike was caused or prolonged by Respondent's unfair labor practices.

I am aware of Respondent's conduct leading up to the July 14 election. However, in consideration of the employees' motivation in striking, at the time of the strike that particular conduct had been cured by a settlement agreement. The agreement was approved by the Regional Director on August 29, 1977, and the notice to employees had been posted since September 6. Ultimately, the settlement agreement was set aside by the Regional Director but not until November 14, 1977.

At the time of the walkout, Respondent had committed an additional 8(a)(1) and (5) violation by unilaterally announcing stricter enforcement of rules as shown above. As the employees were walking out on October 12, the plant manager threatened employee Lynda Strong that the employees would be discharged. However, there was no evidence demonstrating that Respondent was negligent, dilatory, or otherwise remiss in its obligations to meet and negotiate. In fact the only evidence offered demonstrated that it was the Union, not Respondent, that was unavailable to meet and negotiate during several days before October 25, 1977.

Moreover, there was no evidence offered regarding the motivation behind the Octobr 12 strike. The record contains no reference to employee meetings, conversations, or anything else which would show why they decided to strike. I am fully aware of the situations where motivation may be imputed by the Administrative Law Judge (for example, see *Matlock Truck Body & Trailer Corp., and its Agent Roy L. Matlock*, 217 NLRB 346 (1975)). However, there was insufficient evidence here demonstrating that I would be warranted in concluding that unfair labor practices must have played a part in the employees' decision to strike absence some evidence to that point.

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[17] See fn. 12, *supra*.

[18] In its decision reversing Administrative Law Judge Miller, the Board found that Respondent must show that a *status quo ante* remedy would endanger its continued viability (247 NLRB 992). However, that is not the test which is applicable to the instant issue. The question here is whether Respondent violated Sec. 8(a)(5) by its January 5 action.

[19] Compare *International Chemical Workers Union, Local No. 112, AFL–CIO, CLC (American Cyanamid Company)*, 235 NLRB 1316, 1322–23 (1978). Unlike the situation in *American Cyanamid*, it appears that Respondent substantially complied with criteria established in *Westinghouse Electric Corporation (Mansfield Plant)*, 150 NLRB 1574, 1577 (1965). The evidence is convincing that Respondent's action of January 5 was motivated solely by economic considerations, and Respondent had in the past transferred fire coat production from one plant to another. As I find below, the permanent transfer to Beattyville had no demonstrable adverse impact on employees in the unit. Moreover, Respondent, by its January 5 letter and subsequently during negotiations, demonstrated a willingness to negotiate over the permanent transfer. The Union did not put it to the test. There were no substantive negotiations on the issue because of union resistance. When Respondent attempted to explain to the Union why it wanted to leave the "fire coats" in Beattyville, the Union expressed disinterest indicating only that it demanded return of the fire coats.

I find that the General Counsel failed to sustain its burden of proof by showing either direct evidence that the employees were motivated by Respondent's unfair labor practices or that it was inescapable that those violations contributed to the initiation or prolongation of the strike. "Board law holds that an unfair labor practice strike does not result merely because unfair labor practices precede the strike. Rather, there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices. *Typoservice Corporation,* 203 NLRB 1180 (1973)." *John Cuneo, Inc.*, 253 NLRB 1025, 1026 (1981).

7. Reinstatement of strikers

Although the complaint does not allege any impropriety associated with Respondent's reinstatement of striking employees, evidence was presented in that regard primarily on the issue of whether the removal of the fire coat line constituted a unilateral change in working conditions. I have therefore considered the issue. The parties stipulated that all striking employees were offered reinstatement between May 31 and June 20, 1978. All the relevant evidence demonstrated that those striking employees who accepted reinstatement returned to work under substantially equivalent conditions to those which existed when they struck in October 1977. The only matter which arose as an issue in that regard was the question of whether work other than production of fireman's clothing could constitute substantially equivalent employment. In that regard, unrebutted evidence proved that the work actually performed by those striking employees upon their return: (1) was subjected to fewer layoffs and irregularity than work performed during the same period by employees at the Beattyville facility who were engaged in the production of firemen's clothing; (2) involved substantially the same job skills as the production of firemen's clothing. Although the supervisory and managerial coordination required in meshing the various pieces of fire coats into the final product differed from the meshing of other products, that did not materially affect the employees' work. Also, (3) the history of products produced by Respondent demonstrated that other products were manufactured at Lake City before 1976. In 1976 and 1977 fire coats were the exclusive product produced at Lake City. However, as found above, unrebutted evidence demonstrated that Respondent was in the process of securing other facilities to manufacture fire coats. The evidence proved that Respondent would have moved its firemen's clothing line away from Lake City in the absence of union activity.

Therefore, I find nothing in the record which demonstrated that Lake City employees were not offered proper reinstatement following their unconditional offer to return to work.

CONCLUSIONS OF LAW

1. Respondent, Lion Uniform, Janesville Apparel Division, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. On July 14, 1977, the Union was and has been at all times since the exclusive bargaining representative of Respondent's employees in the bargaining unit described below within the meaning of Section 9(a) of the Act. The appropriate bargaining unit is:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Lake City, Tennessee plant, including the leadman and plant clerical employees, but excluding office clerical employees and professional employees, guards and supervisors as defined in the Act.

4. Respondent, by interrogating its employees concerning its employees' union activities; by threatening its employees that selection of the Union as a collective-bargaining representative would be futile by telling the employees that Respondent would not negotiate with the Union, that Respondent would never have a union in its plant, and that the Union could not solve the employees' problems; by threatening its employees with discharge if they joined or engaged in activities on behalf of the Union; by threatening its employees that Respondent would close its plant if the employees selected the Union as their collective-bargaining representative; by promising its employees employment for its employees and their relatives if the employees rejected the Union as their collective-bargaining representative; by soliciting its employees to influence other employees to vote against the Union; by threatening its employees that Respondent had canceled its plans for plant expansion and installation of air conditioning in its plant because of their membership in and activities on behalf of the Union; by threatening its employees that Respondent would withhold wage increases from its employees because of their activities on behalf of the Union; by promising its employees that Respondent would establish a grievance committee if its employees rejected the Union; and by threatening its employees with discharge because they engage in strike activity, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. Respondent, by unilaterally informing its employees that work rules would be more strictly enforced and that employees' privileges of having coffee and placing lunch orders through outside restaurants were being removed, at a time when the Union was collective-bargaining representative of the employees, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The strike among Respondent's bargaining unit employees, which commenced on or about October 12, 1977, was not caused or prolonged by Respondent's unfair labor practices.

7. Respondent did not otherwise engage in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act as alleged in the complaint.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[20]

The Respondent, Lion Uniform, Janesville Apparel Division, Lake City, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, and coercing the employees in the exercise of their rights guaranteed to them in Section 7 of the Act in violation of Section 8(a)(1) of the Act by interrogating its employees concerning its employees' union activities; by threatening its employees that selection of the Union as a collective-bargaining representative would be futile by telling the employees that Respondent would not negotiate with the Union, that Respondent would never have a union in its plant, and that the Union could not solve the employees' problems; by threatening its employees with discharge if they joined or engaged in activities on behalf of the Union; by threatening its employees that Respondent would close its plant if the employees selected the Union as their collective-bargaining representative; by promising its employees employment for its employees and their relatives if the employees rejected the Union as their collective-bargaining representative; by soliciting its employees to influence other employees to vote against the Union; by threatening its employees that Respondent had canceled its plans for plant expansion and installation of air conditioning in its plant because of their membership in and activities on behalf on the Union; by threatening its employees that Respondent would withhold wage increases from its employees because of their activities on behalf of the Union; by promising its employees that Respondent would establish a grievance committee if its employees rejected the Union; and by threatening its employees with discharge because they engaged in strike activity.

(b) Unilaterally informing its employees that its work rules would be more strictly enforced and that the employees' privileges of having coffee and placing lunch orders through outside restaurants were being removed, without first negotiating with Oil, Chemical and Atomic Workers International Union, AFL-CIO, its employees' exclusive collective-bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist a labor organization, or to refrain from any and all such activities.

2. Take the following affirmative action designed and found necessary in order to effectuate the policies of the Act:

(a) Rescind its action of instituting more strict enforcement of work rules and removal of the employee privileges of having coffee and placing lunch orders through outside resteurants.

(b) Post at its facility in Beattyville, Kentucky, and mail to all bargaining unit employees[21] copies of the attached notice marked "Appendix."[22] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their union membership, activities, and desires.

WE WILL NOT threaten our employees that selection of Oil, Chemical and Atomic Workers International Union, AFL-CIO, or any other labor organization, as their collective-bargaining representative would be futile by telling the employees that Respondent would not negotiate with the Union, that Respondent would never have a union in its plant, and that the Union could not solve the employees' problems.

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[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[21] In view of evidence indicating that Respondent no longer maintains a facility in Lake City, Tennessee, but that some former employees of the Lake City facility are now employed at Respondent's Beattyville facility, I recommend the above Order in lieu of the normal recommendation which would have required Respondent to post the attached notice at its Lake City facility.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten our employees with discharge if they join or engage in activities on behalf of the Union.

WE WILL NOT threaten our employees that we will close our plant if the employees select the Union as their collective-bargaining reprsentative.

WE WILL NOT promise our employees employment for themselves and their relatives if they reject the Union as their collective-bargaining representative.

WE WILL NOT solicit our employees to influence other employees to vote against the Union.

WE WILL NOT threaten our employees that Respondent has canceled its plans for plant expansion and installation of air conditioning at its plant because of their membership in and activities on behalf of the Union.

WE WILL NOT threaten our employees that we will withhold wage increases because of our employees' activities on behalf of the Union.

WE WILL NOT promise our employees that we will establish a grievance committee if the employees reject the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with discharge if they engage in strike activity.

WE WILL NOT unilaterally inform our employees that work rules will be more strictly enforced and that the employees' privileges of having coffee and placing lunch orders through outside restaurants are being removed.

WE WILL NOT in any like or related manner interfere with our employees' rights protected by Section 7 of the National Labor Relations Act.

WE WILL rescind our action in informing our employees that work rules will be more strictly enforced, and WE WILL reinstitute the employee privileges of having coffee and placing lunch orders through outside restaurants.

LION UNIFORM, JANESVILLE APPAREL DIVISION

Chassen Brothers, Inc., d/b/a Ann's-Schneider Bakery *and* Local Union No. 50, Bakery, Confectionery & Tobacco Workers Union, AFL-CIO *and* Joseph Dones *and* Charles Skinner. Cases 22-CA-9237, 22-RC-7887, 22-CA-9401, and 22-CA-9423

January 22, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 9, 1981, Administrative Law Judge Eleanor MacDonald issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the Administrative Law Judge's Decision and in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the settlement agreement in Case 22-CA-9237 be, and it hereby is, reinstated.

IT IS FURTHER ORDERED that the objections to the election conducted on August 3, 1979, in Case 22-RC-7887, be, and they hereby are, overruled and that the results be, and they hereby are, certified.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Local Union No. 50, Bakery, Confectionery & Tobacco Workers Union, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge: This case was heard before me in Newark, New Jersey, on February 19, 20, 21, and 22 and March 11 and 13, 1980. The charge in Case 22-CA-9237 was filed on May 23, 1979; the charge in Case 22-CA-9401 was filed by Joseph Dones on August 1, 1979, and amended on August 20 and September 19, 1979; the charge in Case 22-CA-9423 was filed by Charles Skinner on August 8, 1979, and amended on August 21 and September 19, 1979. An informal settlement agreement in Case 22-CA-9237 was entered into on July 13, 1979, and was subsequently set aside by the Regional Director on September 21, 1979. The consolidated complaint issued on September 21, 1979, alleging that Respondent engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), (4), and (5) of the Act including:

1. Engaging in threats, promises of benefits, interrogations, and solicitation of grievances (prior to execution of the informal settlement agreement).
2. Discharging Dones and Skinner for concerted activity (prior to the execution of the settlement agreement).
3. Engaging in harassment, interrogation, and threats, and creating the impression of surveillance (after the execution of the settlement agreement).
4. Giving certain employees money in order to refrain from voting in a Board election held on August 3, 1979.
5. Assigning Dones more arduous and less agreeable work after his reinstatement pursuant to the settlement agreement and issuing Dones warning letters and discharging Dones.
6. Assigning Skinner more arduous and less agreeable work after his reinstatement pursuant to the settlement agreement, and denying Skinner a wage increase and causing his termination.
7. Refusing to recognize and bargain collectively with Local Union No. 50, Bakery, Confectionery & Tobacco Workers Union, AFL-CIO, herein called Local 50, as the exclusive collective bargaining representative of its unit employees.

The complaint further alleges that the unfair labor practices set forth therein are so serious and substantial in character and effect as to warrant the entry of a remedial order requiring Respondent to recognize and bargain with Local 50 on an alleged majority of authorization cards from unit employees.

Respondent filed an answer denying the material allegations of the complaint and alleging that Dones and Skinner were discharged for cause.

In the representation case, a consent election was held pursuant to stipulation on August 3, 1979. After determination of the challenged ballots, the vote was eight for the Union and nine against union representation. One ob-

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[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

259 NLRB No. 162

jection timely filed by the Union is before me for decision pursuant to the Order dated November 15, 1979, consolidating cases and referring the representation case to the Board.

Upon the entire record including my observations of the demeanor of the witnesses and after due consideration of the briefs filed by Respondent and the General Counsel in June 1980, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation, operates a bakery engaged in the manufacture and wholesale and retail sale of baked goods in Jersey City, New Jersey, where it annually purchases and causes to be delivered to it, goods and materials valued in excess of $50,000 directly from other enterprises located within the State of New Jersey, which other enterprises receive said goods and materials in interstate commerce directly from States other than the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Local Union No. 50, Bakery, Confectionery & Tobacco Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

I will consider first the General Counsel's allegations that Respondent engaged in unfair labor practices after the execution of the settlement agreement,[1] since a finding of failure to comply with the settlement agreement or of postsettlement violation is a prerequisite to a finding of violation based on presettlement conduct. *Interstate Paper Supply Company, Inc.*, 251 NLRB 1423 (1980).

A. *Events Relating to Dones*

Joseph Dones was one of the General Counsel's chief witnesses in this case. He testified that he was hired by Myron Chassen in September 1978, as a bench hand and helper. At first he worked 3 days a week on the oven and ran the cleaning machine, but subsequently his hours were changed so that he worked 6 days a week, excluding Saturday, from 1 or 2 a.m. until 10 or 11 a.m. Robert Chassen ran the bakery during most of these early morning hours.[2] Dones stated that he spent the bulk of his time twisting pastry on the bench, but that he also performed other work as follows: unloading the truck on Tuesday, helping in the wrapping room several hours per week, cleaning the bathrooms once a week, taking out the garbage every morning, cleaning "downstairs" every morning for 1 hour, and cleaning the "icebox."

Dones testified that he was discharged in May 1979.[3] As a result of charges filed by the Union, a settlement agreement was entered into and Dones was reinstated with payment of a sum for "net backpay." Dones testified that Leonard McGinley, the Union's business representative and organizer, told him that, from his reinstatement until the date of the consent election (August 3, 1979), Dones would work from 9 a.m. until 6 p.m. and that he would be excused from work on Sundays as well as the normal Saturday day off.

The need for an arrangement to last until the election arose from a change in the operations of the bakery. The uncontroverted testimony of several witnesses shows that, for some time prior to Dones' discharge, the bakery had been subject to repeated citations and threats of closure for uncleanliness by the Board of Health. This was due, in part, to the lack of sufficient facilities for cleaning separate from the baking area. As a result, Respondent undertook certain construction and renovation work and created additional cleaning areas. Further, the hours of the employees who performed cleaning functions were changed so that they began to work at noon which was generally after most of the mixing and baking was completed. (The bakers worked from 2 or 3 a.m. until 11 or 12 a.m.). This system permitted a more thorough cleaning of the bakery premises.

The new system and new hours were instituted prior to the settlement discussions in July 1979, and, when Dones was to be reinstated, Myron or Robert Chassen requested that Dones work new hours from 12 noon to 8 or 9 p.m. However, as a result of Dones' protests that he would be unable to talk union with his coworkers because some of them would be gone by the time he began work, it was agreed that, until the day of the election, he would work from 9 a.m. to 6 p.m. Dones also testified that, as part of the settlement, he was excused from Sunday work so that he could function as a preacher. Before his discharge in May, Dones stated he had been excused by 11 a.m. on Sundays if the bakery were not too busy. With the new hours, this schedule would be impossible. Dones apparently believed that the Sunday excusal would be in effect beyond the election. However, Myron Chassen testified that his understanding of the settlement was that Dones would again work Sundays once the election was over. Chassen explained that Sunday was the busiest workday at the bakery and that he would never have agreed to excuse Dones from work on Sundays on a permanent basis.[4] Further, there was resentment among the other employees at the special treatment afforded Dones. Myron Chassen testified that it had been his understanding from the settlement discussions that a settlement of the charge in Case 22-CA-9237 and a consent election would be obtained only if he agreed to the special conditions for Dones which were to last until the day of the election.

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[1] The settlement agreement was signed by the parties on July 13, and approved by the Regional Director on July 16, 1979.

[2] Myron and Robert Chassen, the two brothers who own and operate Respondent, are, respectively, secretary and president of Respondent. Myron Chassen is generally responsible for the operation of the bakery during normal business hours, while Robert Chassen is in charge of the premises in the early morning hours beginning at midnight while most of the mixing and baking is taking place. Robert Chassen personally conducts the mixing process. The hours worked by the two brothers are not rigidly fixed and they overlap. The bakery is a family enterprise that was formerly operated by the father and uncle of the Chassen brothers. The uncontradicted testimony shows that both Chassen brothers work side by side with their employees and perform many of the same tasks as their employees according to the particular requirements of the day. In fact, the testimony of all the witnesses clearly establishes that all employees, including the Chassen brothers, would normally lend a hand with any type of work that was available and needed to be done at the bakery.

[3] The record shows Dones was discharged on May 21, 1979.

[4] Other witnesses, including McGinley, agreed that Sunday was the busiest day in the bakery.

From Dones' testimony it is clear that he did not object to the requirement that after the election he would start work at noon as did the other employees who performed mostly cleaning work. Under the new system which was in force after his reinstatement, it is undisputed that Dones' working hours would not permit him to do much, if any, manufacturing, and that the tasks that remained to be performed would involve cleaning and other "porter" work.

Dones testified that pursuant to the settlement agreement he was to report to work on Tuesday, July 17, 1979, if certain personal business he was obliged to transact was completed by that date. He had promised to work even if he reported a little late. On direct examination, Dones testified that he was unable to report to work at all and that he therefore called the bakery and asked to speak to Myron Chassen in order to inform him of this fact. However, the woman who answered the phone hung up. Dones' wife also called the bakery, he stated, but the woman hung up on her as well. After having his recollection refreshed by looking at his telephone bill, Dones testified that he called the bakery twice. He also testified that he could not work because he was at the doctor's office. On cross-examination, Dones stated that he could not report to work late, as he had previously suggested he would do if he were able, because he was in court at the World Trade Center in New York City; although his appointment was for 11 a.m., the hearing did not conclude until 2 or 3 or 4 p.m. Dones stated that during a recess his wife had called the bakery. After counsel for Respondent called Dones' attention to the fact that Dones' phone bill indicated that calls had been made from Dones' home in New Jersey at 12:19, 12:31, and 12:35 p.m., Dones added the information that he had taken the train home during a recess and that he and his wife had called the bakery from their home. Counsel for the General Counsel did not seek to clarify this sequence of events on redirect examination, and so the record is barren of any further explanations which might make the testimony seem credible such as the amount of time required to travel back and forth from the World Trade Center, or the reason for Dones' original testimony that he was at his doctor's office.

From the time of his reinstatement until his discharge in August 1979, Dones testified that he did the "dirty work."[5] He testified that he scraped hand trucks in the sun, washed the garage door, washed the floor with a hose and a hand scraper that required him to kneel down, and cleaned the freezers with the doors closed. Concerning the freezers, Dones testified at great length that he was not permitted by Myron Chassen to turn off the blowers and leave the door open while he cleaned and scraped the ice. Dones stated that it was the usual practice to turn off the blowers and keep the door open, although in response to a question by the General Counsel he also testified that he had never seen anyone else clean the freezers.[6]

Dones testified that he spent a few hours cleaning floors every day, and that the areas where new floor had been installed as part of the renovations were "very easy" to clean compared to the condition that had existed previously. Dones stated that he still cleaned the bathroom after his reinstatement and also continued to take out the garbage. On cross-examination, Dones conceded that his post-reinstatement cleaning work resembled his prereinstatement work, except that he had to clean more carefully. Dones testified that after his reinstatement the bakery was like "a concentration camp" in that as soon as one task was finished he was given another, and that one day Robert told him not to talk so much.[7]

On Monday, July 23, 1979, Dones testified, he had a court appointment and was excused from work in advance by Robert Chassen. In August, Dones stated, he missed a day or two of work.

After having his attention directed to Friday, August 17, 1979, Dones testified that Myron Chassen told him that he had missed "quite a few Sundays" and that Dones would be fired if he did not start reporting to work on Sundays. Dones told Myron Chassen that the settlement agreement specified that he would not be required to work on Sundays and "you may as well let me go now." Chassen told Dones that the special arrangement was to apply only until the date of the election. Dones testified that he did not work the next Sunday, and that Mryon Chassen discharged him the next Monday. In response to a leading question by the General Counsel, Dones stated that during the Friday conversation he had offered to work Sundays if his hours could be adjusted; however, Dones could not recall what Chassen's response had been.

McGinley testified that his understanding of the terms of Dones' reinstatement was that Dones was to work as a porter, not a baker, and that he was to be required to work only 5 days a week. McGinley stated that Dones would not have to work Sundays at all, and that this would not change after the election.

Myron Chassen testified that Dones was hired as a porter and that his work consisted primarily of cleaning, helping with the wrapping machine, and helping out generally. After Dones' reinstatement, Dones did no wrapping because, under the new work schedule, the wrapping was completed before Dones appeared. The testimony was corroborated by that of Benjamin Vandross, a witness called by the General Counsel.[8] Vandross testified that, before Dones' discharge, he observed Dones at work and that his job consisted of porter work such as putting out garbage, cleaning the back of the bakery, and working on the wrapping machine. After

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[5] Dones could not recall any of the relevant dates in this proceeding. He was reinstated on July 18, and discharged again on August 20, 1979.

[6] The General Counsel did not ask Dones to explain how he was aware of the usual practice if he had never observed it in the past.

[7] Greg Simon, whose testimony and credibility are discussed below, testified that, after Dones' reinstatement, Myron Chassen stopped Simon from scraping the floors and said that he had someone to do the cleaning now and "that's the law." Chassen said Dones would clean.

[8] Vandross signed an authorization card for the Union. I found Vandross to be a generally credible witness; his testimony was consistent and given in a forthright manner.

Dones' reinstatement, Vandross saw him scraping floors, and cleaning the freezer, storage room, bathroom, and baking racks. Vandross testified that the freezers were cleaned more often after Dones returned and that he heard Myron Chassen tell Dones not to leave the doors open because the cakes would get soft.

Myron Chassen also testified about the incidents related to by Dones. He stated that he has cleaned the freezers at the bakery, and that, in the summer months, the freezer doors must be kept closed during this process or the goods stored within will begin to melt. He also stated that coats and gloves are kept in the freezers for the use of employees working in them. This testimony was corroborated by Terry Smith. Smith also testified that at the urging of other unit employees he gave a sworn statement to the Board to the effect that Myron Chassen closed the door while Dones was working in the freezer without a coat on. In fact, Smith never observed such an incident. Smith also testified that his sworn statement omitted facts he was aware of; namely, that there are jackets in the freezer for the use of employees and that Dones worked in the freezers with the doors open on occasion. Significantly, Dones was not called to rebut this testimony.[9]

Concerning Dones' attendance record, Myron Chassen stated that Dones was discharged for absenteeism in May 1979, because he missed at least 1 day of work every week. After Dones' reinstatement pursuant to the settlement agreement, Chassen testified, Dones missed 6 days in a 3-week period and two warning letters were issued to him. Chassen said that in the past he simply would have fired an employee for that amount of absenteeism, but that he was advised by counsel to send warning letters instead.[10] When Dones failed to report to work on Sundays after the elections, he was discharged. Myron Chassen testified that other full-time employees were absent less frequently than Dones, but that one employee who was absent the same number of days as Dones did not continuously miss Sundays. Chassen also testified that he had offered Dones reinstatement after August 20, if he would work Sundays, but Dones refused.

The General Counsel argues that Dones was discriminatorily discharged in violation of the Act, and contends that the unfavorable changes in Dones' working conditions, the insistence on Dones' working regular Sunday hours after the election, the use of warning letters to Dones, and other alleged acts of interference with the rights of unit employees all show that Respondent had union animus and prove that Dones' postsettlement discharge was an unfair labor practice. I note that the discussion in the General Counsel's brief relating to Dones, as well as to all the other issues in the case, presents a highly selective overview of the testimony and does not explain testimony unfavorable to the General Counsel's case. For reasons which I will discuss below, I am unable to share the General Counsel's view of the facts. In more than a few instances, the General Counsel's brief overzealously misstates the evidence in the record, and the brief also refers to nonexistent pages of the transcript. (To give only two examples, the brief states that Chassen "refused" to alter Dones' Sunday hours when there is no testimony at all to this effect, and the brief refers to "page 168" of the transcript as the source for several important factual assertions when there is no p. 168 in the record).

Dones' testimony is characterized by internal inconsistencies and by a seeming willingness to tell whatever story is best suited to the General Counsel's case. Further, Dones' testimony is contrary in many respects to the testimony of other credible witnesses.

Dones' testimony contradicts that of McGinley, the union representative who was called by the General Counsel in this proceeding.[11] McGinley clearly and unequivocally stated that, as a result of the settlement, Dones was reinstated as a "porter." Yet Dones spent a lengthy time on the witness stand denying that he was a porter and seeking to show that Respondent discriminatorily imposed porter work on him after his reinstatement in order to make his work less pleasant and more difficult than it had been before his first discharge.[12] In the same manner, Dones indignantly described being required to clean the freezer with the door closed contrary to the "usual" practice but later admitted that he had never observed anyone else cleaning freezers. Dones claimed that he could not return to work on July 17, 1979, but while he testified that he was at the doctor's office, he later changed the story to provide details of a day spent at the World Trade Center. And the progression of Dones' testimony, detailed above, concerning the World Trade Center episode is of such a nature as to lead me to believe that Dones fabricated explanations as he went along and as he was confronted with prior inconsistencies in his testimony.

This tendency is nowhere better illustrated than in Dones' testimony concerning his solicitation of authorization cards for the Union, a subject not directly relevant to this portion of the case. On direct examination, Dones identified a number of cards and stated that they had been signed and filled out in his presence, or that they had been signed and completed and handed to him by the individual employees. Based on the testimony of McGinley and of the individual signers, however, it is clear that Dones' testimony was inaccurate and that he had absolutely no memory of the events to which he willingly testified to on behalf of the General Counsel. The record shows that Dones' direct testimony was in error concernig the circumstances of the completion and signature of cards from employees Gibbs, Smith, Pickett, Vandross, Skinner, and Mitchell.

In contrast to the testimony of Dones, Myron and Robert Chassen testified in a credible and forthright manner; their testimony was internally consistent, and they did not seek to evade questions on cross-examination. The General Counsel's brief points out that neither Myron nor Robert Chassen specifically denied uttering certain of the presettlement statements that are alleged to constitute violations of Section 8(a)(1) of the Act. Indeed, this candor leads me to believe that both Chassen brothers testified in a direct and unguarded way. The general character of their testimony comports with the fact that, when the Union's demand for recognition was received in May 1979, Respondent was not represented by experienced labor counsel, and it was only some time after charges were filed that Respondent obtained advice from labor counsel and negotiated the settlement agreement.

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[9] Terry Smith's testimony will be discussed more fully below.

[10] The letter of July 24 states that Dones missed two out of the last seven working days, including July 17 which was unexcused due to lack of notification to Respondent. The letter of August 6, 1979, mentions further absences by Dones and requests that he again report for work on Sundays.

[11] McGinley testified in a calm, forthright manner and did not seek to evade cross-examination. I find that he was a credible witness.

[12] Further, Vandross' testimony about Dones' workload before and after his reinstatement makes it clear that Dones did substantial porter work before his initial discharge in May 1979.

Since I have determined that Dones is not a credible witness, I must evaluate the issues relating to his testimony in light of this finding. Thus, I conclude that, by agreement of the parties, Dones was reinstated as a porter and that he was assigned substantially the same duties after his reinstatement as he had performed prior to his discharge on May 21, 1979. I find that any change in the manner in which he was asked to perform his duties was caused not by Respondent's desire to make his job more onerous and less pleasant, but by the reorganization and renovation of the bakery and by Respondent's desire to avoid further citations from the Board of Health. I also find that Dones was not required to work in a different manner from other employees and that Respondent's requirements as to his manner of cleaning the freezers, for example, were the same as those imposed by Respondent on other employees.

Turning to the question of whether Dones' excusal from Sunday work was to continue beyond the date of the election, I find that Myron Chassen's understanding of the arrangement is more reliable than that of Dones or McGinley. I have already explained that I do not regard Dones as a credible witness. Alhough I have found that McGinley is a credible witness, I believe his memory is less reliable than is Myron Chassen's on the subject of Sunday work for Dones. It is not plausible that Respondent would have agreed to excuse Dones from work on Sunday since it was acknowledged that Sunday is typically the busiest day of the week. It is much more likely that Respondent agreed, as it contends it did, to certain special conditions for Dones to last until the date of the election. From the demeanor of Myron and Robert Chassen and from their testimony, it is clear that they each have an intense commitment to the bakery and are familiar with the most minute details of the enterprise. Therefore, I find Myron Chassen's memory in the matter of Dones' Sunday hours more reliable than that of McGinley. I therefore find that Dones was properly expected to resume work on Sundays after the election.[13]

Both Myron Chassen and Dones himself testified that Dones was fired because he refused to begin regular Sunday work once the election was over. Dones testified that he indicated to Chassen that, if Chassen were to insist on Sunday work, Chassen "may as well let me go now." Although Dones responded to a leading question from the General Counsel by stating that he had offered to adjust his Sunday hours, I do not credit this. Significantly, Dones could not recall what Chassen's response to this offer had been, although Dones did not testify that Chassen had refused his offer. (The General Counsel's brief is quite incorrect on this point.) Further, when Chassen offered reinstatement to Dones on condition that Dones work on Sundays, Dones did not at that time agree to return provided some adjustment could be made in his hours.

I also do not find that Respondent engaged in unlawful conduct when it issued warning letters to Dones concerning his absenteeism and his failure to work on Sundays. Dones was indeed absent frequently and he did refuse to work on Sundays. There is no evidence that Respondent had any other purpose than to follow advice of counsel and make a record of warnings. Nor has the General Counsel shown that any other employee had a record quite as bad as Dones.[14] Finally, it is clear that Respondent repeatedly offered Dones a chance to continue working by improving his attendance record, especially his attendance on Sunday.

B. *Events Relating to Skinner*

Charles Skinner testified that he was hired as a baker's helper in April 1978, and that he was discharged on July 17, 1979. Skinner's testimony about the dates of his hiring, discharge, reinstatement, and second discharge was confused, as was much of the rest of his testimony. In fact, the record shows that Skinner was discharged on May 21, 1979, and that he was reinstated on July 17, 1979, pursuant to the settlement agreement.[15] There is a dispute as to the actual date and circumstances of his second discharge which will be discussed below. Skinner's hours were from 2 or 3 a.m. until 11 a.m. or noon, Sunday through Friday. Before his discharge in May 1979, he made pastry on the belt, scaled dough (weighed it by portion), fried doughnuts, operated the oven, and helped load the oven. After his reinstatement, he again made pastry on the belt but, after a time, Robert Chassen assigned him to operate the two ovens. This work consisted of loading and unloading ovens, and of watching goods in the ovens.

Skinner testified that he asked Robert Chassen for assistance to unload the oven, but that he was not given help. He stated that Chassen told him "that was my job. If I didn't like it . . . go back to the labor board." On direct examination, Skinner stated that no other employees worked the ovens without assistance; however, Skinner later testified that "Paul and George" worked alone. Skinner also stated that he asked Robert Chassen for a raise but that he was refused. Skinner gave it as his opinion that he should have been earning more money because he was working on the ovens. However, on cross-examination, Skinner testified that he did not know how much other oven men earned. He stated that he believed that one oven man who was a long service employee earned more than he did, and he acknowledged that the long service man also performed mixing, a task Skinner did not perform. There was no general wage increase at this time.

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[13] I note also the paucity of testimony by Dones, an otherwise loquacious witness, concerning the precise nature and requirements of his preaching duties. Dones did not testify as to the hours of his preaching duties nor their location, and the record is therefore barren of any specific information as to when he would have to be released on Sunday. This leads me to believe that Dones' commitments were rather vague, and reinforces my belief that the Union agreed that the Sunday excusal would last only until the date of the election. Further, Dones testified that before his first discharge he was excused early on Sunday only if he could be spared; this circumstance lends weight to Respondent's position on this issue.

[14] I do not credit Dones' explanations that he gave notice of intended absences since, as discussed above, I do not believe him to be a credible witness. Further, I do not credit Dones' excuses for his absences, whether a doctor's appointment or a court appearance, since these stories seem to me to be fabricated.

[15] Skinner testified in an inconsistent manner. He showed an extremely poor memory for the sequence of events, despite the extensive use of leading questions by the General Counsel during his direct testimony. Much of his testimony is so undecipherable as to be almost worthless.

Skinner testified that he was unable to get someone to watch the oven while he went upstairs to the bathroom but that he worked out a system for going upstairs while the ovens were loaded. Robert Chassen testified that he did not deny Skinner's proper requests for relief. Skinner testified that on August 6, 1979, he overproofed some crumb buns and Robert Chassen told him to "go home."[16] Skinner thought he was fired but he nevertheless finished out the day. Skinner testified that he overproofed the buns because "I forgot about it," and that while he was unloading the big oven he could not take the crumb buns out. Although his testimony on this point is confused, a careful reading of Skinner's testimony convinces me that Skinner forgot about the crumb buns and only realized that they were overproofed while he was unloading an oven, at which point it was too late to prevent damage. Skinner was working without assistance during this occurrence, and he testified that the damage occurred because he had no help.

Following the incident of August 6, Skinner testified, he did not return to work until about August 17. He received a letter dated August 9, 1979, from Myron Chassen stating that Skinner had previously been warned concerning damage to $700 worth of baked goods, and that Skinner had been absent from work on August 7, 8, and 9.[17] The letter stated:

> The purpose of this letter is to serve you with notice that your continued absence without notice or excuse will result in your dismissal.

Some time after receiving the letter, Skinner went back to the bakery. Upon seeing Robert Chassen, Skinner told him he "came back for my money and my clothes," and Chassen told him to get out. Skinner did not ask Chassen if he could go back to work.

Robert Chassen testified that the work of loading and unloading the ovens is a one man job. In fact, Chassen stated, some oven men also scale dough without assistance while loading and unloading but that Skinner was not asked to do this. The usual procedure is for one man to scale the dough and another to put it in the oven; Chassen said that in that circumstance he would consider that the men were helping each other. From a careful comparison of Skinner's testimony with the testimony of Robert Chassen on this point, I believe that when Skinner testified that an oven man often had assistance, he had reference to the times when one man did scaling and the other loaded and unloaded the goods.

Robert Chassen testified that he assigned Skinner to the ovens because a previous oven man quit and Skinner was next in line to do the work. This testimony was not contradicted by any witness. Robert Chassen stated that after his reinstatement pursuant to the settlement agreement, Skinner "took his time. He walked away a lot and he was a little arrogant and I couldn't talk to him. . . . I had no choice. I had to put up with him." Chassen testified that Skinner had burned merchandise on numerous occasions.

Concerning Skinner's discharge, Robert Chassen testified that one day Skinner ruined a whole rack of coffee buns because he walked outside for coffee.[18] Chassen was so upset because no more could be made that he told him to "go home for the day." He did not see Skinner thereafter. Both Robert and Myron Chassen testified that Skinner was fired because he was absent from work for 9 days. Apparently, a letter of discharge was sent to him.[19] Myron Chassen testified that, after his discharge, Skinner returned to the bakery and threatened him.

The General Counsel asserts that Skinner's August discharge was in violation of Section 8(a)(1), (3), and (4), of the Act. An extended discussion of the General Counsel's brief is not required in that part of the case relating to Skinner since the brief is based on an erroneous view of the facts. Skinner's total inability to place in context the various incidents he was asked to relate and his inability to recall in what sequence these events took place (except in response to leading questions) leads me to believe that he had memorized a series of stories for the hearing in the instant proceeding and was unable to keep his stories straight. I will not, therefore, credit Skinner's testimony where it conflicts with that of Robert Chassen. I am convinced from my observation of Skinner and from a reading of the record that he had little recollection of many of the events he testified to and that much of his testimony had been suggested to him by someone else.

I find that Skinner was not harassed by being assigned to perform oven work in any way that was contrary to the usual practice at the bakery; even Skinner admitted that oven men often work alone. I find that Skinner was not improperly refused a wage increase; there was no testimony to show why he was entitled to an increase. I find that the warning letters were properly issued to Skinner for destruction of baked goods as claimed by Respondent. I find, as testified to by Robert Chassen, that Skinner was not fired on August 6, but that he was told to go home for the rest of the day. Skinner received a letter dated August 9, warning him that as he had been absent from work without excuse for 3 days he faced dismissal if he continued to be absent without notice or excuse. Skinner did nothing on receipt of this letter, and sometime later he returned to the bakery for his money and his clothes. He did not ask to be put back to work. Although, as set forth above, Robert Chassen candidly expressed a certain amount of resentment against Skinner and his "arrogant" postsettlement behavior, the General Counsel has not shown that this played any part in Skinner's termination. Rather, I find that Skinner gave ample cause to Respondent by damaging merchandise and by failing to report to work or to contact Respondent upon receipt of the August 9 letter.

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[16] Skinner's testimony on this incident is not clear; at various points in the record, he placed the crumb bun incident before his reinstatement under the settlement agreement.

[17] On July 24, 1979, Skinner was given a note signed by Robert Chassen listing goods improperly baked by Skinner and warning that he might be dismissed. Skinner denied some of the allegations in this note.

[18] This is the "crumb bun" incident.

[19] This letter was not introduced into evidence.

C. Events Relating to Union Meetings and to the Election

The General Counsel presented the testimony of Greg Simon to show alleged instances of Employer surveillance and interference. Simon testified that he is a porter and that he works the hours of 4 to 10 or 11 p.m.; he stated that he was expected to work 6 days a week but that he occasionally did not work on Wednesdays.[20]

Simon testified that Dones called a union meeting on Saturday in late July 1979 at the Golden Skillet Restaurant. He testified that he and Charles Howard and Terry Smith talked to Myron Chassen about this time and that Chassen asked them to go to the meeting and report back to him concerning what was discussed.[21] Chassen then asked Simon who was for the Union and who would vote against representation. Simon testified that Myron Chassen told the three young men that their names were not on the list of eligible voters. Chassen allegedly told them that the Union was no good, that it slowed up business, and that one bakery which had a union was now closed.

On the Saturday of the meeting, Simon testified, he looked for the Golden Skillet with Howard and Smith but could not find it. The three then saw Myron Chassen near Newark Avenue, and he told them to look for the meeting and report back to him. Simon testified that they did not locate the meeting, but nevertheless, told Chassen that they attended it and that the fellows were drinking and saying "to vote for the Union." On cross-examination, when counsel for Respondent asked Simon about the lie involved in this report to Chassen, Simon testified that he did not lie and that Terry Smith did all the talking. After further cross-examination, Simon recalled that on this day the three young men saw employees Benjamin Vandross and Charles Skinner in a car; Vandross and Skinner told the three about the meeting and so enabled Terry Smith to tell Myron Chassen what had happened there. According to Simon, the three young men did not tell Vandross and Skinner about Chassen's interest in the meeting. It was during this encounter, Simon said, that Vandross told them they had a right to vote.

According to Simon, the day before the election of August 3, 1979, he was at work with Howard and Smith when they saw Myron Chassen at or about 10 p.m.[22] Chassen said "tomorrow" was the election, that they could not vote and he gave Smith $30 "to get lost tomorrow." When the three of them went outside, Smith gave $10 each to Simon and Howard.

On the day of the election, Simon testified, he, Charles Howard, and Terry Smith "got into Terry's car" and, with Terry Smith at the wheel they "went riding." Someone said: "[L]et's go around the bakery." (On cross-examination Simon testified that the car belonged to Smith's brother.) Simon stated that they drove to the bakery and parked in the public lot on the corner of Newark Avenue and Monmouth Street, and that their purpose was to vote in the election. The three young men then walked to another part of the lot toward First Street, the location at the back of the bakery where the election was being conducted in a garage area.[23] Before they left the lot or reached First Street, they saw Myron Chassen who stopped them and asked where they were going. Simon testified that Chassen said, "[Y]ou're not allowed to vote," and told them that their names were not on the list and that they should "go home, and come back to work this evening." After this incident, the three young men left. Simon stated that he, Smith, and Howard came to work at "four o'clock, on the dot" in the afternoon of the election, and that Chassen said, "thanks." On the next payday, Simon testified, there was $30 extra stapled to the outside of each of their pay envelopes, and Myron Chassen said, "Thanks again."[24]

Simon could not remember the day of the week on which the election was held; however, he gave a detailed account of his movements on that morning including a trip to an ice cream parlor. Simon did not recall seeing the union organizer, Leonard McGinley, near the bakery on that day. When McGinley testified, however, he said that on the day of the election, he had positioned himself on Monmouth Street near the bakery so that he could "observe the back where the election was being held." McGinley saw a car with Terry Smith and two other young black men in it which drove around the block once and then went on. McGinley did not see the car pull into the lot and park, nor did he see anyone emerge from the car. Further, he did not observe Myron Chassen talk to three men in the lot.

Charles Howard was called by Respondent and testified that he had been employed by Respondent for 1-1/2 years. From March through August 1979, he worked 6 days a week when there was work available. Howard testified that he recalled the day of the election, and that he remained at home and did not go to the bakery to vote in the morning while the election was held. Howard denied being in a car with Simon and Smith on the day of the election, and said that he had gotten to work by bus that afternoon.

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[20] In fact, the payroll records for 1979 show that he often did not work a full week and that he often worked only 2 or 4 hours per day.

[21] Simon, Howard, and Smith are high school students who work for Respondent after school hours.

[22] The Employer's payroll records show that neither Simon nor Howard were at work on August 2, 1979, the day before the election, and that neither Simon nor Smith worked on the day of the election.

[23] The bakery faces Newark Avenue at the front and First Street at the rear. It is between Monmouth Street and Cole Street.

[24] This last payment is not alleged as a violation in the complaint.

On cross-examination, Howard acknowledged that in June 1979 he borrowed money for a bicycle from Myron Chassen, but he stated that he had long since paid it all back (at the rate of $10 per week). He also testified that he was sometimes given extra money by Chassen for doing good work and that he received $20 at Christmas. Howard denied being given any money by Myron Chassen before the election, and he explained that he did not vote because his mother did not want him to get involved with the Union or with the Labor Board. He recalled that Myron Chassen had told him when the election would be held, although Chassen did not tell him whether or not to vote.

Terry Smith was called by Respondent, he testified that he had been employed at the bakery for about 3 years. Smith stated that on the day of the election, he first arrived at the bakery in time to work at 4 p.m. He denied being in a car with Simon and Howard that morning or going to the bakery to vote in the election.[25]

On cross-examination by the General Counsel, Smith acknowledged giving two sworn statements to the Board which were contrary to his testimony at the hearing. The statements, dated August 13 and 26, 1979, were introduced into evidence by the General Counsel. Smith testified that when he came to the Regional Office to give the statements he was accompanied by Greg Simon. The statement of August 13 is, in substance, to the following effect: On Friday, July 27, 1979, Myron Chassen asked Smith, Howard, and Simon to attend a union meeting and report back concerning statements made by Dones. Chassen also gave the young men $30 "to go the shore" and not vote in the election. The three tried unsuccessfully to find the union meeting on July 28, 1979, and then met "Benny" and "Lee" as these two returned from the meeting. Benny and Lee told the three men what Dones said at the meeting, but when Smith, Howard, and Simon saw Myron Chassen a few minutes later, Smith told Chassen that he could not find the meeting and had not seen anyone. On July 29, a payday, Chassen asked about the meeting and later gave Smith extra money and said, "[T]hank you for not coming." The statement then reads, "I believe he was referring to the election." The statement of August 16, 1979, is to the following effect: On August 2, 1979, Chassen gave Smith $30, mentioning a trip to the shore, and on August 3, 1979, Smith, Simon, and Howard appeared to vote and saw Myron Chassen who told them to go home and come back around 6 p.m.[26]

Pursuant to cross-examination by the General Counsel, Smith stated that he was coerced into giving the sworn statements by Benny Vandross, Joe Dones, and Greg Simon who "threatened, abused and scared" him. Smith testified that initially Vandross and Dones told him to go the Board and sign a statement and that he was beaten up by an unknown person when he failed to do so. Subsequently, when Greg Simon, Dones, and Vandross called him at home, Smith agreed to give a statement. After he gave the first statement, Smith testified, he was threatened again by Dones and Vandross and a gun was mentioned. Further, Smith stated that Greg Simon had called him shortly before the hearing and stated that the General Counsel would help him get into the Army and that if he changed his testimony he would be "lynched." Before this call, Smith had told Simon that he was going to tell the truth at the hearing because he had spoken to a family friend who is a Jersey City police officer earlier in the week, and had been advised about the seriousness of the situation. Concerning the source for the untruths in his statements, Smith explained that Greg Simon coached him in the story and that Dones "put some more lies with it." Smith recalled being told to say that Myron Chassen asked them to go to the meeting, that he gave them money before and after the election and prevented them from voting, and that Dones worked in the freezer without a coat. Finally, Smith testified, Dones approached him while he waited to testify outside the court room and said, "[I]ts for your benefit, and if you tell the truth they're going to throw you in jail." He testified, in great detail, that on the day of the election he spent the morning with his girl friend and later went to work with Howard and Simon. Smith stated that the election was held on a Monday or Tuesday; he denied receiving extra money after the election.[27]

After Smith's testimony was given, the General Counsel recalled Simon, Dones, and Vandross. Simon denied coercing Smith in any way, and stated that Smith had suggested giving an affidavit to the Board, and that Dones also suggested filing a complaint. Vandross denied threatening Smith; he stated, however, that he had called Smith at home about coming to the Board. Vandross testified that, on the night of the election, he and Lee Archer met Smith, Simon, and Howard and that they discussed what had happened and he told them that they were entitled to vote. Dones also called Smith after the election; however, Dones denied threatening Smith. Dones testified that Smith, Simon and Howard told him about being chased from the polls and asked his advice, and that he told all three to file a complaint with the Board.

Myron Chassen testified that he arrived at the bakery at or about 7:30 a.m. on the day of the election. He decorated cakes with whipped cream until about 10:30 a.m. when the Board agent directed him to leave. Thereupon, both Chassen brothers and their counsel stayed in the bakery office for about one-half hour until an employee entered the office to say that a pot of whipped cream had been left out right near the office. At that point, Myron Chassen walked through the manufacturing area to the door of the garage where he attracted the Board agent's attention by waving to him. The Board agent directed Chassen to return to the office and the latter did so. Myron Chassen testified that he was concerned that the cream would spoil in the heat of the day, and that he wanted the Board agent's permission to refrigerate it. Chassen denied being near the parking lot and denied seeing either Smith, Howard, or Simon during the time the election took place.

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[25] As set forth above, the payroll records show that Smith did not work on the day of the election.

[26] Many other subjects, not relevant to this discussion, are covered in Smith's statements.

[27] In fact, August 3, 1979, was a Friday.

Manifestly, a major issue in this case is the relative credibility of the three young men—Greg Simon, Charles Howard, and Terry Smith. Charles Howard testified in a careful, consistent, and forthright manner. He testified that his mother had strong feelings against his involvement with the Union and, for that matter, with the Board. I am convinced from his demeanor and from the nature of his replies to questions posed by counsel that he did indeed shun any involvement with the Union and that his testimony was in all respects truthful. Thus, I credit his testimony that he was not bribed, interrogated, or prevented from voting by Myron Chassen. As will be seen below, I do not credit any of Greg Simon's testimony about alleged unfair labor practices committed by Respondent.

There are many reasons, aside from the truthfulness of Howard's testimony, for discrediting the version of events given by Simon. For one, Simon's stories do not make sense. As an example, if Simon had indeed been asked by Myron Chassen to find the Golden Skillet meeting and report back to him, Simon would surely have mentioned this fact to Vandross and Skinner (two union supporters), when he met them on the day of the meeting and discussed with them what had taken place there. Vandross, a witness called by the General Counsel and whose testimony I credit, did not testify at all about his encounter; Vandross testified that he met the three young men after a postelection meeting which was held at a bar one block from the bakery and that he was accompanied by Lee Archer, not Skinner. Significantly, Simon would not accept responsibility for allegedly reporting back to Chassen and lying about the meeting; he testified that Terry Smith had done the talking. Another example of a story that does not make sense is Simon's version of the alleged bribe. Simon claims that the money was given to Terry Smith in order to insure that the three young men would not vote "tomorrow." However, the payroll records introduced into evidence by the General Counsel show that neither Simon nor Howard were at work on the day before the election. Further, no reason has been shown why Chassen would give the three any money to stay away from the election, and there is no testimony to show Chassen had any basis for believing they intended to vote. Their names were not on the list of eligibles, and Chassen had not been informed that they intended to cast ballots. Indeed, even Simon did not testify that he had expressed any intention of voting before the election.

Simon's story about the election day ride also strains credulity. Simon was able to testify in detail about the ride and the events of the day, but he could not recall seeing McGinley near the bakery during the election although the car allegedly drove close to where McGinley was standing. Further, if Simon had indeed been prevented from voting, why did he not immediately seek out the union organizer and make this fact known? McGinley, a witness called by the General Counsel and whose testimony I credit, had stationed himself so that he could observe the relevant locations during the election. McGinley saw a car with three youths in it, but he was unable to say that Simon or Howard was in the car. McGinley saw the car drive once around the bakery and then depart. If the car had been parked and if the three young men had emerged and had been confronted by Myron Chassen, McGinley would have observed this. His failure to see any of the events testified to by Simon leads to the conclusion that these events did not occur.

Terry Smith admitted giving two false statements to the Board, and there is thus no need to dwell at length on the reasons for finding all of his testimony and his sworn affidavits open to serious question. Although it is difficult to sift fact from fiction in Smith's testimony, it is interesting to note that his first affidavit reads like a badly remembered version of Greg Simon's testimony: for example, the alleged bribe is given on the day of the Saturday union meeting and a second bribe is given before the election. This would seem to lend some credence to Smith's story that his affidavits are false and were given at the urging of Greg Simon and Joseph Dones who also provided the false details to be included in the affidavits. This is not to say, however, that I find his testimony at the hearing to be entirely reliable. For example, Smith gave a very detailed account of his supposed activities on the morning of the election, and yet he was unable to recall what day of the week he was testifying about, nor did he recall that he did not work on the day of the election. In view of the fact that Smith is a self-admitted teller of untruths and in view of the fact that it is impossible to determine when Smith might be giving accurate testimony, I shall disregard all of Smith's testimony and his affidavits. Although the General Counsel urges that Smith's affidavits should be credited, no basis has been shown to support a finding that the statements contained in the affidavits are true.

The General Counsel called Ulyssee Mitchell to testify concerning alleged instances of surveillance by Respondent.[28] Mitchell was hired as a baker's helper in 1978, and he was discharged on August 25, 1979, following an altercation with Robert Chassen during which the police were called. As Mitchell described it, the fracas arose over an order given by Myron Chassen to put away certain goods which was not promptly carried out by Mitchell. Mitchell was accused of "pushing" Robert Chassen and criminal charges were filed by both parties. According to Mitchell, Chassen did not touch him. After the police came, both Joseph Dones and one of the police officers advised Mitchell to leave the scene and "cool off." Mitchell was clearly hostile to both Myron and Robert Chassen, and volunteered the information concerning Robert Chassen that "he's no match for me. I could have washed up the floor with him." On direct examination, Mitchell was confused despite the extensive use of leading questions by the General Counsel, and testified as though he was telling a story by rote. Further, Mitchell resisted counsel's questions on cross-examination and answered evasively.

In response to a series of leading questions by the General Counsel, Mitchell stated that he had called a meeting at the Lucky Seven bar on the Saturday before the election, and that on the next day Robert Chassen asked him if he had attended the meeting. Mitchell allegedly answered, "[N]o . . . I went to Staten Island." Mitchell testified that employee Paul Mueller was 5 feet away when this conversation took place, and that, when Robert Chassen went over to Mueller's work station to look for something, Mueller said: "I was in the bar. I should have found out who all was in there." Thereupon, according to Mitchell, Robert Chassen said: "That's a good idea. Go over to the bar today and find out who all was in the bar, in the meeting." Mitchell testified that, on the next Tuesday, he asked Robert Chassen: "Didn't you tell Paul to go and find out who all went to the meeting." According to Mitchell, Chassen acknowledged that he had and further said that the Union would not win "because we have the majority of the votes in the back." Chassen continued by saying: "But you can vote the way you want to vote . . . because no one would ever know."

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[28] Mitchell signed a card for the Union and was known to support the Union.

Mitchell testified in response to questions by the General Counsel that he had observed Dones' duties after the latter was reinstated and that Dones was given "filthy work" such as cleaning racks in the hot sun, "clean out refrigerators with the motors on . . . got on top of steam things and cleaned them off." Mitchell did not explain how he could observe Dones at work at this time: during the summer of 1979, Mitchell worked in the wrapping room and he began work at 2 a.m., while Dones did not appear until 9 a.m. and worked in other areas of the bakery. The nature of Mitchell's testimony on the subject of dones, and the manner in which it was given convinces me that Mitchell was testifying to matters of which he had no direct knowledge.

In evaluating Mitchell's testimony concerning alleged instances of interrogation and surveillance, I have taken into account his gratuitous expression of hostility to Robert Chassen, his demeanor while testifying, the General Counsel's extensive use of leading questions on direct examination and his unreliable testimony on the subject of Dones. Further, I have considered the likelihood that the story related to by Mitchell is accurate. I have determined that Mitchell is not a reliable witness and that he should not be credited. Although no other witness testified about these events, and Mitchell's testimony is uncontradicted, I am not convinced that the testimony is truthful or accurate. The story told by Mitchell is incredible on its face. As discussed above, certain presettlement statements by both Robert and Myron Chassen, admitted in the testimony of both brothers, were in the nature of interrogations, threats, and the like. The record is clear, however, that once labor counsel was retained by Respondent and the settlement agreement entered into, neither of the brothers made speeches to employees or discussed the Union with employees in informal meetings. Yet the General Counsel would have us believe that less than 1 week before the election, after compliance with the settlement agreement including posting of a notice and reinstatement of two alleged discriminatees, Robert Chassen approached a known union adherent and asked him about a union meeting and further asked another employee to obtain information about the meeting in the presence of this same union activist. It may be that Mitchell dimly remembered some occasion when Robert Chassen may have engaged in improper conduct. However, since the General Counsel supplied the time and place of the union meeting to Mitchell in his very first question about the transaction, Mitchell had no opportunity to try to remember when the conversations occurred. The use of a leading question here is particularly crucial to my evaluation of the testimony because several meetings were held at the bar, and Mitchell should have been permitted to testify of his own recollection concerning the timing of Chassen's remarks. As the record stands, it may be that Mitchell was testifying about a premeeting conversation which took place before the settlement agreement was executed.

Further, there is testimony by Myron Chassen that he was especially friendly with certain employees including a few who told him early in the Union's campaign that they did not favor union representation. Mueller is one of these named employees. If the Chassen brothers wished to spy on the union meeting, it is not reasonable to suppose they would approach Mueller in front of a known union supporter. It is even less likely that Robert Chassen would have admitted such surveillance to Mitchell 3 days before the election. The testimony of both brothers shows that they were well aware of the consequences of the alleged unfair labor practices committed before the settlement agreement, and it is most unlikely that Robert Chassen would have admitted a further unfair labor practice to one of the Union's chief supporters right before the election was to take place.

Since I do not find Mitchell to be a credible or reliable witness, I am unable to find that Respondent engaged in acts of interrogation and surveillance as alleged by the General Counsel.

In summary, I find and conclude that the General Counsel has not shown any violations by Respondent in connection with the union meetings or the election.

D. *The Presettlement Allegations*

On September 21, 1979, the Regional Director vacated and set aside the settlement agreement. As I have found that no unfair labor practices were committed by Respondent after the execution of the settlement agreement, I also find that the Regional Director had no grounds for setting aside the settlement agreement. Therefore, I shall recommend that the settlement agreement in Case 22-CA-9237 be reinstated, and it is therefore unnecessary to make any findings concerning the alleged unfair labor practices predating the settlement agreement. *Deister Concentrator Company, Inc.*, 253 NLRB 358 (1980).

E. *The Refusal To Bargain*

The General Counsel maintains that the unfair labor practices alleged herein are so serious and substantial in character and effect as to undermine the alleged majority status of the Union, and that a bargaining order should issue pursuant to *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). In view of my findings that none of the unfair labor practices alleged by the general Counsel did in fact take place, I conclude that Respondent has not violated Section 8(a)(5) of the Act and that there is no basis for the issuance of a bargaining order pursuant to the rationale of *Gissel*.

Conclusions of Law

1. Chassen Brothers, Inc., d/b/a Ann's-Schneider Bakery, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 50, Bakery, Confectionary & Tobacco Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Based on the findings of fact set forth above, I conclude that Respondent has not violated Section 8(a)(1), (3), (4), or (5) of the Act as alleged by the General Counsel, nor violated the Act in any other manner.

The Representation Proceeding

The objection filed in connection with this proceeding is that Respondent prevented Greg Simon, Terry Smith, and Charles Howard from entering the polling place and voting in the election on August 3, 1979. This objection is coextensive with certain of the unfair labor practices alleged, as to which have made a finding above that they are without merit. Therefore, I find no merit in the Objection.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[29]

The complaint is dismissed in its entirety.

IT IS FURTHER ORDERED that the settlement agreement in Case 22-CA-9237 be reinstated.

IT IS FURTHER ORDERED that the objections to the election conducted on August 3, 1979, in Case 22-RC-7887 be overruled and that a certification of results shall issue.

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[29] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Lord Jim's *and* Hotel & Restaurant Employees and Bartenders Union, Local 2. Cases 20–CA–15570 and 20–CA–15793

January 22, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 14, 1981, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed cross-exceptions and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lord Jim's, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.[2]

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the conclusions of the Administrative Law Judge, we find it unnecessary to rely on his discussion of *Amoco Production Company*, 239 NLRB 1195 (1979), in view of the lack of any evidence to show that anyone other than the members of Bartenders Local 41, which was only one of the unions involved, was given any opportunity to vote on the merger.

[2] Member Jenkins would award interest on backpay in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: These consolidated cases were heard before me in San Francisco, California, on February 20 and March 9, 1981. The charge in Case 20–CA–15570 was filed by Hotel & Restaurant Employees and Bartenders Union, Local 2 (herein called the Union) on August 18, 1980, and a copy thereof was served on Lord Jim's (herein called Respondent) on August 19, 1980. On November 10, 1980, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing in Case 20–CA–15570 alleging that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act. On November 18, 1980, the Union filed the charge in Case 20–CA–15793. Following investigation thereof, the Acting Regional Director issued a complaint and notice of hearing on December 17, 1980, alleging that Respondent violated Section 8(a)(3) and (1) of the Act. On that same date, the Acting Regional Director ordered that the two cases be consolidated for purposes of hearing.

The Issues

On March 9, 1981, the second day of the hearing, I granted Respondent's motion to dismiss the complaint alleging a violation of Section 8(a)(5) of the Act (Case 20–CA–15570) on the ground that the General Counsel and the Union had failed to prove a *prima facie* case. The basis of that ruling will be set forth herein. The principal issues presented for decision in Case 20–CA–15793 are as follows:

1. Whether Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee Regan Foiles on October 21, 1980.
2. Whether Respondent violated Section 8(a)(1) of the Act by interrogating Foiles regarding her union sympathies; by instructing Foiles to disassociate herself from the Union; by creating the impression that Foiles' union activities were under surveillance by Respondent; and by threatening Foiles with physical harm because of her union sympathies.

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a sole proprietorship of Spiro Tampourantzis[1] engaged in the operation of a bar and cocktail lounge in San Francisco, California. In the course and conduct of its business, Respondent annually derives gross revenues in excess of $500,000 and annually purchases directly from suppliers located outside the State of California goods and materials valued in excess of $5,000.

Accordingly, Respondent admits and I find Respondent to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] The transcript contains various spellings of Tampourantzis' name. The spelling used herein is that given by Tampourantzis on the witness stand.

II. THE LABOR ORGANIZATION INVOLVED

The Union represents employees in the hotel and culinary trades in dealing with their employers for purposes of collective bargaining. The Union is a labor organization within the meaning of Section 2(5) of the Act.

The Failure To Prove a *Prima Facie* 8(a)(5) and (1) Violation

As discussed above, I granted Respondent's motion to dismiss the complaint in Case 20-CA-15570 alleging a violation of Section 8(a)(5) and (1) of the Act. In my view, the General Counsel and the Union had failed to prove an essential element of a *prima facie* case. The relevant complaint allegation reads as follows:

> Since an unknown date in the past, and at all times material herein, the Union has been designated exclusive collective-bargaining representative of Respondent's employees in [an appropriate unit].[2] . . . and since that time the Union has been recognized as such representative by Respondent. Such recognition has been embodied in successive collective bargaining agreements, the most recent of which is effective by its terms for the period October 7, 1973 to October 31, 1980.

In support of this allegation, the General Counsel presented evidence that on October 7, 1973, Respondent entered into an agreement with six labor organizations[3] covering the terms and conditions of employment of its bartenders and cocktail waitresses. These six labor organizations have ceased to exist. Prior to 1975, Waiters and Dairy Lunchmen's Union No. 30 and Waitresses & Cafeteria Employees Union No. 48 merged into Dining Room Employees Union, Local 9. In 1975, the remaining five labor organizations were merged into a single labor organization, the Union herein. The five labor organizations went out of existence and a new labor organization, the Union, was formed. Although not pleaded in the complaint, the General Counsel contends that the Union is a successor to the six contracting unions. Evidence was presented that members of Bartenders, Local 41, were given notice of and voted in an election relating to the merger. There was no evidence that the employees of Respondent were members of Bartenders, Local 41, were given notice of the election, or voted in the election. Further, there was no evidence that cocktail waitresses (the only other contract classification in which Respondent employed employees and who comprised half of the bargaining unit), whether union members or not, participated in any election relating to the merger. To the contrary, I was requested to take, and took, judicial notice of the case of *Karl Kahn, et. al. v. Hotel and Restaurant Employees, etc.*, 469 F. Supp. 14 (N.D. Cal. 1977), affd. *per curiam* 597 F.2d 1317 (9th Cir. 1979), in which the district court found that the instant merger was unilaterally ordered by the president of the Hotel and Restaurant Employees' and Bartenders' International Union and that there *was no vote* on the merger.

In deciding whether a union is a successor to another union in any particular unit, the Board "looks to a number of factors, including whether democratic procedures have been followed in any vote on affiliation or merger, whether the new organization has succeeded to the assets and liabilities of the predecessor, whether the employees in the bargaining unit have had an opportunity to register their desires, and whether there is a continuity in the leadership and representation of the employees in the bargaining unit." See, e.g., *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Gene Graham Ford, Inc.)*, 188 NLRB 515, 518 (1971). The Board has indicated that whether the employees in the unit have had an opportunity to pass on the change of representative is "the primary concern" in such cases. *Newspapers, Inc., Publishers of the Austin American and the Austin Statesman*, 210 NLRB 8, 9, fn. 4 (1974), affd. 515 F.2d 334 (5th Cir. 1975). See also *William B. Tanner Company (formerly Pepper & Tanner, Inc.)*, 212 NLRB 566, 567 (1974), enforcement denied 517 F.2d 982 (6th Cir. 1975), and *Factory Services, Inc.*, 193 NLRB 722 (1971).

In *Jasper Seating Company, Inc.*, 231 NLRB 1025 (1977), the Board refused to find a successor union based on the fact that nonmembers of the union were not given an equal unqualified opportunity to participate in the affiliation vote. In *Amoco Production Company*, 239 NLRB 1195 (1979), remanded 613 F.2d 107 (5th Cir. 1980), the Board overruled *Jasper Seating* stating:

> The fact that union merger or affiliation votes are basically internal organizational matters, coupled with the employees' opportunity to exercise their right to choose whether to participate or to refrain from engaging in concerted activity, persuades us to find that union affiliation votes limited to union members are valid.
>
> An affiliation is the alignment or association of a union with a national or parent organization. An affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization.

Thus, the Board expressly distinguished the creation of a new labor organization from an internal union matter such as an affiliation vote.[4] Where a new labor organization is formed and the existing bargaining representative is dissolved, the rights of all unit employees and not just union members are affected. Such a change goes beyond internal matters and affects representative status. See, e.g., *Independent Drug Store Owners of Santa Clara*

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[2] The appropriate unit alleged in the complaint is as follows: All employees employed by Respondent at 1500 Broadway, San Francisco, California, who are employed in the job classifications listed in the Independent Restaurant & Tavern Agreement effective October 7, 1973; excluding all other employees, guards and supervisors as defined in the National Labor Relations Act.

[3] The six unions were waiters and Dairy Lunchmen's Union No. 30; Waitresses & Cafeteria Employees Union No. 48; Bartenders, Local 41; Cooks, Pastry Cooks and Assistants Union, Local 44; Miscellaneous Culinary Employees Union, Local 110; and Hotel, Motel, Club and Service Workers Union, Local 283.

[4] See also then Member Truesdale's concurring opinion at 1196.

County, 211 NLRB 701 (1974), enfd. 528 F.2d 1225 (9th Cir. 1975).

In *Amoco*, the Board restated the principle that affiliation procedures must meet due process requirements; for example, proper notice to all members, an orderly vote, and some reasonable precautions to maintain the secrecy of the ballot. In the instant case, the merger ordered by the president of the International Union does not meet those requirements. Further, the only evidence of an election showed that members of the Bartenders Union voted in favor of the merger. There was no evidence that members of the other labor organizations voted in any election. Thus, even if an election limited to union members were sufficient, there would be insufficient evidence in this case to find proper successorship.

The General Counsel and the Union have failed to prove by any other means that Respondent was obligated to bargain with the Union. In his post-hearing brief, the General Counsel contends that Respondent has recognized the Union and complied to some extent with the 1973 collective-bargaining agreement. However, no evidence in support of this contention was offered. Evidence was presented that in 1977 the trust funds[5] brought suit against Respondent seeking payment pursuant to the provisions of the 1973 bargaining agreement. In that suit, a settlement was reached by the assignee of the trust funds and Respondent. That evidence was presented with the express purpose of showing attempts by the Union to enforce the agreement and, therefore, that the Union had not abandoned its representative status. However, the settlement was not offered and could not be used as an admission that Respondent had recognized the Union or an admission that Respondent had a bargaining agreement with the Union. See Federal Rules of Evidence, Rule 408.

Accordingly, for the failure to prove a *prima facie* case, the recommended Order will provide for dismissal of the complaint in Case 20-CA-15570.

III. THE ALLEGED UNFAIR LABOR PRACTICES IN CASE 20-CA-15793

Regan Foiles first worked for Respondent as a cocktail waitress in 1974. She was fired in 1974 and rehired 2 years later. Thereafter, Foiles, a student, worked for Respondent from time to time amounting to 4 or 5 months a year. Foiles voluntarily quit on these occasions and was always permitted to return when she needed work. In early September 1980,[6] Foiles returned to work for Respondent as a cocktail waitress. Her regularly scheduled hours were 10 a.m. to 6 p.m., Saturdays and Sundays. Foiles also worked as a fill-in for 1 weekday each week.

Foiles was not a member of the Union. She testified that in early October she had a conversation with a bartender in which she suggested that the employees would have better working conditions and more job security "with the Union."[7] in mid-October, Foiles had a similar conversation with Rhonda Riley, a cocktail waitress and friend of Tampourantzis.[8] Shortly after her conversation with Riley, on October 16, Foiles was questioned by Tampourantzis concerning the Union. Tampourantzis, who was talking to Riley, called Foiles over to him and asked her how she voted in the union election. Foiles asked if there had been an election and Tampourantzis answered asking Foiles how she would vote if there was an election. Foiles then asked Tampourantzis if there was going to be an election. Tampourantzis said there had already been an election and told Foiles to keep out of the Union and to "keep away from the whole thing." Tampourantzis was not questioned about this conversation and Riley did not remember the conversation. As indicated above, Foiles' testimony is credited.

I find that Tampourantzis' questioning of Foiles tended to convey displeasure with union activity and thereby tended to discourage such activity. See *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980). Accordingly, I find that Respondent violated Section 8(a)(1) of the Act. Further, Tampourantzis' instruction to Foiles not to have anything to do with the Union unlawfully restricted Foiles' union activities and, therefore, violated Section 8(a)(1) of the Act. *Interstate Transport/Security Division of PJR Enterprises, Inc.*, 240 NLRB 274 (1979).

On October 21, Foiles, who was not working that day, went into Respondent's bar to use the pay telephone. Tampourantzis approached Foiles and told her that she had betrayed him. Tampourantzis also said that Foiles had gotten him in trouble with the Union. He then told Foiles that she was fired and that he did not want her in the bar any more. Tampourantzis said he felt like hitting her and that he should slap her face. Foiles said she would talk to him again, when he was sober. Tampourantzis again told Foiles to leave the bar. Foiles then left the bar and went home.[9]

Tampourantzis testified that he had been at the bar for a day and a half prior to this incident. However, at the time of the incident, Tampourantzis was suffering from insufficient sleep and too much drink. For these reasons, Tampourantzis' was unable to recall what he said while discharging Foiles. However, while testifying, Tampourantzis' moved his arms in such a manner as to confirm the threatening manner described by Foiles in her testimony. Foiles' testimony regarding this incident is credited.

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[5] San Francisco Culinary, Bartenders and Service Employees Welfare Fund and San Francisco Culinary, Bartenders and Service Employees Pension Plan.

[6] Unless otherwise stated, all dates hereinafter refer to calendar year 1980.

[7] At the time of this conversation, the charge in Case 20-CA-15570 was pending but the complaint had not yet issued. On August 6, Respondent filed a petition in Case 20-RM-2319 seeking a Board-conducted election to resolve the question of union representation. On November 5, the Regional Director dismissed the petition based on the complaint in Case 20-CA-15570. On December 29, the Board reversed the Regional Director and reinstated the petition in Case 20-RM-2319.

[8] Foiles testified in a candid and straightforward manner and, therefore, her testimony is credited. Riley testified that she did not recall this conversation, but did not deny that the conversation occurred.

[9] Tom Glendenning, employed by Respondent as a bartender, was present during this conversation. At the hearing, counsel for the General Counsel represented that he had subpenaed Glendenning but that Glendenning had failed to appear to testify. Respondent, concurrent with its post-trial brief, moved to strike, *inter alia*, these representations on the ground that proof of service was not established. Further, Respondent moved that I draw an adverse inference against the General Counsel for not calling Glendenning to corroborate Foiles' testimony.

Glendenning, apparently still employed by Respondent, was equally available to Respondent to refute Foiles' testimony as he was to the General Counsel to corroborate it, but Respondent also failed to call him as a witness. Under such circumstances, no inference should be drawn. See *Local 259, United Automobile, Aerospace, and Agricultural Implement Workers of America (Atherton Cadillac, Inc.)*, 225 NLRB 421, 422, fn. 3 (1976).

I find that Tampourantzis remarks in discharging Foiles created the impression of surveillance of employees' union-related conversations and/or other union activities. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act. Further, Tampourantzis' threatening statements, in the presence of employee Glendenning, tended to threaten employees that Respondent would resort to force to halt union activities among its employees. By such conduct, Respondent violated Section 8(a)(1) of the Act.

Respondent's defense is that it discharged Foiles because, during the week prior to her discharge, Foiles spent 10 minutes talking to another employee, leaving Riley to wait on all the customers. On the evening in question, Foiles, believing that no waitress was scheduled to relieve her, called a waitress named Betty to work as her relief. Unbeknownst to Foiles, Tampourantzis had called another waitress to work that shift. Foiles was directed by Tampourantzis to tell Betty that she could not work. Thus, when Betty arrived, Foiles told her that she could not work and would not be paid showup time. Understandably, Betty was upset and Foiles tried to explain the mixup to her. At the tail end of this conversation Foiles suggested that, if the employees were represented by the Union, Betty would have been paid showup time.

Riley testified that Foiles, who was normally a very good employee, was talking with Betty for 10 minutes, while Riley had to wait on Foiles' customers.[10] Riley was displeased by this fact and mentioned it to her friend, Susan O'Neil, who was also a close friend of Tampourantzis. Riley testified that on October 18 she had drinks with O'Neil and at that time mentioned that Foiles had been talking to Betty about the Union, while Riley had to wait on her customers. O'Neil testified that on October 19 she repeated this conversation to Tampourantzis. O'Neil testified that she told Tampourantzis that Foiles had talked to Betty about the Union, while Riley had to wait on Foiles' customers. Tampourantzis denied that O'Neil mentioned the Union to him. Tampourantzis' denial is not credited.

Tampourantzis testified that, after he learned that Foiles was talking instead of working he decided to fire her. He fired Foiles on October 21, the first time he saw her after that decision. As discussed above, he was not able to recall the conversation and Foiles' version of the discharge is credited. Tampourantzis testified that he has fired many other employees for breaking rules. However, he said he gave employees many chances and that it was only after they continued to break his rules that he fired them.[11] No evidence was offered that Foiles had ever broken a rule before. Foiles had never received a warning or reprimand during her employment with Respondent. Further, from the credited testimony of Foiles and Riley it appears that Tampourantzis knew that Betty was the same waitress who Foiles had called in to work as her relief. Thus, Tampourantzis knew that Foiles had a legitimate reason for talking to Betty. Foiles credibly testified that Tampourantzis was present in the bar during this conversation.[12] Finally, while Tampourantzis testified that he investigates complaints against employees to ascertain whether the complaints are true, he took no such action with respect to Foiles. Tampourantzis did not question either Foiles or Riley about this incident.

The critical issue herein is Respondent's motive for discharging Foiles. Accordingly, the General Counsel must first make a *prima facie* showing sufficient to support the inference that an intent to discourage union membership was a "motivating factor" in Respondent's decision. Upon such a showing, the burden shifts to Respondent to demonstrate that the same action would have taken place even in the absence of such an intent. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

Clearly, the General Counsel has established a *prima facie* case. On October 16, Foiles was instructed not to have anything to do with the Union. On October 21, she was told that she had betrayed Respondent and gotten Tampourantzis in trouble with the Union. She was threatened with physical harm and discharged. The only conclusion to be drawn from such circumstances is that Foiles was discharged for her union sympathies. It is no defense that Foiles did not join the Union or engage in union activities of any substance. It is violative of Section 8(a)(3) of the Act to discharge an employee in order to prevent or discourage such activities.

Respondent has failed to rebut this *prima facie* case. The evidence presented in Respondent's defense establishes that, upon hearing that Foiles discussed the Union with Betty, Tampourantzis decided to terminate Foiles. He had known that Foiles had a legitimate reason to talk to Betty about the scheduling mixup that evening. In fact, Tampourantzis had told Foiles to inform Betty that she (Betty) was not needed that evening. Thus, all Tampourantzis learned from O'Neil was that Foiles discussed the Union with Betty. In discharging Foiles, Tampourantzis made no reference to the alleged reason for the discharge to any other work transgression. He only said that Foiles had betrayed him and gotten him in trouble with the Union. Further, no opportunity to explain the incident was afforded Foiles, in spite of Tampourantzis' alleged practice of giving employees such opportunities prior to discharging them. Finally, there was no evidence that Foiles had ever before violated any of Respondent's rules. According to Tampourantzis, he gave other employees "five, ten or twenty chances" before firing them.

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[10] Riley testified that, except for the evening in question, Foiles "always worked, she never used to fool around or talk to customers when she was working."

[11] Tampourantzis testified that he fired employees after he gave them "ten chances." He also testified that he gave some employees "twenty chances." He did not deny Foiles' testimony that she was never warned or reprimanded during her employment with Respondent.

[12] Riley's testimony to the contrary, that Tampourantzis had left the bar momentarily, is not credited.

In sum, I find that Foiles' union sympathies were a "motivating factor" in Respondent's decision to fire her and that Respondent's defense was not a true reason for firing Foiles. *A fortiori*, Respondent has failed to establish that Foiles would have been discharged in the absence of her union sympathies. Therefore, I find that Respondent has violated Section 8(a)(3) and (1) of the Act by discharging Foiles for such unlawful motive.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by questioning an employee about her union sympathies; by directing an employee to disassociate herself from the Union; by creating the impression of surveillance of its employees' union conversations and activities; and by threatening an employee with physical harm because of her union activities or union sympathies.

4. Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by unlawfully discharging Regan Foiles in order to discourage union activities among its employees.

5. The unfair labor practices specifically found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not engaged in unfair labor practices in violation of Section 8(a)(5) of the Act as alleged in the complaint in Case 20–CA–15570.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Respondent shall be required to offer Regan Foiles reinstatement to her former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges. Respondent shall be required to make Foiles whole for any loss of earnings she may have suffered by reason of her unlawful termination, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the act, I hereby issue the following recommended:

ORDER[13]

The Respondent, Lord Jim's, San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Questioning employees concerning their union activities or union sympathies.

(b) Directing employees to disassociate themselves from Hotel & Restaurant Employees and Bartenders Union, Local 2, or any other labor organization.

(c) Creating the impression of surveillance of its employees' union conversations or union activities.

(d) Threatening employees with physical harm because of their union activities or union sympathies.

(e) Discharging employees in order to discourage membership in or activities on behalf of the Union or any other labor organization.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purpose of the Act:

(a) Offer to reinstate Regan Foiles to her former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay and benefits she may have suffered as a result of the discrimination against her, in the manner set forth above in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its San Francisco, California, facilities copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[13] All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint in Case 20-CA-15570 be dismissed in its entirety.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT question employees concerning their union activities or union sympathies.

WE WILL NOT direct employees to disassociate themselves from Hotel & Restaurant Employees and Bartenders Union, Local 2, or any other labor organization.

WE WILL NOT create the impression of surveillance of our employees' union conversations or union activities.

WE WILL NOT threaten employees with physical harm because of their union activities or union sympathies.

WE WILL NOT discharge employees in order to discourage membership in or activities on behalf of the Union or any other labor oraganization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to reinstate Regan Foiles to her former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and WE WILL make whole Foiles for any loss of earnings she may have suffered by reason of our discrimination against her, plus interest.

LORD JIM'S

The Maumee Stone Company, Union Quarry Division *and* Ronald W. Taylor. Case 8-CA-13815

January 25, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 15, 1981, Administrative Law Judge Lewis F. Parker issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein.

The Administrative Law Judge found that Respondent excluded Ronald Taylor, the elected steward, from a collective-bargaining negotiation session. However, the Administrative Law Judge then concluded that "an entry of an order with respect to this violation" is not appropriate because "the union representative did not complain about Mr. Taylor's exclusion and none of the hourly employees or the representative objected to negotiating without Mr. Taylor."

The General Counsel excepts, contending that the Administrative Law Judge applied an improper test in determining whether Respondent's actions violated the Act. We find merit in this exception. Absent unusual circumstances, an employer cannot refuse to bargain with a person who represents a labor organization. *Booth Broadcasting Co.*, 223 NLRB 867 (1976). The fact that Ronald Taylor was not an employee of Respondent when he was asked to leave the negotiation session is not an unusual circumstance sufficient to bar him from the session, for he had been chosen, as the union steward, to represent the employees in bargaining. Whether Respondent's actions were objectionable to others or had any adverse impact on the negotiations is not the test; that was the Administrative Law Judge's subjective reaction. The test is whether Respondent's conduct reasonably tends to interfere with protected rights. We find here that it did so, in violation of Section 8(a)(1) of the Act and that a remedy is required.

CONCLUSIONS OF LAW

1. Respondent Maumee Stone Company, Union Quarry Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by Paul Pruitt, violated Section 8(a)(1) of the Act by refusing to permit Ronald Taylor, a representative chosen by the employees for purposes of bargaining, to participate in collective-bargaining negotiations.

THE REMEDY

Having found that Respondent engaged in the unfair labor practice set forth above, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Maumee Stone Company, Union Quarry Division, Scott, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Insisting or demanding that a person selected by the employees as a representative for bargaining be excluded from participating in collective-bargaining negotiations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

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[1] The Administrative Law Judge found that agents of Respondent announced to Respondent's employees that they saw no reason why the employees would join a union because they would receive all the same benefits as Respondent's unionized employees. He further found that inasmuch as the statements were not made with the intent to discourage union activity and did not have the effect of discouraging that activity, they were not unlawful.

The General Counsel excepts, contending the Administrative Law Judge's credibility findings are erroneous and that he applied an improper standard in reaching his conclusion. We agree that the Administrative Law Judge applied an erroneous standard, for the test is not whether Respondent intended to discourage union activity or whether its conduct had that effect, but whether Respondent's conduct "reasonably tends to interfere with the free exercise of employee rights under the Act." *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975). Although the Administrative Law Judge applied an inappropriate standard in determining whether the statements violated Sec. 8(a)(1) of the Act, in the circumstances of this case, including the nature of the statements and the nonexistence of union activity at the time the statements were made, in our opinion, the agents' comments did not constitute a promise of benefit.

259 NLRB No. 150

(a) Post at its premises in Scott, Ohio, copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by an authorized representative, shall be posted as herein provided immediately upon receipt thereof, and be so maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT insist or demand that any person selected by the Union to be a member of its bargaining committee not be present at or participate in bargaining negotiations.

WE WILL NOT in any like or related manner interfere with our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

THE MAUMEE STONE COMPANY,
UNION QUARRY DIVISION

DECISION

STATEMENT OF THE CASE

LEWIS F. PARKER, Administrative Law Judge: This case was heard on February 4, 1981, in Van Wert, Ohio. The complaint, which issued on June 30, 1980, and which was amended at the hearing,[1] alleges that Respondent The Maumee Stone Company, Union Quarry Division, violated Section 8(a)(1) of the Act by: (1) promising, through its agents and supervisors, benefits to its employees if they refrained from engaging in union activities; (2) prohibiting an employee from engaging in protected union activity, and; (3) discharging or terminating the employment of Ronald Taylor, the Charging Party, to discourage employees from engaging in protected union activity. The complaint also alleges that Respondent, by discharging Taylor, violated Section 8(a)(3) of the Act.

Upon the entire record and from my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I hereby make the following:

FINDINGS OF FACT

A. *Commerce*

Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

B. *Background*

Union Quarry Company operated a quarry, an asphalt plant, and a road construction business in Scott, Ohio, for several years. Wiley Sauls was the owner of Union Quarry. Bernie Fisher, an employee of Union Quarry since 1960, was its superintendent, and he now fills the same capacity for its successor, Maumee Stone. Vondale Taylor was, prior to its takeover by Maumee Stone, general manager of Union Quarry.

Ronald W. Taylor, the Charging Party, had been, as of the date of his last employment with the Company (November 24, 1979) an employee of Union Quarry for 4-1/2 years. Until 1978, when he suffered a back injury and was placed on medical leave, Ronald Taylor worked primarily in the quarry. On his return to the Company on June 4, 1979, Vondale Taylor told him he could not return to his job because it was filled. After some discussion, Ronald Taylor was given a job at the asphalt plant. He stayed there until he was laid off on November 24, 1979.

In late December 1979, Maumee Stone purchased the quarry, its equipment, and buildings from Union Quarry. The asphalt plant was purchased by a company named Oamco and Fred R. Creager & Sons purchased Union Quarry's road construction operation. After the takeover of Union Quarry, Vondale Taylor was hired by Fred R.

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[1] Upon motion by the General Counsel, I amended the third sentence of par. 2 of the complaint to read: "Annually, in the course and conduct of its business, the Employer received goods valued in excess of $50,000 directly from points located outside the State of Ohio."

Creager & Sons. Sauls, the former owner, was retained as a consultant by Maumee Stone but Michael Uhl, the treasurer of that company, denied that either Sauls or Vondale Taylor had any authority on the day that it began to operate the quarry to speak on behalf of Maumee. Maumee Stone began operating the quarry on January 2, 1980.

1. The January 2 meeting

On January 2, a morning meeting of all employees of Maumee Stone was held at its new quarry.[2] Vondale Taylor addressed the employees and informed them of the change of ownership. According to Routt, who attended this meeting, when one of the employees asked about a union, Vondale Taylor stated: "All the other quarries is union and chances are that we would be union, too, but he said he saw no reason why we'd want to go union, because we get the same as others."

Later that same day Uhl of Maumee Stone was introduced to the employees by Sauls who also discussed a union: ". . . . he sees no reason why we'd want to go union, because we'll get the same as what others get."

Another employee, Mace, corroborated Routt's description of the statements made by Vondale Taylor and Sauls. Mace believed that Sauls was speaking for the new company. Uhl told the employees that no changes would be made for the time being and that the 10 quarry employees then working would be retained and paid the same salary as before. He also said that he could not make any further commitments to them but that Maumee Stone's president, Kirkby, would speak to the employees about a week later.

In mid-January, Kirkby spoke to the Union Quarry employees, told them that all Maumee Stone quarries were union and said that if they wanted to they could form a union. He asked them to choose two or three representatives and said that negotiations would begin in about 2 weeks. The quarry employees contacted a representative of the International Union of Operating Engineers. Two meetings took place, and in late January all active quarry employees signed union authorization cards.

2. Ronald Taylor's status after his November 1979 layoff

Although Ronald Taylor had been laid off in November 1979, he continued to have some connection with the quarry, for he went with his wife, Connie, to pick up her check at the quarry office during the first few months of 1980. At one of these visits, Bill Snyder, the weigh master, gave him a W-2 form to fill out.

On January 18, 1980, while Ronald Taylor at the quarry, he asked Vondale Taylor and Bernie Fisher about the possibility of employment with the new company. They answered that they did not buy the company and that, "They didn't know nothing about it."

Sometime during January 1980, three Union Quarry employees visited Jack Smith, a union steward at another Maumee Stone quarry. He arranged for a union representative to be at his house on the following Saturday; on that day, the whole quarry crew signed union cards. Ronald Taylor was not at this meeting.

On January 30, 1980, Vondale Taylor and Bernie Fisher called two quarry employees, Brent Harris and Leo Carrier, to a meeting at the quarry. Harris testified that Taylor and Fisher said that they heard the employees were going union, that they did not have 100 percent of the employees to sign union cards,and that if they were going to be 100 percent, Rock (Ronald) and Connie Taylor would have to sign union cards. Fisher also repeated his statement to other employees on the same day.

On February 13, 1980, Ronald Taylor was invited to a union meeting at the Holiday Inn in Van Wert, Ohio. He signed a union card at this meeting. On March 6, 1980, at a union meeting in Scott, Ohio, the quarry employees present elected Ronald Taylor as steward. The next day he went to the quarry to pick up his wife's check and saw Vondale Taylor and Bernie Fisher:

> Q. What, if anything, was said?
>
> A. Well, I was joking, I said, I see you got a new steward. And he said, Who? And I said, I'm your new steward. And he said, No, you won't ever be my steward. He said, because you're on lay-off.

On March 10, 1980, Fisher telephoned Ronald Taylor at home and told him that he should attend a Federal safety meeting which was to be held at the Auglaize Quarry on April 8. On March 14, 1980, Fisher told Ronald Taylor to attend another safety meeting scheduled for March 29 at the Union Quarry. Quarry employees are required by Federal law to attend these meetings. Fisher testified that he decided to send Ronald Taylor to the meetings in case he was hired.

On March 28, 1980, Ronald Taylor went to the Union Quarry offices after he was informed that there would be a negotiating meeting at 10 a.m. He testified that shortly before 10 a.m.:

> . . . Fred, the union representative, come in. They all walked in the office. Fred walked right on by me. I tailed in right behind him. I got about ten feet inside the door.
>
> Q. And what, if anything, happened when you got ten feet inside the door?
>
> A. Mr. Pruitt come over, put his hand on my shoulder and asked me to leave without any further explanation.
>
> Q. He didn't say anything more than please leave?
>
> A. No, sir.

Pruitt (Respondent's general manager) explained at the hearing that he asked Ronald Taylor to leave because he thought it would be inappropriate to sit down at a negotiating table and discuss wages and benefits of employees with someone who was not an employee.

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[2] Maumee Stone hired all 10 employees who were working in the quarry as of that date. Ronald Taylor was not one of them, since he was on layoff.

Ronald Taylor left. Later, when the union representative came out of the meeting, Ronald Taylor said, "Hey, what's the story?" He said, "The company don't recognize you as an employee, until you're an employee. I can't help you one bit."

Ronald Taylor then asked Pruitt, "Just where do I stand with the company?" Pruitt said that he had no record of Ronald Taylor's seniority with the Company, had never seen Ronald Taylor before that day, and asked Ronald Taylor to explain what he had done before the takeover. Pruitt told Ronald Taylor that he would be called if the quarry needed help that summer. Later that day, Bernie Fisher told Brent Harris to inform Ronald Taylor not to attend the safety meetings. Although Bernie Fisher told him that some employees were a little upset about Ronald Taylor's exclusion from this meeting, Pruitt testified that none of the hourly employees or the union representative objected to conducting negotiations without Ronald Taylor being present. In April 1980, Union Quarry and the Union signed a collective-bargaining agreement effective February 1, 1980, through January 31, 1983. Ronald Taylor did not appear at union meetings to discuss the agreement, nor did he vote on ratification.

3. Ronald Taylor's Blue Cross coverage

Although he was laid off in November, Ronald Taylor used the last pay which he received from Union Quarry to pay $240 for Blue Cross coverage until February 1981. At that time, although he was not on Maumee Stone's payroll, he received a new policy from Blue Cross which was paid for by Maumee Stone. From that time until September 16, 1980, he received no bills for Blue Cross insurance. Uhl stated at the hearing that Ronald Taylor's Blue Cross coverage was mistakenly paid by Maumee Stone after February because Sauls gave him a list of road crew employees whose Blue Cross coverage should be continued even though they had been laid off. Ronald Taylor's name was included in that list. At the direction of Vondale Taylor, Fisher sent a letter to Ronald Taylor canceling his policy effective October 10, 1980.

Ronald Taylor testified that as far as he knew, Maumee Stone had taken no action against any other employees because of their union activities, and Routt agreed that Maumee Stone did not do anything actively to prevent the Union Quarry employees from having a union. Ronald Taylor has not been hired by Maumee Stone, although a temporary employee was taken on in November 1980.

C. *Legal Discussion*

1. The authority of Wiley Sauls and Vondale Taylor

Respondent denies that either Sauls or Vondale Taylor were its agents or supervisors when they made the statements which the General Counsel claims are illegal, but the evidence convinces me that their statements are binding on Respondent.

Sauls was the former owner of Maumee Stone who, at the time he talked with the quarry employees on January 2, 1980, was a consultant to that company. Vondale Taylor was not, according to Uhl, employed by Maumee Stone on that date, and denied that either Vondale Taylor or Sauls had authority to speak for the Company on that date, yet Fisher, the quarry supervisor, testified that until January 1981, Vondale Taylor was "over me" and he later canceled Ronald Taylor's Blue Cross policy on Vondale Taylor's orders. Uhl also conceded that employees of the quarry had been in the habit of talking to Vondale Taylor for 10 years. Furthermore, he stated that while Vondale Taylor was employed by the Creager Company, "I'm not saying there wasn't some flow over from before," the "before," I take it, referring to his job with Union Quarry.

After considering the evidence on this point, I reject Uhl's conclusion that Sauls and Vondale Taylor had no authority to speak for Maumee Stone. They may not have been directed to make the challenged statements, but both of them had a past history of authority over the employees of the quarry. Sauls was a consultant with the new company, and Vondale Taylor was employed by a company whose operations were apparently closely related to the quarry's operations.[3] Vondale Taylor also took actions on behalf of the quarry after the takeover which are consistent with the conclusion that he was still acting as a *de facto* supervisor at Union Quarry. Finally, Uhl's failure to disavow the statements made by Sauls is inconsistent with the claim that he spoke without authority. See *Cagle's Inc.*, 234 NLRB 1148, 1149 (1978), affd. 588 F.2d 943 (5th Cir. 1979). In conclusion, I find that Sauls and Vondale Taylor spoke at the January 2 meeting as agents of Respondent.

If this conclusion is incorrect, the statements made by Sauls and Vondale Taylor are nevertheless imputable to Respondent because the quarry employees had reason to believe that they spoke for the new owner. This belief, expressed by Mace at the hearing, was not unreasonable in light of Sauls' and Vondale Taylor's status, and the fact that Uhl, representing the new owner, accompanied Sauls to the meeting. Moreover, the fact that Uhl never disavowed Sauls' statement would indicate to the employees that Sauls spoke for the management of Maumee Stone. *Broyhill Company*, 210 NLRB 288, 294 (1974), affd. 514 F.2d 655 (8th Cir. 1975); *Crawford Container, Inc.*, 234 NLRB 851, 859 (1978); *P.E. Van Pelt, Inc. d/b/a Van Pelt Tire Trucks*, 238 NLRB 794, 798 (1978).[4]

2. The promise of benefits

According to the Board in *American Telecommunications Corporation, Electromechanical*, 249 NLRB 1135, 1136 (1980), an employer's statement that "employees would receive all the benefits of a union contract without a union was promise of benefits made for the purpose of coercing the employees into rejecting the Union."

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[3] See *Budget Marketing, Inc.*, 241 NLRB 1108, fn. 1 (1979).

[4] *Dayton Food Fair Stores, Inc.*, 399 F.2d 153 (6th Cir. 1968), cited by Respondent, is not inconsistent with this ruling, for there the court held on the basis of a different factual situation that an employee did not have just cause to believe that a supervisor's remarks were made on behalf of the employer.

The Board reached this conclusion because *American Telecommunications'* director of operations did not limit his comments on benefits to "informing the . . . employees that in the past Respondent had a practice of giving the same benefits at all of its plants." Rather, his comments were interpreted as:

> . . . conveying the message that any benefits which would accrue to . . . employees pursuant to subsequent collective bargaining automatically would be granted to the Upland employees, and that these employees would receive such benefits whether or not they also selected the Union as their bargaining representative. *Id.* at 1136.

Respondent argues that the facts presented in this case are far different from those in *American Telecommunications, supra,* and claims that the statements made by Vondale Taylor and Sauls amounted to nothing more than an argument that the quarry employees did not need a union, a claim which is lawful, citing *Pearl Recycle Center,* 237 NLRB 491, 494 (1978); *Howard Johnson Company,* 242 NLRB 386 (1979); and *Gerry's Cash Markets, Inc., Gerry's I.G.A.,* 238 NLRB 1141, 1153 (1978), in all of which the Board agreed that statements to the effect that union representation was unnecessary did not violate Section 8(a)(1) of the Act.

After considering the statements of Vondale Taylor and Sauls and the context in which they were made, I find that they were not promises of benefits made for the "purpose of coercing the employees into rejecting the Union." *American Telecommunications Corporation, supra.*

There is no doubt that on January 2, the employees of the quarry were concerned about their jobs, but the General Counsel insists that the challenged statements were made to discourage the formation of a union, not to alleviate fears about future employment. The evidence presented by the General Counsel does not support this argument. The purpose of the meetings on this day was to reassure the quarry employees about their positions with the new company, not to discourage the formation of a union by the promise of benefits, for unionization was discussed only after some employees asked questions about this subject. Indeed, it was only several weeks later (and after Kirkby said that he did not oppose a union) that the quarry employees began serious union activity. Considering the timing of the challenged statements, and the lack of substantial evidence of union animosity, I conclude that they were, at most, expressions of opinion that employees would be as well off without a union as with one, *Gerry's, supra.* The statements were not made with the intent of interfering with the formation of a union at the quarry. Furthermore, the statements did not have such an effect, for a collective-bargainin agreement with the employees was signed only a few months after the allegedly intimidating statements were made.

3. The refusal to permit Ronald Taylor to participate in a collective-bargaining meeting

Absent unusual circumstances, an employer cannot refuse to bargain with a person who represents a labor organization. *Eskimo Radiator Mfg. Co.,* 243 NLRB 1127 (1979). Although Ronald Taylor was not an employee of Union Quarry when he was asked to leave the bargaining meeting, this is not an "unusual circumstance," for the quarry employees elected him as a union steward and were entitled to his representation at the meeting.

However, Respondent's violation of Section 8(a)(1), while not strictly justifiable, is understandable. Pruitt asked Ronald Taylor to leave the bargaining session because he did not feel that it was appropriate to discuss employee benefits with a nonemployee. Although Pruitt was wrong as a matter of law, "the union representative did not complain about Mr. Taylor's exclusion and none of the hourly employees or the representative objected to negotiating without Mr. Taylor." Thus, while Pruitt's act was a violation of Section 8(a)(1) of the Act, it was objectionable, apparently, only to Ronald Taylor, a nonemployee, and it had no adverse effect on negotiations which, very shortly, resulted in the signing of a collective-bargining agreement. Under these circumstances, I do not believe that the entry of an order with respect to this violation is appropriate. See *Bowling Corporation of America, Inc. d/b/a Alganquin Bowling Center, Inc., and Edgar Meyer,* 170 NLRB 1768, 1770 (1968).

4. The claim that Ronald Taylor was discharged because of his Union activity

The General Counsel alleges that on March 28, 1980, when Pruitt told Ronald Taylor that he was not an employee of Union Quarry, Ronald Taylor had status as a laid off employee and that his status was unlawfully terminated as a result of his union activities.

The General Counsel's burden in this case is to establish that protected conduct was a "motivating factor" in Respondent's treatment of Ronald Taylor. *Wright Line, A Division of Wright Line, Inc.,* 251 NLRB 1083 (1980).

The General Counsel claims that Ronald Taylor possessed "the status of a laid off employee with full recall rights." These rights were supposedly recognized by Respondent or its agents through their treatment of Ronald Taylor after the takeover. These facts are discussed fully above, but they do not indicate that Respondent unequivocally recognized Ronald Taylor's "recall rights." Ronald Taylor's Blue Cross coverage was continued, not because he was an employee, but because of a mistake. He was scheduled to attend safety meetings in case of a recall, not because he was considered an employee with an absolute right to be recalled. Thus, I cannot agree with the General Counsel that the facts of this case "establishes the Respondent considered Ron Taylor to possess employment status with recall rights from January 1 through March 28."

However, I will assume for purposes of discussion that the General Counsel's conclusion is correct, and that Ronald Taylor was entitled to be recalled if there was an opening. Assuming this to be true, none of Respondent's actions with respect to Ronald Taylor unlawfully affected this status, for he was never told that he would not be rehired if there was an opening. Pruitt told him on March 28 that he was not an employee, but specifically advised Ronald Taylor that he would be considered for any future opening at the quarry.

Despite this conclusion, I will further assume for the sake of argument that Ronald Taylor's status as employee with recall rights was terminated on March 28, 1980; however, after considering the arguments presented by the General Counsel, I find that his status was not terminated because he was engaging in protected activity. In reaching this conclusion I have considered those factors which the Board has in past cases looked to for assistance in determining the "true, underlying motive" for a discharge. *W. H. Scott d/b/a Scott's Wood Products*, 242 NLRB 1193 (1979). These are: knowledge of union activity, antiunion bias, demonstrated unlawful hostility, and the timing of the discharge, *Jeffrey P. Jenks d/b/a Jenks Cartage Company*, 219 NLRB 368, 369 (1975); *N.L.R.B. v. Dan River Mills, Incorporated, Alabama Division*, 274 F.2d 381 (5th Cir. 1960). The validity of the reason for the discharge must also be considered. *Paramount Metal & Finishing Co., Inc. and Paramount Plating Co., Inc.*, 225 NLRB 464 (1976).

Neither the management of Maumee Stone nor Pruitt has any history of union bias; in fact, other Maumee quarries are unionized. Before Pruitt excluded Ronald Taylor from the bargaining session because he was not recognized as an employee, Kirkby had told the quarry employees that he did not oppose a union and it is, therefore, not credible that Pruitt's action on March 28 was the result of union animus, or animus toward Ronald Taylor because he knew of his status as the union steward.

The reason for Pruitt's action of March 28 is explainable as due to puzzlement over the reason for Ronald Taylor's appearance at the bargaining session. Pruitt was concerned that a nonemployee was to bargain over employee rights. His action was incorrect as a matter of law, and Ronald Taylor should have been admitted to the bargaining session, but he was not excluded because of his status as a union steward or because of unwillingness to negotiate with the union, for Pruitt did negotiate with the union representative on this day and thereafter. These negotiations were apparently conducted without rancor, and they resulted in an agreement. There is, furthermore, no evidence that Respondent took any adverse action with respect to other employees who supported the Union.

Considering all of the evidence presented by the General Counsel, I find that Pruitt's action on March 28, 1980, was not prompted by Ronald Taylor's union activities or any desire to discourage union activities.

CONCLUSIONS OF LAW

1. Respondent Maumee Stone Company, Union Quarry Division is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The International Union of Operating Engineers, Local 18, AFL-CIO, has been, and is now, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not, by its agents and supervisors, promise benefits to employees if they refrained from engaging in union activities.

4. Respondent, by its agent, Paul Pruitt, at its facilities, refused to permit an elected union steward, who was not an employee, from participating in collective-bargaining negotiations, thus prohibiting him from engaging in union activity protected by Section 7 of the Act; nevertheless, because of the circumstances described above, the entry of an order with respect to this violation of Section 8(a)(1) of the Act would serve no purpose.

5. Respondent did not unlawfully discharge or terminate the employment of Ronald Taylor on March 28, 1980.

[Recommended Order for dismissal omitted from publication.]

Graham Architectural Products Corporation ***and*** **District Lodge No. 98, International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 4-CA-10333 and 4-RC-13685**

January 25, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 13, 1981, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and supporting brief, and Respondent filed cross-exceptions and a brief in support thereof and in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

1. The General Counsel excepts to the Administrative Law Judge's failure to find that Respondent additionally violated Section 8(a)(1) by interrogating employees Darlene Stambaugh, Sonia Shaeffer, and Rosa Jones about their sentiments regarding the Union. We find merit in these exceptions.

About 3 days before the July 16, 1979,[3] election, Stambaugh was called to the desk of her supervisor, Greg Nash, and asked whether she was "for the Union." When she replied that she did not have to tell him, he said, "No, you don't." She went on, however, and stated that she planned to vote for the Union. The Administrative Law Judge, relying on *J. K. Electronics, Inc., d/b/a Wesco Electrical Company,*[4] found no violation in this conduct. We find that the facts here are significantly different from those in *Wesco.* In that case, a supervisor first asked an employee whether she had been to any union meetings, and then took the question back, saying that he could not ask her that question. The Board found no violation, finding that the supervisor immediately took the question back and that it was clear that he did not wish the employee to respond. Here, in contrast, Nash did not withdraw his question but simply conceded, when challenged, that Stambaugh was correct in saying she did not have to answer. By that time, he had already confronted Stambaugh and, if she did not answer, her silence could be construed as support for the Union.[5] Accordingly, we find that, by Nash's conduct, Respondent violated Section 8(a)(1) of the Act.

A few days before the election, Sonia Shaeffer was asked by her former supervisor, McArthur, what she thought the Union "could get for her." She replied that she expected better pay and benefits. The Administrative Law Judge found that this conversation did not constitute interrogation within the meaning of Section 8(a)(1) of the Act because Shaeffer was openly active on behalf of the Union and the question came up in the context of a personal conversation about McArthur's baby and included a general discussion of union benefits and wages around the country. The Board has held, however, that the coercive impact of such questions is not diminished by the employee's open union support or by the absence of attendant threats, *PPG Industries, Inc., Lexington Plant, Fiber Glass Division,* 251 NLRB 1146 (1980), and that such an interrogation is not made lawful by being conducted in a "friendly" manner, *Quemetco, Inc., a subsidiary of RSR Corporation,* 223 NLRB 470 (1976). The fact that McArthur was no longer Shaeffer's supervisor does not require a different result, since he remained one of Respondent's supervisors and hence its agent.

On July 18, employee Rosa Jones was approached at her desk by Supervisor Danfelt, who asked her how she felt about the Union. She told

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[1] The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In adopting the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(3) and (1) of the Act when it transferred employee David Reisinger, we disavow his finding that at the time of the transfer Reisinger had not identified himself as a union organizer or supporter, since Reisinger had already been interrogated by Supervisor Lehr upon returning from a lunchtime visit to the union hall. Nevertheless, the General Counsel has not established a violation of the Act by a preponderance of the evidence. Further, in view of the Administrative Law Judge's discrediting of Reisinger's testimony that Lehr told him he was being transferred because he was talking too much about the Union, we find it unnecessary to pass on the Administrative Law Judge's statement that, even assuming *arguendo* that Lehr had made such a statement, there would still be no violation of the Act.

Although we find, contrary to the Administrative Law Judge, that Respondent violated Sec. 8(a)(1) of the Act by interrogating employees Stambaugh and Shaeffer, we nevertheless find that the General Counsel has not established by a preponderance of the evidence that Respondent violated Sec. 8(a)(3) of the Act by transferring Stambaugh and reprimanding Shaeffer.

[3] All dates herein are 1979 unless otherwise noted.

[4] 232 NLRB 479, 482 (1977).

[5] *Ethyl Corporation,* 231 NLRB 431, 434 (1977).

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Danfelt that she did not want to talk about it, and he replied that nothing would happen if she did. Jones testified that, when she replied that she thought the Union was "all right," Danfelt's complexion changed and he left the area. He returned shortly thereafter and asked if she thought a union could get her more money. When she answered that she did not know, Danfelt asserted that it was by no means certain that it could. The Administrative Law Judge concluded that Danfelt's assurance that nothing would happen to Jones as a result of her answering his question rendered his conduct lawful. We do not agree. Contrary to the Administrative Law Judge, an inquiry into an employee's views toward a union, even in the context of assurances against reprisals, reasonably tends to interfere with the free exercise of an employee's Section 7 rights.[6] We therefore conclude that Respondent additionally violated Section 8(a)(1) of the Act when Danfelt questioned Jones.

2. The General Counsel excepts to the Administrative Law Judge's finding that Respondent did not violate the Act by prohibiting handbilling on Respondent's property. We find merit in this exception. On July 18, Supervisor Lehr ordered employee Jill Strayer to "get the hell off" Respondent's parking lot, saying that she was not allowed to distribute "junk" on company property. The Administrative Law Judge found that Lehr was aware that the literature Strayer was distributing related to the Union, but that his conduct was not unlawful since Strayer was able to reach even more employees from outside the parking lot, and both Strayer and other employees were allowed to distribute literature in the plant itself. It is well established, however, that employees have the right to solicit union support by handbilling during nonworktime while on their employer's premises,[7] and a violation of this right is not cured by the fact that an employer did not prohibit distribution on other occasions.[8]

3. The Union filed timely objections to conduct affecting the results of the election which were based on conduct which was also the subject of the unfair labor practice allegations. Based on his conclusions that Respondent had engaged in only three instances of coercive interrogation involving 2 of approximately 180 employees, and that these incidents were isolated and not pervasively disseminated, the Administrative Law Judge recommended that the objections be overruled. We have found, however, that Respondent committed additional unfair labor practices directly involving at least six employees. Further, it is clear that word of these unfair labor practices was disseminated to additional employees. In these circumstances we find that Respondent's unfair labor practices were not isolated. Since five of Respondent's unfair labor practices occurred during the critical period we find that by this conduct Respondent interfered with its employees' free and untrammeled choice in the election. Accordingly, we shall order that the election in Case 4–RC–13685 be set aside, and we shall direct that a second election be conducted.

AMENDED CONCLUSIONS OF LAW

Insert the following new Conclusions of Law 3 and 4 and delete Conclusion of Law 5:

"3. By coercively interrogating employees Diana Oberdick, David Reisinger, Darlene Stambaugh, Sonia Shaeffer, and Rosa Jones, and by interfering with employee Jill Strayer's lawful distribution of union literature, as found above, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

"4. By engaging in the conduct described above which took place during the critical period prior to the election, Respondent has interfered with its employees' freedom of choice in the election conducted on July 16, 1979."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Graham Architectural Products Corporation, York, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as new paragraph 1(b) and reletter the subsequent paragraph accordingly:

"(b) Interfering with the lawful distribution of union literature on Respondent's property."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election held in Case 4–RC–13685 be, and it hereby is, set aside, and that said case be, and it hereby is, remanded to the Regional Director for Region 4 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

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[6] *Pacesco, a division of Fruehauf Corporation*, 237 NLRB 399, 400 (1978).

[7] *East Bay Newspaper, Inc., d/b/a Contra Costa Times*, 225 NLRB 1148 (1976); *Bulova Watch Company, Inc.*, 208 NLRB 798 (1974).

[8] *Briggs & Stratton Corporation*, 244 NLRB 780, 783 (1979).

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing during which all parties were given an opportunity to present evidence and argument, it has been determined that we violated the law by committing unfair labor practices. In order to remedy this conduct, we are being required to post this notice. We intend to comply with this requirement, and to abide by the following commitments:

We will not coercively interrogate our employees concerning their union membership or activities.

We will not interfere with the lawful distribution of union literature on our premises.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Graham Architectural Products Corporation

DECISION

Statement of the Case

Bruce C. Nasdor, Administrative Law Judge: This case was heard before me in York, Pennsylvania, on March 6 and 7, 1980. The charge in Case 4-CA-10333 was filed by District No. 98, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as the Union or Petitioner), on July 16, 1979. On July 23, 1979, the Union filed objections to the election.[1] Thereafter, first and second amended charges were filed on July 31 and September 19, 1979, respectively. On February 13, 1980, an order consolidating the unfair labor practice case and Case 4-RC-13685 issued. The allegations in the complaint and the objections to the election parallel each other. The complaint alleges that Graham Architectural Products Corporation (hereinafter called Respondent) violated the National Labor Relations Act, as amended (hereinafter referred to as the Act), by interrogating employees, preventing an employee from handbilling during nonwork hours on company property, threatening to stall negotiations by engaging in dilatory tactics, telling employees they were not getting a raise because they were seeking union representation, transferring union adherents to other jobs, and disciplining a union adherent.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following:

Findings of Fact

I. JURISDICTION

Respondent, a Pennsylvania corporation, is engaged in the manufacture of commercial aluminum replacement windows. Its facility located at East Street and Penn Central Railroad York, Pennsylvania, is involved herein. During the preceding year, Respondent purchased and received goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania. Respondent is an employee engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

District Lodge No. 98, International Association of Machinists and Aerospace Workers, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE EVIDENCE

The Union commenced its organizational efforts in the spring of 1979[2] and filed a petition on May 7, 1979. Prior to the election, which was held on July 16, 1979, the Union filed a request to proceed.

Interrogation

Diana Oberdick testified that, sometime in early July, her supervisor, Robert Reichard, approached her where she was working and asked if she knew how the Union got started in there (hereinafter the plant). She said she did not know. Oberdick allegedly communicated this conversation to three of her coworkers.

Oberdick testified further that, on July 10, Reichard asked her if they could go outside the plant and talk. They went outside and stood between the main building and the warehouse where they discussed her personal problems[3] and her relationship with another company supervisor. She testified that after the conversation "he asked me what my opinion was, what did I think about the union situation and I told him." She responded that the Company had mistreated her and it did not really matter to her, but she "would be for the Union if it would get in."

The conversation lasted approximately 30 minutes. Reichard did not testify.

David Reisinger testified that, during his lunch hour on July 9, he went to the union hall with another employee, Alan Johnson, and picked up a union badge and union literature. When he returned to the plant at 12:30 p.m., he was called into the office of Michael Lehr, his supervisor. On his way to Lehr's office, Reisinger met him at the timeclock. He testified that Lehr asked him where he had been to lunch. Reisinger responded that he went to Turkey Hill. Upon further questioning, Reisinger responded he had gone to the union hall. Lehr asked him what he had gotten from the union hall and he said he wanted to see it. Reisinger told Lehr he could not see any of the material. Reisinger testified that he usually played basketball with Lehr at lunchtime. The conversation lasted 15 or 20 minutes and other subjects were discussed. Lehr did not testify.

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[1] Respondent moved to dismiss the objections because the Union executed a request to proceed. It avers that this constituted a waiver to the right to file objections.

[2] All dates are in 1979 unless otherwise indicated.

[3] A couple of weeks prior, Oberdick had walked out of the plant as a result of some dissatisfaction.

Darlene Stambaugh testified that, on July 13, her supervisor, Greg Nash, called her over to his desk[4] and asked whether she was for the Union. She replied that she did not have to tell him and Nash responded, "No, you don't." Stambaugh did proceed to tell Nash that she was not ashamed of the fact that she was voting for the Union. Thereafter they engaged in an hour and a half conversation discussing the pros and cons of the Union. The latter part of the conversation is not alleged to be violative of the Act.

Stambaugh testified further that she openly engaged in union activities by wearing a union button and handing out union literature and pins. According to her testimony, she made no effort to hide these activities and performed them in the open where she was observed by Nash and other supervisors.

Sonia Shaeffer testified that, a few days before the election, Supervisor Michael McArthur came to her desk and said hello, and she asked McArthur about his baby. McArthur then asked Shaeffer what she thought the Union could get for her. She replied that the Union would get her more money and better benefits. They then talked about different wages, the cost of living across the country and the west coast, and that if the employees went on strike they could not collect unemployment benefits.

Shaeffer testified that she and McArthur were friends, and she openly engaged in union activities, by handing out union literature at the plant gate, helping to solicit signatures on union authorization cards, and discussing the Union with employees. At the time of her conversation with McArthur she was wearing a union button.[5] McArthur was not called to testify.

Rosa Jones testified that, on July 18, she was approached at her desk by Art Danfelt who asked her how she felt about the Union. Jones testified that she told Danfelt that she did not want to talk about it, and he told her that nothing would happen if she talked about it. Jones told him that the Union was "all right." Danfelt then left the area. Danfelt was not called as a witness.

Prohibiting Handbilling

Jill Strayer testified that on July 18, at 6:30 a.m.,[6] she began handing out union literature on the company parking lot. After 15 or 20 minutes, Supervisor Michael Lehr drove into the parking lot and, according to her testimony, "he told me that I wasn't allowed to hand junk out on company property." Strayer advised him that she had a right to distribute union literature on the company parking lot, but Lehr told her to get off the company property and to move to the railroad tracks, approximately 100 yards away.[7] After a few minutes, Strayer went into the plant where she continued handbill to her coworkers. It took her 5 minutes to go into the plant, clock in, and begin work. Therefore, if Lehr's conduct interfered with Strayer's activities it was for a 5-minute duration. Strayer did not offer a handbill to Lehr.

The Threat To Engage in Dilatory Tactics

Reisinger testified that about 3 weeks prior to the election he attended a meeting in Respondent's cafeteria with several other employees and Donald Graham, Respondent's president. The purpose of the meeting, which Reisinger testified he called, was to discuss a rumor that two plant managers were going to be fired. The employees told Graham they did not want these individuals terminated. Graham replied that the rumor was false and that one of the individuals was being promoted to another position.

The first subject matter testified to by Reisinger was the meeting with Graham. Initially, Reisinger did not remember much of the meeting and testified "but over the time, I don't remember it. I have a hard time remembering." After some prodding by counsel, Reisinger testified that Graham stated, "If the Union came in he would bargain in good faith, but it *would* take a year to a year and a half to reach an agreement, a contract." On cross-examination, he qualified his testimony to the extent that Graham said, regarding the negotiations, "it *might* take a year, a year and a half."

Graham testified that at the meeting one employee stated that the Union would quickly resolve all of their problems. In response to this, Graham told the employees that if the Union won the election the Company "would negotiate in good faith as we had in other union plants that we have, and that we might reach a contract quickly as we did in the New Kensington,[8] or that it might take a substantial length of time and they might have higher benefits or lower benefits."

Graham testified that a week before the election he spoke to the entire complement of employees in small groups of 15. He clarified, in his words, as best he could, what would take place after the election and stated that negotiations might take a significant period of time or they might not, and no one could project such a thing. He testified that there were those of the employees who had been told that July 21 would be an immediate solution to all problems if the Union won the election. He was attempting to clarify this.

On July 13, Respondent disseminated to all employees by means of a leaflet the following:[9]

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[4] Stambaugh testified that Nash's desk was on the production line in an open area where the employees worked in close proximity to the desk, which was not walled or partitioned off.

[5] McArthur was not Shaeffer's supervisor nor was he on the same shift as she.

[6] Her shift started at 7 a.m.

[7] This location was the entranceway for people coming into the plant, according to the testimony of Strayer. Moreover, she testified that at the initial location where she was handbilling, not all of the employees would pass her, but when she moved to the tracks at the plant entrance she was at a position where most of the employees would pass her as they came to work.

[8] New Kensington Container is a related plant owned by Graham and it is organized, and under contract.

[9] The leaflet which was received in evidence, contained many questions and answers; this quote is only one of the questions and answers.

> Q. If the Union won the election, *how long would it take to negotiate a new labor agreement?*
>
> A. Who can tell!! One thing is for certain at every clause, every word and every punctuation mark must be negotiated, It's not just their proposals. They have to bargain over our proposals and counterproposals, it is quite common for "first" *contracts to take months* to negotiate.

Threat To Withhold Raises

Jill Strayer testified that she had a conversation with Respondent's vice president, Russell Trout, at which time she asked him about a rumor that the other plant[10] was getting raises. Strayer testified that she did not remember Trout's exact words but, "that they were working on it or something like that." Strayer was prompted by leading questions to testify further that she specifically asked Trout about raises for the plant where she worked, which is the subject of this litigation. She testified that Trout responded "that we were asking for a union and the other plant was not." She allegedly then said to Trout, "Well in plain words, we are the bad guys and they are the good guys." According to her, Trout merely grinned but made no verbal response.

Strayer admitted that during the conversation she told Trout that if Graham would give the employees a wage increase "that this union thing would go away." On cross-examination, she admitted that Trout stated that during the union campaign Respondent could not give a raise that was not scheduled. According to her testimony, Trout also said that the reason he was telling her this was because he had been told by his lawyers that Respondent could not give a wage increase.

Strayer testified that on June 6 she and all other employees received a company leaflet on company stationery, that stated, *inter alia*:

> Q. If Graham does not want a union, why doesn't he offer us something?
>
> A. Federal law prohibits a company from making any unscheduled changes in wages, hours or working conditions once a union files a petition.[11]

The Transfers of Reisinger and Stambaugh

Reisinger's conversation with his supervisor, Lehr, has been set forth *supra*, in the section herein captioned "Interrogation." This alleged conversation occurred on July 9. According to Reisinger, Lehr concluded the conversation by stating that Reisinger was going to have to stop talking union and that he was being sent back to the warehouse to separate metal. Later in his testimony, his version was, "I was talking too much about the union, trying to get the union in." Reisinger testified on direct examination that he had never worked in the warehouse before and that he was not busy at the warehouse, but spent most of his time throwing a frisbee. He testified that he received the same pay while working in the warehouse as he received before his transfer. Another employee, Robert Hillegas, was sent to the warehouse at the same time as Reisinger. Reisinger was reassigned to the inspector's job sometime after the election.

During his cross-examination, Reisinger deviated from his earlier testimony and admitted that he was a troubleshooter for the Company, that he annually performed inventory work in the warehouse in January and July, and that he was taken off his regular work as inspector and assigned to other jobs on a temporary basis. He testified that he had actually been sent out of the plant to other cities to perform installation work on jobs in Ohio, Chicago, Boston, and Baltimore.

Reisinger testified further that, in July 1979, the Company was busier than it had ever been, and that there were more parts in the warehouse to be inventoried than ever before. Furthermore, because a supervisor of the crew that performs inventory work had been injured and was not working, the warehouse was a mess and parts were scattered all over the floor, rather than being in their place on racks. Thus, there was work to be done, but it required two individuals to carry the metal. In view of the fact that no one was willing to help him, he spent his time, as stated earlier, throwing a frisbee.

On cross-examination Reisinger admitted that, at the time of his conversation with Lehr, his union activities were not known.

Stambaugh began working for Respondent in mid-April as an "Assembler C," her job was that of "dropping sash." The job involves carrying glass portions of the windows to the windowframe and placing them in the frame. Sometime during the middle of the week of July 16, Nash instructed Stambaugh to "wrap windows." She was told that she would be wrapping for just that 1 day, but in fact continued until January 1980. She testified that it was a less preferable job, because there is heavy work involved and it requires very little skill. Her classification and pay remained the same. "Wrapping windows" is to prepare the windows for shipment by placing cardboard between them and wrapping them in paper.

Stambaugh testified that persons in the assembler C classification performed various duties besides "dropping sash." She testified further that it is a rare occurrence for employees to be transferred among the various jobs on the production line.

She also testified that her worksite was located 6 to 8 feet from where she worked "dropping sash." Moreover, according to her testimony, there were three or four people less to talk to, although she concedes that during breaks she could talk to more of her coworkers. She also worked with another employee who helped her wrap windows. She did not complain to Nash when he asked her to wrap windows. Nash did not testify.

Stambaugh admitted that during her tenure with the Company she built sash, wrapped windows, dropped sash, and screwed sash. These transfers occurred before she engaged in any union activities.

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[10] Graham owned another plant in York, Pennsylvania, which was referred to as the engineering plant.

[11] The document was received in evidence as Resp. Exh. 1.

The Reprimand of Sonia Shaeffer

Shaeffer engaged in union activities by handbilling the plant, helping to get cards signed, talking to employees about the Union, and wearing a large union button at the plant. She was one of the Union's observers at the election.

Shaeffer testified that, on July 25, she was ill and instructed her daughter to call the personnel office at approximately 4 p.m. to report her absence. The next day, July 26, she sent her daughter to pick up her paycheck and to report her absence for that day. She testified that on July 27 her husband called the personnel office around 3 p.m. to report that she would be out.

She did not call in herself on these occasions because it was a "hassle" to call.

When Shaeffer reported to work on July 30 she was given a written reprimand[12] by her second-shift supervisor, Phillip Armold.

Respondent's work rules provide for disciplinary action when an employee fails to call in when absent.

Armold testified that, on July 25 and 26, Shaeffer failed to report to work and did not call in to report her absences. He testified that he checked with the receptionist whose job it is to report (by writing down the names of people who call in) their absences. According to Armold, Shaeffer's name was not on the call-in sheet. He also testified that on July 26, at or about 5 p.m., which was an hour and half after the shift started, Shaeffer's daughter came to the plant to pick up her check. Her daughter did not mention Shaeffer's absence. On Friday, July 27, when Arnold reported to work, he was told by an employee in personnel that Shaeffer had called in that afternoon, to report that she was sick.

Armold testified that she was disciplined for failing to report to work on 2 consecutive days without calling in, which violates the company rule. The parties stipulated that for the period beginning January 1, to the date of the instant litigation, five employees of Respondent were disciplined or discharged for being absent from work without calling in.

Shaeffer testified that she was aware of the rule and knew of an employee, Paul Moxley, who was fired for not reporting in.

CONCLUSION AND ANALYSIS

Although Reichard's interrogation of Oberdick was arguably in the nature of a casual conversation, and the two are friends, in my opinion the two instances of interrogation are in violation of Section 8(a)(1) of the Act. The fact that Reichard and Oberdick were friends does not provide an effective barrier interference and coercion inherent in the interrogation. *Quemetco, Inc., a subsidiary of RSR Corporation*, 223 NLRB 470 (1976). I also conclude that the interrogation of Reisinger,[13] by his supervisor, Lehr, was violative of the same reasons in this proceeding. Lehr did not testify in this proceeding.

Nash's question to Stambaugh was, in my opinion, of no consequence and not coercive. Nash immediately withdrew his inquiry and assured Stambaugh she did not have to answer. Moreover, it is clear from Stambaugh's testimony that she understood she did not have to respond and advised Nash of this. There was an incident in *J. K. Electronics, Inc., d/b/a Wesco Electrical Company*, 232 NLRB 479 (1977), which is distinguishable from the allegation in this case. The Administrative Law Judge, with Board approval, dismissed the allegation. I will similarly recommend that this allegation of interrogation be dismissed.

I find that McArthur's interrogation of Shaeffer, if it can be characterized as interrogation, is not violative of the Act. The conversation occurred in the context of a personal discussion about Shaeffer's baby and, generally, union benefits and wage rates across the country. McArthur was not even Shaeffer's supervisor, and did not work on the same shift. There was no reason to think that McArthur was trying to ascertain Shaeffer's sentiments, in view of the fact that she was openly active on behalf of the Union and was wearing a union button at the time. In my view this is not the kind of questioning that is threatening or coercive, and the circumstances of this conversation would not induce any fear of reprisal. I will recommend dismissal of this allegation.

In my opinion the character of the conversation between Supervisor Danfelt and Jones and Danfelt's assurance to Jones that nothing would happen to her as a result of the conversation render this allegation meritless. This type of interrogation does not interfere with, restrain, or coerce employees (Jones) in the exercise of Section 7 rights within the meaning of Section 8(a)(1) of the Act. Moreover, I do not believe that this incident rises to the level of the interrogation alleged and found in *Paceco, a Division of Fruehauf Corporation*, 237 NLRB 399 (1978). Accordingly, I will recommend that this allegation be dismissed.

Prohibiting Handbilling

In my opinion the state of the evidence is such that it does not establish that Respondent prohibited Strayer from distributing union literature at its facility.

Respondent argues that Lehr acted ambiguously when he told Strayer to move to another location, because he, Lehr, did not know what Strayer was handing out. Although the evidence indicates Strayer did not reveal specifically what she was distributing, I think it reasonable to assume, under the circumstances, that Lehr was aware of what was being distributed.

Although Lehr did not testify, Strayer establishes in the record that, after her conversation with Lehr, she continued to hand out union literature to employees arriving at the plant entrance, and indeed was able to reach and communicate with more employees. All employees pass through the plant entrance where she was directed to stand. Furthermore, she continued to distribute handbills upon entering the plant before her shift started. Moreover, other witnesses testified that they freely distributed union literature in the plant and solicited employees without any interference by Respondent.

Respondent argues that I should interpret Lehr's action as a concern that distribution of material in the middle of a busy parking lot jeopardizes the safety of individuals arriving at the plant, as well as the safety of the individual engaged in the distribution. This is a valid argument, the only problem is, there is no probative evidence in the record to support this contention, inasmuch as Lehr did not testify.

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[12] Received in evidence.

[13] Other aspects of Reisinger's testimony and credibility are discussed *infra.*

In conclusion, the weight of the evidence convinces me that by moving Strayer to another location, where in fact she was able to reach more employees, Respondent did not in any way prohibit or interfere with her distribution of union literature. Accordingly, I will recommend dismissal of this allegation.

The Threat To Stall Negotiations

Reisinger was called as a witness to testify in support of this allegation. I completely reject Reisinger's version of what Graham stated at the meeting. He admitted that he did not remember what happened at the meeting, and on cross-examination qualified his testimony. He also admitted that his testimony was not accurate and contained omissions. On cross-examination, Reisinger added allegations that did not appear in his direct testimony or in his affidavit.[14] Furthermore, he admitted that he "skipped over" his affidavit rather than reading it.

I find Graham to be a completely credible and reliable witness, and I accept as truth his version of what he said at the meeting. Moreover, the propaganda disseminated by the Company in its leaflet supports Graham's version of what he articulated verbally at the meeting. Accordingly, I will recommend dismissal of this allegation.

Threat To Withhold Raises

Strayer's testimony, that what Trout told her was the same as that which was reflected in the leaflet she received, convinces me that there is no merit to this allegation. I believe that her testimony on cross-examination reveals specifically what Trout said. In my opinion, Trout told Strayer in effect that Respondent would not engage in an illegal act by paying a wage increase to get rid of the Union. Her testimony on direct examination was less than convincing. She testified that she did not know what Trout said and that she could not remember his exact words. She finally testified about the incident after leading questions were propounded to her. I discredit her testimony. In my opinion, her testimony on direct examination is worthless and, accordingly, I will recommend dismissal of this allegation.

The Transfer of Reisinger

Reisinger's credibility has been discussed *supra*. On the state of the evidence, counsel for the General Counsel has not sustained his burden of proof that the Company discriminated against Reisinger by transferring him to the warehouse.

I specifically discredit the comment he attributes to Lehr, regarding antiunion motivation for sending him to the warehouse, even though I earlier credited that part of his testimony relating to Lehr's earlier interrogation. Assuming, *arguendo*, that Lehr's statement to transfer Reisinger came on the heels of a comment that he was being transferred because he was "talking too much about the union," my conclusion would remain the same. I would still find that the transfer was based on business considerations.

It is true that Reisinger's assignment to the warehouse did not affect terms or conditions of his employment in an adverse manner, and that he enjoyed throwing the frisbee. It is also true that he told his supervisor he enjoyed working in the warehouse. These factors are not necessarily mitigating, if discrimination was the basis for the decision to transfer. What is dispositive is that the probative evidence supports the proposition that the transfer was based purely on a business decision. Thus, on cross-examination Reisinger changed his story and admitted that he had performed inventory work for 5 years in January and July. Moreover, at least some of this work was performed in the warehouse.

He also conceded that he was one of the few individuals who was qualified to perform the inventory duties, because of his long-term duration with Respondent, and the fact that he was able to identify most of the parts.

Reisinger also testified on cross-examination that, at the time of his conversation with Lehr, when he was told that he would be sent back to the warehouse to separate metal, he had not identified himself as a union organizer or supporter. Accordingly, I will recommend dismissal of this allegation.

The Transfer of Stambaugh

Stambaugh was moved approximately 6 to 8 feet away from where she had been working dropping sash. The evidence is consistent with the fact that she was not in any way isolated from her fellow employees; indeed, she had a partner wrapping windows with her. The record is devoid of any evidence that she was transferred in retaliation for her union activities in violation of Section 8(a)(1) and (3) of the Act. Her wages and conditions of employment were not adversely affected. She herself testified that she remained on the same line with the same supervisor and coworkers. She also testified that she did not like the job as well because it involved heavier work and less skill. Moreover, she was moved to the end of the production line and, according to her testimony, was not able to move around and talk to her coworkers as she had before while working. In my opinion, assuming *arguendo*, that she did not have the same exposure to her coworkers as before, this in and of itself does not establish a violation of the Act.

Furthermore, Stambaugh admitted that during her relatively short tenure with the Company she was transferred among several jobs prior to any of her union activities. There is no evidence to indicate that her transfer was motivated by union animus. Accordingly, I will recommend dismissal of this allegation.

The Reprimand of Shaeffer

Respondent does not dispute its knowledge of Shaeffer's union activities. Record testimony and documentary evidence reveal, in my opinion, that the basis for the reprimand was not because she failed to call in by

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[14] It is questionable whether or not he ever read his affidavit.

3 p.m., but rather that she was absent from work for 2 consecutive days and Respondent was not apprised of these absences.

I believe the reference in the reprimand to reporting in by 3 p.m. when absent is merely an instruction for the future.

It is clear that the company rules require employees to apprise Respondent of their absences, and other employees have been disciplined for not adhering to this rule.

I credit the testimony of Supervisor Armold, that he reprimanded Shaeffer because she failed, on two consecutive occasions, to report in. Armold testified that the reference to the 3 p.m. reporting time was so that he could utilize help from other departments if necessary. Armold testified that Respondent had been advised, on July 27, that Shaeffer had called in that afternoon to report that she was sick. The evidence is clear that she was not disciplined for July 27.

It is also noted that neither Shaeffer's daughter nor husband was called to testify that they, in fact, notified Respondent of her absences. The inference I draw is that their testimony would be adverse to Shaeffer's case. Furthermore, several months after the election Shaeffer, a union observer, received a promotion which she had requested.[15]

The record evidence does not establish disparate treatment between Shaeffer and other employees. Accordingly, I will recommend dismissal of this allegation.

Respondent argues that the Union waived its right to file objections to the election, by virtue of the fact that they executed a request to proceed 4 days before the election. On this basis Respondent moved to dismiss the objections to the election. I agree with counsel for the General Counsel that the request to proceed is merely a device to permit the Board to conduct an election, despite the fact that there are unfair labor practice charges pending. The motion to dismiss is denied.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercive interrogation of its employees, Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

4. The allegations of the complaint that Respondent has engaged in conduct violative of Section 8(a)(3), and other 8(a)(1) violations of the Act, have not been supported by substantial evidence.

5. The allegations of the complaint which have been found to be meritorious are of an isolated nature, *de minimis*, and did not affect the results of the election.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Out of a unit of approximately 180 eligible voters, I have concluded that Respondent engaged in coercive interrogation in three instances involving 2 employees. I conclude that they were isolated and too minimal to warrant invalidating the election.[16] The tally of ballots reflects 68 votes cast for the Union and 93 against, with 7 challenges. Accordingly, I recommend that the objections be overruled and that an appropriate certification be issued.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[17]

The Respondent, Graham Architectural Products Corporation, York, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union membership and/or activities.

(b) In any like or related manner interfering with, restraining, or coercing our employees in the exercise of the rights guaranteed them by Section 7 of the Act.[18]

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Post at its premises at East Street and Penn Central Railroad, York, Pennsylvania, copies of the notice marked "Appendix."[19] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by an authorized representative of Respondent, shall be posted immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

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[15] She hedged somewhat in this regard but finally answered without equivocation that she was receiving a higher wage rate than previously.

[16] The dissemination of the interrogations was limited in nature, rather than pervasive.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[18] A broad injunctive order is not warranted in this case. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

International Printing and Graphic Communications Union, Local 391 *and* Salem Gravure Division of World Color Press, Inc. Case 14–CB–5423

January 25, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

Upon a charge filed on June 29, 1981, by Salem Gravure Division of World Color Press, Inc., herein called the Charging Party, and duly served on International Printing and Graphic Communications Union, Local 391, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 14, issued a complaint and notice of hearing on August 5, 1981,[1] against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that Respondent violated Section 8(b)(1)(B) of the Act since on or about May 6 by disciplining Maintenance Foreman Edward Rinehart and Assistant Maintenance Foreman Billy Olden for acting in according with their supervisory duties.

On August 14, counsel for the General Counsel received a letter, dated August 13, from Respondent, discussing the allegations of the complaint and generally denying that it has engaged in certain unfair labor practices affecting commerce.[2] On August 21, counsel for the General Counsel mailed a certified letter to Respondent, explaining that its letter of August 13 was not sufficiently specific to meet the requirements of Section 102.20 of the Board's Rules and Regulations, which require that an answer specifically admit, deny, or explain each of the facts alleged in the complaint. Respondent was further advised that, unless an answer complying with the Board's Rules and Regulations was filed on or before noon, August 28, counsel for the General Counsel would take further action, up to and including a Motion for Summary Judgment. On August 28, counsel for the General Counsel received a letter, dated August 27, from Respondent, stating that the August 13 letter was a clear and sufficient answer. No further response from Respondent was received.

On September 10, counsel for the General Counsel filed with the Board a motion entitled "Motion for Summary Judgment on Complaint and Notice of Hearing for Failure to File an Adequate Answer." He asserts that Respondent failed and refused to file an adequate answer, and that no issue of fact exists warranting or requiring a hearing. He moves that the proceedings be transferred to the Board, that all allegations contained in the complaint and notice of hearing be deemed admitted true, and that an order be entered for an appropriate remedy for the violations alleged, without holding a hearing or without taking evidence in support thereof. Thereafter, on September 16, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted, stating that a response should be filed on or before September 30. Respondent did not file a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer

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[1] All dates herein are in 1981 unless otherwise indicated.

[2] In the letter, Respondent stated:

> The charges filed by the Employer against the Union have quite a few mis-givings in them. The Union does not feel it has engaged in, and is engaging in, certain unfair labor practices affecting commerce.
>
> The Maintenance Foreman and Assistant Maintenance Foreman have always been members of the Union and I would hope they continue to be.
>
> The Maintenance Foreman and Assistant Maintenance Foreman direct the work force on their shift. I have *never* seen them at the bargaining table for collectivebargaining nor have I seen their names on grievances for adjustment of. I have seen the Department Manager performing these functions.
>
> The union members felt and still feel that the members in question did not meet their initiation pledge they gave in joining the Union.
>
> The Union did issue a verbal reprimand to brothers Edward Rinehart and Billy Olden as union members wronging a brother member, but not as supervisors representing the Company.

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> filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing served on Respondent specifically stated that unless an answer is filed to the complaint within 10 days from the service thereof "all of the allegations of the complaint shall be deemed to be admitted to be true and may be so found by the Board." As outlined above, and as set forth in the uncontroverted allegations of the Motion for Summary Judgment, Respondent replied to the complaint by a letter dated August 13, in which it generally denied that it had engaged in unfair labor practices. By a letter dated August 21, counsel for the General Counsel informed Respondent that its answer was not sufficiently specific to comply with the Board's Rules regarding valid answers. In addition, counsel for the General Counsel advised Respondent of the consequences of the failure to file an answer complying with the Board's Rules and Regulations. However, the only response received from Respondent was a letter dated August 27, stating that its letter of August 13 was a sufficient answer. Thereafter, on September 10, no adequate answer having been filed, counsel for the General Counsel filed the instant Motion for Summary Judgment.

Respondent's answer is improper under Section 102.20 of the Board's Rules and Regulations, because it does not specifically admit, deny, or explain each of the facts alleged in the complaint. Therefore, as Respondent has not filed an answer acceptable under the Board's Rules and Regulations within 10 days from service of the complaint, or within the extended time afforded it by the General Counsel, and as no good cause for its failure to do so has been shown, in accordance with the Rule set forth above, the allegations of the complaint are deemed to be admitted to be true and are so found to be true. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE CHARGING PARTY

The Charging Party, Salem Gravure Division of World Color Press, Inc., is an Illinois corporation engaged in the manufacture of, and the nonretail sale and distribution of, magazines and related products, at its principal office and place of business at Selmaville Road, Salem, Illinois. During the year ending July 31, a representative period, Salem Gravure Division of World Color Press, Inc., in the course and conduct of its business operations, manufactured, sold, and distributed at its Salem, Illinois, facility, products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said facility directly to points located outside the State of Illinois.

We find, on the basis of the foregoing, that the Charging Party is, and has been at all times material herein, an employer within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Printing and Graphic Communications Union, Local 391, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

At all times material herein, Edward Rinehart, maintenance foreman, and Billy Olden, assistant maintenance foreman, were selected for and occupied the above positions for the Charging Party, and have been supervisors within the meaning of Section 2(11) of the Act and representatives of the Charging Party for the purposes of collective bargaining or the adjustment of grievances. Furthermore, at all times material herein, Edward Rinehart and Billy Olden have held membership in Respondent.

Commencing on or about May 6, Respondent subjected these two men to investigation and, on or about June 6, to verbal reprimand for acting in accordance with their duties as supervisors and as representatives of the Charging Party for the purposes of collective bargaining or the adjustment of grievances.

Accordingly, we find that by the conduct described in the above paragraph, Respondent did restrain and coerce and is restraining and coercing the Charging Party in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of the Charging Party described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act, we shall order that it cease and desist therefrom, and that it take certain affirmative action, set forth below, which is designed to effectuate the purposes and policies of the Act.

Specifically, we shall order that Respondent Union be required to send letters to Edward Rinehart and Billy Olden, stating that it will not subject them to investigation or verbal reprimand for acting in accordance with their duties as supervisors within the meaning of Section 2(11) of the Act and as representatives of the Charging Party for purposes of collective bargaining or the adjustment of grievances.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Charging Party, Salem Gravure Division of World Color Press, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent International Printing and Graphic Communications Union, Local 391, is a labor organization within the meaning of Section 2(5) of the Act.

3. Edward Rinehart and Billy Olden are supervisors within the meaning of Section 2(11) of the Act and representatives of the Charging Party for the purposes of collective bargaining or the adjustment of grievances.

4. Edward Rinehart and Billy Olden have held and hold membership in Respondent.

5. By subjecting Edward Rinehard and Billy Olden to investigation and verbal reprimand for acting in accordance with their duties as supervisors within the meaning of Section 2(11) of the Act, Respondent restrained and coerced the Charging Party in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances, and thereby violated Section 8(b)(1)(B) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Printing and Graphic Communications Union, Local 391, Effingham, Illinois, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Subjecting Edward Rinehart and Billy Olden to investigation and verbal reprimand for acting in accordance with their duties as supervisors within the meaning of Section 2(11) of the Act and as representatives of Salem Gravure Division of World Color Press, Inc., for the purposes of collective bargaining or the adjustment of grievances.

(b) In any like or related manner restraining or coercing Salem Gravure Division of World Color Press, Inc., in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Send a written notice to Edward Rinehart and Billy Olden, stating that it will not subject them to investigation or verbal reprimand for acting in accordance with their duties as supervisors within the meaning of Section 2(11) of the Act and as representatives of Salem Gravure Division of World Color Press, Inc., for the purposes of collective bargaining or the adjustment of grievances.

(b) Post at its offices at Effingham, Illinois, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Sign and deliver sufficient copies of said notice to the Regional Director for Region 14 for posting by Salem Gravure Division of World Color Press, Inc., at its Salem, Illinois, facility where notices to its employees are customarily posted, if said Employer is willing to so post.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT subject Edward Rinehart and Billy Olden to investigation and verbal reprimand for acting in accordance with their duties as supervisors and as representatives of Salem Gravure Division of World Color Press, Inc., for the purposes of collective bargaining or the adjustment of grievances.

WE WILL NOT in any like or related manner restrain or coerce Salem Gravure Division of World Color Press, Inc., in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL send a written notice to Edward Rinehart and Billy Olden, stating that we will not subject them to investigation or verbal reprimand for acting in accordance with their duties as supervisors and as representatives of Salem Gravure Division of World Color Press, Inc., for the purposes of collective bargaining or the adjustment of grievances.

INTERNATIONAL PRINTING AND
GRAPHIC COMMUNICATIONS UNION
NO. 391

The Celotex Corporation *and* United Cement, Lime and Gypsum Workers International Union, AFL–CIO. Case 26–CA–8246

January 25, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On November 5, 1980, Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding and, on December 5, 1980, he issued an erratum to the Decision. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs,[1] and Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The Celotex Corporation, Texarkana, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had the opportunity to present their evidence, the National Labor Relations Board has found that we have violated the National Labor Relations Act and it has ordered us to post this notice and to comply with its provisions.

WE WILL NOT maintain any rule, such as General Rule of Conduct 10, prohibiting you from distributing or removing union literature in nonworking areas during nonworking time, and requiring our prior authorization to so distribute or remove union literature, on company premises, and WE WILL revoke Rule 10.

WE WILL NOT threaten you that we will go strictly by the book if you support United Cement, Lime and Gypsum Workers International Union, AFL–CIO, or any other labor organization.

WE WILL NOT warn you, suspend you, or otherwise discriminate against you because you support United Cement, Lime and Gypsum Workers International Union, AFL–CIO, or any other labor organization.

WE WILL NOT institute and implement a policy of stricter enforcement of work rules without first affording United Cement, Lime and Gypsum Workers International Union, AFL–CIO, the opportunity to bargain over such decision and the effects it would have upon you, and WE WILL revoke that policy which we adopted in early January 1980.

WE WILL NOT in any like or related manner interfere with, restrain, coerce, or discriminate against you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revoke the warnings we issued to William Norris and Wayne Ryan on January 16, 1980, and WE WILL physically expunge such warnings from their personnel files.

WE WILL make whole, with interest, Larry McCommas and William Norris for our suspending them on January 15, 1980, and June 25, 1980, respectively.

WE WILL revoke all warnings and suspensions which we imposed on you from January 3, 1980, to June 30, 1980, as a result of the policy we adopted, and will now revoke, about early January 1980, and WE WILL physically expunge all such documents from the personnel files of the affected employees, and WE WILL make whole, with interest, all employees suspended during the period of January 3, 1980, to June 30, 1980.

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[1] The General Counsel also filed a letter with the Board requesting that his brief be amended concerning the proposed formula for the backpay remedy.

[2] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(3) of the Act by suspending William Norris for 3 days on June 25, 1980, we rely solely on the ground that, in assessing this discipline, Respondent relied on Norris' prior unlawful January 16, 1980, warning and that Respondent failed to demonstrate what discipline Norris would have received absent reliance on this unlawful warning. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[3] Member Jenkins would award interest on backpay in accord with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

259 NLRB No. 159

THE CELOTEX CORPORATION

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge: This case was heard before me at Texarkana, Texas,[1] on July 28 and 29, 1980, pursuant to a complaint issued on April 2, 1980, by the General Counsel of the National Labor Relations Board through the Regional Director for Region 26. The complaint is based on a charge filed on January 25, 1980, by United Cement, Lime and Gypsum Workers International Union, AFL-CIO (herein Union), against the Celotex Corporation, Texarkana plant (herein Respondent, Celotex, or Company).

An amended charge was filed by the Union on March 5, 1980, and the complaint was amended on April 30, 1980, and, over Respondent's objection, at the hearing.

In his complaint, as amended, the General Counsel alleges that Respondent has violated Section 8(a)(1) of the Act by maintaining an improper no-distribution rule and by threatening employees; Section 8(a)(3) of the Act by requiring a doctor's statement for illness absences to be excused, and warning and suspending employees; and Section 8(a)(5) of the Act by unilaterally instituting and pursuing a policy of stricter enforcement of its employee work rules.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent corporation maintains a facility at Texarkana, Arkansas, where it is engaged in manufacturing foam insulation. During the past year, Respondent sold and shipped goods valued in excess of $50,000 from its Texarkana plant directly to points located outside the State of Arkansas. Celotex admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Chronology*

As outlined by Plant Manager Robert Hawkins, Respondent's Texarkana facility began operations in the summer of 1978 with Frank Boone as the plant's manager. Hawkins testified that, although the plant's beginning production figures were satisfactory, its 1979 progress was not. According to Hawkins, Celotex made a dual transfer in order to solve problems at two plants. Thus, it transferred Boone to its Pennsauken, New Jersey, plant to straighten out problems there, and assigned Hawkins to replace Boone at Texarkana. Hawkins arrived at Texarkana on October 23, 1979. Upon his arrival, Hawkins met with his salaried staff and decided on a course of action needed to reduce the production reject rate and to increase overall efficiency. He testified that he initially devoted his attention to equipment/machinery problems and then, beginning in December 1979, to the "people" problems such as absenteeism and tardiness which were adversely impacting on production.

Although not precisely established in the record, it appears that Hawkins' October 23, 1979, arrival approximated the early stage of an organizing campaign by the Union among Respondent's production, maintenance, and warehouse employees. The Union filed its representation petition in Case 26-RC-6131 on November 16, 1979.[2] By his six-paragraph letter[3] dated November 20, 1979, Plant Manager Hawkins, in part, advised Respondent's employees as follows:

> Dear Fellow Employees:
>
> I am certain that you have by now learned that an outside third party is attempting to unionize all of our hourly employees. Because of these efforts, I will try to keep you informed as to the facts concerning their attempt to take control over your working life.
>
> * * * * *
>
> My basic philosophy is pro-employee. I only hope that you will give me the chance to demonstrate that during the coming months and years, by turning away this outside third party.

The General Counsel does not allege the letter to be violative of the Act in any manner. Hawkins testified that he thereafter spoke to the employees, apparently along the same lines as his letter, only once about the Union.

The Union won the January 3, 1980, Board-conducted election,[4] and on February 27, 1980, following resolution of the Employer's objections, it was certified as the exclusive representative of the production, maintenance, and warehouse employees, including scrap disposal driver and leadmen, employed by Celotex at its Texarkana, Arkansas, facility.

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[1] The transcript cover suggests that the hearing was held in "Texarkana, Arkansas-Texas." Although the Federal courthouse in Texarkana straddles the boundary between Texas and Arkansas, there is a courtroom on each side of the boundary. This hearing was conducted on the Texas side of the courthouse.

[2] Pursuant to my request, the General Counsel and Respondent supplied the case number and filing date to me by post-trial stipulation wires.

[3] ALJ Exh. 1.

[4] The parties stipulated that the tally of ballots revealed a total of 52 eligible voters in the bargaining unit.

In its post-hearing brief, Respondent represents that on August 13, 1980, following 16 negotiating sessions, the first of which occurred on March 4, 1980, Celotex and the Union mutually agreed to a complete collective-bargaining agreement. The terms of the agreement reportedly were ratified on August 14, 1980.

B. *Alleged 8(a)(1) Violations*

1. No-distribution rule

It is undisputed that at all times material herein Respondent has maintained in effect rule 10 of the General Rules of Conduct set forth in the employees handbook (G.C. Exh. 2) which prohibits, under pain of possible discipline, the following conduct:

> 10. Distributing, posting, or removing any literature on Company property without management authorization.[5]

Violation of the rule subjects the offending employee to possible penalties ranging from a written warning to discharge.

As the rule is unlawfully broad upon its face, I find it to be violative of Section 8(a)(1) of the Act in that it unlawfully restricts the exercise of employees' Section 7 rights to distribute union literature in nonworking areas during nonworking time. *Westinghouse Electric Corporation*, 240 NLRB 905 (1979). Moreover, the rule illegally requires management authorization to engage in protected distribution. *AMC Air Conditioning Co.*, 232 NLRB 283, 284 (1977). Since "removing" could be construed as prohibiting an employee from taking union literature home with him, the rule again is illegally defective.

2. Steven G. Halterbaum's remarks

a. *December 1, 1979, trim saw conversation*

Formerly a production foreman, Steven G. Halterbaum replaced Howard Pittman as production superintendent when Pittman was discharged about August 1979. Halterbaum testified that Pittman was more lenient in the area of employee discipline than Halterbaum considered desirable. Complaint paragraph 8(a) alleges that about December 1, 1979, Halterbaum "threatened its employees with more onerous working conditions by telling them Respondent was going strictly by the book if the Union was voted in."

In support of this allegation, former employee Walter "Bud" Corley testified that about the first of December he and Halterbaum had a conversation alone at the trim saw. At the time, and through election date, Corley campaigned against the Union and wore a "vote no" sticker on his cap. Corley asked Halterbaum how things were going to be run after the election if the Union were voted in. Halterbaum replied that they would go "strictly by the book."

Conceding this conversation, Halterbaum testified he told Corley they would go by the book regardless of the election's outcome because of the way the plant was being handled at the time. He testimonially confirmed that Corley was against the Union at the time of the conversation and, indeed, that Corley was soliciting matters "to discuss with the people—the pros and cons of the union."

Under cross-examination, Halterbaum admitted that he had stated in his pretrial affidavit that he could not recall telling an employee that "if the union was voted in, we would go strictly by the book." Moreover, he further admitted that he was present during the testimony of Corley, that prior to hearing Corley's testimony he had no recollection of the matter, but that Corley's testimony so refreshed his recollection he could now recall the conversation and the duality of his response.[6]

I find Corley to be a credible witness, and I discredit Halterbaum. Accordingly, I find that on or about December 1, 1979, Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraph 8(a). *Jamaica Towing, Inc.*, 236 NLRB 1700 (1978), enfd. in pertinent part 602 F.2d 1100 (2d Cir. 1979).

That there is no evidence Corley disseminated Halterbaum's threat and that Corley was opposed to the Union are immaterial considerations. As to the former, dissemination of a threat affecting all unit employees is presumed, and the burden was on Respondent to prove that the threat was not repeated to other employees. *Coca-Cola Bottling Company of Bloomington, Indiana, Inc.*, 250 NLRB 1341 (1980). Respondent did not discharge its burden. Actually, dissemination is inherently probable in view of Halterbaum's admission that Corley was seeking information "to discuss with the people . . . ."

With respect to whether the threat could coerce a single individual opposed to the Union, the answer must be in the affirmative. Such a threat tends to inhibit an employee's freedom of choice to change his position. In any event, as an employee, Corley is statutorily entitled to be free from the erroneous information implicitly contained in the threat, to wit: that Respondent legally could penalize employees for electing the Union to be their collective-bargaining representative.

b. *December 1, 1979, stretch wrap conversation*

Complaint paragraph 8(b) alleges that, around December 1979, Halterbaum, by telling employees negotiations would start from nothing, unlawfully informed employees that it would be futile for them to select the Union as their bargaining representative.

Former employee Corley also credibly testified that about the same date of the trim saw conversation he, Production Superintendent Halterbaum, and employees Pam Jones, Mike Bell, and Wayne Ryan were present at the stretch wrap machine when a conversation occurred. On that occasion the Union was being discussed, and Corley said that the employees would lose all their benefits. Ryan responded that was incorrect. Corley then said Halterbaum had so informed him and thereupon asked him if that were true. Halterbaum stated that the employees "would start out with nothing."

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[5] Rule 10 is the subject of complaint par. 7.

[6] Witness sequestration under Fed. R. Evid. 615 was not requested by either party.

Halterbaum testified that, when he walked up to the stretch wrap machine, opposing groups of employees were discussing the Union. He was asked what the employees would have if the Union came in, and he responded, "Everything is negotiable." He could not recall who made the inquiry, and he testified that Production Foreman Byron Brewer also was present. Briefly testifying on the point, Brewer corroborated Halterbaum.

Corley and Ryan testified in a credible manner. In contrast, I discredit Halterbaum and Brewer. Moreover, as will be noted below regarding a warning to alleged discriminatee William Norris, Brewer's testimony was contradicted by two employee witnesses currently employed by Respondent.

Accordingly, I find that on or about December 1, 1979, Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraph 8(b). *Hospital Service Corporation d/b/a Blue Cross*, 219 NLRB 1, 6–7 (1975).

C. *Alleged 8(a)(3) Violations*

1. The doctor's statement rule

Complaint paragraph 9 alleges that on or about January 15, 1980, Respondent "imposed stricter enforcement of its work rules on its employees by requiring them to present doctors' statements for absences" in violation of Section 8(a)(3) of the Act.

General Counsel's Exhibit 3(a),[7] a memo dated December 17, 1979, from Halterbaum[8] to all employees on the subject of "Excused or Unexcused Absences," reads:

> All absences and tardies are unexcused except for those [which have] compelling, justifiable reasons.
>
> Absences due to illness will be excused *only* if the employee furnishes a Doctor's statement upon returning to work.

The General Counsel offered no positive evidence demonstrating that publication of the December 17 doctor's excuse rule was inspired by unlawful considerations. Instead, he argues, in essence, that I should disbelieve Plant Manager Hawkins' testimony on the subject. Hawkins testified that he instituted the rule in Texarkana based upon his prior managerial experience in industry plus the discovery in December 1979 that absenteeism had jumped to 7-1/2 percent from October's 4-1/2 percent rate.[9] Although not so articulated, the argument of the General Counsel impliedly includes the further request that, after disbelieving Hawkins' testimony, I infer from such disbelief an improper motive and affirmatively find that such motive was that which is proscribed by Section 8(a)(3) of the Act. Under appropriate circumstances, an administrative law judge, as trier of fact, may indeed disbelieve the testimony of a witness and find the opposite to be true. *N.L.R.B.* v. *Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962). Conditions are not present here which would justify the affirmative finding the General Counsel seeks.[10] Accordingly, having found no unlawful motivation in the institution of the rule, I shall dismiss complaint paragraph 9.

2. January 15, 1980, suspension of Larry McCommas

Larry McCommas was employed by Respondent from August 1979 until he quit in January 1980 because he could not obtain a transfer from the second shift to the day shift. On January 15, 1980, McCommas was suspended for 3 days[11] for having been 3 hours tardy on January 11 and, according to the suspension document[12] and testimony, for prior absences. McCommas concedes that he had been spoken to and warned previously about his attendance problems. Indeed, he received an "oral" warning[13] on December 20, 1979, for absenteeism and tardiness. At that time, McCommas was advised that a future violation could result in "suspension up to layoff."

It is undisputed that, in December, McCommas informed Supervisor Rick Brackeen that he was going to vote for the Union in the upcoming election. Brackeen responded that he did not think there should be a union at the plant. The record does not reflect whether the McCommas-Brackeen conversation occurred before or after his December 20, 1980, warning. However, it appears that the plant was closed for the holidays the last week in December. This warning was the only documented one issued in December[14] or, with a single exception,[15] in January prior to the 15th of the month. Thus, it appears to be a logical and permissible inference that the McCommas-Brackeen conversation occurred prior to December 20, and that Respondent, with such knowledge, retaliated against McCommas with the warning for his announced intent to vote for the Union. Moreover, I note that McCommas' suspension, after the December 20 "oral" warning,[16] itself fails to comply with Plant Manager Hawkins' admitted December 1979 instructions to his staff to follow the progressive discipline system.

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[7] The memo, G.C. Exh. 3(a), is signed by Halterbaum.

[8] Identified in the memo as plant supervisor rather than plant superintendent.

[9] The source of these percentages is not identified. Although Resp. Exhs. 2 and 3 reveal absentee-tardy rates of October, 3.48 percent; November, 6.3 percent; and December, 7.21 percent, Industrial Relations Supervisor Majorie Lou Ford testified that it was well into 1980 before she prepared these exhibits, at Hawkins' request, based on information contained on employee timecards. Ford further explained that, prior to January 1980, the timecards were only documents maintained which would disclose an employee's attendance record. In January, Ford began preparing daily attendance records for employees. As of the date of the hearing, however, no cumulative (or "morning") report was prepared which would advise management of the current day's attendance figures. On the other hand, Ford testified that, on one occasion in either November or December 1979, when absenteeism was particularly acute, Hawkins advised Ford that he was aware of the absenteeism problem.

[10] Were I to find otherwise, I would dispose of the time period variance between the alleged date of the rule and its actual December date as a matter fully litigated.

[11] Complaint par. 10(a).

[12] G.C. Exh. 5(ee).

[13] G.C. Exh. 5(ff). The document erroneously reflects 1980.

[14] When the absentee-tardy rate reached its highest 1979 percentage.

[15] The exception was the January 9, 1980, termination of an employee who had not reported to work for 2 consecutive days, G.C. Exh. 5(o).

[16] The December 20 document specifies that it is an "oral" warning.

Hawkins specified that this meant a written warning prior to suspension.

The January suspension document falsely states that McCommas gave no excuse for his tardiness. Halterbaum conceded that McCommas "probably" told his foreman that his January 11 tardiness was because of car trouble and that such excuse "probably" was reflected on the tardy slip submitted by the foreman. McCommas testified that he had been late because of car trouble. He denied that his tardiness had anything to do with watching a new color television set.[17]

Finally, it is to be noted that Halterbaum apparently had the warning already prepared before he spoke with McCommas, for he handed it to McCommas as the latter entered his office pursuant to summons. The entire matter leaves the distinct impression that Halterbaum pounced on the January 11 tardiness as a pretext in order to set McCommas up for more severe discrimination in the future.

In view of the foregoing, I find that the January 15, 1980, suspension was unlawfully motivated and I shall order the suspension document expunged from his personnel records and that he be made whole for the 3 days he was suspended. As there is no complaint allegation concerning the December 20, 1979, warning issued to former employee McCommas, I shall not order that it be expunged.

3. January 16, 1980, warning to Wayne Ryan

Employed since August 15, 1979, scrap disposal operator Wayne Ryan actively and visibly supported the Union during the preelection campaign. In addition to distributing authorization cards, Ryan prominently displayed a "vote yes" button on the front of his cap daily for several weeks.

Ryan received a "written" warning (G.C. Exh. 5(dd)) from Supervisor Byron Brewer for "misconduct" described as "Wayne did not report for work Wednesday, January 16, and did not call in to explain why he did not report."[18] In accordance with past practice at the plant, Ryan sent word by another employee, William Norris, to Supervisor Brewer that Ryan would have to be absent that day because his wife and child were sick. Brewer testimonially confirmed that Norris reported that Ryan would be absent, that such was in accordance with past practice, and that prior thereto there had been no rule requiring an employee personally to call in. Industrial Relations Supervisor Ford confirmed the absence of any such rule in the past. Indeed, she testified that she did not learn of the new rule until the Ryan warning. She testified that Respondent had devised the rule in January 1980, or possibly in December.

In its post-hearing brief, Respondent concedes that it should have publicized the new requirement,[19] but argues that the administrative requirement was motivated by a desire to curb "the rampant absenteeism problem" and not by unlawful considerations.

Actually, Respondent offered no evidence regarding its motive in instituting the new requirement. Supervisor Brewer testified that Halterbaum, on being told of Ryan's situation, simply told Brewer to "write him up." On cross-examination, Brewer admitted that as of the time of the warning there was no rule prohibiting employees sending a message of absence through a fellow employee. And in her testimony, Ford revealed that her discussion with management about the issue came *after* the warning. Thus, it is reasonable to infer, as I do, that the rule was instituted *with* the January 16, 1980, warning to Ryan and, as I find, in retaliation against him, as a prominent union supporter, for the employees voting in the Union.[20] Accordingly, I find that the warning violates Section 8(a)(3) of the Act, and I shall order that it be expunged from Ryan's personnel records.

4. January 16, 1980, warning to William Norris

William "Bill" Norris, a modi-glass operator, has been employed by Celotex since it commenced operations in July 1978. Among his other active union activities, Norris served as the Union's observer at the January 3, 1980, election. Following the election, Norris was selected by unit employees to serve as president of the Local Union.

In his modi-glass operator position, Norris operates a machine which inserts fiberglass into the insulation board manufactured by Respondent. Thermoboard, also produced by the Company, does not utilize fiberglass. On those occasions when the production line is running thermoboard, Norris had standing instructions to perform odd jobs and "look busy."

Norris credibly testified that, athough employees receive 15-minute breaks twice a shift, taking longer breaks was a common occurrence. Moreover, it appears that, when thermoboard was being run, Norris did not always "look busy," for he conceded that some employees had commented, but not complained, that he did not "do a lot." The record reflects, however, that prior to 1980 Norris had not received warnings for any of his conduct.

Norris concedes that on January 16, 1980, he took an extended break of a full 30 minutes. On that day thermoboard was being run and, prior to his break, Norris was cleaning up the glass area. Supervisor Byron Brewer came into the breakroom where Norris was talking with Walter Bud Corley. Brewer asked Norris if he were ready to return to work, that "we don't take 30-minute breaks around here." Norris denied that he had been there for 30 minutes, but Brewer said he had timed Norris. At that point, Norris returned to the work he had been doing. The next morning Brewer, after consulting with Halterbaum, issued a "written" warning[21] to

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[17] Halterbaum explained that the television set was part of McCommas' overall absenteeism problem as discussed by them on January 15, 1980.

[18] Complaint par. 11.

[19] Respondent denies in its brief that it is a new rule, and contends that it is merely "a matter concerned with the administration of one existing rule, G.C. Exh. 2, p. 19, item 11 [chronic absenteeism or tardiness]."

[20] Ford erroneously testified that Mike Bell received a prior warning for such an offense. In fact, Bell's warning, G.C. Exh. 5(cc), is dated 1-18-80 for an absence on 1-17-80.

[21] Complaint par. 11.

Norris. In the document (G.C. Exh. 4) Brewer described the offense as:

> Bill took 30 minutes for break instead of the allowed 15 minutes. Bill has taken extended breaks repeatedly. This kind of conduct cannot be allowed.

On reading the warning, Norris told Brewer that the concluding portion advising that a future violation could result in discipline "up to and including dismissal" was ridiculous.

Brewer testified that, in the week to 2 weeks preceding January 16, Head Operator Everett Thompson, Assistant Operator John Daughtery, and Foil Operator Al Murphy had complained about Norris staying too long on breaks. They inquired whether they were going to get 30-minute breaks, too. Consequently, Brewer decided to time Norris on the occasion in issue. Brewer conceded that Thompson, Daughtery, and Murphy operate equipment different from Norris', that their machines run thermoboard, and that they must operate their machines even though Norris' machine might not be in operation.

Respondent called Daughtery and Murphy as witnesses, but Thompson was not called. Murphy, present during Brewer's testimony, flatly denied complaining about Norris. Daughtery, also present during Brewer's testimony, stated that he recalled no specific complaint, and testified that he complains "about everybody." The credible testimony of Daughtery and Murphy casts a pall of doubt over Brewer's explanation for the reason he issued the warning.

In addition to the suspicion raised by the testimony of Daughtery and Murphy, it seems clear that, had Brewer previously counseled Norris, he would have so stated in the January 16 "written" warning.[22]

On cross-examination Brewer admitted that he had never timed anyone else, and that he timed Norris only because of the many complaints he had received.[23] He also conceded that he did not issue a warning to Walter Corley[24] even though Corley was in the breakroom longer than Norris; he admitted such fact to Brewer, and requested that he likewise receive a warning. Brewer testified that he refused to issue a warning to Corley because he had not timed him and an employee could later retract such an admission.

On due consideration of the entire record, I find that Respondent, at the first opportunity following the January 3 election, discriminatorily and restrictively applied its breaktime rule against the Union's leading figure. Thus, I find that Respondent seized upon the January 16 extended break incident as a pretext to mask its true motive of discriminating against the bargaining unit in general, and Norris in particular, for their having selected the Union to represent them.

In light of the mid-January warnings to Norris and Ryan, and the 3-day suspension to McCommas, it is clear that Respondent had embarked upon a program of making good on the preelection threat Production Superintendent Halterbaum pronounced to Walter Corley—things would be run strictly by the book if the employees voted in the Union!

Accordingly, I shall order that Respondent expunge the unlawful January 16, 1980, warning which it issued to Norris.

5. June 25, 1980, suspension of William Norris

By hearing amendment granted over objection, the General Counsel added complaint paragraph 10(b) alleging that Respondent unlawfully suspended William Norris for 3 days on or about June 25, 1980.[25] In his post-hearing brief, the General Counsel pointedly states that he does *not* seek to litigate the propriety of the June 25 suspension, but merely by seeks a finding that "the discipline was based, at least in part,[26] on prior discriminatory discipline; i.e., the January 16 warning."[27]

The June 25 suspension notice (G.C. Exh. 5(ww)) issued to Norris was precipitated by Norris' failure to report for overtime work on Saturday, June 21, 1980.[28] The offense description reads:

> This employee, being aware of the condition of his personnel file, choose [sic] not to show up for work on 6/21/80. In looking into his file he has excessive abenteeism & tardiness.

Regarding the second sentence, Plant Manager Hawkins testified that the suspension was based on prior warnings contained in Norris' personnel file as well as insubordination.[29] The record reflects that Norris has received the following discipline:

Date	*Event*	*Discipline*
1/16/80	Extended break	Written warning[30]
4/10/80	Tardy & no call	Verbal warning

---

[22] Brewer apparently bypassed the counselings and "oral" warning called for in Plant Manager Hawkins' December instructions.

[23] None of the 1979 warnings, G.C. Exhs. 5(a), (f), (h), (i), (p), (q), (u), (y), (z), (ff), or (ggg), with the possible exception of 5(f) (employee left production line and went on break without permission), related to taking an extended break.

[24] As noted earlier, Corley wore a "vote no" sticker during the preelection period.

[25] Respondent ultimately withdrew its request for a continuance which it had lodged.

[26] This "mixed motive" concept brings into play the post-hearing decision of the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[27] As the General Counsel does not attack the June 25 suspension insofar as it pertains to the event triggering the suspension, I see no need to discuss that event, or the penalty, in detail.

[28] Norris and three, possibly four, other employees attended a rock concert in Dallas, Texas, on that date. There is some conflict in the record concerning whether in fact they had prior permission to miss work that Saturday so they could attend the concert.

[29] As noted later, the insubordination matter relates to the first sentence of the warning. Industrial Relations Supervisor Ford also testified that the suspension was based on Norris' prior warnings.

[30] Complaint par. 11.

—Continued

Date	*Event*	*Discipline*
5/8/80	Absent & no call	Written warning
6/14/80	Tardy & no call	Written warning
6/25/80	Absent 6/21	3-day suspension[31]

Discriminatee Wayne Ryan was one of the four employees who absented themselves from work on June 21 in order to attend the Dallas concert. He received a 1-day suspension, as did employee Gerald Rose, while the remaining two employees, according to Hawkins, received written warnings. Ryan's disciplinary record is as follows:

Date	*Event*	*Discipline*
1/16/80	Absent & no call	Written warning[32]
5/8/80	Absent & late call	Verbal warning
6/4/80	Absent	Written warning
6/14/80	Tardy & no call	Written warning
6/25/80	Frequent absenteeism and tardiness	1-day suspension[33]

Concert attendee Gerald Rose also was suspended 1 day on June 25 for "too frequent" absenteeism and tardiness (G.C. Exh. 5(nn)). His record contains two prior warnings: an apparent verbal warning for being absent March 10, 1980, (G.C. Exh. 5(pp)), and a June 4, 1980, written warning for being tardy and without calling in (G.C. Exh. 5(oo)).

Greg Harris' record[34] contains only a single prior disciplinary action, a August 27, 1979, written warning for failure to report to work when told he was needed. The identity of the possible fifth attendee does not appear in either the testimony or the exhibits.

It is clear that Respondent, in part, based its June 24 suspension of Norris upon the discriminatory warning of January 16. Prior to *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, it would appear that the entire suspension would be unlawful and would have to be revoked. In *Wright Line*, the Board articulated the different burdens in dual motive (as distinguished from pretext) cases. Presumably, there was a dual motive here for the suspension.[35] the suspension.[35] Therefore, after the General Counsel established the illegal conduct as a motivating factor, Respondent had the burden of demonstrating that it would have reached the same decision absent the January 16 warning. Respondent did not directly carry that burden here. Although the presence of the "insubordination"[36] factor arguably could accomplish that requirement, I would find that it does not because it calls for too much speculation here in the absence of testimony. Nevertheless, I shall discuss the issue inasmuch as it includes an additional ground for resolving the suspension itself.

The insubordination matter is related to the first sentence of Norris' suspension notice where there is a reference to Norris being aware of the contents of his personnel file. Plant Manager Hawkins testified that employees are entitled to inspect their personnel files maintained by the Company. Norris and Ryan availed themselves of this benefit and, together, went to the personnel office to inspect their files on Friday, June 20, 1980. Hawkins testified that it was reported to him that Norris, on inspecting his file, which contained the original copies of his warnings, remarked that his record did not look too bad and he was going to go anyway (to the concert). Hawkins testified that he deemed this remark to be insubordination. At one point he seemed to testify that he considered the act of inspecting the file as part of the insubordination. However, as the insubordination tag, initially applied also to Ryan, was dropped as to Norris, and Ryan was suspended for only 1 day, as was Rose who apparently did not inspect his file, it appears that it was only Norris' comment which Hawkins in fact deemed insubordinate.

The General Counsel does not argue that Norris' remark was protected as being part of a concerted activity. Indeed, he contends that the suspension of Norris is vitiated only because the suspension relies, in part, on the illegal warning of January 16. But complaint paragraph 10(b) is a general allegation, not a limited one. Under these circumstances, an administrative law judge is not restricted to the legal theory advanced by the General Counsel where the evidence fairly supports an additional legal basis for a violation and, as here, the matter has been fully litigated. *Victor Miceli and Sam Miceli d/b/a Riverside Produce Company*, 242 NLRB 615 (1979).

Since Norris and Ryan were engaged in the joint activity of inspecting their personnel files, it is clear that such conduct was concerted. If the two had been discussing what the Union should seek in contract negotiations regarding discipline for absenteeism, and Norris had been overheard contending that three prior warnings for absenteeism should not be considered bad, and that an employee should be able to skip an overtime day, could Norris have been disciplined for such remark? Surely Respondent would not so argue. Conduct does not have to be wise, prudent, and judicious in order to be protected. *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962). And different attitudes toward working conditions and rules are common in collective bargaining. Norris' remark may indeed have been unwise, and may have reflected a poor work attitude,[37] but it was a protected remark inasmuch as it flowed from lawful, concerted activity. Accordingly, I find that Respondent violated Section 8(a)(3) of the Act by relying on Norris' June 20, 1980, remark in assessing him a 3-day suspension.

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[31] Complaint par. 10(b), but only to the extent the suspension is based on the January 16, 1980, warning.

[32] Complaint par. 11.

[33] The General Counsel does not explain why he did not move to amend the complaint to attack Ryan's 1-day suspension as he did regarding Norris' 3-day suspension.

[34] The word "record" can be misleading since it is used here based on the exhibits received in evidence. Those exhibits, however, do not go into 1978. Harris has clock number 17, as G.C. Exh. 5(a) reflects; Norris, employed in July 1978, has clock number 13; and Ryan, hired in August 1979, has clock number 105. Rose had clock number 54. Presumably, therefore, Harris and, possibly, Rose were hired in 1978 and their personnel files conceivably could have contained one or more 1978 warnings.

[35] That is, the illegal January 16, 1980, warning having a significant impact on the suspension and the separate lawful motive of attempting to control absenteeism.

[36] The "insubordination" matter is discussed below.

There is no testimony as to what discipline would have issued to Norris if the January 16 warning and his "insubordination" had been disregarded.[38] It could be argued that the record evidence indirectly demonstrates that it would have been a 1-day suspension. Thus, Gerald Rose, with two prior warnings, was suspended for 1-day. Ryan, even with his January 16 warning, plus three others, was given a 1-day suspension. Disregarding the January 16 warning, Norris, like Ryan, had three prior warnings. Consequently, it could be contended that Norris, except for the "insubordination," would have received a 1-day suspension.

This potential argument is unsound, however, for the reason that the record also reflects that, unlike Gerald Rose, employee Earnestine Price, clock number 24, received three warnings without any suspension. Thus:

Date	*Event*	*Discipline*
9/13/79	Left plant—insubordination	Written warning
2/6/80	Extended Lunch break	Oral warning
5/31/80	Left plant without clocking out	Written warning

In light of the three warnings issued to Price, with the first involving insubordination, and no suspension, the Gerald Rose situation, in the absence of record testimony, cannot be the standard by which Norris is judged. This is so because it could well be that Rose was issued a 1-day suspension only to lend a stronger air of legitimacy to the discipline assessed union supporters Norris and Ryan.[39] In short, the situation is too entangled with discriminatory acts toward Norris and Ryan to be unraveled on the basis of the documentary exhibits.

As the record fails to reflect what penalty would have been assessed had the remark not been considered, I find that the 3-day suspension must be revoked. Respondent did not carry its *Wright Line* burden of establishing what the penalty would have been absent consideration of Norris' remark and the January 16 warning.

D. *Alleged 8(a)(5) Violations*

1. Complaint paragraph 16

As amended, this paragraph alleges "since on or about January 3, 1980, Respondent has unilaterally instituted and pursued a policy of stricter enforcement of its employees' work rules." Prior to the amendment, the allegation referred to the certification date, February 27, 1980, rather than to the January 3, 1980, election date. The stricter enforcement concept is alleged only as an 8(a)(5) violation and not also as an 8(a)(3) violation. In its amended answer and its post-hearing brief, Respondent denies that it had a duty to bargain with the Union prior to the February 27 certification date. Moreover, it further argues that there could be no violation prior to February 27 since the Union never requested bargaining prior to the certification.

Respondent's arguments are unavailing, for the duty to bargain, at least in the sense of a prohibition on unilateral changes, attaches as of the election date. *Howard Plating Industries, Inc.*, 230 NLRB 178, 179 (1977); *Mike O'Connor Chevrolet Buick-GMC Co., and Pat O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701 (1974), enforcement denied on different grounds 512 F.2d 684 (8th Cir. 1975).[40] As stated by the Board in *Mike O'Connor Chevrolet* at 703:

> The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes.

There are no "compelling economic considerations" shown of record here. Indeed, although the General Counsel has not attacked Respondent's motive for so greatly accelerating the rate of post-election warnings, the evidence would appear to support an allegation of unlawful retaliation.

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[37] It must be recalled, however, that there is conflict in the record concerning the matter of advance permission to be off work on Saturday, June 21, 1980. I have not deemed it necessary to resolve that matter.

[38] Respondent, at the hearing and in its brief, argues that the suspension should not be subject to litigation here since Respondent was considering discharging both Norris and Ryan and the suspensions were the result of negotiations with the Union. That theory is misapplied here, for our facts do not give rise to a litigation barring agreement sanctioned by cases such as *Coca-Cola Bottling Company of Los Angeles*, 243 NLRB 501 (1979). That is, there is no evidence Respondent reduced the discipline from a discharge to a suspension as the *quid pro quo* for an assurance from the Union and Norris that the matter would not be litigated in the future. As the hearing in the instant case already was scheduled by notice in the April 2, 1980, complaint, Respondent could well have anticipated that the suspension could become the subject of future litigation. Respondent could have guarded against that possibility by obtaining the kind of agreement approved by the Board in *Coca-Cola, supra.*

[39] As noted above, Norris was president of the Local Union.

[40] *Dobbs House, Inc.*, 181 NLRB 83 (1970), and *Lawson-United Feldspar & Mineral Co.*, 189 NLRB 350, 362 (1971), relied on by Respondent in its post-hearing brief, do not call for a different result. *Dobbs* is not inconsistent with the above analysis, and the Administrative Law Judge's conclusion in *Lawson-United*, at 362, to the effect that the bargaining obligation regarding unilateral changes did not begin until the certification date, is not controlling. This is so because there the alleged unilateral changes occurred even prior to the election. Thus, the reference in that case was not set in the proper context.

2. The alleged unilateral changes

a. *Postelection—precertification memos*

The evidence regarding this subject is chiefly documentary and consists of various postelection memos (G.C. Exhs. 3(b)–3(i)) to employees covering, for example, the use of vending machines, clocking out, safety shoes, and shipping errors. One memo is dated June 10, 1980, and one exhibit is a duplicate. There is no record evidence that any of these memos is of a different nature from any of Respondent's other preelection rules. The General Counsel does not even bother to brief the matter of these documents. Accordingly, I find no violation in the issuance of these memos.

b. *Postelection warnings accelerated*

At the hearing, and in his post-hearing brief, the General Counsel has announced that he seeks rescission of most[41] postelection warnings because Respondent issued them on a highly increased frequency as the result of a new (as demonstrated by such increased frequency) postelection policy adopted and implemented without notice to and consultation with the Union. In his brief, the General Counsel argues that *Electri-Flex Company*, 228 NLRB 847 (1977), enfd. in pertinent part 570 F.2d 1327 (7th Cir. 1978), supports a finding here that Respondent's new policy violated [Section 8 (a)(5)] of the statute. For the reasons stated below, I agree.

As set forth above, Plant Manager Hawkins testified that it was not until December 1979 that he turned his attention to "people" problems. Hawkins testified unconvincingly on this score, and I do not credit him. Moreover, it is extremely unlikely that he would not be paying close attention to "people" matters with an election petition having been filed on November 16, 1979. Indeed, only 4 days later he issued a letter, described earlier herein, to employees in which he expressed very much concern about "people" matters. Hawkins also conceded that attendance has a direct impact on the production figures he was concerned with—machine downtime and production rejects. It therefore would be unlikely that he would not be considering the attendance factor along with the equipment and mechanical factors. Finally, I note that in the November-December 1979 period Celotex employed only about 50 production and maintenance employees. This is hardly so large a number as to indicate that consideration of their attendance problems required a time study independent of other problems.

In all of 1979, Respondent issued a total of 11 warnings[42] with approximately 50 percent being based upon absenteeism-tardiness. During the first 6 months of 1980, Respondent issued a total of 49 warnings with about the same ratio being for absenteeism-attendance. At that rate of acceleration, Respondent, as the General Counsel aptly observes in his brief, has increased its warning frequency by the astonishing figure of 1,000 percent. While an individual warning in isolation may appear lawful on its face, such a limited consideration does not overcome the strong *prima facie* case established by the General Counsel showing almost no warning activity by Respondent in December[43] followed by a flurry of postelection warnings, some found discriminatory herein, in January and thereafter. Finally, Production Superintendent Halterbaum's ringing threat to employee Corley is a prophesy fulfilled: If the Union is voted in, "we will go strictly by the book."

In light of the foregoing, and upon the entire record, I find that Respondent has violated Section 8(a)(5) of the Act, as alleged, by unilaterally instituting and pursuing a policy of stricter enforcement of its employees' work rules.[44]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by maintaining an overly broad no-distribution rule; by threatening employees with stricter enforcement of work rules if they voted in the Union; and by threatening employees with revocation of all their benefits prior to contract negotiations if they voted in the Union.

4. Respondent has violated Section 8(a)(3) and (1) of the Act by suspending employees Larry McCommas on January 15, 1980, and William Norris on June 25, 1980; and by issuing written warnings to employees William Norris and Wayne Byan on January 16, 1980.

5. All production, maintenance and warehouse employees, including scrap disposal driver and leadmen employed at the Employer's Texarkana, Arkansas, plant; but excluding all other employees, including office clerical employees, quality control technicians, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times since February 27, 1980, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive bargaining representative of the employees in the unit described above.[45]

7. Respondent has violated Section 8(a)(5) and (1) of the Act by failing to give prior notice to the Union, and

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[41] At the hearing, the General Counsel stated that rescission was not sought regarding the discharges, but only the warnings and suspensions. G.C. Exh. 6 tabulates the warnings into four groups: oral, written, suspension, and termination. Of the seven terminations, one is a duplicate (G.C. Exhs. 5(rr) and 5(fff)) and two occurred in 1979. Of the seven suspensions, two have been litigated (McCommas and Norris), and Ryan's of June 25, 1980, is one of the other five. One, G.C. Exh. 5(ss), was issued to Walter Corley, who later was terminated (G.C. Exhs. 5(rr) and 5(fff)).

[42] G.C. Exhs. 5(a), (f), (h), (i), (p), (q), (u), (y), (z), (ff), and (ggg). G.C. Exhs. 5(a)–5(ggg) are the warning, suspension, and termination documents issued by Respondent during 1979 through the first half of 1980.

[43] And that being the (unalleged as a discriminatory) warning issued to Larry McCommas on December 20, 1979 (G.C. Exh. 5 (ff)), discussed earlier herein.

[44] Athough there is no direct evidence that Respondent failed to notify and consult with the Union before it instituted and implemented its policy, the record evidence gives rise to an inference, which I draw, that it did not.

[45] For this paragraph, which refers to Respondent's plenary duty to bargain, the certification date, rather than the election date, is used. *Howard Plating Industries, Inc.*, 230 NLRB 178.

the opportunity to bargain, over Respondent's decision to institute, and the implementation thereof, a new policy of stricter enforcement of its employees' work rules.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The General Counsel has not established that Respondent has violated the Act except to the extent found above.

10. The General Counsel has not established that Respondent violated Section 8(a)(3) and (1) of the Act by issuing its rule of December 17, 1979, requiring employees to present a doctor's statement in order to obtain an excused absence because of illness.

IV. THE REMEDY

Having found that Respondent has engaged in the unfair labor practices set forth above, I shall recommend that it be ordered to cease and desist therefrom, to take certain affirmative action designed to effectuate the policies of the Act, and to post signed and dated copies of an appropriate notice to employees.

I shall recommend an order requiring Respondent to rescind its General Conduct Rule 10 because of its unlawfully broad nature. Since I have found the warnings issued to William Norris and Wayne Ryan on January 16, 1980, were in retaliation for their union activities, I shall recommend that Respondent revoke such warnings and physically expunge them from the personnel records of these employees.

As I have found that Respondent unlawfully suspended Larry McCommas on January 15, 1980, for 3 days, and William Norris on June 25, 1980, for 3 days, I shall recommend that Respondent be ordered to make each whole for any loss of earnings or benefits he may have suffered as a result of the discrimination against him. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[46] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Having found that Respondent failed to give notice to the Union of its decision to institute a new policy of stricter enforcement of its employees' work rules, and the opportunity to bargain concerning that decision and its implementation before such decision was implemented, I shall recommend that Respondent be ordered to restore the *status quo ante* and to revoke its policy; rescind all warnings and suspensions issued from January 3, 1980, to June 30, 1980; and physically expunge all such warning and suspension notices from the personnel files of the affected employees; and make whole all employees suspended in accordance with the formula set forth above regarding employees William Norris and Wayne Ryan.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[47]

The Respondent, The Celotex Corporation, Texarkana, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining any rule prohibiting its employees from distributing or removing union literature in nonworking areas during nonworking time or requiring management authorization to so distribute or remove.

(b) Threatening its employees that it would go strictly by the book if they support the Union or any other labor organization.

(c) Threatening its employees with cancellation of benefits if they support the Union or any other labor organization.

(d) Warning, suspending, or otherwise discriminating against employees in any manner with respect to their tenure of employment or any term or condition of employment because they engage in activity on behalf of United Cement, Lime and Gypsum Workers International Union, AFL-CIO, or any other labor organization.

(e) Unilaterally instituting and implementing any new policy regarding stricter enforcement of employees' work rules without first giving the Union notice and the opportunity to bargain over such decision and its proposed implementation.

(f) In any like or related manner interfering with, restraining, coercing, or discriminating against its employees in the exercise of their rights to self-organization, to form, join, or assist United Cement, Lime and Gypsum Workers International Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which will effectuate the purposes of the Act:

(a) Rescind General Rule of Conduct 10 prohibiting its employees from distributing or removing union literature in nonworking areas during nonworking time and requiring management authorization to so distribute or remove.

(b) Revoke and rescind the written warnings issued to William Norris and Wayne Ryan on January 16, 1980, and the suspension notices to Larry McCommas and William Norris on January 15, 1980, and June 25, 1980, respectively, and physically expunge from their respective personnel files any record of such warnings and suspensions.

(c) Make whole Larry McCommas and William Norris in the manner set forth above in the remedy section for any loss of pay or other benefits they may have suffered by reason of the discrimination against them.

(d) Revoke and rescind all other warnings and suspensions issued to employees from January 3, 1980, to June

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[46] The General Counsel's plea, supported by an extensive form brief attached to his main brief, that interest be assessed at 9 percent is denied. *Huron Dressed Beef, Inc.*, 252 NLRB 151, 156, fn. 15 (1980).

[47] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

30, 1980, physically expunge such records from the personnel files of affected employees and, in the manner set forth above in the remedy section of this recommended Order, make whole all employees who have been suspended.

(e) Revoke the policy adopted in early January 1980 of strictly enforcing employees' work rules.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Texarkana, Arkansas, plant signed copies of the attached notice marked "Appendix."[48] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps it has taken to comply therewith.

IT IS FURTHER ORDERED that paragraph 9 of the complaint be dismissed.

IT IS FURTHER ORDERED that the complaint, as amended, be dismissed insofar as it alleges violations of the Act not specifically found.

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[48] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Channel Island Development Corp., d/b/a The Lobster Trap & Casa Sirena Marina Hotel *and* Warehouse, Processing & Distribution Workers Union, Local 26, International Longshoremen's & Warehousemen's Union *and* Culinary Alliance & Bartenders Union, Local 498, Hotel & Restaurant Employees and Bartenders' International, AFL-CIO. Cases 31-CA-9050, 31-CA-9272, and 31-RC-4493

January 25, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 28, 1981, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[1] and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions [3] of the Administrative Law Judge and to adopt his recommended Order as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Channel Island Development Corp., d/b/a The Lobster Trap & Casa Sirena Marina Hotel, Oxnard, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs accordingly:

"(d) Expunge from its files any reference to the discharges of Arnalfo Cortez, Ignatio Cortez, Jr., and Manuel Merino on May 17, 1979, and notify them, in writing, that this has been done and that evidence of this unlawful discharge will not be used as a basis for future discipline against them."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election in Case 31-RC-4493 be, and it hereby is, set aside, and that a new election shall be conducted in accordance with the Direction of Second Election set forth below.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their and other employees' activities on behalf of, sympathy for, or their desires with respect to representation by Warehouse, Processing & Distribution Workers Union, Local 26, International Longshoremen's & Warehousemen's Union, or Culinary Alliance & Bartenders Union, Local 498, Hotel & Restaurant Employees and Bartenders International, AFL-CIO, or any other labor organization.

WE WILL NOT maintain a surveillance of our employees' activities on behalf of either of the above or any other labor organization.

WE WILL NOT threaten to demote our employees because of their activities on behalf of

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[1] Respondent's request for oral argument is hereby denied as the record and briefs adequately present the issues and positions of the parties.

[2] We find without merit Respondent's allegations of bias on the part of the Administrative Law Judge. There is no basis for finding that bias or partiality existed only because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court has stated "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *N.L.R.B.* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949). Moreover, as it is the Board's established policy not to overrule an administrative law judge's resolutions as to credibility except where, as is not the case here, the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect, we find, contrary to Respondent's contention, no basis for disturbing the Administrative Law Judge's credibility findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951).

[3] In affirming the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) when executive housekeeper Palacio interrogated employees on or about April 23, 1979, we note that Palacio only admitted asking employees if they had heard anything about a union representative being at the hotel over the weekend. Employee witnesses credibly testified, however, that Palacio also inquired whether cards had been circulated and whether the employees had been asked to join a union. Although we find Palacio's admitted interrogation sufficient to establish a violation, we find the further interrogations established by credited testimony were likewise unlawful.

In adopting the Administrative Law Judge's recommendation to set aside the election, we do not rely on Palacio's unlawful interrogation of employee Cortez inasmuch as it occurred after the election, according to Cortez' credited testimony.

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the above-named or any other labor organization.

We will not threaten our employees with discharge to discourage employees from seeking and securing representation by the above-named or any other labor organization.

We will not discharge our employees to discourage our employees from seeking and securing representation by the above-named or any other labor organization.

We will not condition the reinstatement of any employees discharged to discourage their and other employees' support of the above-named or any other labor organization or their abstention from that support.

We will not grant wage increases to discourage our employees from seeking and securing representation by the above-named or any other labor organization.

We will not promise improvements in wages and benefits if our employees will refrain from seeking and securing representation by the above-named or any other labor organization.

We will not threaten reductions in wages and benefits if our employees seek and secure representation by the above-named or any other labor organization.

We will not threaten our employees with the futility of seeking and securing representation by Local 498 by threatening not to sign any contract with that Union containing wage and benefit provisions unless that contract contains wage and benefit provisions lower than those we currently provide.

We will not solicit grievances from our employees and promise to resolve them to discourage their seeking and securing representation by the above-named or any other labor organization.

We will not otherwise interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act to form, join, or assist the above-named or any other labor organization, to bargain collectively through the above-named or any other labor organization, to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection, or to refrain from any or all of those activities.

We will reinstate Arnulfo Cortez, Ignatio Cortez, Jr., and Manuel Merino to their former positions or, if those positions no longer exist, to substantially equivalent positions, if necessary terminating any employees hired to replace them.

We will expunge from our files any reference to the discharges of Arnulfo Cortez, Ignatio Cortez, Jr., and Manuel Merino on May 17, 1979, and **we will** notify them that has been done and that evidence of the unlawful discharge will not be used as a basis for future discipline against them.

We will make those three employees whole for any wage and benefit losses they have suffered because we discharged them to discourage their and other employees' union support, with interest.

Channel Island Development Corp., d/b/a The Lobster Trap & Casa Sirena Marina Hotel

DECISION

Statement of the Case

George Christensen, Administrative Law Judge: These cases were heard before me on April 1, 2, 3, 4, 22, 23, and 24, and July 15 and 16, 1980, in Ventura, California, to resolve issues raised by a consolidated complaint issued by the Regional Director for Region 31 of the National Labor Relations Board based on a charge filed by Warehouse, Processing & Distribution Workers Union, Local 26, International Longshoremen's & Warehousemen's Union (Local 26), on June 4, 1979, in Case 31-CA-9050 and a charge filed by Culinary Alliance & Bartenders Union, Local 498, Hotel & Restaurant Employees and Bartenders' International, AFL-CIO (Local 498), in Case 31-CA-9272 on August 9, 1979, and amended on November 7, 1979,[1] against Channel Island Development Corp., d/b/a The Lobster Trap & Casa Sirena Marina Hotel (the Respondent). Local 498's objections that certain conduct of the Respondent alleged in its charges prevented a fair election in Case 31-RC-4493 are also before me for resolution.

The Respondent operates a hotel and a restaurant in Oxnard, California. Local 498 launched a campaign to organize the Respondent's hotel employees and Local 26 launched a campaign to organize the Respondent's restaurant employees in early and mid-1979. Local 498's campaign culminated in an election on July 12 which resulted in a tie vote and union objections to the Respondent's conduct allegedly affecting that outcome. The consolidated complaint and the election objections allege that the Respondent interfered with the hotel employees' exercise of a free choice in the election and attempted to discourage its hotel employees from supporting Local 498 in the election, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by:

1. Interrogating hotel employees about their and other employees' activities on behalf of Local 498.
2. Telling a hotel employee in the past that, when another union tried to organize the hotel's employees, the employees who supported that union were discharged.

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[1] Read 1979 after all further date references omitting the year.

3. Telling a hotel employee eligible to vote in the election that she was not eligible to vote.

4. Threatening a hotel employee with the discharge of those hotel employees who initiated Local 498's campaign.

5. Informing a hotel employee that it was futile for the hotel employees to select Local 498 as their bargaining representative, since the Respondent would not sign a contract with it.

6. Threatening hotel employees with reductions in benefits and wages and loss of the Respondent's personal loan program if the hotel employees sought and secured union representation.

7. Promising hotel employees free uniforms, paid sick leave, premium pay for holidays, leaves of absence, wage increases, and a dental plan, if they desisted from seeking and securing union representatives.

8. Soliciting grievances from hotel employees and promising to remedy them.

9. Granting employees wage increases.

The consolidated complaint also alleges that the Respondent interfered with Local 26's organizational effort and violated Section 8(a)(1) and (3) of the Act by discharging several employees to discourage those and other employees' support of Local 26 and violated Section 8(a)(1) of the Act by conditioning recall of the discharged employees on their abandoning further support of Local 26 and by maintaining a surveillance of its restaurant employees' union activities.

The Respondent denies it committed the acts alleged, denies it violated the Act and interfered with the employees' exercise of a free choice in the election, and moves the complaint and petition be dismissed or (re the petition) the election objections be overruled and the election result certified.

The major issues for resolution are whether the Respondent committed the acts alleged and, if so, whether by such commission it violated the Act and interfered with the employees' free choice in the election.

The parties appeared by counsel at the hearing and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs were filed by the General Counsel and by the Respondent.

Based upon my review of the entire record, observation of the witnesses, and perusal of the briefs, I enter the following:

FINDINGS OF FACT

I. JURISDICTION AND THE LABOR ORGANIZATIONS

The complaint alleges, the answer admits, and I find that at all pertinent times the Respondent was an employer engaged in commerce and in a business affecting commerce and Locals 498 and 26 were labor organizations within the meaning of Section 2(2), (5), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES AND ELECTION MISCONDUCT

A. *Background*

At the time Locals 498 and 26 launched their organizational campaigns among the Respondent's hotel and restaurant employees, there were approximately 45 employees in the hotel unit Local 498 sought to represent[2] and 34 employees in the restaurant unit[3] Local 26 sought to represent. The two campaigns were conducted independently.

Between April 14 and 22 Carolyn Herrera, a hotel employee, solicited and secured the signatures of a majority of the employees in the hotel unit to cards authorizing Local 498 to represent them for collective-bargaining purposes. On April 23 Local 498 filed with the Regional Director a petition for certification (based on those cards) as the restaurant unit's exclusive collective-bargaining representative (Case 31-RC-4493).

On April 25 and May 2, Local 26's representative, Fritz Conle, conducted meetings at the home of Ignacio Cortez, Sr. (Cortez Sr.). Cortez Sr., was a restaurant employee, as were his sons Ignacio Cortez Jr. (Cortez Jr.), and Arnulfo Cortez (A. Cortez). The wife of Cortez Sr., and mother of Cortez Jr., and A. Cortez, Emilia Cortez (E. Cortez), who was employed as a maid in the hotel unit, also attended. Conle solicited and secured the signatures of Cortez Sr., Cortez Jr., A. Cortez, and other employees to cards authorizing Local 26 to represent them for collective-bargaining purposes. Conle also supplied the Cortezes (other than E. Cortez) with blank cards which they utilized in soliciting and securing the signatures of other restaurant employees for return to Conle.

Cortez Jr., A. Cortez, and a third cook were discharged in mid-May.

An election was conducted among the hotel unit employees on July 12; the result was a tie vote. Local 498 filed timely objections to the election.

The complaint and election objections allege that, between April 23 and July 12, the Respondent prevented a fair election and violated the Act by various acts and conduct specified above. The complaint further alleges that the Respondent discharged the three cooks in mid-May to discourage employee support of Local 26, conditioned their rehire on their abandonment of further support of Local 26, and maintained a surveillance of the restaurant employees' activities on behalf of Local 26, thereby violating the Act.

The alleged election interferences and violations shall be treated in chronological sequence below.

B. *The Alleged April Hotel Employee Interrogations—Palacio*

The complaint and objections allege that in April the Respondent's executive housekeeper, Frances Palacio,[4] interrogated hotel employees concerning their union activities, sympathies, and desires, thereby violating Section 8(a)(1) of the Act and interfering with the employees' free choice in the election.

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[2] Maids, housemen, floor supervisors, hotel maintenance men, bellmen, and gardeners.

[3] Cooks, food preparers, kitchen helpers, and dishwashers.

[4] I find at all pertinent times Palacio was a supervisor and agent of the Respondent acting on its behalf.

Palacio, following her normal practice of not working weekends, did not work on Saturday and Sunday, April 21–22. Shortly after she came to work on Monday, April 23, several maids informed her that over the previous weekend a union tried to get into the hotel, a union representative was on the hotel premises, and Carol Cordin, one of the housekeeping supervisors, was behind the effort to bring the Union in.[5] Palacio immediately informed Stephen Erdos, the Respondent's general manager,[6] that several maids told her a union had been on the premises attempting to organize; Erdos asked her who initiated the union campaign; and she replied it was one of the floor supervisors, Carol Cordin.[7] When she later received information Herrera was involved in the organizational effort, Palacio relayed that information to Erdos.[8]

In any event, it is undisputed after receiving the initial reports of union activity at the hotel premises over the April 21–22 weekend Palacio made a tour of the hotel and engaged a number of the housekeeping department employees in conversation.

At one point in her testimony Palacio denied she discussed a union with any of the employees during her tour and denied any of the employees discussed a union with her; after confrontation with her pretrial affidavit, however, she changed her testimony and conceded, as stated in the affidavit, that during her tour she asked the employees she contacted what they had heard about a union and whether they were asked to join a union.[9]

Several hotel employees testified Palacio questioned them on April 23 concerning union activities. Maid E. Cortez testified, that, during the morning of April 23, Palacio approached her in the hotel room where she was working, and informed Cortez she knew someone was trying to bring a union in; that she heard a union representative was in the hotel during the weekend; that Erdos instructed her to find out if any of the employees were passing out cards at the hotel, and asked her if she knew who was passing out cards; that she replied she knew nothing about it; and that Palacio commented each maid she asked was giving her the same answer. Maid Barbara Mixon testified that Palacio approached her where she was working, stated she heard a union representative was coming around, and asked Mixon if she had seen or heard one; that she replied no; that Palacio then asked if cards were going around and whether she had signed one; and that she again replied no. A third employee, Herrera, testified that during the same week Palacio approached her, stated she had been told to ask all the housekeeping employees if they had seen or talked to a union representative, and asked Herrera if she had seen a union representative at the hotel talking to employees or passing out cards to them; and that she replied in the negative. A fourth employee, dispatcher Judy Dykes,[10] testified that Palacio asked her if she had seen a union representative at the hotel the weekend of April 21–22.

As noted above, while initially Palacio denied engaging in any discussions with any employees concerning a union on April 23, she changed that testimony when confronted with her pretrial affidavit and admitted she had. After that admission, Palacio conceded she discussed a union with E. Cortez, Cordin, Ruth Newton, Maria Gonzales, Priscilla Hanson, and Lupe Valle, but denied she engaged in any discussion of a union with Mixon, Herrera, and Dykes. Following her admission to conversations about a union with E. Cortez, Cordin, Newton, Gonzales, Hanson, and Valle, she verified the accuracy of the statement in her pretrial affidavit that she asked each of those six what they knew about the rumors that a union representative was on the premises over the weekend and whether they were asked to join a union.[11]

The contradictory and self-serving nature of Palacio's testimony is glaring and leaves little basis for crediting, other than those portions supported by her pretrial affidavit. By way of contrast, the testimony of E. Cortez, Mixon, Herrera, and Dykes was mutually corroborative, consistent, and given in a straightforward and convincing manner.

On the basis of the foregoing, I credit the testimony of E. Cortez, Mixon, Herrera, and Dykes and those portions of Palacio's testimony wherein she conceded the accuracy of her pretrial affidavit; i.e., where she admitted she asked employees Cordin, Newton, Gonzales, Hanson, and Valle what they knew about the rumors that a union representative had been on the hotel premises during the weekend and whether they were asked to join a union.

I therefore find that on April 23 the Respondent, by Palacio, interrogated hotel employees concerning their and other employees' union activities, thereby violating Section 8(a)(1) and interfering with the employees' free choice in the election.

C. *The Alleged April 23 Threat to a Hotel Employee—Palacio*

The complaint and objections allege that, in or about late April or early May, Palacio told an employee that, when a union tried to get in before, employees associated with the union were fired, thereby violating Section 8(a)(1) of the Act and interfering with the employees' free choice in the election.

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[5] Cordin is identified as "Corridon" in the transcript.

[6] I find at all pertinent times Erdos was a supervisor and agent of the Respondent acting on its behalf.

[7] While initially Palacio denied that she told Erdos one of the floor supervisors initiated the union campaign, she changed her testimony and admitted she advised Erdos it was Cordin when confronted with her pretrial affidavit so stating.

[8] At one point Palacio testified it was maid Connie Dziedic who informed her of Herrera's involvement a few days after she received the April 23 reports; at another point, she testified it was maid Priscilla Hanson who told told her of Herrera's involvement a few hours after she received the April 23 reports.

[9] The foregoing concession was made during cross-examination; on redirect, Palacio again changed her testimony, stating she only asked what they had heard about a union, denying she asked the employees if they were asked to join a union.

[10] The dispatcher assists the executive housekeeper in advising the housekeeping employees what assignments Palacio had given them, issuing linen, taking and making telephone calls as directed, preparing work schedules, preparing timesheets, etc.

[11] An admission she recanted on redirect, as noted earlier.

Dykes testified that, while she was in the linen room with Palacio on April 23, the telephone rang and she answered; that Erdos was on the line and asked for Palacio; that she gave the telephone to Palacio; that she heard Palacio state she did not believe it was her department and would find out who it was; and that, after completing the conversation with Erdos, Palacio stated to her that a union tried to get into the hotel before and employees who supported it were fired.

Palacio denied the remarks attributed to her by Dykes. Dykes was a straightforward witness and gave direct and convincing testimony; Palacio, on the contrary, as noted heretofore, repeatedly contradicted herself in a transparent effort to give testimony favorable to the Respondent.

I credit Dykes' testimony and find on April 23 the Respondent by Palacio violated Section 8(a)(1) of the Act and interfered with the employees' free choice in the election by telling an employee a union tried to get into the hotel before and employees who supported it were discharged.

D. *The Alleged May Surveillance—Marzorati and DeHoyas*

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by conducting a surveillance of its restaurant employees' union activities in May.

A. Cortez testified that, over the weekend of May 11, one of the Respondent's security guards known to him as Mario (Mario DeHoyas) visited the kitchen on several occasions and engaged him in conversation, that DeHoyas expressed interest in securing union representation and asked if the restaurant employees were interested, that he replied they already had a union, that DeHoyas stated the Teamsters were the best union, that he replied he and many other restaurant employees already signed cards with a different union, that DeHoyas asked its name, that he replied he was unable to supply its name, that DeHoyas asked him for one of the cards the restaurant employees signed, that he agreed to supply DeHoyas with a card, and that DeHoyas subsequently asked him for the card and he said he did not have one for him.[12] Cortez Sr. and Cortez Jr. testified that they also had conversations in the kitchen area with DeHoyas over the same weekend, and that during the course of those conversations during the course of those conversations DeHoyas professed interest in securing union representation, stated he favored the Teamsters or the Farm Workers unions, and drew from Cortez Sr. statements he already supported a different union (Local 26) and from Cortez Jr. an ambiguous response.

DeHoyas corroborated the testimony recited above to the extent he conceded he visited the kitchen, and spoke with members of the Cortez family there and one of them offered to secure a union authorization card for him on a date he could not recall. DeHoyas denied he solicited the views of any restaurant employees concerning union representation, and stated that one of the Cortez family solicited him to sign a card authorizing a union to represent him and offered to supply him with a card for his signature. DeHoyas "could not recall" whether Victor Marzorati, the Respondent's president,[13] assigned him to investigate union activity among the restaurant employees,[14] conceded there was a "possibility" he gave a report to Marzorati concerning information he secured concerning union activity among the restaurant employees, but that he "could not recall" whether or not he gave such a report.[15] DeHoyas did recall, however, that he reported to his immediate superior, Guard Captain Wayne Redfern, that a member of the Cortez family offered him a union authorization card.

Erdos, the Respondent's general manager, testified he received a telephone call from a waitress employed at the restaurant on a date he could not recall with certainty and the waitress informed him that Cortez Sr. announced he was going to conduct a union meeting at 10 a.m. the following day at the restaurant and immediately passed that information on to Marzorati.

Marzorati testified he contacted DeHoyas, and assigned him to check out the report, and DeHoyas reported a few days later that the alleged union meeting was not held. At one point in his testimony, Marzorati stated he made the assignment in early May; at another point, that it was in late May or early June. His pretrial affidavit places the date in early May.

Both Marzorati and Erdos learned of union activity among the hotel employees on April 23, when Local 498 filed its petition for certification as their exclusive collective-bargaining representative.[16] It reasonably may be presumed Marzorati and Erdos were vitally interested in learning whether and to what degree interest in union representation had spread to the Respondent's restaurant employees. While Marzorati testified on receiving Erdos' report of union activity among the restaurant employees, he assigned DeHoyas only to ascertain if a union meeting was scheduled to be conducted, and was indeed conducted on company premises on company time, I find that testimony suspect, particularly in view of DeHoyas' evasive testimony when questioned about the extent of his assignment and in view of his persistent questioning of the three members of the Cortez family.[17]

Whatever the limitations of DeHoyas' assignment, it is undisputable that Marzorati's agent, DeHoyas, asked questions and developed information concerning the restaurant employees' union activities at Marzorati's direction, and transmitted that information at least to his immediate superior, Redfern.[18]

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[12] In the interim between promising DeHoyas a card and DeHoyas' request for it, A. Cortez had second thoughts about supplying a security guard with a card and decided not to furnish it.

[13] I find at all pertinent times Marzorati was a supervisor and agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

[14] Marzorati testified he assigned DeHoyas to check out a report that Cortez Sr. had scheduled a union meeting at the restaurant.

[15] Marzorati testified DeHoyas reported no union meeting was held at the restaurant.

[16] As noted above, Palacio also informed Erdos that on April 23 she received reports from several maids that a union representative contacted them in an effort to secure their support over the preceding weekend.

[17] I credit the testimony of the three members of the Cortez family; DeHoyas' testimony was evasive and in stark contrast to the convincing nature of the testimony of the Cortez family, particularly A. Cortez.

There remains the date DeHoyas carried out his assignment. It is clear the three cooks, including A. Cortez and Cortez Jr. were discharged on May 17. It is clear, then, the DeHoyas-Cortez exchanges occurred prior to May 13, as they took place while A. Cortez and Cortez Jr. were at the restaurant, working. I find and conclude that they occurred on the dates the Cortezes testified to; i.e., the weekend of May 11-13, and that the assignment was given between May 7-11.

On the basis of the foregoing, I find and conclude that in early May the Respondent, by Marzorati and DeHoyas, conducted an inquiry into the extent and nature of union activity among the restaurant employees, thereby violating Section 8(a)(1) of the Act.

E. *The Alleged May Discriminatory Discharges and Reinstatement Offer—Marzorati, Erdos, and Sanchez*

The complaint alleges that the Respondent discharged cooks A. Cortez, Cortez Jr. and Manuel Merino to discourage their and other employees' union support, thereby violating Section 8(a)(1) and (3) of the Act, and that the Respondent additionally violated Section 8(a)(1) of the Act by conditioning a reinstatement offer addressed to Cortez Jr. on refraining from engaging in any campaign to organize the restaurant employees.

The Respondent contends that it was unaware of any union activity among the restaurant employees prior to the discharges, that the three cooks were discharged for cause, and that the alleged reinstatement offer never was made.

I reject the first contention. The three members of the Cortez family employed at the restaurant (Cortez Sr., Cortez Jr., and A. Cortez) were prime actors in Local 26's effort to organize the Respondent's restaurant employees;[19] Erdos was informed of Cortez Sr.'s union activities in early May, immediately passed on that information to Marzorati, and Marzorati immediately passed that information on to the head chef at the restaurant, Jose Sanchez;[20] Marzorati assigned guard DeHoyas to investigate the reported union activity; and, between May 11-13, DeHoyas learned that members of the Cortez family and additional restaurant employees supported a union and made a report whose details he "could not recall" concerning his investigation to Marzorati and Redfern.

On the basis of the foregoing, I find sometime between May 3 and 10 the Respondent learned of a union organizational campaign among its restaurant employees and Cortez Sr.'s involvement therein; that it became aware by May 13 other restaurant employees supported union representation, including A. Cortez.

At the time the three cooks were discharged (on May 17), Cortez Sr. had been employed at the restaurant for approximately 11 years, specializing in the cutting and preparation of fish. His sons were hired in 1975; by May they progressed to positions as cooks. Merino began work as a cook in approximately November 1979.[21] Both sons received increases of 50 cents per hour in their May 5 paychecks (covering the payroll period April 16-30), pursuant to Sanchez' recommendation (based on their work) and with Marzorati's approval. Merino received a 25-cent increase about the same time.

Cortez' two sons and Merino worked on Sunday, May 13, were not scheduled for work between May 14-16, and were scheduled to return to work on May 17. During the day shift, prior to the time Cortez Jr., A. Cortez, and Merino were scheduled to report for work (they were scheduled for the shift covering the dinner and evening hours, 4 p.m. to midnight), Cortez Sr. was at work (he was scheduled to go off work at 4 p.m.). Sometime that morning Sanchez informed Cortez Sr. that he was going to reassign A. Cortez from his position as cook back to his previous position as food preparer. Cortez Sr. did not remonstrate with Sanchez over the demotion at that time but later, recalling Sanchez told him a short time previous that A. Cortez' work was good and that Sanchez had gotten a raise for him on that premise, he reminded Sanchez he secured a raise for A. Cortez just a short time previously and stated his work was fine and asked why, despite that, he was demoting A. Cortez. Sanchez replied plans had changed; he was not going to demote A. Cortez, he was going to fire all three of the Cortezes. Cortez Sr. asked why. Sanchez replied he did not know. Cortez Sr. shortly thereafter telephoned his home and informed his sons they and he had been fired.

On receiving the call, Cortez Jr. came to the restaurant and sought out Sanchez. He asked Sanchez why he, his brother, and his father had been fired. Sanchez replied that the Company was being reorganized and Marzorati told him everyone was to be fired, including Sanchez.

When Cortez Sr. completed his shift that day, Sanchez gave him final paychecks for his two sons and Merino. Noting there was no check made out to him, Cortez Sr. asked where his check was. Sanchez responded plans had changed, he was not going to be fired.

Later in the day the three discharged cooks (Cortez Jr., A. Cortez, and Merino) came to the restaurant and asked the restaurant manager, Craig Adford,[22] why they were fired. Adford replied he did not know and suggested they contact Marzorati. The three went to Marzorati's office and were informed by Marzorati's secretary he was out of town. They went back to the restaurant, contacted Sanchez, and repeated the question. This time Sanchez stated he did not know why they were fired and promised to try to get them reinstated.

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[18] DeHoyas was vague concerning what report he made to Marzorati, failing to corroborate Marzorati's testimony he reported the allegedly scheduled union meeting was not held.

[19] Meetings for the purpose of persuading employees at the Respondent's restaurant to support Local 26 were held at the Cortezes home; all three Cortezes solicited other restaurant employees to support Local 26; two of the three solicited other restaurant employees to sign cards authorizing Local 26 to represent them, etc.

[20] I find that at all pertinent times Sanchez was a supervisor and agent of the Respondent acting on its behalf.

[21] Merino did not testify; counsel for the General Counsel stated he was in the military service stationed in the Philippine Islands at the time of the hearing.

[22] I find that at all pertinent times Adford was a supervisor and agent of the Respondent acting on its behalf.

A few hours later Sanchez telephoned Cortez Jr. at his home and told Cortez Jr.[23] he thought he could get the boys their jobs back, but they would have to promise not to bring in a union. Cortez Jr. gave the requested promise and was assured of reemployment.

The following day (May 18) Sanchez, in a conversation with Cortez Sr. referred to his conversation with Cortez Jr. the preceding evening, stating in essence the three caused their discharge by engaging in union activities, and for Cortez Sr. not to be ungrateful, since he was trying to get them reinstated. Later in the day, Sanchez assured Cortez Sr. that his sons would be rehired.

Cortez Jr. and A. Cortez went to the restaurant on May 18 and again saw Sanchez. Sanchez directed them to see Erdos, sending along a cook he recruited the previous evening as one of the replacements for the three discharged cooks, Reuben Ronquillo,[24] to act as a translator.[25] When the three arrived at Erdos' office, Ronquillo went into Erdos' office and the two Cortezes remained outside; when Ronquillo emerged, he told them (in Spanish) Erdos only wanted to hire one cook and it would look bad only to rehire one of them, so he would not rehire either of them.

On May 19 Sanchez told Ardissoni that Marzorati threatened to close down the restaurant if he did not fire the three cooks.[26]

I also find without merit the Respondent's contention that the three cooks were discharged for cause, i.e., for insubordinate conduct during their May 11 work shift following a period in which their work was of poor quality and quantity.

The Respondent contends the incident which triggered the May 17 discharge was an insubordinate remark uttered by Cortez Jr. during the May 11 evening work shift. Yet no valid evidence was produced that Cortez Jr. made the remark attributed to him;[27] *four* employees were threatened with discharge on May 17, including one noncook (Cortez Sr.), and three cooks were discharged for a remark attributed to only one of their number; Sanchez gave conflicting explanations for his threat and for the discharges and never told the three discharged cooks or Cortez Sr. the three were discharged for alleged insubordination and preceding poor work; and the discharges followed closely after the Respondent learned there was union activity among the restaurant employees and that Cortez Sr. and A. Cortez were active therein; and Sanchez in essence advised Cortez Jr. he could not secure reinstatement unless he, his brother, and Merino agreed to refrain from any support of a union.[28]

Contrary to the Respondent's contention, I find that on the basis of the evidence recited above the Respondent on May 17 threatened to demote A. Cortez and subsequently to discharge Cortez Sr., Cortez Jr., A. Cortez, and Merino to discourage union support among the restaurant employees; that the Respondent discharged Cortez Jr., A. Cortez, and Merino to discourage those activities; that the Respondent conditioned an offer to reinstate Cortez Jr. and A. Cortez, on their refraining from any effort to secure union representation; that by the threat and the conditional offer the Respondent violated Section 8(a)(1) of the Act; and that by the discharges the Respondent violated Section 8(a)(1) and (3) of the Act.

F. *The Alleged May Interrogations—Palacio*

The complaint and election objections allege that in May Palacio interrogated a hotel employee about her union activities, sympathies, and desires and later interrogated another hotel employee about her vote in the forthcoming election, thereby violating Section 8(a)(1) of the Act and inhibiting the employee's free choice in the election.

The Respondent denies that the alleged acts occurred.

Dykes testified that not long after her original (April 23) interrogation by Palacio,[29] while she, Palacio, and several maids were in the linen room, Palacio asked her what she thought about Local 498 and she replied the only union she knew anything about was the one her father belonged to, the Carpenters. Dykes also testified that not long thereafter (in May), again while she, Palacio, and several maids were in the linen room, including maid Ruth Newton, Palacio asked Newton how she was going to vote in the election and Newton replied that, if the Union were going to help the employees, she was for it and, if it were not going to help them, she was not.

Palacio testified that at some time Dykes mentioned to her that her father was in the Carpenters union, but denied the comment was made in response to her inquiry concerning Dykes' views about Local 498 and denied she asked Newton at any time how she was going to vote in the election.

For the reasons set out in section B, above, I credit Dykes' testimony and find that, in May, Palacio questioned Dykes about her union views, sympathies, and desires and during the same month asked Newton how she was going to vote, thereby violating Section 8(a)(1) of the Act and inhibiting employee free choice in the election.

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[23] Cortez Jr. was senior and lead cook of the three and received a higher rate of pay.

[24] Ronquillo and another cook, Bruce Ardissoni, at that time were working part time for the restaurant; both were offered and accepted full-time employment as replacements for the discharged cooks on the day of the discharge, May 17. They were not approached at any time previous and offered the jobs in question.

[25] None of the Cortezes understand or speak much English.

[26] Ardissoni's testimony to that effect is undisputed and is credited. The other findings above are based on the testimony of Cortez Sr., Cortez Jr., and A. Cortez, which I credit, discrediting contrary testimony. The three Cortezes impressed me as honest, forthright, and sincere witnesses doing their best to give truthful answers to the questions propounded to them with some difficulty arising from their failure to understand what was asked of them.

[27] Adford testified that, after a waitress came to him complaining about the way food was coming out of the kitchen, he went to the kitchen and asked what was going on; that Cortez, Jr. made a comment in Spanish; that he asked Merino what Cortez Jr. said; and that *Merino* replied Cortez Jr. stated that, if he did not like what was going on, to replace the cooks; and that he replied, "OK" and left. Headwaitress Roberta Sayers testified that one of the waitresses complained to her about the way food was coming out of the kitchen and she referred the waitress to Adford; that Adford went into the kitchen and asked what was going on; that *Cortez Jr.* replied that, if Adford did not like what was going on, to replace the cooks, and that Adford replied, "OK" and left. Cortez Jr. testified Adford came to the kitchen with regard to a waitress' complaint and he showed Adford a ticket which showed the waitress, not the cooks, made a mistake in an order and denied he made the statement attributed to him; A. Cortez had no recollection of the incident. I do not credit Sayers' testimony (she exhibited a strong tendency to tailor her testimony) and, therefore, find no valid evidence established that Cortez Jr. made the statement attributed to him.

[28] The three cooks were in close contact.

[29] See sec. B, above.

G. *The Alleged May, June, and July Interrogations—Erdos*

The complaint and election objections allege that, in May, June, and July, Erdos interrogated a hotel employee about her union activities, thereby violating Section 8(a)(1) of the Act and inhibiting employee free choice in the election.

Herrera testified that, about a month after she secured the signatures of a majority of the hotel employees within the unit Local 498 sought to represent (in late April), she was summoned to Erdos' office; Erdos informed her that he received reports she was involved in Local 498's campaign, asked her if the rumors were correct, and she denied any knowledge of the matter; and Erdos persisted, asking why the rumors were being circulated if they were not true and she repeated her denial. Herrera testified she again was summoned to Erdos' office a few weeks later; Erdos informed her he was continuing to receive reports she was involved in Local 498's campaign and she again denied their accuracy; Erdos again raised a question concerning why he was continuing to receive such reports if they were inaccurate, and she replied a maid she had directed not to come to work (at Palacio's instructions) threatened to make trouble for her; and Erdos replied he knew about that. Herrera testified to a third conversation with Erdos a few days before the July 12 election, while the two were in the parking lot, wherein Erdos asked her what the employees thought about the election and how they were going to vote, and she replied she did not know.

Erdos confirmed he summoned Herrera to his office on one occasion, but testified he told her he received reports she was distributing union literature to the hotel employees, asked her if the report were accurate and she denied its accuracy. Erdos denied he summoned and questioned her a second time about any union activity on her part and denied he at any time asked her what the employees thought about the election and how they were going to vote.

Taking either Herrera's or Erdos' version of the May conversation, it is clear Erdos summoned Herrera to his office and asked her if she were engaging in activities in support of Local 498, and I so find. I further find, that by such conduct the Respondent violated Section 8(a)(1) and inhibited an employee's exercise of free choice in the election.

I also credit Herrera's testimony concerning the other two exchanges; she impressed me as an honest, sincere witness. I therefore find in June Erdos again interrogated Herrera concerning her union activities; in July interrogated Herrera concerning other employees' union views, sympathies, and desires; and the Respondent by those actions additionally violated Section 8(a)(1) of the Act and interfered with an employee's exercise of a free choice in the election.[30]

H. *The Alleged Unlawful April–June Wage Increases*

The complaint and election objections allege that between April and June the Respondent granted wage increases to its employees to discourage their union support, thereby violating Section 8(a)(1) of the Act and interfering with the hotel employees' making a free choice in the election.

The Respondent's payroll records reflect most of the housekeeping employees under Palacio actively employed in the Respondent's housekeeping department on April 30 received a wage increase in the paychecks they received in early May for the payroll period April 16–30, effective April 16, and the balance received increases in the third week in June for the payroll period June 1–15, effective June 1. Those records also reflect that a substantial number of restaurant employees under Sanchez in the kitchen crew received increases in the latter part of May for the payroll Period May 1–15, effective May 1, and in June.

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[30] The Respondent contends that findings of unfair labor practice or election interference may not be predicated on the conduct of Palacio (see sec. B, above) and Erdos towards Herrera on the grounds that she was a supervisor within the meaning of the Act at the time the alleged acts occurred. The Respondent also contends that the representation case should be dismissed on the grounds the authorization cards which formed the basis for Local 498's petition for certification in the representation case were tainted by Herrera's solicitation thereof. I reject both contentions, finding at times pertinent that Herrera was not a supervisor within the meaning of Sec. 2(5) of the Act. Between April and August, Herrera was classified as a floor supervisor, along with four other hotel employees. Their duties were to inspect the work of the maids in the hotel sections to which they were assigned, make sure they did their work properly, handle any guest complaints which arose in their sections (absence of items, malfunctions, recleaning, etc.). If dissatisfied with the performance of any maid or houseman in their sections, they reported the source of their dissatisfaction to Palacio and she took whatever action she deemed necessary. The floor supervisors and all other classifications recommended the hire of various persons from time to time; sometimes their recommendations were adopted, sometimes they were not. They could and did reassign maids within their sections from time to time to accomplish necessary cleaning in a timely fashion (Palacio made the initial assignments by floor and room). They did not process requests for time off (other than to pass on such requests to Palacio for decision) or layoff or recall employees, and they did not discharge them. (While Erdos testified that Herrera effectively recommended the discharge of an employee, his pretrial affidavit corroborates Herrera's testimony that on one occasion she reported to Erdos that one of the maids was drunk and, in accordance with Palacio's instructions, she sent her home—and Erdos and Palacio, after a later conference, decided to discharge that employee. Erdos' affidavit also contradicts his testimony and corroborates the testimony of Herrera and Palacio to the effect that Herrera and the other floor supervisors neither had nor exercised the power to hire, fire, discipline, layoff, recall, or grant time off to employees.) The floor supervisors did not promote employees and, on the one occasion when Palacio asked Herrera for a recommendation to fill a vacant floor supervisor position, Palacio rejected Herrera's recommendation. All the floor supervisors, including Herrera, were included in the eligible voter list prepared and submitted by the Respondent to the Regional Office for use at the election and they voted in the election without challenge. Herrera's workweek was Wednesday through Sunday; on Saturday and Sunday, she substituted for Palacio in the sense she checked to see if the maids reported as assigned on those 2 days and called in replacements for any no shows from a list Palacio prepared, plus extending her work checks beyond her section. I find these extra weekend duties insufficient to remove Herrera from the same employee status as the other floor supervisors. I therefore find at times pertinent Herrera and the other floor supervisors were not supervisors and agents of the Respondent acting on its behalf within the meaning of Section 2(5) of the Act.

Marzorati testified that the Respondent adjusts wages with each increase in the Federal minimum wage,[31] bringing any employee below the minimum up to it; that the supervisors in charge of each department conduct biannual reviews of the job performance of each of the employees under their direction and, following such reviews, submit recommendations for his approval for wage increases for each employee whose work they found sufficiently satisfactory to warrant a wage increase; that each supervisor has discretionary power to decide which employees deserve increases and which do not, and he normally accepts their recommendations; that the supervisors also have discretionary power to recommend employees under their supervision for merit increases outside the regular review periods; and that the job performances of all new hires are reviewed by their supervisors on their completion of their 3-month probationary period and, if their work is satisfactory, normally the new hires are recommended for and receive increases.

A review of the wage histories of the Respondent's restaurant and hotel employees contained in the summaries of the Respondent's payroll records and testimony of the Respondent's own witnesses contradicts Marzorati's testimony; an examination of the summary of the Respondent's payroll records prepared by the Respondent's payroll clerk, Donna Downey, covering a period extending far before the time the Union's organizational campaign began, fails to show any pattern of biannual wage adjustments; both Sanchez and Downey testified that there was no such review policy in effect prior to the Union's organizational efforts; and Downey testified that Palacio's predecessor as executive housekeeper never conducted such reviews.[32] An examination of the payroll summaries further reveals that almost all of the increases received by employees in late June, effective June 1 for the payroll period June 1–15, were granted to maids and housemen hired between April 28 and May 25; i.e., prior to their having completed their alleged probationary periods and subsequent to the approval and grant of the increases received in early May. It is further evident that many of the employees who received the May and June increases also received increases effective January 1, 1979, to comply with the minimum wage law increase on that date.[33]

Findings have been entered that on April 23 Marzorati, Erdos, and Palacic became aware of Local 498's campaign to organize the Respondent's hotel employees and its possible extension to the restaurant employees, confirmed during the week of May 7–11 by a report to Erdos and transmitted to Marzorati and Sanchez; on the basis of those findings and the above findings concerning the timing and generality of the increases, plus the false explanation given therefor, I find, that as alleged, the Respondent granted wage increases to its employees between May 1 and June 30 to discourage their union support, in violation of Section 8(a)(1) of the Act, and thereby also interfered with employee free choice in the July 12 election.

I. *The Alleged July Threats, Promises, and Grievance Solicitations—Marzorati*

The complaint and election objections allege that, at meetings conducted by Marzorati in July, Marzorati offered and promised to hotel employees paid sick leave, paid holidays, increased wages, a new dental plan, and free uniforms; threatened hotel employees with reduced health benefits, loss of a personal loan program, and the futility of supporting Local 498, since the Respondent would not sign a contract wich Local 498; and solicited and promised to resolve employee grievances, all for the purpose of discouraging the hotel employees from supporting Local 498, thereby violating Section 8(a)(1) of the Act and inhibiting an employee's exercise of a free choice in the election.

It is undisputed that Marzorati summoned Respondent's employees in the housekeeping department to two meetings, one in either late June or early July, and the other day before the July 12 election, and that Marzorati summoned the Respondent's floor supervisors to several meetings during the same period.

During the course of the general meetings, Marzorati produced and identified a document as the current contract between Local 498 and the Oxnard Hilton,[34] and maintained that:

1. The health benefits currently provided to the hotel employees by the Respondent were superior to those provided under the Hilton-Local 498 contract, detailing the alleged differences.

2. The Hilton-Local 498 contract provided for the payment of the Federal minimum wage, while the Respondent paid rates above that minimum and was establishing a committee to make a quarterly review and adjustment of wages.

3. The Hilton-Local 498 contract did not provide paid sick leave, and the Respondent was considering granting that benefit.

4. The Hilton-Local 498 contract did not provide premium pay for the holiday work, and the Respondent was considering granting that benefit.

5. The Hilton-Local 498 contract did not provide dental benefits and the Respondent was considering such a plan.

6. In the event the employees voted for representation by Local 498, they would receive the wages and benefits set out in the Hilton-Local 498 contract; they would have to pay union dues and would receive nothing in return; they would lose the benefit of the Respondent's personal loan policy, since it could not be continued without Local 498's agreement, Local 498 would not agree to its continuance, and Local 498 would not provide any loans; and, if Local 498 sought "unreasonable" wages and benefits in excess of those provided in the Hilton-Local 498 contract, the Respondent would not agree and the employees would have to go on strike,

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[31] Most new employees were hired at the prevailing minimum wage; on January 1, 1979, the minimum wage was increased to $2.90 per hour.

[32] Palacio succeeded to that position in early 1979.

[33] With some compliance exceptions.

[34] A hotel near the Respondent's hotel.

which they could not afford, while Local 498's officials would continue to ride around in big Cadillacs and draw big salaries.

7. In response to an inquiry concerning the accuracy of alleged statements by Palacio to the effect the maids were going to have to provide part of their work clothes, Marzorati stated that the Respondent would continue its policy of providing full uniforms, and would reimburse any maids for the cost of any portion of her work clothes she had to purchase; Marzorati closed by urging the employees to vote against union representation.[35]

At several July meetings limited to Marzorati and the floor supervisors, Marzorati informed the floor supervisors that he excluded Palacio from the meetings so they could speak freely; stated he suspected employee interest in union representation stemmed from problems he was unaware of; asked what problems were troubling the employees; listened to their recitation of problems over inadequate supplies, understaffing, overwork, nepotism and favoritism (Palacio's son and daughter worked in housekeeping), and Palacio's ignoring and failing to rectify employee complaints; and promised to take care of some of the problems expressed.

On the basis of the foregoing, I find that in July, by Marzorati, the Respondent by implication promised hotel employees new and improved wage adjustment practices (quarterly wage reviews); promised its employees potential improvements in benefits (paid sick leave, premium pay for holiday work, dental plan, and wage increases from the reviews) if they voted against union representation; threatened them with the loss or reduction of current wage rates and benefits (wages, health benefits, personal loans) and potential benefits (paid sick leave, premium pay for holiday work), if they voted for union representation; threatened them with the futility of voting for such representation (refusing to sign any contract containing wage rates and benefit provisions in excess of those allegedly contained in the Hilton-Local 498 contract); and solicited and promised to resolve their grievances, thereby violating Section 8(a)(1) of the Act and interfering with an employees' exercise of free choice in the election.

J. *The Alleged July 11 Interrogation—Marzorati*

The complaint and election objections allege that on July 11 Marzorati interrogated an employee concerning her union activities, sympathies, and desires, thereby violating Section 8(a)(1) of the Act and interfering with an employee's exercise of free choice in the election.

Mixon testified that after the July 11 meeting closed and as Marzorati and the maids were leaving the meeting room, she approached Marzorati, stated that she applied several times for the promotion to the position of floor supervisor, that she was promised a promotion, that others with less service time were promoted instead, that she thought that was unfair, that Marzorati replied that he would look into the matter, that Marzorati asked if she were for the Union, and that she replied no.

Marzorati corroborated Mixon's testimony concerning her approach and complaint, but stated that he replied that such promotions depended on Palacio's recommendations, that he would check with Palacio to see if she were willing to recommend Mixon for promotion, that he did not inquire into Mixon's views on union representation, and, as Mixon and he parted, he simply commented that he hoped his message came across and Mixon would support the Company at the election.

I credit Mixon's testimony; her testimony was candid and straightforward. Marzorati's testimony, as noted heretofore, was not credible in a number of instances.

I therefore find and conclude by Marzorati's July 11 interrogation of Mixon concerning whether or not she supported the Union, the Respondent violated Section 8(a)(1) of the Act and inhibited an employee's exercise of the voting franchise in the July 12 election.

K. *The Alleged July 12 Interrogation—Palacio*

The complaint and election objections allege that on July 12 Palacio interrogated an employee concerning her union activities, sympathies, and desires, thereby violating Section 8(a)(1) of the Act and interfering with the employee's exercise of free choice in the election.

E. Cortez testified that on the day of the election (July 12), prior to the election (it was held in the afternoon), Palacio asked her what she thought about the Union, she replied she did not know, and Palacio stated that the employees never would get union representation because Marzorati would not sign a union contract.

Palacio denied making the statements attributed to her by E. Cortez.

Findings have been entered above finding E. Cortez' testimony reliable and Palacio's unreliable; I find, in this instance as well, E. Cortez' testimony was forthright and convincing and is credited.

I therefore find that, by Palacio's July 12 interrogation of E. Cortez concerning her union sympathies and conveying the impression it was futile to support Local 498 in the election because Marzorati would not sign a contract with it, the Respondent violated Section 8(a)(1) of the Act and interfered with an employee's exercise of free choice in the election.[36]

L. *The Alleged July 12 Instructions to Eligible Employees Not To Vote in the Election—Palacio*

The complaint and election objections allege that on July 12 Palacio told an employee eligible to vote in the July 12 election she was not eligible to vote, thereby violating Section 8(a)(1) of the Act and interfering with an employee's exercise of the voting franchise in the election.

It is undisputed that on July 12 Palacio told maid Velia Vildosolo she was not eligible to vote in response to the latter's inquiry and that she instructed Dykes not to telephone maid Sharon Henderson and tell her to come in to vote, on the ground Henderson was ineligible to vote.[37] It is also undisputed that the payroll eligibility date for participation in the election was June 8 and both Vildosolo and Henderson were hired subsequent to June 8.

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[35] These findings are based upon the mutually corroboratory testimony of Dykes, Herrera, and Mixon, which I credit, plus partial corroboration by Marzorati.

[36] Since the Respondent had ample opportunity to litigate the latter matter, I find it constitutes an additional violation.

I therefore find that Palacio advised Vildosolo she was ineligible to vote and instructed Dykes not to telephone Henderson to come in and vote under the correct impression that Vildosolo and Henderson were not eligible to vote and therefore the Respondent did not violate Section 8(a)(1) and interfere with those two employees' election franchise.

M. *The Alleged July 12 Threat—Palacio*

The complaint and election objections allege that on July 12 Palacio threatened an employee with the discharge of those employees who supported Local 498 in the election campaign, thereby violating Section 8(a)(1) of the Act and interfering with an employee's free choice in the election.

I credit Dykes' testimony that on July 12 Palacio told Dykes the Company knew which employees started the Union and they would be fired when the Union lost the election; the threat is consistent with Palacio's earlier statement the Respondent fired supporters of a union after a previously unsuccessful organizing attempt at the hotel and Dykes was a convincing witness, while Palacio was not.

I therefore find that by Palacio's July 12 statement to Dykes the Respondent knew which employees started the Union and they would be fired when the election was over, the Respondent violated Section 8(a)(1) of the Act and interfered with employee exercise of a free choice in the election.

N. *The Alleged March 28, 1980, Threat To Reduce Benefits and Wages If the Hotel Employees Sought and Secured Representation by Local 498—Daly*

The complaint alleges that on March 28 Erdos and Labor Relations Consultant Terence Daly[38] threatened to reduce benefits and wages if the hotel employees sought and secured representation by Local 498, thereby violating Section 8(a)(1) of the Act.

Sometime in March Marzorati advised Daly the hotel employees were concerned over the forthcoming hearing on Local 498's unfair labor practice charges and election objections and assigned Daly to address the hotel employees to explain the purposes of the hearing and any subsequent events flowing from it which would affect them, and to answer any questions the employees wished to ask.

The meeting was scheduled for and held on March 30 with the hotel employees Local 498 sought to represent, Erdos and Daly, in attendance. After introducing Daly, Erdos left the meeting. Daly designated a bilingual employee to repeat his comments to the assembled employees in Spanish.

Daly informed the employees that a hearing had been scheduled to determine the merits of Local 498's charges and election objections and the end result might be a second election. He then asked for any questions. Instead of asking him questions concerning the hearing, the possible results thereof, etc., the employees asked questions about what levels of wages, benefits, etc., they might expect if Local 498 became their bargaining representative. Daly responded by displaying a document he identified as the current agreement between Local 498 and the Oxnard Hilton, and repeated many of the statements Marzorati uttered in his two meetings with the employees prior to the July 12 election; i.e., that the health and life insurance benefits set out in the contract were inferior to those currently provided for by the Respondent, that the contract provided payment of the minimum wage ($3.10) and the Respondent currently paid wage rates higher than the minimum wage, and that the employees would receive the level of wages and benefits set out in the contract in the event they secured representation by Local 498.[39]

I find that by the foregoing on March 28, 1980, Daly conveyed to the Respondent's hotel employees assembled at the meeting the impression their wages and health and life insurance benefits would be lowered to those allegedly set out in the Oxnard Hilton-Local 498 contract in the event they voted for representation by Local 498 in a second election, thereby discouraging their continued support of Local 498 and violating Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. At all material times the Respondent was an employer engaged in commerce and in a business affecting commerce and Locals 26 and 498 were labor organizations within the meaning of Section 2(2), (5), (6), and (7) of the Act.

2. At times material Marzorati, Erdos, Palacio, Sanchez, Redfern, and Adford were supervisors and agents of the Respondent acting on its behalf and DeHoyas and Daly were agents of the Respondent acting on its behalf within the meaning of Section 2(11) of the Act.

3. At times material the Respondent's floor supervisors, including Herrera, were not supervisors and/or agents of the Respondent acting on its behalf within the meaning of Section 2(11) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating its employees concerning their and other employees' union activities, sympathies, and desires.

(b) Maintaining a surveillance of its employees' union activities.

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[37] Henderson was off duty on the day of the election; Palacio instructed Dykes to telephone all the maids who were not scheduled to work that day (July 12) and remind them to come in and vote, making an exception in the case of Henderson.

[38] Daly was retained by the Respondent in early 1979 to assist the Respondent in conducting its campaign to counter Local 498's attempt to organize its hotel employees. I find at times pertinent Daly was an agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

[39] These findings are based primarily on the testimony of E. Cortez and Herrera and partially by the testimony of Daly, which is credited to the extent it corroborates or amplifies the testimony of E. Cortez and Herrera.

(c) Threatening to demote an employee because of his union activities.

(d) Threatening employees with discharge to inhibit employees from seeking and securing union representation.

(e) Discharging employees to discourage them and other employees from seeking and securing union representation.

(f) Conditioning an offer to reinstate employees discharged to discourage employee union activity on their abstention from union support.

(g) Granting wage increases to discourage employees from seeking and securing union representation.

(h) Promising wage and benefit improvements if employees refrain from seeking union representation.

(i) Threatening wage and benefit reductions if employees secure union representation.

(j) Threatening employees with the futility of securing union representation, by threatening not to sign any contract unless it provided for wage rates and benefits lower than those currently enjoyed by those employees.

(k) Soliciting and promising to resolve employee grievances to discourage their seeking and securing union representation.

5. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging A. Cortez, Cortez Jr., and Merino to discourage them and other employees from seeking and securing union representation.

6. By 4(a), (b), (g), (h), (i), (j), and (k), above, the Respondent interfered with employee exercise of free choice in the July 12 election.

7. The Respondent did not otherwise violate the Act.

8. The above unfair labor practices and election interferences affected and affect interstate commerce within the meaning of the Act.

THE REMEDY

Having found the Respondent engaged in unfair labor practices, I shall recommend it be directed to cease and desist therefrom and take affirmative action designed to effectuate the purposes of the Act. Having found the Respondent discharged A. Cortez, Cortez Jr., and Merino to discourage employee efforts to secure union representation, I shall recommend the Respondent be directed to offer A. Cortez and Cortez, Jr. reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, if necessary terminating any employees hired to replace them, and to offer to Merino on his leaving military service reinstatement to his former position on timely application therefor under the terms of governing statutes, if necessary terminating any employee hired to replace him. I shall further recommend A. Cortez, Cortez Jr., and Merino be made whole for any losses in wages and benefits they have suffered by virtue of the discrimination against them, with the amount due to each of them calculated in the manner set out in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and interest thereon computed in accordance with the formula set out in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Having found by a substantial number of the unfair labor practices the Respondent interfered with the employees' exercise of a free vote in the July 12 election, I shall recommend that that election be set aside and a new election conducted when the Regional Director finds the effect of those unfair labor practices and election interferences have been dissipated.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I recommend the issuance of the following:

ORDER[40]

The Respondent, Channel Island Development Corp., d/b/a The Lobster Trap & Casa Sirena Marina Hotel, Oxnard, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist:

(a) Interrogating its employees concerning their and other employees' union activities, sympathies, and desires.

(b) Maintaining a surveillance of its employees' union activities.

(c) Threatening to demote employees because of their union activities.

(d) Threatening to discharge employees to inhibit employees from seeking and securing union representation.

(e) Discharging employees to discourage them and other employees from seeking and securing union representation.

(f) Conditioning an offer to reinstate employees discharged because of their union activities on their abstention from those activities.

(g) Granting wage increases to discourage employees from seeking and securing union representation.

(h) Promising wage and benefit improvements if employees refrain from securing union representation.

(i) Threatening wage and benefit reductions if employees secure union representation.

(j) Threatening employees with the futility of seeking union representation by threatening not to sign any contract with the Union unless it contains wage rates and benefits lower than those currently enjoyed by its employees.

(k) Soliciting and promising to resolve employee grievances to discourage their seeking and securing union representation.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer to A. Cortez and Cortez Jr. reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, if necessary terminating any employees hired to replace them.

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[40] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Offer to Merino on his leaving military service reinstatement to his former position on timely application therefor under the terms of governing statutes, if necessary terminating any employee hired to replace him.

(c) Make whole A. Cortez, Cortez Jr., and Merino in the manner set out in "The Remedy" section of this Decision.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and any other records necessary to analyze and determine the amounts and benefits due under this Order.

(e) Post at its restaurant and hotel premises known as the Lobster Trap Restaurant & Casa Sirena Marina Hotel in Oxnard, California, copies of the attached notice marked "Appendix."[41] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

The election in Case 31–RC–4493 shall be, and is, set aside, and a new election shall be conducted under the auspices of the Regional Director for Region 31 when in his judgment the effect of the unfair labor practices and election interferences set out in this Decision have dissipated.

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[41] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

E. I. Du Pont de Nemours and Company *and* International Chemical Workers Union, Local 527, AFL–CIO. Cases 22–CA–9926 and 22–CA–10479

January 25, 1982

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On June 11, 1981, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent E. I. Du Pont de Nemours and Company, Parlin, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified herein.

1. Substitute the following for paragraph 2(a):

"(a) Rescind and expunge from the personnel file the written reprimand issued to Isaac Samuels on October 24, 1980."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not change the holiday provisions of our contract with Local 527 International Chemical Workers Union, AFL–CIO, during the term of that contract by granting and scheduling an extra holiday, unless and until Local 527 has first given its approval.

We will not conduct investigatory interviews with any employee without the presence of a union steward where that employee reasonably believes that the interview would lead to discipline and has requested that a union steward be present.

We will not in any like or related manner interfere with, restrain, or coerce any of our employees respecting their rights under Section 7 of the Act.

We will rescind and expunge the written reprimand issued to Isaac Samuels on October 24, 1980, because it was the result of an unlawful investigatory interview with him.

E. I. Du Pont de Nemours and Company

DECISION

Statement of the Case

James F. Morton, Administrative Law Judge: On April 24, 1980, International Chemical Workers Union, Local 527, AFL–CIO (herein called the Union), filed the charge in Case 22–CA–9926 alleging that E. I. Du Pont de Nemours and Company (herein called Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (herein called the Act). On December 4, 1980, the Union filed the charge in Case 22–CA–10479 alleging that Respondent violated Section 8(a)(1) of the Act by having engaged in certain conduct, specified below, towards employee Isaac Samuels. On January 30, 1981, the General Counsel of the National Labor Relations Board issued an order consolidating those cases, a complaint and notice of hearing. On February 10, 1981, Respondent filed its answer to that complaint. The hearing was held before me in Newark, New Jersey, on March 9, 1981.

The issues raised by the pleadings and as articulated at the hearing by respective counsel are:

1. Whether Respondent, in violation of Section 8(a)(1) and (5) of the Act, established another holiday for employees represented by the Union during the term of the contract covering them without having obtained the Union's consent.

2. Whether Respondent, in violation of Section 8(a)(1) and (5) of the Act, changed established grievance procedures by having refused the Union's request to use a telephone during a grievance meeting and by having refused the Union the opportunity for a recess at that meeting.

3. Whether Respondent, in violation of Section 8(a)(1) of the Act, conducted an investigatory interview with employee Isaac Samuels on October 24, 1980, and thereafter disciplined him as a result of that interview, not-

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

withstanding that that employee had requested to be represented by the Union at that interview and that he reasonably believed that the interview would result in disciplinary action.

Upon the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent makes photographic materials at its Parlin, New Jersey, plant. The Union represents a unit of "wage roll employees including all hourly paid production, maintenance, laboratory and clerical employees employed by (Respondent there) but excluding all salary employees, watchmen, guards, professional employees, and all supervisory employees." A contract covering that unit of employees had been in effect from September 26, 1978, to September 23, 1980; the current contract is effective from September 24, 1980, to September 24, 1982. The negotiations between the Respondent and the Union which led up to agreement on the terms of both the 1978–80 contract and the current 1980–82 contract bear on the question as to whether Respondent unlawfully put into effect a new paid holiday.

B. *The Holiday Issue*

1. The negotiations

In the course of the negotiations leading up to the 1978–80 contract, the Union had sought to increase the number of paid holidays from a total of 10 a year to a total of 12. Its efforts thereon were not successful. Art. VI, section 1 of the 1978–80 contract listed ten paid holidays. That agreement was signed on January 15, 1979.

On November 13, 1979, Respondent proposed increasing the number of paid holidays from 10 to 11. The Union asked why Respondent had not countered with an offer of one extra paid holiday to the Union's demand in 1978 for two such holidays. Respondent replied that an extra holiday was not "timely" in 1978 but that it was in late 1979, and that Respondent was offering an extra holiday in order to remain competitive in being able to attract a competent work force and to retain it. Instead of accepting Respondent's offer, the Union submitted a counterproposal, i.e.—that Respondent fund a drug prescription plan with the moneys it would have spent to pay the unit employees for the extra holiday. The Union's counterproposal was discussed at negotiating sessions on December 17, 1979, and January 21, 1980. On the latter day, Respondent advised that it rejected the counterproposal and stated that it was interested only in providing an extra holiday. It appears that, sometime before the next meeting was held on the holiday issue, as discussed below, Respondent notified its salaried employees (who are excluded from the unit represented by the Union) that they would receive an extra holiday, in addition to the 10 they then received.

On January 24, 1980, the Union's representatives, at another negotiating session, advised Respondent that the Union considered it unfair for Respondent to have notified its salaried employees that they would receive an extra holiday when no agreement thereon was reached by Respondent and the Union. The Union also advised Respondent that, while the unit employees preferred a drug prescription plan, the Union was prepared to go along with the extra holiday. The Union offered Respondent four alternate days on which it was prepared to reach agreement. These days, listed in the order of the Union's stated preference, were: (1) the date on which an employee celebrates his or her birthday, (2) the day after Christmas, (3) the day before New Year's Day, or (4) Veteran's Day.

On February 4, 1980, Respondent advised the Union that it rejected the four alternatives offered by the Union. Its representative explained that granting an extra holiday on an employee's birthday could be too difficult to administer, that there would be too many holidays in the yearend period if the extra holiday were scheduled for the day after Christmas or the day before New Year's Day and that not many of the salaried employees favored Veteran's Day as the day for the extra holiday. Respondent advised that most of the salaried employees favored scheduling the extra holiday on the Friday before Labor Day. At another negotiating session on February 18, 1980, the Union advised that it was not interested in having the extra holiday on the Friday before Labor Day. On February 27, 1980, the Union offered to accept that day provided that Respondent would agree that in 1981 and each year thereafter, the extra holiday would be a "floating" holiday, i.e.—one that would be mutually determined by the Union and Respondent in each of those years. Respondent stated then that it was not interested in a floating holiday.

On March 17, 1980, the Union offered another counterproposal respecting the day on which the extra holiday would be held. It offered to hold the holiday on the last Friday in July or the first Friday in August and stated that either of those days would "break up the summer." Respondent rejected that proposal and advised them that there was no point in discussing alternate days as Respondent, based on "administrative necessity," was going to hold the extra holiday on the Friday before Labor Day. The union representatives caucused and then told Respondent's representatives that the Union refused to accept that day as the date for the 11th holiday.

On March 18, 1980, Respondent distributed a four-page circular to its employees at its Parlin plant, which reported on safety awards, organization changes, new employees, and other matters. One of those other matters concerned the extra holiday issue and was reported as follows:

> At the March 17th—Union/Management Meeting the following items were discussed.
>
> *11th Holiday*
>
> The Friday before Labor Day has been established as the date to celebrate the eleventh Holiday.
>
> The Holiday was originally offered in mid-November 1979. Since that time we have met with the Union frequently and considered a variety of dates suggested. It was a topic again at the Union/Management Meeting on 3/17/80, and the Union is still in disagreement, however, we pointed out we are already three months into 1980 and need to get plans for the Holiday started. Efficient business scheduling and general employee appeal were considered in selecting the day.
>
> Two additional requests were made by the Union at the meeting (3/17/80), which were the first Friday in August or the last Friday in July. These choices were rejected as not having appeal different than those already discussed.
>
> The Holiday will be celebrated each year on the Friday before Labor Day.

In July 1980, negotiations began with respect to the terms and conditions of a contract to succeed the 1978-80 contract, then scheduled to expire on September 23, 1980. At the outset of those contract renewal negotiations, Respondent listed the extra holiday among the "housekeeping" items to be cleared up before discussions on the terms of a renewal contract got underway. Housekeeping items are those matters on which agreement had been reached between the parties in the period between the execution of the 1978-80 contract and the start of the negotiations for a renewal contract. The Union objected to the inclusion of the extra holiday as a "housekeeping" item and it was removed from that category. Thereafter, Respondent's representative endeavored, on about four occasions, to discuss the matter of the extra holiday with the Union but was advised that the matter was out of the Union's hands—a reference apparently to the notice Respondent issued to employees on March 18, 1980, that the extra holiday will be celebrated each year on the Friday before Labor Day. The current contract, 1980-82, lists 11 paid holidays—one of them is the Friday before Labor Day. That contract was signed on February 2, 1981.

On August 29, 1980, the Parlin plant was closed down. All employees—wage roll and salaried employees—received it as a paid holiday.

2. Analysis

The undisputed evidence is that the 1978-80 contract contained ten specific holiday dates; that the Union had been unsuccessful during the negotiations leading up to that contract to persuade Respondent to increase that number to 12; that during the term of the 1978-80 contract the Union implicitly agreed to add a holiday to the total of ten contained in that contract; that the Union never agreed during the term of that contract as to the day when the holiday would be held and had vainly offered alternate proposals; that Respondent advised all its employees at Parlin on March 18, 1980, that the extra holiday would be held on August 29, 1980, and on the Friday before Labor in each year thereafter; that the Union notified Respondent that it refused to accept that day as the date for the 11th holiday; that the Union objected to Respondent's attempt to include the Friday after Labor Day date as an agreed on holiday under "housekeeping items" in the renewal contract negotiations; that Respondent then withdrew that holiday date as an item on which agreement had been reached; that August 29, 1980, was a paid holiday for all employees; and that the Friday after Labor Day is among the holidays in the current contract.

It is the General Counsel's contention that the foregoing facts establish that Respondent, on March 18, 1980, unilaterally added the day after Labor Day as a holiday to those listed in the contract in effect as of that date. Respondent asserts that it did not make a unilateral change in the holiday provisions of that contract as (a) the Union had agreed to add an 11th holiday to that contract, (b) the Union is estopped from asserting that it had not agreed also that that holiday would be celebrated on the day after Labor Day, and (c) the holiday became effective after the Union had reopened the contract and such a modification was permissible under the provisions of Section 8(d) of the Act.

Section 8(d) of the Act and clear case law prohibit unilateral midterm contract modifications.[1] The undisputed facts establish that, while the parties had agreed that there would be an extra holiday, there was no agreement during the contract term as to when the holiday would be held. In view of this and as the then existing contract specified not only the agreed on holidays but the dates on which they would be celebrated,[2] it is axiomatic that Respondent's implementation of the August 29 date for the extra holiday violated Section 8(a)(1) and (5) of the Act.[3] Respondent's estoppel argument is premised on its view that the Union did not "formally object"[4] to the implementation of the 11th holiday but instead allowed its members to celebrate it. The General Counsel has observed in his brief that Respondent's tactics were designed to undermine the support given the Union by the employees in the unit it represents. It seems to me that Respondent did place the Union in a quandary. On the one hand, the Union could not have insisted that Respondent withdraw its plan to give gratuitously all employees an extra day off with pay, unless the Union was ready to risk being ousted by the employees as their representative. On the other hand, the Union could not assent to Respondent's plan after Respondent had rejected all of the Union's prior proposals, unless the Union was ready to concede that there is no way an employer can be stopped from unilaterally putting a benefit into effect during a contract term. The way out of this quandary, it seems to me, is the one followed by the Union—to voice dissent and seek relief under the Act to bar a repetition of such conduct.

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[1] *Oak Cliff-Golman Baking Company*, 202 NLRB 614 (1973).

[2] One of the holidays set out in the 1978-80 contract was identified as the "Friday following Thanskgiving Day."

[3] *C & S Industries, Inc.*, 158 NLRB 454, 457 (1966).

[4] I infer that Respondent would require the Union to have served it with a written request not to implement the 11th holiday to be a method whereby the Union could be said to have "formally" objected to the change; in its brief Respondent indicates that a formal grievance would have been another suitable method of the Union's voicing its objection. Also in its brief Respondent alludes to a colloquy between myself and the Union's vice president respecting whether the Union notified Respondent that it did not want the holiday to be put into effect. Of greater significance is the uncontroverted evidence that Respondent withdrew the scheduling of the 11th holiday from the list of "housekeeping" items when the parties were clearing the bargaining table at the outset of the renewal contract discussions. In effect Respondent thereby conceded that agreement had not been reached.

Respondent separately urges that it was lawful for it to close its Parlin plant on August 29, 1980, as a holiday as such a "modification" is permissible under Section 8(d) once the Union, as it did, reopened the 1978–80 contract for renewal negotiations. Respondent acknowledges in its brief that it offers this view as its construction of Section 8(d) and that it can find no case law to support that view. The cases cited at footnotes 1 and 3, *supra*, seem to be dispositive of the merits of that view as the principle enunciated in those cases encompasses the argument submitted by Respondent. Further, were merit to be found in Respondent's contention as to its interpretation of Section 8(d), the language of that section would encourage unilateral modification during the insulated period of an expiring contract. Such a construction would promote industrial strife, hardly the aim of Section 8(d). Finally, I find merit in the argument expressed by the General Counsel in its brief. There, he notes that, in any event, the modification occurred on March 18, 1980, a date well before the Union served the notices to negotiate a renewal contract.

C. *Alleged Refusal To Permit Union To Use Telephone or To Caucus as Unilateral Changes in Procedures Governing Grievance Meetings*

The General Counsel asserts that Respondent violated Section 8(a)(1) and (5) of the Act by having unilaterally changed grievance meeting procedures on April 23, 1980, when it refused to permit union representatives to use a telephone in order to make an inquiry to obtain information related to a grievance under discussion then. Respondent contends that the Union's request was in connection with an issue not relevant to that grievance. Respondent's view is that enough time had been spent discussing the merits of the grievance itself and that it did not desire to waste time by engaging in collateral discussion. The essential facts do not appear to be in dispute.

On April 23, 1980, the parties were involved in a third-step grievance meeting pertaining to whether: (1) Respondent had a contractual right to combine two crews into one, (2) the employees affected by the change were accorded their contractual rights, and (3) certain employees whose duties had changed should continue to receive the higher of a two-tier wage rate. In discussing the third aspect of that grievance, the following matters surfaced. Prior to the integration of the crews, certain operators had performed higher rated work and received a corresponding wage rate; lesser skilled operators earned less. When the crews were combined, the skilled operators were required at times to perform less skilled work. Respondent took the position at the April 23, 1980, session that the skilled operators would receive the higher rate only when performing the more skilled functions; the Union contended that those skilled operators should get the higher rate at all times, even when they were assigned to less skilled work. After the parties discussed the matter for some time, the Union's president asked in essence whether an employee who substituted for an operator receiving the higher rate would receive that higher rate even when performing work normally paid at the lower rate and he observed that, several years previously, in a similar case, Respondent had agreed that the substitute employee should get the higher rate. Respondent's representative at this April 23, 1980, meeting acknowledged that that same principle should apply when the substitute is doing the more skilled work but he continued to assert that a two-tier wage rate would be followed with operators to be paid the higher rate when doing skilled work and the lower rate for the less skilled work. At that point, the Union's president sought to use the telephone. When asked by Respondent why he wanted to use the telephone, the Union's president advised that it was necessary to do so but refused to specify a reason other than state that it sought information to confirm the resolution of the earlier grievance similar to the one under discussion. Respondent's representative refused to permit him to do so. It appears that the parties had been discussing the grievance for about an hour as of that point. The Union's witnesses testified that they intended to call Respondent's superintendent of labor relations to review the grievance he settled several years previously as, in the Union's view, that settlement was a binding precedent. Respondent contends that no useful purpose would have been served by the Union's confirming what Respondent had already been conceded particularly as that point had no bearing on the issue than in dispute. The Union's president also had asked at the April 23, 1980, meeting to use the pay telephone outside. Respondent denied this request and stated that, if the Union developed any pertinent information later, Respondent would be willing to reconvene the third step grievance meeting to consider any new data. The meeting ended with Respondent's denial of the grievance in its entirety. That grievance has not been taken to arbitration as of the date of the hearing in the instant case.

The General Counsel adduced testimony that that was the first time in the numerous grievance meetings held between Respondent and the Union that the Union's representatives were denied access to a telephone to obtain data it deemed necessary to aid it in processing a grievance. Respondent's area supervisor testified that he has represented Respondent at the third-step grievance level on or about 12 occasions and never had received a request from the Union to use a telephone at any one of those meetings, other than the one held on April 23, 1980.

The General Counsel's contention is that Respondent was obligated to honor the Union's request to use the telephone in connection with the grievance under consideration then as it had always done so in the past. The General Counsel views as irrelevant that (a) the grievance had been under discussion for an hour, (b) Respondent had clearly informed the Union that it would reconvene the meeting at the Union's request if it so desired, and (c) the matter about which the Union had sought to use the telephone appeared to Respondent to be irrelevant to the issue under discussion. Such a construction of the good-faith bargaining requirements of Section 8(d) of the Act respecting unilateral changes unduly emphasizes rigid procedural formalities. Good-faith bargaining does not require a party to stand by while the other side pursues an inquiry with someone outside of those present on an apparently irrelevant point, notwithstanding that a considerable time had already been spent discussing the merits of the grievance itself. Good-faith bargaining would seem to require a party to be willing to meet again to discuss the matters developed by that inquiry if they proved significant. It is evident to me that Respondent's actions in the April 23, 1980, grievance discussions were in accord with those considerations of good-faith bargaining. All of the relevant circumstances must be considered in determining whether an employer's denial of a request respecting the utilization of the grievance machinery violates Section 8(a)(1) and (5).[5] The evidence in the instant case fails to establish that Respondent's unwillingness to allow the Union access to its telephone or to agree to a short recess on April 23, 1980, constituted a violation of the Act, especially as the testimony discloses that Respondent had indicated its willingness to reconvene the grievance meeting to consider any new points the Union might wish to present.

D. *The Weingarten Issue*[6]

1. The different factual accounts

In the latter part of 1980, Respondent scheduled weekend overtime work at Parlin Plant due to increased orders. On various occasions at that time, one of the unit employees there, Isaac Samuels, declined to work on weekends. In late October 1980, Samuels advised his supervisor that he would not work scheduled overtime on the coming weekend. On October 23, 1980, he was informed that, if he failed to report to work on the Saturday of that week, he would be considered AWOL and that that could lead to his discharge. The *Weingarten* violation allegedly occurred on October 24, 1980.

Samuels testified as follows as to the events on October 24. His supervisor, Raymond Zera, told him that he wanted to talk to him about overtime and that he, Samuels, then requested Zera to call a shop steward to be with him. Zera told him that he did not need a steward but, when Samuels insisted, Zera tried by telephone without success to locate one. Zera then informed Samuels that the steward was out to lunch, and Zera again stated to Samuels that he did not need a steward. Samuels insisted on a steward being present and again Zera told him one was not needed. At this point, he told Zera that Zera is after all trying to "stick it up [Samuels'] ass" while saying at the same time that he does not need a shop steward. Zera told him then to get into the office where he waited while Zera left and returned with Respondent's area supervisor, Kerry Quackenbush. Quackenbush told Samuels that he was not going to put up with Samuels' abusing his foreman by calling him an "asshole." Samuels told Quackenbush that he did not call Zera an asshole. Quackenbush told Samuels to go back to work and that he would get back to Samuels later about the matter. Shortly thereafter, Samuels was ordered to report to Zera's office where Zera handed Samuels a typewritten sheet with the heading, "Written Reprimand" on it. Therein, Zera wrote that (a) he had informed Samuels earlier that day that if he intended to be excused from weekend overtime because of illness, he should make sure to bring in a doctor's note to verify his illness, (b) Samuels had responded then that he would not work weekend overtime and would not claim illness, and (c) Samuels had then called Zera "an asshole" and, when asked to repeat it, Samuels again called Zera an "asshole." The Union's steward, who was also present in Zera's office then, asked Samuels if it were true that he called Zera an "asshole" and Samuels said it was not. The steward asked Zera if there were any witnesses. Zera responded that there were none and Zera then said that Samuels had just admitted that he had called him, Zera, an "asshole". Samuels then told his steward to make a note of the fact that Zera has bad hearing as he was sitting only 3 feet away and did not hear Samuels deny that he called Zera an "asshole".

Zera's account of the October 24 incident is as follows. He approached Samuels and said he would like to have a word with him. Samuels said he wanted a steward present. Zera replied that none was needed as the discussion was purely informative. Zera had no intention of talking about discipline but merely intended to tell Samuels that if he planned to report off sick instead of working the assigned weekend overtime, he must bring in a doctor's note. Zera then so informed Samuels who then said that Zera intended to fire him. At that point, Samuels started to walk away. Zera heard him say "asshole" and then questioned Samuels as to what he had said. Samuels turned and said directly to Zera that he "is an asshole." Zera then ordered Samuels to wait. The rest of Zera's account parallels Samuels' version. Zera conceded that he erroneously thought that Samuels, in the subsequent meeting in his office with the Union's steward present, admitted calling Zera an asshole and that in fact Samuels had denied doing so.

I credit Samuels' account as to the events on October 24. Zera did not deny trying without success to locate the steward on the telephone; he testified in a conclusionary manner that he had told Samuels what he intended to tell him; he testified that Samuels was walking away from him when he uttered the word "asshole" and that it was only when Zera questioned him did he hear Samuels tell him that he, Zera, was an "asshole" the account Zera set out in the October 24 "Written Reprimand" as to what Samuels had said differs somewhat from Zera's testimony at the hearing; and, most significantly, Zera admits that he misunderstood Samuels when Samuels, in the presence of a union steward, denied calling him an "asshole" despite the fact that Samuels was then facing him and was only a few feet from him and whereas, when the incident occurred, Zera said Samuels was walking away from him.

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[5] Cf. *American Ship Building Company*, 240 NLRB 1, 17-18 (1979). The cases relied on by the General Counsel in his brief to me are readily distinguishable from the instant cases, on the facts.

[6] This refers to the matters considered in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

Samuels had filed a grievance respecting the written reprimand issued him on October 24. It was pursued through the preliminary steps but was withdrawn by the Union prior to arbitration. Samuels was later discharged apparently on the basis of events that occurred after October 24 and has filed a grievance thereon. That grievance is being pursued.

2. Analysis

It is settled law that an employer violates Section 8(a)(1) of the Act by conducting an investigatory interview with an employee after having denied that employee's request for representation by his union steward and where that employee reasonably believed that the interview may lead to disciplinary action. The General Counsel contends that the written reprimand issued Samuels on October 24 was the result of Zera's having conducted an investigatory interview with him on that date without the presence of a requested steward and notwithstanding that Samuels then had reasonably believed that the discussion with Zera would lead to discipline against him. Respondent asserts that Zera did not conduct an investigatory interview with Samuels on October 24; that Zera did not deny Samuels' request for representation; that Samuels had no reasonable basis to believe that Zera's discussion with him could result in discipline and that Samuels was not in fact disciplined as a result of information obtained in that discussion. There is no contention that Samuels was disciplined; because he sought union representation or because he was otherwise engaged in protected activity. The issue framed by the pleadings is purely a *Weingarten* one and, as expressed by the parties before me, is one which essentially requires factual resolutions—whether Samuels reasonably feared the prospect of discipline, whether Zera did in fact conduct an investigatory interview, and so on.

Respondent states that Samuels could have no reasonable basis to fear being disciplined in view of the assurances Zera gave him. The credited evidence establishes that Zera told Samuels that he did not need a steward. Zera's actions, however, belied his very words as he made efforts to locate Samuels' steward. That, in context with the prior warnings given Samuels, makes it obvious to me that Samuels reasonably feared discipline may result from discussing, with Zera on October 24, the matter of weekend overtime assignments. In any event, Zera's statement that Samuels did not need a steward is not a sufficient basis to disregard Samuels' request.[7]

The next question is raised by the contention of Respondent that no investigatory interview took place on October 24, 1980. Respondent notes that, although Zera intended to talk to Samuels respecting his oft-stated refusal to work weekend overtime, Zera in fact did not question him thereon. That argument seems to me to emphasize style over substance. Respondent urges that Zera sought only to warn Samuels that he better have a doctor's note if he claimed illness as the reason for not working the scheduled weekend overtime. Implicit in such a warning, and for that matter in Zera's persistence in talking to Samuels on October 24 after the representation request was made, is an inquiry by Zera of Samuels as to whether or not he still intended to go through with his intention of refusing to work weekend overtime, despite the fact that he had been given a written warning thereon the previous day. Samuels recognized that point instinctively when he complained that Zera was trying to stick it to him while telling him at the same time that he did not need a steward. I thus conclude that Respondent did conduct an investigatory interview that day with Samuels despite repeated requests for a shop steward. Respondent thereby violated Section 8(a)(1) of the Act.[8]

Lastly, Respondent contends that the discipline meted out to Samuels on October 24 was unrelated to any information elicited from Samuels that day. That contention goes to the scope of the remedy to be provided as all the essential elements of a *Weingarten* violation have been established. The short answer to Respondent's contention is that *Weingarten* expressly recognizes that an employee may be too fearful or inarticulate, when alone, to participate intelligently in an investigatory interview and that the presence of a union representative may prevent needless hard feelings from arising. It seems obvious to me, and I thus conclude that the discipline meted out to Samuels was an outgrowth of the unlawful interview. In the *Weingarten* case itself, the information that gave rise to the ultimate filing of the unfair labor practice charge was volunteered by the employee and was collateral to the investigation itself. To provide an appropriate remedy, I shall recommend that Respondent rescind the October 24 "Written Reprimand."

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and

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[7] *Lennox Industries, Inc.*, 244 NLRB 607 (1979)

[8] Cf. *AAA Equipment Service Company*, 238 NLRB 390 (1978). Respondent cites the Board's holding in *Chrysler Corporation, Hamtranck Assembly Plant*, 241 NLRB 1059 (1979), and cases discussed therein as support for its contention that it did not conduct an investigatory interview on October 24. That case does not stand for any conclusive presumption which would obviate a need for me to make a factual determination. At best, the facts in *Chrysler* are somewhat analogous to those in the instant case. On the critical point, however, those facts are readily distinguishable. In *Chrysler*, the meeting had ended and then the employee began an altercation. In the instant case, Zera was endeavoring to persuade Samuels to forgo union representation with respect to whether Samuels would use illness as an excuse to evade weekend overtime and then disciplined Samuels because he misunderstood Samuels response. Thus, Zera had continued the investigatory interview and disciplined Samuels for refusing to cooperate. I view the facts in *Chrysler* and those of the cases cited therein (e.g., *Amoco Oil Company*, 238 NLRB 551 (1978)), as not controlling and, on the basic issue, inapposite.

(5) of the Act by having, since on or about March 18, 1980, designated August 29, 1980, and the Friday before Labor Day in each succeeding year as an extra holiday for all wage roll employees employed at its Parlin, New Jersey, plant notwithstanding that such designation changed the holiday provisions of the then existing contract between Respondent and the Union and notwithstanding that the Union had not assented thereto.

4. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having conducted an investigatory interview with its employee, Isaac Samuels, on October 24, 1980, and disciplined him for statements it concluded he made then, without having afforded him union representation as had been requested by him and notwithstanding that he reasonably believed that the investigation would lead to discipline against him.

5. Respondent did not violate Section 8(a)(1) and (5) of the Act by having refused to permit the Union to use a telephone during a grievance meeting on April 23, 1980, or by having refused to honor the Union's request for a brief recess at that meeting.

6. The activities of Respondent as found above in paragraphs 3 and 4, occurring in connection with its operations as described in paragraph 1, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, E. I. Du Pont de Nemours and Company, Parlin, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the International Chemical Workers Union, Local 527, AFL-CIO (herein the Union), by changing, during the term of a collective-bargaining agreement it has with the Union for its wage roll employees at Parlin, New Jersey, the holiday provisions of that contract without having first obtained from the Union its assent to such change.

(b) Conducting an investigatory interview of any wage roll employee at its Parlin, New Jersey, plant without the presence of a union steward where the employee has requested the presence of such steward and where that employee reasonably believes that the interview would lead to disciplinary action against him, or to the imposition of discipline as a result of matters arising out of such an investigatory interview.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind the written reprimand issued to Isaac Samuels on October 24, 1980.

(b) Post at its Parlin, New Jersey, plant copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegation that Respondent violated Section 8(a)(1) and (5) of the Act by having refused to permit the Union to use a telephone during a grievance meeting on April 23, 1980, and by having refused to agree to the Union's request for a short recess during that meeting shall be, and hereby is, dismissed.

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[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Texaco, Inc. ***and*** **Leon J. Dove and Antonio O. Dominguez.** Cases 28-CA-5937-1 and 28-CA-5937-2

January 26, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 2, 1981, Administrative Law Judge James T. Barker issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order[2] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Texaco, Inc., El Paso, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(b):

"(b) Make Leon Dove whole by paying sick and accident benefits due him during the period January 8, 1980, to such date as he was released from medical care."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through a representative they choose

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT withhold payment of sick and accident benefits payable to the following named employees for the designated period, or otherwise discriminate against employees, because of any union activity by them, or by any of our employees, including strikes.

Antonio Dominguez—January 10, 1980, through February 18, 1980.

Leon Dove—January 8, 1980, through such date as he was released from medical care.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL make whole Antonio Dominguez and Leon Dove for sick and accident benefit payments due them for the above-described time it was withheld, together with interest.

TEXACO, INC.

DECISION

STATEMENT OF THE CASE

JAMES T. BARKER, Administrative Law Judge: This case was heard before me at El Paso, Texas, on December 11, 1980, and February 17, 1981, pursuant to an order consolidating cases and consolidated complaint and notice of hearing issued on July 16, 1980, by the Region-

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[1] Respondent excepts, *inter alia*, to the Administrative Law Judge's finding that Leon J. Dove was not released from medical care until January 14, 1980. We find, in agreement with Respondent, that the record is not clear as to whether Dove was released on that date or 1 week earlier, as contended by Respondent. Therefore, we shall defer the determination of the exact date Dove was released from medical care to the compliance portion of this proceeding, and will modify the Administrative Law Judge's recommended Order accordingly.

Member Jenkins adheres to his partial dissent in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), but notes that the principles contained therein are not involved in this proceeding. Members Zimmerman and Hunter note that they did not participate in *Emerson Electric* and, inasmuch as the remedial issue raised in Member Jenkins' partial dissent is not presented here, express no opinion on that remedial issue.

[2] The Administrative Law Judge correctly ordered that backpay with interest be paid the discriminatees, but inadvertently failed to specify the applicable interest rate. In accordance with our established policy, we hereby direct that interest on the backpay be computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on the backpay due based on the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

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al Director of the National Labor Relations Board for Region 28.[1] The complaint in Case 28-CA-5937-1 is based upon a charge filed by Leon J. Dove, an individual, on June 12, and the complaint in Case 28-CA-5937-2 is based on a charge filed on June 16 by Antonio O. Dominguez, an individual.[2] The consolidated complaint alleges violations of Section 8(a)(1) and (3) arising from the action of Respondent in discontinuing the payment of sick leave benefits to Dove and Dominguez because the Union had engaged in an economic strike against Respondent. The parties were provided full opportunity to make opening and closing statements, to examine and cross-examine witnesses, introduce relevant evidence, and to file briefs with me. Counsel timely filed briefs with me.

Upon the basis of the entire record, my observation of the witnesses, and the briefs filed with me, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent has been a corporation duly organized under the laws of the State of Delaware, and has engaged in the business of refining and distributing gasoline and other petroleum products throughout the United States, including El Paso, Texas. During the 12-month period immediately preceding the issuance of the consolidated complaint herein, Respondent, in the course and conduct of its business operations, purchased goods, materials, and services valued in excess of $50,000 in connection with its operations at its El Paso facility, and caused the same to be transported in interstate commerce and delivered to its El Paso facility directly from suppliers located outside the State of Texas.

Upon the foregoing facts which are not in dispute, I find that at all times material herein Texaco, Inc., has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that at all times material herein, Oil, Chemical and Atomic Workers International Union, Local No. 4-612, AFL-CIO, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The General Counsel contends that under the principles enunciated by the Board in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), Respondent violated Section 8(a)(1) and (3) of the Act by discontinuing the accident and sick leave benefits of unit employees Dove and Dominguez at the commencement of the strike at the El Paso facility which began on January 8 and continued until on or about March 29. It is the contention of the General Counsel that both Dove and Dominquez were on authorized sick leave at relevant periods prior to January 8, and that, pursuant to a blanket, previously announced policy, Respondent discontinued the sick leave benefits to Dove and Dominguez without first acquiring information that the employees had affirmitively acted to show public support for the strike.

Respondent denies the commission of any unfair labor practices and asserts, initially, that the *Emerson Electric* principle is not applicable in the factual circumstances of this case. In any event, Respondent contends, the rule in *Emerson Electric* is unreasonable and conflicts with well-established principles of labor law.

B. *Pertinent Facts*

1. Background facts

At all material times Respondent has recognized the Union as the exclusive collective-bargaining representative of all its approximately 125 operating and maintenance employees employed at the El Paso facility. Article VIII of the collective-bargaining agreement which all relevant prior times had been in effect between Respondent and the Union includes as an employee benefit an accident and sick leave benefit plan, hereinafter referred to as A & S benefits, and the constituent elements of the plan are defined in an officially promulgated benefits plans handbook. In substance, the A & S plan is a noncontributory benefit plan which provides for payment of benefits to regular employees with 1 year or more of service who are absent from work due to illness or inury and are unable to work because of that illness or injury. Benefits are determined by length of service. Employees with 10 years of service who otherwise qualify under the plan to receive benefits are entitled to 13 weeks of full pay and 39 weeks of half pay thereafter.

As a consequence of negotiations between Respondent and the Union, the parties entered into a memorandum of agreement renewing the previously existing collective-bargaining agreement between them to be effective from January 8, 1979, through January 7, 1981. The January 19, 1979, memorandum of agreement had the effect of substantively modifying certain provisions of the previous agreement and of specificaly renewing all other terms and provisions thereof. The memorandum of agreement provided, *inter alia*, that upon written notice to the Company given no earlier than November 1, 1979, the parties agreed to negotiate with respect to the general hourly wage scale, full-paid uniform health care benefits package, and improvement in vacation schedules. The memorandum of agreement further provided that if the parties failed to reach agreement on these specified subjects within 60 days after the giving of timely notice, the Union would have the right to strike, but not prior to January 8, 1980. On November 1, 1979, Respondent received the Union's notice of an intention to strike on January 8, 1980. Prior to the strike, Respondent prepared a 3-page document entitled, "Procedures in Case of Strike" and dispatched it to the Union and handed it out to all of the employees. In essence, the document explicated Respondent's policy with respect to funding, accrediting employee service, and implementation of the fringe benefit and leave provisions of the collective-bargaining agreement during the period of any strike, which might transpire. Included in the document was the following:

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[1] Unless otherwise specified, all dates herein refer to the calendar year 1980.

[2] I reject Respondent's contention that this matter is improperly before the Board because it derives from charges filed by individual unit members whose rights to proceed individually assertedly were extinguished by reason of the strike settlement agreement achieved between the Union and Respondent requiring the Union to withdraw pending unfair labor practice charges and not to initiate new ones relating to strike conduct or occurrences. See, e.g., *Lodge 743 International Association of Machinists Corp.*, 337 F.2d 5, 8-9 (2d Cir. 1964).

> *Accident and Sick (A & S) Benefit Plant*
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> Upon commencement of a strike, all A & S benefits will be discontinued, except in those cases involving accident or injury. A & S benefits will be continued to those employes who are disabled due to industrial injury until medically released by their doctors or until expiration of such benefits in accordance with the Plan's benefit schedule, whichever occurs first.
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> Decision will be reserved regarding the payment of A & S benefits upon termination of the strike for employees who become disabled during the strike and whose disability continues beyond the termination of the strike.
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> Decision will also be reserved regarding the resumption of A & S benefits which were discontinued at the beginning of the strike for those employees who are still disabled after the termination of the strike.
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> Under no circumstances will A & S benefits be payable if they would not have been payable in the absence of a strike.

In a related sense the benefits plan handbook provides in pertinent part that:

> Should you [employee] become ill or have an accident while not at work, you are eligible for Accident and Sick Benefits unless you are on a personal business or military leave of absence or on layoff status at the time of such illness or accident. Should you receive full pay for vacation periods, you will not receive benefits under this Plan if you become sick while on vacation. If you cannot return to work on the date you anticipated, however, the Plan will apply against further absence.

Under the plan there is no vesting or accrual of A & S benefits, and benefits are paid to employees qualified to receive them out of current operating expenses. In the face of a strike, it is the policy of Respondent to pay A & S benefits to employees who were absent due to an *industrial* illness or injury at the time the strike commences for as long as their absence and their incapacity to work due to industrial illness or injury continue. A & S benefits to employees absent due to illness or injury arising from *nonindustrial* causes cease with the commencement of the strike.[3]

Frank Smith, Respondent's supervisor of employees relations in the El Paso area, testified credibly that a desire on the part of the Company not to finance the strike efforts of its employees was one of the principal considerations underlying this policy. He further credibly testified, in effect, that other nondiscriminatory administrative considerations dealing essentially with the integrity of employee claims of entitlement and verification of illness were the other motivating factors.

Smith further credibly testified that after the strike commenced on January 8, no employee whose A & S benefits had been terminated came forward to disavow the strike or to affirmatively establish their entitlement to A & S benefits. Moreover, after the strike commenced, the Union did not undertake to inform Smith that any employee whose A & S benefits had been terminated was not actually supporting the strike. As a general policy, Respondent does not require medical verification of illness for absences of less than 1 week. Medical substantiation is "frequently" required in connection with absences of longer duration.

2. The alleged proscribed conduct

Leon Dove had been an employee of Respondent for approximately 25 years when the strike commenced on January 8. He was employed in the bargaining unit represented by the Union at the El Paso facility. On December 10, 1979, Dove had gone on sick leave for gall bladder surgery. The surgery was performed by Dr. Joseph Motes, Jr., and Dove subsequently consulted with Dr. Motes concerning his condition. This consultation took place during the first week of January, and Dr. Motes issued Dove a written release to return to work effective January 7. Dr. Motes issued the release pursuant to Dove's request but advised Dove that due to the nature of Dove's work he should use his discretion in determining actually when to return to duty. Dove visited his personal physican, Dr. William M. Tubbs, on January 4 and 11. On January 4, Dr. Tubbs told Dove, in substance, that, in light of the nature of the operation which he had undergone, he advised against an early return to duty. He suggested that Dove wait "at least another week" until returning to work. Dove considered the matter and, in the course of Dove's office visit on January 11, Dr. Tubbs gave Dove an oral release to return to work on January 14. Pursuant to Dove's subsequent request, Dr. Tubbs provided a written release, dated January 29, stating, "The above patient can return back to regular duty work January 14, 1980."[4] On February 4, Dr. Motes responded to a written inquiry dispatched to him by Respondent. In his response, Dr. Motes certified that his records disclosed that Dove was released to resume work on or about Monday, January 7.

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[3] The foregoing is based on documentary evidence of record, stipulation of the parties, and the credited testimony of Frank Smith.

[4] The above findings with reppect to the office visits paid by Dove to the respective physicans, as well as the releases provided Dove, are based on the credited testimony of Leon Dove and documentary evidence of record. Dove's testimony in these respects was confused and imprecise as to chronology and thus, to an extent, the findings are based on inference and probability distilled from the totality of the record.

Dove was a member of the Union and was on dues checkoff when the strike commenced. As a union member, he considered himself obliged to support an authorized strike whether or not he agreed with its goals. Prior to strike he had voted in favor of its authorization. Dove understood that as a union member he was subject to fine and expulsion if he had undertaken any effort to hinder the progress of the strike. Dove did not participate in the picketing activity that accompanied the strike but after January 14 he periodically performed telephone duties at the Union's headquarters during the course of the strike. The union hall was located approximately 1-1/2 miles from Respondent's El Paso facility. When Dove was on duty at the union headquarters, his ingress and egress was through the main entrance. During the course of an earlier strike by the bargaining unit members called by the Union against Respondent, Dove and all other bargaining unit members honored the picket line throughout the entire course of the strike.

Dove's A & S benefits were terminated on January 8, the initial day of the strike. After being notified of the termination of his A & S benefits, Dove made no effort to lodge a protest with Respondent. He did not undertake to contact Frank Smith, or any representative of Respondent, during the strike to indicate his availability for work.

Antonio Dominguez was at all relevant times a member of the Union employed in the bargaining unit at the El Paso plant of Respondent. Dominguez entered Respondent's employ in 1946 and has been continuously employed at all times thereafter. On December 3, 1979, Dominguez commenced a vacation which was scheduled to continue through January 4. Pursuant to further arrangements he had scheduled another period of vacation to begin January 7, allocable to his 1980 vacation entitlement. During the course of his initial vacation, and prior to the commencement of the strike on January 8, Dominguez became ill and was hospitalized for diabetes. He made this known to Frank Smith who considered his request that his vacation status be terminated and that he be put on sick leave. Smith told Dominguez that he was unable to grant his request because his current year's (1979) vacation had already commenced. However, Smith informed Dominguez that the rules governing this question would permit Dominguez to postpone his vacation planned to commence on January 7, 1980, and enter sick leave status on that date. This arrangement was formulated. Because of the 1-day waiting period requirement attaching to A & S benefits, Dominguez was in sick leave status without pay on January 7 but was granted A & S benefits for January 8, the last working day prior to the commencement of the strike. Dominguez' A & S benefits terminated on January 9 and were not thereinafter reinstated. On June 14, Dr. Harold J. H. Marshall, at the request of Dominguez, provided Dominguez with a written statement setting forth that:

> Antonio O. Dominguez was ill and unable to work from January 7, 1980. His diagnosis was diabetes mellitus (out of control). He recovered sufficiently to permit him to return to work February 18, 1980.

Dominguez credibly testified that, if he had been healthy on January 8, he would not have crossed the picket line to resume work. On February 18, Dominguez began picketing activities in support of the strike and honored the picket line for the entire term of the strike. In this period of time, Respondent received no information to the effect that Dominguez was actively supporting the strike, and no information to the contrary was conveyed.[5]

Conclusions

The threshold issue in the instant case is whether on the basis of the Board's Decision in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), enfd. as modified, 650 F.2d 463 (3d Cir. 1981), an employer violates Section 8(a)(1) and (3) of the Act by terminating at the outset and for the duration of a protected economic strike sick and accident benefits to all unit employees except those whose disability derives from industrial injury, in circumstances wherein the reason advanced by the employer for terminating the benefits relate solely to (1) the unwillingness of the employer to assist in financing a strike against itself and (2) nondiscriminatory administrative considerations.[6] I find that under *Emerson Electric* Respondent must be held here to have violated Section 8(a)(1) and (3) of the Act, and that the discriminatory effect flows from the inherently destructive nature of Respondent's prestrike policy announcement which was implemented and triggered by the commencement of the strike. *N.L.R.B.* v. *Erie Resistor Corp., et al.*, 376 U.S. 221 (1963); *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Absent here is any overtone or undercurrent of a generic antiunion hostility or purpose otherwise to defeat the Union.

In the *Emerson* case, the Board held that the respondent therein violated Section 8(a)(1) and (3) of the Act by terminating sick and accident benefits to employees who were physically unable to work on and after the initial day of the strike, because other employees actively employed at the respondent's facility had gone out on strike. In reaching this conclusion, the Board, *inter alia*, overruled *Southwestern Electric Power Company*, 216 NLRB 522 (1975), and adopted the rationale that the employees in question had a Section 7 right to refrain from declaring their position on the strike while they were medically excused. As a consequence, the Board declared:

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[5] The foregoing findings are based on a composite of the credited testimony of Frank Smith and Antonio Dominguez, as well as documentary evidence of record. While there are inferences in the record that the medical statement of Dr. Marshall was requested by Dominguez in anticipation of the filing of charges alleging unfair labor practices deriving from Respondent's termination of Dominguez' A & S benefits, the authenticity of the statement was not challenged, and the accuracy of the representations contained therein was not convincingly placed in doubt.

[6] In enforcing the Board's Order in *Emerson*, and endorsing the principal component of the substantive pronouncements therein, the Third Circuit Court of Appeals modified the remedial provisions of the order which had directed benefits of disabled employees be terminated at the time the employee acquired information to the effect that the relevant individuals had affirmatively acted to show public support of the strike. This remedial issue is not present here for I do not interpret the General Counsel's claims interposed on behalf of Dove and Dominguez to encompass periods after they received their medical releases from their attending physicians.

> . . . an employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. To allow the termination of such benefits to certain employees as a result solely of the strike activity of others is to penalize the employees who have not acted in support of the strike.
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> However, while disabled employees need not affirmatively disavow the strike action, neither can they participate in the strike without running the risk of forfeiting benefits prospectively . . . . For all practical purposes, an employee, disabled or sound, who affirmatively demonstrates his support of the strike by picketing or otherwise showing public support for the strike, has enmeshed himself in the ongoing strike activity to such an extent as to terminate his right to continue disability benefits [footnote citations deleted].
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> * * * * *
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> Accordingly, we now hold that for an employer to be justified in terminating any disability benefits to employees who are unable to work at the start of a strike it must show that it has acquired information which indicates that the employee whose benefits are to be terminated has affirmatively acted to show public support for the strike.

The General Counsel contends that the instant matter falls squarely within the dictates of the Board's *Emerson Electric* decision and is in no significant respect distinguishable.[7] On the other hand, Respondent contends that the accident and sick benefits plan was one freely negotiated into the collective-bargaining agreement and that, by assenting to the inclusion of the plan in the negotiated agreement, the Union waived what the Board in *Emerson Electric* deemed a Section 7 right. Respondent contends his waiver resulted from the Union agreeing to limit A & S benefits to employees whose absence is caused *solely* by illness or injury, and by further agreeing to permit the Company to shift the burdening of proving entitlement to the employee claiming A & S benefits. Respondent asserts that this contractual reservation of rights requiring employees covered by the plan to come forward and present satisfactory evidence of entitlement to benefits is nowhere precluded by the *Emerson Electric* decision, for the Board in *Emerson* did not undertake to deny to employers the right to freely negotiate contractual provisions regarding the payment of A & S benefits, but rather fashioned decisional vehicle by which the Board "simply tightened the degree of proof required before an employer terminated A & S benefits during a strike to employees who would otherwise *be eligible under the employer's accident and sick benefit plan*," (Emphasis supplied.)

In sum, Respondent contends that A & S benefits were terminated at the outset of the strike on the theory that an employer has no legal obligation or reason to finance a strike against itself by paying benefits to strikers, and for other nondiscriminatory administrative reasons. Moreover, Respondent avers that, after their A & S benefits were terminated, neither Dove nor Dominguez complied with the requirements of promulgated benefits plan either by establishing their eligibility by providing medical certification routinely required by the Company, or by disavowing the strike. Further, Respondent submits that it had sufficient basis on the initial day of the strike to infer strike support on the part of employees whose benefits were terminated, evolving not only from historical background provided by the 100-percent effectiveness of the 1969 strike at the El Paso facility, and from mangagement awareness of the existence of the Union's disciplinary power over its members; but also from evidence developed during the course of the hearing serving to verify the accuracy of its prestrike judgment concerning the degree of support which unit employees would accord the strike.

Respondent further distinguished the applicability of *Emerson Electric* to the case at bar by contending that the evidence adduced herein establishes that Dove had received medical clearance to return to work 2 days prior to the beginning of the strike.[8]

In addition to contending *Emerson Electric* is distinguishable from the instant proceeding, Respondent advances argument which, in essential aspects, reduces to a contention that the *Emerson* decision is improvident in imposing a virtually *per se* rule proscribing any denial of accident and sick benefits during a strike; and is a decision which, (1) invites sophistry and gamesmanship on the part of employees and union officials; (2) improperly equates the Section 7 right of an employee to refrain from declaring his or her position on a strike while medically excused, with the bestowal of the right of an employee to keep his or her position with respect to the strike a secret in order to preserve their entitlement to A & S benefits; (3) significantly derrogates an employer's right not to finance a strike against itself; (4) forces employers to violate the Act by discriminating against classes of employees based on their visible support of a strike; and (5) leaves employers no effective means of enforcing their rights without violating the Act.

A decision in this matter must proceed from the premise that an administrative law judge of the Board is a bound by case precedent of the Board until and unless that precedent is supplanted by a decision of the United States Supreme Court. *Lenz Company*, 153 NLRB 1399, 1401 (1965). Further, no party to this proceeding challenges the legal efficacy of the proposition that an employer is not required to finance a strike against itself by paying wages or other similar expenses. *General Electric Company*, 80 NLRB 510 (1948). Finally, it is an established principle of law that an employer may not withhold payment of already earned or accrued benefits contingent upon the cessation by employees of a legitimate ecomonic strike. E.g., *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

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[7] The parties concede the equivalency for legal purposes of the present accident and sick benefits, on the one hand, and the disability benefits which were pertinent in the *Emerson* case.

[8] As found below, this is not a viable contention based on the totality of the evidence of record.

The threshold finding is here made that, by reason of their past service, both Dove and Dominguez had qualified to receive A & S benefits under the terms of the collective-bargaining agreement and the promulgated benefits plan, for a period which extended beyond the commencement day of the strike. Moreover, I find that the A & S benefits pertinent herein were accrued benefits constituting deferred compensation for work already done. See, *E. L. Wiegand Division, Emerson Electric Co.* v. *N.L.R.B.*, 650 F.2d 463, 468 (3d Cir. 1981), enfg. as modified 146 NLRB 1143 (1979). A finding is further made that, contrary to Respondent, neither the language in the collective-bargaining agreement nor the provisions of the employee benefits plan contains a waiver cognizable by the Board as a defeasance of the rights of the employees herein "to refrain from declaring their position on this strike while they are medically excused" as a condition of qualifying for payment of accured accident and sickness benefits. While pointing to the negotiated collective-bargaining agreement and the corollary benefits plan as the source of its reserved right in the face of an impending strike to terminate A & S benefits, and to require employees affected by the termination to come forward and present satisfactory evidence of entitlement to benefits, Respondent is, in ultimate effect, interposing a waiver argument. *Perkins Machine Company*, 141 NLRB 98, 102 (1963), is instructive:

> . . . an effective waiver will be found to have been given when it appears in "clear and unmistakeable" language, either contained in the contract itself or expressed at the bargaining table before the contract was signed. On the other hand, a purported waiver will not be lightly inferred in the absence of "clear and unequivocal" language. Even when the parties consciously explore the matter during the negotiations and the contract fails to touch upon it, something more is required before the union will be held to have bargained away its rights, namely, a conscious relinquishment by the union, clearly intended and expressed.

Neither the collective-bargaining agreement nor the benefits plan itself contains "clear and unmistakeable" language from which a waiver may be inferred. Respondent came forward with no bargaining history supportive of its waiver claim. The *H. K. Porter Co.* principle is not here involved.[9] I find no waiver. See *Tide Water Associated Oil Company*, 85 NLRB 1096, 1098 (1949), cf. *United Aircraft Corporation* v. *N.L.R.B.*, 440 F.2d 85, 96 (2d Cir. 1971).

Against this background and upon the record developed in this proceeding, I find that Respondent, in close factual analogy to operative circumstances present in *Emerson Electric*, disseminated a declaration that A & S benefits would not be paid to employees who would otherwise receive them, and did so at a time when a strike at its facility was imminent. This declaration came before there was any showing of how widespread the strike would be and before Respondent was aware that any of the employees who were unable to work ratified or actively supported the strike. The General Counsel points to this conduct as evidence of an improper, antiunion motive warranting a finding of a violation of Section 8(a)(3) of the Act. No other direct evidence of unlawful motivation is present in the instant record.

I interpret the *Emerson Electric* decision as declaring that the termination of accrued sick leave benefits to employees prior to any showing that they affirmatively supported the strike, evinces an intent on the part of the employer to discourage employees from exercising their Section 7 rights by coercing them to refrain from supporting the economic strike called by their duly selected bargaining representative at the premises of their employer; and retaliates in a discriminatory manner against them for their presumed but unverified support of the strike. The fact that the employer may also have had a valid business reason for terminating the accrued benefits is of no consequence under this doctrine. In the face of this controlling precedents, I am constrained to here find a violation of Section 8(a)(1) and (3) of the Act. Cf. *General Electric Company, supra*. The fact that in *Emerson Electric* the union therein affirmatively protested to the employer withholding the benefits that the individuals who were unable to work were not participants in any strike, is not, in my opinion, sufficient basis for distinguishing the instant case wherein the record contains no explicit evidence of a challenge by the Union. The Board majority in *Emerson* specifically held:

> . . . we conclude that an employer may not rely on such speculative grounds to justify the termination of existing disbability benefits to employees which, as found here by the Admidnistrative Law Judge, had accured to them as a result of past work performed.

The absence of any showing by the employees on sick leave that they affirmatively supported the strike was the touchstone of the Board's rationale, and the protest interposed by the union representatives in *Emerson* was merely tertiary.

Having concluded that disposition of this case is controlled by the *Emerson Electric* decision of the Board, it becomes decisionally irrelevant to assess the merits of the contentions raised by Respondent challenging the validity either of the legal rationale supporting the majority opinion in *Emerson Electric* or the derrogating effect of that ruling upon the rights of employers to be free from the legal imperative of financing a strikes against themselves.

In sum, consistent with the dictates of *Emerson Electric*, I conclude and find that Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 right to refrain from declaring their position on the strike at the El Paso facility which commenced on

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[9] *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

January 8, by terminating the sick leave benefits of employees Dove and Dominguez while they were medically excused from duty, thereby violating Section 8(a)(1) of the Act. I further conclude and find that this identical conduct of Respondent also violated Section 8(a)(3) of the Act.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Texaco, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local No. 4-612, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating the sick leave benefits of Leon Dove on January 8 and Antonio Dominguez on January 9 at a time when they were medically execused and prior to any showing on their part they affirmatively supported the strike which commenced at Respondent's El Paso facility on January 8, 1980, Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed under Section 7 of the Act and unlawfully discriminated against them in violation of Section 8(a)(1) and Section 8(a)(3) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent terminated the sick and accident benefits of employees Antonio Dominguez and Leon Dove in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to make Dominguez and Dove whole by paying to each of them the sick and accident benefits due them from the date the sick and accident benefits were initially terminated to the date on which they were cleared by competent medical authority to return to duty. Consistent with this directive, Respondent is ordered to pay sick and accident benefits to Leon Dove from January 8 through January 13, 1980, and to pay sick and accident benefits to Antonio Dominguez from January 10 through February 13, 1980.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Texaco, Inc., El Paso, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Upon the commencement of a lawful economic strike, and while the strike is in progress, discontinuing accident and sick benefits for employees during the normal term of their entitlement, but excluding all periods subsequent to the active participation of any employee or employees in strike activity or public demonstration of support of the strike.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercixe of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Make Antonio Dominguez whole by paying sick and accident benefits due him during the period January to January 13, 1980, with interest.

(b) Make Leon Dove whole by paying sick and accident benefits due him during the period January 8, to January 13, 1980, with interest.

(c) Preserve and, upon request, make available to the Board or its agents, all records necessary to analyze the amount of accident and sick benefits due in the effectuation of their remedial order.

(d) Post at Respondent's place of business in El Paso, Texas, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WTEV-TV, Inc., d/b/a WLNE-TV *and* Local 1228, International Brotherhood of Electrical Workers, AFL-CIO, CLC, Petitioner. Case 1-RC-17266

January 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Wendy Bittner of the National Labor Relations Board. Following the close of the hearing the Regional Director for Region 1 transferred this case to the Board for decision. Thereafter, the Employer and the Petitioner each filed briefs.Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The Employer is a Delaware corporation engaged in the operation of a commercial television station at its two facilities in New Bedford, Massachusetts, and Providence, Rhode Island. Its annual gross volume of business exceeds $100,000 and it annually receives supplies valued in excess of $50,000 directly from points located outside the Commonwealth of Massachusetts and State of Rhode Island.

2. The parties stipulated that the Petitioner which claims to represent certain employees of the Employer is a labor organization as defined in the Act.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The Petitioner seeks to represent all news cameramen employed by the Employer in the news department at Providence, Rhode Island, and New Bedford, Massachusetts, but excluding all other employees, salesmen, guards, and supervisors as defined in the Act. This petitioned-for unit is comprised of nine news cameramen. The Employer, however, contends that the smallest appropriate unit must include all employees of the company at WLNE-TV, New Bedford, Massachusetts, and Providence, Rhode Island, who are directly involved in or contribute to the production, presentation, or *transmission of programs*, including producers, editors, directors, production coordinators, anchorpersons, interviewers, sports announcers, weather persons, cameramen, artists, reporters, copywriters, and schedulers assigned to the public affairs, news, program, film, special projects, promotion, and traffic departments; but excluding all other employees, including employees in the existing collective-bargaining unit,[1] sales employees, clerical employees, guards, and supervisors as defined in the Act. The unit requested by the Employer would be comprised of about 50 employees. At the hearing, the Petitioner indicated that it would not proceed to an election in a unit different from the one petitioned for.

The Employer operates a news oriented television station involved in the production of on-the-spot reporting of news events, sports, and weather, "documentary mini-series programs," and "regularly scheduled special project programs" requiring solicitation or polling of public opinion. The station is divided into 12 departments: program, film, public affairs, news, technical, sales, promotion, traffic, accounting, special projects, maintenance, and service and facilities. Each department has a manager or director who reports to the general manager. The general manager, department managers and directors, news operations manager, and executive producer are salaried employees. The other employees whom the Employer would include in the bargaining unit are: cameramen, reporters, and anchorpersons; sports and weather announcers and directors in the news department; artists, art assistants, and production coordinators in the program department; certain producers in the public affairs department; copywriters in the promotion department; interviewers in the special projects department; and schedulers in the traffic department. All of these are paid by the hour,[2] use the same timecards, and, with the exception of part-time employees, receive the same fringe benefits.

The cameramen, whom the Petitioner seeks to represent, are hired, supervised, and evaluated by the news director, who also supervises other employees in the news department, including reporters, anchormen, directors, and producers. While it appears from the record that the only formal qualification for the news cameramen position is camera experience, the news director may consider special abilities or areas of experience when hiring. It is the Petitioner's position that the news cameramen employed in the news department of WLNE share a unique community of interest, distinct from all other classifications of employees at the station. The record shows, however, that the functions actually performed by the news cameramen are significantly integrated with functions of other newsgathering employees at the station. For example, a news cameraman and a reporter are sent from the studio to cover a news story as a team. Once in the field, the two jointly decide which scenes to tape and whom to interview. The news cameraman is responsible for taping as the reporter interviews witnesses or participants. At times, news cameramen are required to cover stories alone and are responsible for both taping and reporting. After returning to the station, the reporter and cameramen work with the producer, anchorperson, and director in editing the tape and writing the accompanying story. Editing and writing can be performed by any of these employees. There are other employees such as artists, schedulers, and film editors, who are involved in the production and actual presentation of the broadcast.

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[1] At the time of the hearing the Petitioner represented a unit of the Employer's technical, building, and maintenance employees.

[2] Although the anchorpersons in the news department are paid at an hourly rate, they receive a minimum annual rate pursuant to their personal service contracts.

In addition, it appears that personnel have been interchanged between departments and also among classifications within the news department. The record discloses that until about a year before the hearing there was a split classification of photographer/reporter. That classification was discarded and at the time of the hearing, "reporter" and "news cameraman" were separate classifications. Although there have been no news cameramen transferred to the reporter position since the change, two photographer/reporters have become reporters and a former film processor is presently classified as a news cameraman.

The Petitioner contends that these news cameramen are entitled to separate representation because of a "unique community of interest." It notes that the news director makes the final decision on hiring cameramen and that the nine here involved are full-time employees and receive higher pay than the reporters. It appears that in 1981 the station changed from film to video tape in its broadcasting. At that time there were four news cameramen plus a film processor who was then promoted to news cameraman. The additional four cameramen then recruited had prior camera experience. It also appears that the station does not use reporters as cameramen and that camerman do not generally appear on the air. However, most cameramen have had news experience and some reporting background and, if "out" alone without a reporter, will act as a reporter. Apparently none is sent out specifically to act in that capacity. The Board has, of course, found units of film cameramen appropriate, as in *Columbia Broadcasting System, Inc.*, 110 NLRB 2108 (1954), where the Board found them "to comprise a separate and functionally distinct group, not unlike groups such as the lithographic employees or truckdrivers the Board normally grants severance to despite a broader bargaining history." Also, no news cameramen have been transferred to positions as reporters at WTEV. However, the fact remains that these cameramen do work closely with reporters on assignment, are not separately supervised as a group, and from time to time may themselves act as reporters.

Based upon regular contact on assignment with other employees, similarity of benefits, common supervision within the news department, and some integration of job functions, we agree with the Employer's contention that the nine news cameramen do not share a community of interest separate and apart from other employees involved in and contributing to the production and presentation of news programs.[3] Accordingly, we find the requested unit of news cameramen inappropriate separately for the purpose of collective bargaining. As the Petitioner has indicated a desire not to proceed to an election in any other unit, we shall dismiss its petition.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dimissed.

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[3] See *The Journal Co. d/b/a WTMS-AM-FM-TV*, 205 NLRB 36 (1973), where the Board denied a unit of newsmen noting that announcers also exercised a similar news presentation function and that photographers in the news department also served as reporters.

Bedford Farmers Cooperative *and* United Textile Workers of America, AFL-CIO. Cases 26-CA-8354 and 26-CA-8354-2

January 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 1, 1981, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.

1. The Administrative Law Judge concluded that Respondent's discharge of employee Clanton was not unlawful. We disagree.

Clanton began working for Respondent in its warehouse and as a truckdriver in June 1978. Clanton was an active union supporter. Prior to his discharge four of Respondent's supervisors at various times interrogated Clanton about the employees' union activities. The Administrative Law Judge properly found that these conversations, occurring as they did against a backdrop of union animus, were unlawfully coercive.

In mid-March,[2] a fellow employee, Glascoe, complained to Clanton about Respondent's manager, Fox. Clanton asked Glascoe if he would be interested in joining the Union when he became a full-time employee and Glascoe said he would. Subsequently, Respondent's assistant manager, King, warned Clanton that Clanton's efforts to persuade Glascoe to join the Union had displeased Manager Fox. King added that if Clanton wanted to keep working he was going to have to keep quiet.

On April 10, Clanton and another employee were cleaning up around Respondent's facility. When Clanton went to the mechanic shop to ask Assistant Manager King a question, Fox shouted to Clanton and the other employee, "You boys come in here and clean this shop up—haul this trash off for J. Clyde." Clanton started to roll a barrel out of the shop. Fox and King came near him and Clanton said to Fox in the presence of King and a customer that he, Clanton, was 41 years old, considered himself to be a man, and resented being called a boy. King said, "Aw, Jimmy," to which Clanton replied, "I mean it, I don't want to be called a boy."

Clanton took the barrel outside and was emptying it when Fox came out and admonished Clanton for embarrassing Fox in front of a customer. Clanton tried to apologize, but Fox brushed the apology aside and told Clanton that he, Fox, had been getting reports from all over that Clanton was always announcing what he would and would not do. Clanton then asked to have Union President Moneyham present.

Fox summoned Moneyham to his office. In the course of the ensuing discussion Fox refused to divulge the sources of the complaints about Clanton. Finally, Fox stated that he was not satisfied with Clanton's apology and that he, Fox, needed to "go cool off." Fox told Clanton to continue talking to King and Moneyham and left the office. King assured Clanton and Moneyham that Fox would "be all right if he had time to cool off." Clanton then went home.

Clanton attempted to return to work several times but was not permitted to do so. Finally, on April 18, Clanton obtained a written termination notice from Respondent.

An incident somewhat comparable to the confrontation between Fox and Clanton involved employee Glascoe. Two or three weeks before Clanton's termination, Fox criticized Glascoe's work. Glascoe went to the office manager and asked for his check. He told Respondent's supervisor, Smith, that he was quitting and going home. Glascoe then found Fox out in a car in the parking lot. Glascoe demanded that Fox get out of the car and then, in the Administrative Law Judge's words, "proceeded to castigate Fox for the manner in which the manager was treating him." Glascoe then announced that he was going home and left despite Fox's efforts to calm him down. Fox persuaded Glascoe to return to work soon after the incident.

The Administrative Law Judge found that "at the time Leon Fox decided to terminate Clanton, he was aware of Clanton's prounion sentiment and was ill-disposed toward him for that reason." However, he concluded that there was no showing that Clanton's discharge was linked to Fox's animus. He

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Unless otherwise noted all dates herein refer to 1980.

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relied primarily on the lack of any new overt union activity by Clanton after King's warning to Clanton in mid-March and what he found to be a lack of disparate treatment of Clanton's "misconduct" by Fox.

As the Administrative Law Judge found, Fox was openly hostile to the Union. Among the numerous incidents of threatening and coerceive conduct by Fox found unlawful by the Administrative Law Judge are remarks by Fox to employee Glascoe during the latter's job interview in February warning Glascoe that he, Fox, was trying to get rid of the Union and that Glascoe should not get involved with the Union. About 1-1/2 months after Glascoe began working for Respondent, Fox asked Glascoe if he had spoken to any of the "Union people." Glascoe told Fox that Clanton had solicited him on behalf of the Union. Later, as noted above, Assistant Manager King told Clanton that Fox was not going to stand for that sort of conduct and Clanton had better keep quiet. Several weeks after that warning Clanton was discharged.

That there was no evidence of solicitation by Clanton subsequent to his conversation with Glascoe is not dispositive of the issue here. Indeed, it appears that King was merely stating his belief that if Clanton continued his union activity his job would be in jeopardy, but he did not exclude the possibility that Clanton's past activity, including his solicitation of Glascoe, was sufficient in itself to incur Fox's discriminatory action. And the timing of the discharge of Clanton, coming as it did soon after Glascoe reported his conversation about the Union with Clanton to Fox, coupled with Fox's union animus and his expressed desire to get rid of the Union, is enough to establish a *prima facie* case that Clanton's union activity was a motivating factor in his discharge.

Faced with the General Counsel's *prima facie* case, Respondent has not established that the discharge would have taken place even in the absence of Clanton's protected activity.[3] In this regard, although Fox testified that he had been receiving complaints since January concerning Clanton's work performance, Fox took no action regarding Clanton until Clanton's solicitation of Glascoe. Perhaps Glascoe's altercation with Fox may have been of a somewhat lesser magnitude than the incident between Fox and Clanton in that the latter occurred in front of a customer and the former in front of other employees. However, even taking this into account, the treatment accorded Clanton when contrasted with the treatment accorded Glascoe was plainly disparate. Glascoe was entreated to stay with Respondent but Clanton was discharged without any prior warning except the unlawful one regarding his union activity. Thus, while Fox may have been genuinely disturbed by Clanton's conduct in front of a customer, Respondent has not shown that Clanton would have been discharged absent Fox's additional desire to rid Respondent of the Union. Accordingly, we conclude that Respondent's discharge of Clanton violated Section 8(a)(3) and (1) of the Act.

2. In his Conclusions of Law, the Administrative Law Judge found, *inter alia*, that by unilaterally, without notice to or consultation with the Union, hiring new employees instead of recalling certain previously laid-off employees Respondent violated Section 8(a)(5) and (1) of the Act. We disagree.

The evidence in the record regarding this alleged violation shows that on September 13, 1979, Respondent laid off three employees and that none of the three employees was recalled by Respondent. Additionally, it appears that the Union sought to negotiate for the reinstatement of the laid-off employees but that no agreement was reached on the subject.

Respondent argues that the three employees were laid off before the Union was certified and before Fox became Respondent's manager and therefore there was no duty to bargain concerning them. Respondent further argues that two of the employees were fully or semi-retired and had not expressed any interest in returning to work and the third employee was not interested in returning on a part-time basis although part-time work was the only type of work available.

The Administrative Law Judge found that the failure to recall the three employees was an unlawful unilateral change in past practice. However, it is axiomatic that the record must include evidence establishing the past practice in order to support a finding that Respondent's action constituted a departure from it.[4] Here no evidence concerning Respondent's past practice regarding the recall of laid-off employees is contained in the record. Accordingly, without reaching Respondent's other contentions, we conclude that the General Counsel has not shown that the failure to recall the employees constituted a change in past practice, much less an unlawful unilateral change. We shall thus dismiss that portion of the complaint regarding the failure to recall the three previously laid-off employees and we shall modify the recommended Order accordingly.

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[3] See, generally, *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[4] See, e.g., *Eazor Express Incorporated*, 238 NLRB 1165 (1978), and *Seattle Department Stores Association, Inc.*, 177 NLRB 805 (1969).

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 5:

"5. By unilaterally, without notice to or consultation with, the above-named Union, changing the rates of pay, wages, hours, and other terms and conditions of employment of the employees in the above-described unit by reducing the working hours of unit employees and assigning their work to supervisors, dealing directly with unit employees by offering them wage increases if they abandoned the Union and by offering employees wage increases if they abandoned the Union and caused others to do so, increasing the unit employees' wages, altering its method of computing overtime for unit employees, discontinuing its practice of permitting unit employees to take their birthdays off as paid holidays, and discontinuing deliveries to customers on Saturdays; by sending to the bargaining table bargaining representatives who had no authority to conclude a collective-bargaining agreement, or to make firm contract proposals; and by negotiating with the Union in bad faith and in a manner calculated to preclude consummation of a collective-bargaining agreement, Respondent has failed and refused to bargain collectively with the Union, and has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act."

Insert the following as Conclusion of Law 7 and renumber the subsequent Conclusions of Law accordingly:

"7. By discharging James F. Clanton, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified and set out in full below, and hereby orders that the Respondent, Bedford Farmers Cooperative, Shelbyville, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about their union activities, membership, or sentiments, or the union activities, membership, or sentiments of fellow employees.

(b) Warning employees against associating with United Textile Workers of America, AFL-CIO, or any other labor organization, or telling employees that Bedford Farmers Cooperative is attempting to rid itself of that Union, or any other labor organization.

(c) Warning employees that Bedford Farmers Cooperative is not required to sign a collective-bargaining agreement with the Union, or otherwise expressing an anticipatory refusal to bargain collectively with the Union.

(d) Offering or granting employees wage increases in order to persuade them to abandon the Union, or any other labor organization, or to induce them to persuade other employees to abandon the Union, or any other labor organization.

(e) Threatening employees with discharge or other reprisals because they support or engage in activities on behalf of the Union, or any other labor organization.

(f) Refusing to bargain collectively in good faith concerning rates of pay, wages, hours of employment, or other terms and conditions of employment with the Union as the exclusive representative of the employees in the following appropriate unit:

> All truckdrivers, warehousemen and garage employees employed at the Employer's Shelbyville, Tennessee, location, excluding all office clerical employees, professional employees, guards and supervisors as defined by the Act.

(g) Unilaterally, without notice to, or consultation with, the Union, reducing the hours of unit employees and assigning bargaining unit work to supervisors or nonunit employees, increasing the wages of unit employees, changing the method of computing overtime for employees in the bargaining unit, discontinuing its policy of granting unit employees a day off with pay on their birthdays, eliminating Saturday deliveries, or otherwise changing the rates of pay, wages, hours, or other terms or conditions of employment of any bargaining unit employee without first notifying the Union, and bargaining collectively with it in good faith concerning such proposed changes; provided that nothing herein shall require Respondent to rescind any wage increases which it has previously granted.

(h) Dealing directly with employees in the unit described above with respect to their rates of pay, wages, hours, or other terms and conditions of employment.

(i) Failing to give its representatives sufficient bargaining authority in negotiations with the Union.

(j) Discharging or otherwise discriminating against employees because of their activity on behalf of the Union, or any other labor organization.

(k) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Vest in its bargaining representative authority to negotiate and to conclude a contract with the aforesaid Union, and, if it reserves the right to consult with its bargaining representative and to inform him or her of its positions on bargaining issues before committing itself to proposals or counterproposals made during the course of the negotiations, to do so promptly and in such a manner as not unduly to impede the progress and consummation of the negotiations.

(b) In all other respects, upon request, bargain collectively with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Offer to employee James F. Clanton immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, plus interest, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[5]

(d) Make whole Lee Jacobs and all the other unit employees who were denied a paid holiday on their birthday, or who suffered loss of wages as a result of Respondent's unilateral decisions to terminate Saturday deliveries, to change the method of determining overtime, and to reduce the unit employees' scheduled week from 50 to 45 hours, in the manner provided in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(e) Reinstate the 50-hour week schedule for unit employees, Saturday deliveries, paid birthday holidays, and the payment of overtime for all hours of work performed in excess of 8 on each workday, except for hours worked on Saturday which will all be computed as overtime.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Shelbyville, Tennessee, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act other than those found above.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate you about your union activities, membership, or sentiments, or the union activities, membership, or sentiments of fellow employees.

WE WILL NOT warn you against associating with United Textile Workers of America, AFL–CIO, or any other labor organization.

WE WILL NOT tell you that Bedford Farmers Cooperative is attempting to rid itself of the above-named Union, or any other labor organization.

WE WILL NOT tell you that Bedford Farmers Cooperative is not required to sign a collective-bargaining agreement with the above-named Union, or otherwise express an anticipatory refusal to bargain collectively with that Union.

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[5] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on backpay in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT offer you wage increases in order to persuade you to abandon your support for the aforesaid Union, or any other labor organization, or to induce you to persuade fellow employees to do so.

WE WILL NOT threaten you with discharge or other reprisals because you support or engage in activities on behalf of the aforesaid Union, or any other labor organization.

WE WILL NOT refuse to bargain collectively in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with the above-named Union as the exclusive representative of the employees in the following appropriate unit:

> All truckdrivers, warehousemen and garage employees employed at the Employer's Shelbyville, Tennessee, location, excluding all office clerical employees, professional employees, guards and supervisors as defined by the Act.

WE WILL NOT unilaterally reduce the hours of unit employees, assign bargaining unit work to supervisors or nonunit employees, increase the wages of unit employees, change the method of computing overtime for employees in the bargaining unit, discontinue our policy of granting unit employees a day off with pay on their birthdays, eliminate Saturday deliveries, or otherwise change the rates of pay, wages, hours, or other terms or conditions of employment of any bargaining unit employees without first notifying the aforesaid Union and giving it an opportunity to bargain about such matters; provided that nothing herein shall require us to rescind any wage increases which we have previously granted to the employees in the bargaining unit.

WE WILL NOT fail to give our representatives sufficient bargaining authority in negotiations with the aforesaid Union.

WE WILL NOT deal directly with unit employees with respect to their rates of pay, wages, hours, or other terms and conditions of employment.

WE WILL NOT discharge or otherwise discriminate against employees because of their activity on behalf of the Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights to engage in self-organization, to form, join, or assist any union, to bargain collectively through representatives of their own choosing, to engage in activities together for the purpose of collective bargaining or other mutual aid or protection, or to refrain from the exercise of any or all such activities.

WE WILL, upon request, bargain with the aforesaid Union as the exclusive representative of all employees in the above-described appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL authorize our bargaining agent to negotiate and to conclude a contract with the aforesaid Union, and, if we reserve the right to consult with our bargaining agent and inform him or her of our positions on bargaining issues before committing ourselves to proposals or counterproposals made during the course of the negotiations, we shall do so promptly and in such a manner as not unduly to impede the progress and consummation of the negotiations.

WE WILL offer employee James F. Clanton immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of pay he may have suffered as a result of our discrimination against him, with interest.

WE WILL make whole, with interest, Lee Jacobs and each unit employee who was denied a paid holiday on his or her birthday or who lost wages as a result of our unilateral decisions to terminate Saturday deliveries, to change the method of determining overtime, and to reduce our unit employees' scheduled workweek from 50 to 45 hours.

WE WILL reinstate the 50-hour week schedule, Saturday deliveries, paid birthday holidays, and the payment of overtime for all hours of work performed in excess of 8 hours on each workday, except for hours of work performed on Saturday which will all be computed as overtime.

BEDFORD FARMERS COOPERATIVE

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge: These cases were heard before me in Shelbyville, Tennessee, on October 15 and 16, 1980,[1] pursuant to an order consolidating cases, consolidated complaint and notice of hearing issued by the Regional Director for the National Labor Relations Board, herein called the Board, Region 26 on May 22, 1980, and an amended order consolidating cases, consolidated complaint issued by the Acting Regional Director for Region 26 on October 3. The Charging Party, United Textile Workers of America, AFL-CIO, herein called the Union, filed the unfair labor practice charges in these cases, respectively, on April 2 and 3. The consolidated complaint, as amended first by the Acting Regional Director's order and again at the hearing, alleges that Respondent, Bedford Farmers Cooperative, herein called the Co-op, had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*. The Co-op by its timely answer, as amended, denied any commission of the alleged unfair labor practices.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the parties' briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Co-op, a corporation with an office and place of business in Shelbyville, Tennessee, engages in the retail sale of farm supplies. In the course and conduct of its business operations, the Co-op annually derives gross revenues exceeding $500,000 from its retail sales. The Co-op also annually receives at its Shelbyville, Tennessee, facility products, goods, and materials valued in excess of $50,000, which are shipped to it directly from points outside the State of Tennessee. In its answer, the Co-op admits that, at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and I so find.

The complaint alleges, the Co-op in its answer admits, and I find that the Union, United Textile Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

The Co-op is an organization formed and operated in accordance with an act of Congress, the Cooper-Volstead Act. Its membership includes 2,800 to 3,000 farmers. The Co-op's purpose is to supply the needs of farmers in their farming operations.

The Co-op's management policies are the responsibility of the nine persons elected to its board of directors for 3-year terms. The board employs a manager, who supervises the Co-op's day-to-day operation in accordance with its policies. Leon Fox has been the Co-op's manager since January 2.

On October 5, 1979, following a representation election held on September 27, 1979, the National Labor Relations Board certified the Union as the exclusive bargaining representative of the following unit of the Co-op's employees:

> All truckdrivers, warehousemen and garage employees employed at the [Co-op's] Shelbyville, Tennessee, location, excluding all office clerical employees, professional employees, guards and supervisors as defined by the Act.

By letter dated October 16 to the Co-op, the Union requested a meeting to begin collective bargaining. The Co-op's manager, Kary Collier, replied that the Co-op's board of directors had not appointed a negotiating committee but, as soon as that had been done, the Union would be told "as to an agreeable meeting time."

Collier soon resigned. Assistant Manager Billy King, who became acting manager, suggested to the Union that negotiations not start until the Co-op had selected a new manager. The Union agreed to wait. Thereafter, the Co-op hired its current manager, Leon Fox.

On January 26, the parties embarked upon contract negotiations. Thereafter, the parties held bargaining sessions on February 9, 16, and 23 and April 17 and 29.

The issues presented concern the Co-op's conduct after Fox became its manager. Specifically, with respect to Section 8(a)(1) of the Act, the issues presented are whether the evidence shows that the Co-op violated that section of the Act by: informing its employees that the Co-op would not agree to a contract; interrogating employees regarding their union activities, membership, and desires; advising employees to remain away from the Union and that the Co-op was seeking to oust the Union; informing employees that the Co-op was not required to sign a collective-bargaining agreement; and threatening its employees with discharge because of their union activity or other support for the Union.

Further issues presented are whether the Co-op violated Section 8(a)(3) and (1) of the Act by unilaterally granting its employees a wage increase, and by terminating employee James Clanton.

Finally, the issues presented with regard to Section 8(a)(5) and (1) of the Act are whether the Co-op violated its bargaining obligation by unilaterally discontinuing its policy of granting a paid holiday to employees on their birthday, hiring new employees rather than recalling laid-off unit employees, reducing the unit employees' working hours, changing its method of computing overtime, discontinuing Saturday deliveries, bargaining with individual unit employees, and by sending a representative to the bargaining table without authority to bind the Employer.

B. *Alleged Interference, Restraint, and Coercion*

On February 20, while interviewing Timothy Glascoe for employment, Manager Fox stated that the Co-op "had been having some problems with the Union, and that some complications had arisen between the Union and himself." Fox also disclosed that he was attempting "to get rid of the Union." Fox advised Glascoe "to try to not get involved with the Union, to try to stay away from the Union, but to be friends with the guys but not get real close friends with them." Fox also inquired as to whether Glascoe had any prior knowledge of the Union and the Co-op's problem with the Union.[2]

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[1] All dates hereafter refer to 1980, unless otherwise stated.

Contrary to the General Counsel's contention, I find that Fox's question regarding Glascoe's knowledge of the Union and the Co-op's difficulty with the Union did not intrude upon Glascoe's Section 7 rights.[3] Fox did not seek disclosure of Glascoe's union activity or sentiments. Nor did Fox seek information regarding union activities or sentiments of other employees. Instead, Fox's inquiry was directed at whether Glascoe knew of the Co-op's bargaining relationship with the Union. I find, therefore, that Fox's question regarding Glascoe's knowledge of the Union and the Co-op's troubles with the Union did not violate Section 8(a)(1) of the Act. I shall, therefore, recommend dismissal of the allegation that this interrogation violated Section 8(a)(1) of the Act.

However, I find Fox's warning and his remark that he was acting to defeat the Union, at a time when it was engaged in bargaining, did unlawfully interfere with Glascoe's freedom to engage in union activities, for Fox was using his position as a supervisor to restrain Glascoe from lending support to the Union. The warning suggested that Glascoe's relationship with the Co-op might suffer if he defied the Co-op and supported the Union's futile attempt to obtain a contract. Accordingly, I find that Fox's warning was violative of Section 8(a)(1) of the Act.

In mid-March, Glascoe complained to fellow employee, James Clanton, that Manager Fox was shifting Glascoe from job to job. Clanton asked Glascoe if he would be interested in joining the Union after he became a full-time employee. Glascoe said he would.[4]

At the end of March, Assistant Manager Billy King approached Clanton at the Co-op. After expressing his friendly attitude toward Clanton, King reported that Manager Fox was displeased about some of Clanton's remarks. When Clanton sought an explanation, Billy King responded: "[W]ell, I'll just be honest with you, this business about asking the new boy about joining the Union . . . he's the boss, and he's not going to stand for it." Clanton protested, saying it was his belief that he had a right to talk about the Union. In response, King warned in substance that Fox was "not going to stand for it." He also warned: "I'll just be honest with you, you want to keep working . . . you are going to have to keep quiet."[5]

At or about the same time, Manager Fox found Glascoe cleaning the Co-op's office and asked him if he "had spoken to any of the Union people." Glascoe replied that employee Clanton had talked to him about the Union.[6]

There can be little doubt that King's warning to Clanton amounted to a threat that, if Clanton persisted in soliciting support for the Union among his fellow employees, Manager Fox would terminate him. Beyond question, such a threat seriously impairs an employee's Section 7 right to support a labor organization. I also find that Fox's coercive interrogation of Glascoe was likely to restrain Glascoe from becoming a union member. I therefore find that by King's threat and Fox's interrogation the Co-op violated Section 8(a)(1) of the Act.

In mid-February, while conversing with employees Danny Knight, Mike Mooneyham, and C. A. Adcock regarding the then-current collective-bargaining negotiations, Manager Fox stated that the Co-op's board of directors was having "a hard time agreeing on anything," and that in his opinion "it would be hard to ever get a contract agreed on because the Board of Directors couldn't agree on the contract." Contrary to the General Counsel's allegation, I do not find Fox's remark violative of the Act for, although he left no doubt that collective bargaining with the Co-op would be difficult, Fox did not suggest that it would be futile. I shall, therefore, recommend dismissal of this allegation.

During January, February, and March, and up until April 10, employee Clanton had repeated encounters at the Co-op with Supervisors J. C. Robinson, Wayne Hornaday, Phillip Pyrdum, and Dale Conn regarding the Union. Each of these supervisors, at various times during those months, questioned Clanton about what happened at union meetings and whether the employees would seek the Labor Board's assistance or otherwise take action against Fox and whether they intended to go on strike.[7] This questioning occurred against a backdrop of union animus, including a threat of discharge, and was therefore coercive. I find that by this interrogation the Co-op violated Section 8(a)(1) of the Act.

On August 8, Co-op employees Roger Gregory and Billy G. Solomon visited Manager Fox in his office. Solomon and Fox got into a discussion regarding Fox's decision to promote employee Mike Mooneyham to foreman and grant him a wage increase. When Solomon protested that Fox should not have raised Mooneyham's wages, Fox retorted that he was running the Co-op and that Solomon, who was president of the Union's local and engaged in contract negotiations with the Co-op, had nothing to say about the operations. Fox also added that the Co-op was not required to sign any contract with the Union. I find it likely that the two employees, hearing Fox's remarks, concluded that the Co-op had no intention of ever joining in a collective-bargaining agreement with the Union. The Co-op's refusal to bargain in good faith prior to August 8, as found below, gave substance to Fox's suggestion that the Union's negotiations with the Co-op were an exercise in futility.[8] I find, therefore, that by this suggestion the Co-op violated Section 8(a)(1) of the Act. *El Rancho Market*, 235 NLRB 468, 470-472 (1978).

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[2] I based my findings regarding Fox's remarks to Glascoe on the latter's testimony which was uncontradicted.

[3] In pertinent part, Sec. 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[4] I base my findings as to Glascoe's conversation with Clanton on the latter's testimony.

[5] I based my findings regarding King's remarks to Clanton on the latter's testimony. In contrast to Clanton, who provided a fully detailed description of the alleged incident, King was led through two questions about talking to Clanton about "union activity." Thus, of the two, Clanton impressed me as the more reliable witness on this matter.

[6] I based my findings regarding Fox's conversation with Glascoe on this occasion on Glascoe's testimony, which was undenied.

[7] My findings regarding these incidents of interrogation involving Clanton were based on his testimony, which was uncontradicted.

C. *The Alleged Discrimination Against James F. Clanton*

1. The facts

The facts relating to this alleged violation are substantially free of dispute. The Co-op hired James F. Clanton in June 1978. Thereafter, until his discharge on April 10, the Co-op employed Clanton in the warehouse and as a truckdriver under the immediate supervision of J. C. Robinson.

Clanton supported the Union; he attended union meetings. In mid-March, he asked employee Glascoe about joining the Union. However, there is no showing that Clanton thereafter solicited other employees on the Union's behalf.

Prior to his discharge, Clanton had several encounters with supervisors, including J. C. Robinson, regarding the Union. Some of those conversations were concerned with what happened at union meetings, the employees' intentions regarding Manager Fox, and whether the employees intended to engage in a strike. In one of them, in mid-March, Assistant Manager King warned Clanton that his effort to persuade Glascoe to join the Union had displeased Manager Fox. In this last confrontation, King warned that further solicitation on the Union's behalf by Clanton would result in Clanton's discharge.

The incident which immediately preceded Clanton's termination occurred on the afternoon of April 10, at the Co-op. Clanton and employee Johnny Reed were cleaning up trash and tidying up the ground adjacent to the Co-op's building. Clanton asked for and received Assistant Manager King's instructions regarding the propane tanks which were outside the shop. At this point, Manager Fox who was in the shop shouted to Clanton and Reed, "You boys come in here and clean this shop up—haul this trash off for J. Clyde." Clanton went into the shop, began rolling a barrel out to a truck. As Fox and King came near him, Clanton, in the presence of King and a customer, protested that he was 41 years old, considered himself to be a man, and resented being called a boy.

Assistant Manager King, attempting to make light of Clanton's protest, said: "Aw, Jimmy." However, Clanton brushed King's gesture aside, saying, "I mean it. I don't want to be called a boy." Clanton continued with his work. As he was dumping trash, Fox approached and summoned Clanton to his office.

Fox admonished Clanton for embarrassing him in front of a customer. Fox brushed aside Clanton's attempt to apologize for the affront, and voiced other complaints that Clanton had been reported to him for announcing what he would and would not do. Clanton insisted that Fox's remarks necessitated the presence of employee Mooneyham, the president of the Union's local. Fox quickly summoned Mooneyham to his office.

When Mooneyham arrived, Clanton reviewed the incident and Fox's complaints. Clanton had asked Fox to identify the sources of the complaints about his talking. Fox refused. Clanton asked if Fox intended to punish him on hearsay; Fox did not answer. Mooneyham asked Assistant Manager King how he would have reacted if an employee had talked to him in the manner Clanton had addressed Fox. King replied in essence that he would discharge the employee.

Upon hearing King's response, Clanton stated that he had already apologized for what he had said in front of a customer and that, as far as he was concerned, the matter had concluded. However, Manager Fox was quick to respond that he was not satisfied with the apology and that it was necessary for him to "go cool off." Fox instructed Clanton to continue talking to King and Mooneyham and to leave when he had concluded. Fox left the office.

Assistant Manager King assured Clanton and Mooneyham that Fox would "be all right if he had some time to cool off." At Mooneyham's instruction, Clanton went home.

Clanton returned to the Co-op on the following morning and found his timecard absent from the rack. Employee Mooneyham sought out Manager Fox for an explanation. After approximately 30 minutes, Mooneyham returned and told Clanton that Fox would not permit him to work that day, but might do so on April 12. Clanton's further attempts to return to work met with failure. Finally, on Friday, April 18, Clanton obtained a written termination notice from the Co-op.

The record shows only one other confrontation between Fox and a hired employee. Two or three weeks before Clanton's termination, Manager Fox confronted employee Tim Glascoe, as the latter was on his way from the sales counter to the fertilizer building. Fox rebuked Glascoe, saying, "[A]ll you've been doing all morning is running around . . . get your butt right back up to the front."

Stunned by Fox's rebuke, Glascoe went to the office manager, asked for his check, and announced he was going home. After receiving his check, Glascoe informed Supervisor Clyde Smith that he was quitting and going home.

Next, Glascoe sought out and found Manager Fox with Supervisor Dale Conn in an automobile in the Co-op parking lot. Glascoe flagged Fox down and demanded that he get out of the automobile. He then proceeded to castigate Fox for the manner in which the manager was treating him. Glascoe complained that he was receiving menial work assignments which he described as "dirt jobs" and "dirty work." Glascoe said that he "was sick of it," because all that Fox "did was fuss and complain." Finally, Glascoe announced that he was "going home." Despite Fox's effort to calm him down, Glascoe left. Soon after this incident, Glascoe again encountered Fox, who persuaded him to return to work.

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[8] My findings regarding this incident are based on Gregory's testimony which was uncontradicted.

2. Analysis and conclusions

Counsel for the General Counsel argues in his brief: "The timing of the discharge, the union animus, and the disparate treatment clearly establish that Clanton was fired for his activities on behalf of the Union." The Co-op contends in its brief: "There is no credible evidence in the record that Clanton's termination had even the slightest connection with Union activity or that it reflected any Union animus whatsoever on the part of management." Although the Co-op's union animus was amply shown, I find that the General Counsel has failed to show the necessary link between that animus and Clanton's discharge.

In making my appraisal of the General Counsel's case, I have been guided by the teaching of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). There the Board announced (251 NLRB at 1089) that henceforth it will:

> . . . require that the General Counsel make a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected conduct was a "motivating factor" in the employer's [discharge] decision. Once this is established, the burden will shift to the employer to demonstrate that the [discharge] would have taken place even in the absence of the protected conduct.

Applying this analysis to the facts of the instant case, I find that the General Counsel has not shown that the Co-op's union animus was a "motivating factor" in the decision to discharge Clanton.

Employee Clanton actively supported the Union; he attended union meetings. In March, he pressed employee Tim Glascoe to join the Union.

It is also clear that Manager Fox was openly hostile toward the Union. In February, he told employee Glascoe that he was trying to free the Co-op of the Union. Fox also warned Glascoe to stay clear of the Union and thereafter interrogated Glascoe about conversations with union supporters.

Under Fox's questioning, Glascoe revealed that employee Clanton had talked to him about the Union. Soon after Fox learned of Clanton's solicitation on behalf of the Union, Assistant Manager King warned Clanton that Fox was displeased with his attempt to enlist Glascoe into the Union. Finally, King warned Clanton that his continued employment depended upon his desisting from such solicitations. In sum, I find that at the time Leon Fox decided to terminate Clanton he was aware of Clanton's prounion sentiment and was ill disposed toward him for that reason.

However, there is no showing that following King's warning Clanton engaged in any overt union activity which might have come to Fox's attention. Thus, at the time Fox made his decision to discharge Clanton there was no fresh manifestation of Clanton's prounion sentiment.

Further, there is no showing that Fox's response to Clanton's outburst in the presence of a customer was unusual. It does not appear that other employees guilty of similar misconduct suffered less punishment than did Clanton.

Glascoe's confrontation with Fox 2 or 3 weeks earlier did not occur in the presence of a customer. Further, comparison of the two incidents shows that Clanton was more abrupt and heated in his response to Fox's use of the word "boys" than was Glascoe in complaining about his "dirty work" assignments. Absent is any evidence that, after Clanton's misconduct on April 10, Fox, King, or any other supervisor made any reference to Clanton's union activity or prounion sentiment. Instead, the credited testimony of all of the participants in the incident of April 10 and its aftermath in Fox's office depicts Fox as genuinely disturbed by Clanton's misconduct in the presence of a customer. I also credit Fox's testimony that, in deciding to discharge Clanton, he took into account the complaints from the Tennessee Farmer's Co-op and Co-op supervisors that Clanton was impertinent. In sum, therefore, I find that the General Counsel has not shown that hostility toward Clanton's union activity or prounion sentiment played any part in Fox's decision to discharge Clanton. I shall, therefore, recommend dismissal of the allegation that Clanton's discharge violated Section 8(a)(3) and (1) of the Act.

D. *The Alleged Refusals To Bargain*[9] *in Good Faith*

Soon after Leon Fox became the Co-op's manager, J. Clyde Smith, who was then president of the Union's local, and Gary Crockett, the Union's representative, told Fox that the Union was ready to negotiate for a contract. Fox responded that he would get in touch with the Union when the Co-op had appointed a negotiating committee.

However, before the first bargaining session, Manager Fox changed the Co-op's Saturday delivery policy. Before his arrival the Co-op's policy was to deliver orders to customers Monday through Saturday. At some point in January, Fox instructed his warehouse supervisor, J. C. Robinson, to eliminate Saturday deliveries on a gradual basis. Fox made this decision to cut cost, and without consultation with the Union. Indeed, the subject of Saturday delivery was never a topic at any of the bargaining sessions between the Co-op and the Union.

As a result of the elimination of Saturday deliveries employee Lee Jacobs, who usually performed such work, did not work on the following Saturdays: March 29, April 12, 19, and 26, May 17, and August 9.

Prior to January 2, the unit employees regularly worked 50 hours per week, 9 hours per day on Monday through Friday, and 5 hours on Saturday. During January, after Fox became manager, and without notifying or consulting with the Union, Fox reduced the unit employees' weekly schedule to 45 hours. Thereafter, unit employees worked 8 hours per day, Monday through Friday, and 5 hours on Saturday. The Co-op did not reduce its supervisors' working hours. I also find from the testimony of Mike Mooneyham and Wayne Hornaday that, after the reduction in the unit employees' hours, supervisors performed substantially more unit work than they did when the unit employees had a 50-hour schedule.

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[9] No issues of credibility were raised in regard to these allegations.

On January 26, the bargaining representatives for the Co-op and the Union met for the first time. The Co-op's committee consisted of J. C. Robinson, chairman of its board of directors, Directors Bobby Don Hicks and Leon Foster, and Manager Fox. International Representative Crockett, Local President Smith, Local Vice President Mooneyham, and Local Treasurer C. A. Adcock comprised the Union's bargaining committee.

The Union presented its contract proposals, which the parties discussed. Further, the Union protested the reduction of the unit employees' working hours and the consequent reduction in their take-home pay. The Union also complained that supervisors were performing work which properly belonged to the unit employees. Fox responded that the reduction of unit working hours was a cost-cutting expedient. The Union also sought negotiations for the reinstatement of laid-off employees before the Co-op hired new employees. The union committee reminded Fox that the Co-op had laid off unit employees J. D. Bomar, James Simmons, and Fred Durham prior to his arrival,[10] and that they had not been recalled. The Co-op did not respond to the Union's expressed concern on this subject. Nor did the parties agree on any of the Union's proposed contract.

At the second bargaining session, on February 9, the Union repeated its complaint regarding the reduction of unit employees' working hours. The Co-op responded that it could not afford to continue paying overtime to the unit employees. The parties also discussed the employee classifications set forth in the Union's contract proposal. No agreement resulted and the Co-op submitted no counterproposal.

About mid-February, Manager Fox, in a conversation with employees C. A. Adcock and Mike Mooneyham, announced that he would raise the unit employees' hourly rate to $4.15 plus 20 cents for the gas truckdriver and make no changes in the current insurance and uniform benefits on the condition that "the Union was voted out." Adcock and Mooneyham responded that they were "just representatives of the Union" and would have to consult the membership before making a decision. Fox told the two employees to do so and tell him of their decision. At the time of Fox's offer, the unit employees' hourly wage was about $3.80. The gas truckdriver's wage was slightly higher. Mooneyham and Adcock reported Fox's offer to their fellow employees.

Soon after this encounter, Fox, without consulting with the Union or giving the Union prior notice, announced an increase in the unit employees' hourly rate to $4.35, except for the gas truckdriver, who would receive $4.55 per hour. Following Fox's announcement, the Co-op put the wage increases into effect.

The parties conducted negotiations on February 16 and 23. At one of these meetings, International Representative Crockett complained that the Co-op had granted the employees a wage increase without notifying the Union. Fox's response was: "The boys needed the increase." The Union did not accept Fox's explanation and protested that the Co-op was neglecting the bargaining process. Neither meeting produced any binding agreement on any contract issue. The Co-op did not present a counterproposal at either meeting.

At the February 23 meeting, the Co-op offered to raise hourly unit wages to $4.60 for all classifications except the gas truckdriver, who would receive $4.80. The Co-op also proposed the elimination of existing hospitalization and its policy of allowing employees 12 days of sick leave per year. The Union agreed to submit the Co-op's proposal to the unit employees, but predicted rejection.

At the next bargaining session in mid-March, the Union announced that the employees had rejected the proposal calling for the elimination of health insurance and sick leave. At the same meeting, a mediator appeared and suggested that as the Co-op recently had retained counsel the Union should give the attorney and the Co-op an opportunity to try to draw up a proposal. The Union agreed.

On April 17, the parties resumed negotiations. The Co-op's counsel, Jack Irion, attended and participated with its committee. At the outset, the parties discussed the Union's proposed contract item by item. Among the points of discussion was overtime. The Co-op claimed it could not afford to pay overtime. Attorney Irion announced that the Co-op would draw up a counterproposal for submission to the Union. This meeting produced some tentative agreements or understandings on nonmonetary issues.

On April 22, International Representative Crockett received the Co-op's proposal. He scheduled a meeting with the unit employees, on the following day, to review the proposal. Crockett noted that the counterproposal contained provisions which had been agreed on tentatively at the April 17 meeting. These items included overtime and vacation schedules. However, on the night of April 22, Attorney Irion notified Crockett that the Co-op's board of directors had rejected the counterproposal. The Union went through with its meeting, but did not present the repudiated counterproposals to the assembled employees.

The next bargaining session was on April 29. The Union pressed the Co-op for an explanation of its refusal to accept its own counterproposal. The troublesome items included overtime and dues checkoff. The Co-op claimed it could not afford another payroll deduction or overtime. After a brief recess, the Union submitted its second written contract proposal. However, no agreements resulted from this last negotiating meeting.

At the negotiations on April 17, the Union told Fox that, under the Co-op's policy, an employee received overtime for all work performed in excess of 8 hours per day, regardless of whether the employee worked in excess of 40 hours during the same week. The Co-op's counterproposal, prepared by Attorney Irion, after the April 17 negotiations, reflected that policy in the following excerpt from its article VIII, which was entitled "Hours of Employment":

> *Section 2.* Overtime shall be paid at the rate of time and one half (1-/12) [sic] as follows:

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[10] The Co-op laid off the three employees on September 13, 1979.

1. For all work done in excess of eight (8) hours in any one day.

Sometime between this April 17 meeting and April 29, on Manager Leon Fox's instructions, Office Manager Ann Turner began paying unit employees for overtime only to the extent that their working hours exceeded 40 hours per week. Fox admitted changing the overtime computation without advising the Union.

Before Fox assumed management of the Co-op, each unit employee annually enjoyed six paid holidays, including the Fourth of July, Labor Day, Thanksgiving, Christmas, New Year's Day, and his or her birthday. On May 27, employee Billy G. Sullivan asked Office Manager Turner if the Co-op would permit him to take his birthday off, with pay. She replied that Manager Fox had advised her to discontinue the practice of giving the employees birthdays off with pay. In July, employee Lee Jacobs experienced the same result when he asked Leon Fox about taking his birthday off with pay. The Co-op never notified the Union of the discontinuance of its paid birthday policy.

Chairman Marvin Roberts of the Co-op's board of directors conceded that the bargaining authority granted to the Co-op's negotiating team by the Co-op's board of directors was "indefinite." When Attorney Jack Irion presented his contract proposal drawn up after the negotiating session of April 17, the Co-op's board of directors considered it item by item, approving some and rejecting others. Upon completing this process, the board notified Irion that it had rejected the proposed contract. Roberts admitted that, under the Co-op's view of collective bargaining, its bargaining committee was to meet with the Union's bargaining committee upon the latter's request, make a proposal to the Union, and then present the tentative agreement reached at the bargaining table to the Co-op's board of directors for approval. Roberts conceded that whatever the Co-op's negotiating team might agree to would be subject to its board of directors' final approval. Roberts also conceded that, as of October 16, the board had not provided bargaining guidelines to its bargaining committee.

At the initial negotiating session, Gary Crockett told Manager Fox that the Union wanted laid-off unit employees Durham, Bomar, and Simmons recalled before the Co-op hired any new employees. Nevertheless, the Co-op thereafter hired five new employees without notifying the Union. The first new hire was Timothy Glascoe, on February 13. Thereafter the Co-op hired Greg Flannery on March 7, Johnny Reed on April 7, Randy Adams on April 11, and Max Mitchell on April 18. Of the six new hires, only Mitchell was employed in a nonbargaining unit position, involving the display room and the counter.

In June or July, Fox offered to employee Mooneyham a promotion to supervisor of the Co-op's two gas trucks and the painting of the Co-op's fuel tanks. Fox included in his offer a 20-cent wage increase, raising Mooneyham's wage to $4.75.

Mooneyham accepted the offer. However, upon assuming his new duties, Mooneyham found that he had no supervisory authority. He did not have authority to hire or fire, or to discipline employees, or to effectively recommend such actions. Indeed, although Fox told Mooneyham that two employees would be assigned to him, Fox never told Mooneyham what authority he would have over them. However, after 1 or 2 days Fox informed Mooneyham that the promotion to supervisor was violative of "Labor Laws" and was therefore rescinded. Mooneyham remained a unit employee, driving the Co-op's gas truck. However, Mooneyham continued to receive the hourly wage of $4.75. Also, shortly after receiving the wage increase and the short-lived promotion, Mooneyham terminated his union membership.

On the morning of August 7, employees Danny Knight, Roger Gregory, and Mike Mooneyham were discussing the Union in the Co-op's tire shop. Mooneyham told his colleagues that he thought Manager Fox would treat them better if they abandoned the Union. That same morning employees Gregory and Knight encountered Fox who, under their questioning, answered that, if they abandoned the Union and persuaded all of their colleagues to do so, he, Fox, could give Gregory and Knight more money. On the following morning, Gregory told Fox that he and Knight had rejected Fox's offer and would continue to support the Union.[11]

The General Counsel contends that the Co-op violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the unit employees' hours of employment, altering its computation of overtime for unit employees, discontinuing the granting of birthdays as paid holidays, hiring new employees rather than recalling laid-off unit employees, discontinuing Saturday deliveries, granting a wage increase to unit employees, dealing directly with unit employees, and sending a representative to the bargaining table without affording him authority to negotiate an agreement. Further, the General Counsel urges that, by this unlawful conduct, the Co-op demonstrated an intent to frustrate the collective-bargaining process by resort to surface bargaining. The Co-op denies commission of the alleged violations of Section 8(a)(5) and (1) of the Act. For the reasons set forth below, I find merit in the General Counsel's contentions.

In pertinent part, Section 8(d) of the Act defines the duty to bargain imposed by Section 8(a)(5) as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." It is well settled that an employer's change of established terms and conditions of employment, without first giving notice to and conferring with the statutory bargaining representative of its employees, constitutes an unlawful refusal to bargain. *N.L.R.B.* v. *Benne, Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, 743, 747 (1962); *N.L.R.B.* v. *C & C Plywood Corporation*, 385 U.S. 421, 425–430 (1967).

Applying the principles of Section 8(d) of the Act in the instant case, I find that the Co-op violated its bargaining obligation under that section when it neglected to consult the Union and provide it with an opportunity to negotiate regarding the Co-op's decisions to discontinue Saturday deliveries, the reduction of working hours of unit employees, the granting of a wage increase to the unit employees in February, the change in computation of overtime payments in late April, the discontinuance of the policy of granting employees their birthdays as paid holidays, and hiring new employees rather than laid-off unit employees James Simmons, J. D. Bomar, and Fred Durham.

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[11] My findings regarding the incident of August 7 are based on the testimony of Gregory and Knight.

The facts do not support the Co-op's plea that its unilateral reduction in union working hours from 50 to 45 was excused by the existence of an impasse at the bargaining table. For, assuming that an impasse on that issue would have excused this unilateral decision, there was no impasse at the time Fox made his decision. Fox's testimony and that of Union Representative Crockett shows that Fox reduced the regularly scheduled hours of unit employees from 50 to 45 at an unspecified time in January, prior to the first bargaining meeting. Indeed, at that first meeting the Union protested the the *fait accompli*. Thus, when Fox made his unilateral decision to reduce unit working hours the parties had not even begun negotiations.

Nor was there an impasse in April when Fox ordered a change in the computation of overtime. Indeed, this unilateral reduction in overtime flew in the face of the Co-op's tentative agreement to adhere to its traditional policy.

The Co-op's cause is not helped by its asserted financial woes, for such a claim of economic necessity, even if sustained, does not excuse the Co-op's unilateral reductions in working hours, the termination of paid birthday holidays, the change in overtime computations, the elimination of Saturday deliveries, or any of the other unilateral actions recited above. See *Fiberboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 213–214 (1964). I therefore find that by the above-recited unilateral actions, which affected the unit employees' wages, hours, and conditions of employment, the Co-op violated Section 8(a)(5) and (1) of the Act.

I also find that the across-the-board wage increase which the Co-op announced in mid-February was prompted by its desire to get rid of the Union. The announcement of the increase so close to Fox's disclosures of this desire, in his remark to Glascoe, Mooneyham, and Adcock, and when contract negotiations were in progress, was designed to suggest that the employees would be better off if they abandoned collective bargaining through the Union. I find that this wage increase interfered with the employees' right to support the Union and therefore violated Section 8(a)(1).[12]

The Co-op also ran afoul of the Act by dealing directly with its employees.

Section 8(a)(5) of the Act not only prohibits an employer from refusing to bargain with the designated collective-bargaining representative of its employees but also obligates the employer to deal only with that representative and to refrain from bargaining directly with individual employees. *Medo Photo Supply Corporation* v. *N.L.R.B.*, 321 U.S. 678, 683–684 (1944); *Erlich's 814, Inc.; Erlich's Northwest, Inc.; Capri Launderers & Dry Cleaners, Inc.*, 231 NLRB 1237 (1977).

The Co-op violated this obligation twice. In February 1980, Manager Fox told employees Mooneyham and Adcock about his willingness to grant the unit employees wage increases if they abandoned the Union. Again, on August 7, the Co-op dealt directly with the unit employees, when Fox offered Gregory and Knight wage increases to induce them to abandon the Union and persuade the other unit employees to do likewise. By Fox's overtures to the employees, the Co-op also unlawfully interfered with its employees' right, under Section 7 of the Act, to support the Union. Accordingly, I find that, by Fox's offers, the Co-op violated Section 8(a)(1) and (5) of the Act. *Erlich's 814, Inc., supra.*

The Co-op again violated the requirements of good-faith bargaining by sending to the bargaining table representatives with insufficient authority to engage in meaningful negotiations. The Co-op's bargaining committee had no authority either to enter into a contract or to advance any binding contract proposals. Indeed, the committee had no guidance from the Co-op. When Attorney Jack Irion, a member of the Co-op's negotiating committee, drew up the substance of tentative agreements reached on April 17 between his committee and the Union's committee, the Co-op's board of directors rejected them *in toto*. Thus, the proposals made by Irion and his colleagues "were little more than trial balloons which [the Co-op's board of directors] could seemingly shoot down or reject at will. Such conduct does not constitute good-faith bargaining." *Manor Mining and Contracting Corporation*, 197 NLRB 1057, 1059 (1972). In sum, I find that the Co-op used its bargaining committee to frustrate the Union's efforts to obtain a collective-bargaining agreement, and thereby violated Section 8(a)(5) and (1) of the Act. *Manor Mining and Contracting Corporation, supra.*

The determination of whether the Co-op bargained in good faith in a sincere effort to reach an agreement as required by Section 8(d) of the Act, or merely engaged in surface bargaining to camouflage an intention not to reach agreement, is one requiring an assessment of motivation. *"M" System, Inc., Mobile Home Division Mid-States Corporation*, 129 NLRB 527, 547 (1960). In explaining that assessment, the Board declared:

> Good faith, or the want of it, is concerned essentially with a state of mind. There is no shortcut to a determination of whether an employer has bargained with the requisite good faith the statute commands. That determination must be based upon reasonable inference drawn from the totality of conduct evidencing the state of mind with which the employer entered into and participated in the bargaining process. The employer's state of mind is to be gleaned not only from his conduct at the bargaining table, but also from his conduct away from it—for example, conduct reflecting a rejection of the principle of collective bargaining or an underlying purpose to bypass or undermine the Union man-

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[12] Having found that the Co-op violated Sec. 8(a)(5) and (1) of the Act by unilaterally granting a wage increase to the bargaining unit employees, I find it unnecessary to determine whether this same conduct also violated Sec. 8(a)(3) of the Act, as alleged.

> ifests the absence of a genuine desire to compose differences and to reach agreement in the manner the Act commands. All aspects of the Respondent's bargaining and related conduct must be considered in unity, not as separate fragments each to be assessed in isolation.

Applying the foregoing principles to the Co-op's total course of conduct, I find, as the General Counsel contends, that the Co-op engaged in surface bargaining.

The Co-op's unfair labor practices, as found above, revealed an intent to escape the onus of collective bargaining with the Union. Manager Fox expressed this objective in February when he told Glascoe of his effort to get rid of the Union. At or about the same time, Fox repeated this theme when he offered a wage increase to the unit employees if they repudiated the Union. In August, Fox's offer of wage increases to employees Knight and Gregory was conditioned on their precipitating the Union's repudiation by the unit employees. As part of its campaign to oust the Union, the Co-op, while pleading poverty at the bargaining table as an excuse for unilaterally reducing overtime, unilaterally granted a substantial wage increase to the unit employees.

The Co-op also sought to persuade the unit employees that collective bargaining was futile. Fox warned that the Co-op would probably not sign a contract with the Union. The Co-op, as if to prove Fox's point, sent a bargaining committee to the negotiations without adequate guidance or bargaining authority. Finally, to show that the Union was superfluous, the Co-op repeatedly made unilateral changes in the unit employees' wages, hours, and other conditions of employment, at times when it was obligated to consult with the Union. In short, I find that the Co-op rendered the six negotiating sessions from January 26 to April 24, both dates inclusive, an exercise in futility for the Union and the unit employees.

From all the Co-op's conduct, after January 2, as reviewed above, I find that it bargained with the Union in bad faith, and without any intention of executing a collective-bargaining agreement. I further find that the Co-op thereby violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Bedford Farmers Cooperative, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Textile Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All truckdrivers, warehousemen and garage employees employed at the Respondent's Shelbyville, Tennessee, location, excluding all office clerical employees, professional employees, guards and supervisors as defined by the Act.

4. Since September 27, 1979, the above-named Union has been the exclusive representative of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By unilaterally, without notice to, or consultation with, the above-named Union, changing the rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the above-described unit; hiring new employees instead of recalling previously laid-off unit employees; reducing the working hours of unit employees, and assigning their work to supervisors, dealing directly with unit employees by offering them wage increases if they abandoned the Union, and by offering employees wage increases if they abandoned the Union and caused others to do so; increasing the unit employees' wages; altering its method of computing overtime for unit employees; discontinuing its practice of permitting unit employees to take their birthdays off as paid holidays; discontinuing deliveries to customers on Saturdays; sending to the bargaining table bargaining representatives who had no authority to conclude a collective-bargaining agreement or to make firm contract proposals; and negotiating with the Union in bad faith and in a manner calculated to preclude consummation of a collective-bargaining agreement, Respondent has failed and refused to bargain collectively with the Union, and has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By telling employees that Respondent was not required to sign a contract, by interrogating employees regarding their union activities and sentiments, by threatening an employee with discharge if he continued to solicit support for the Union among his fellow employees, by granting and offering employees wage increases to induce them to abandon the Union, by warning an employee to stay away from the Union and by announcing that Respondent was seeking to get rid of the Union at a time when the Union was the exclusive collective-bargaining representative of Respondent's employees, in the above-described unit, Respondent violated Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has not otherwise engaged in conduct violative of the Act, as alleged in the complaint as amended.

THE REMEDY

Having found that Respondent has committed certain unfair labor practices, I shall recommend that it be ordered to cease and desist from such conduct and to take such affirmative action as I find necessary to remedy the effects of the unfair labor practices and to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act, by unilaterally hiring new employees instead of recalling laid-off employees James Simmons, J. D. Bomar, and Fred Durham, I shall recommend that Respondent be required to offer them immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and to make them whole for any loss of pay they may have suffered by paying each a sum of money equal to the amount he would have earned from the date he would have been recalled according to seniority, to the date of his recall less his earnings during said period, including interest, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[13]

Having found that Respondent unilaterally reduced the unit employees' weekly working hours from 50 to 45, eliminated Saturday deliveries, revised its method of computing overtime, and discontinued its policy of granting unit employees a paid holiday on their birthdays, I shall recommend that Respondent restore each of those conditions of employment to its *status quo ante*. I shall also recommend that Respondent be ordered to make its employees whole for the monetary loss suffered by them as a result of the unlawful discontinuance of the practice of giving each unit employee a paid holiday on his or her birthday together with interest to be computed in the manner described above. I shall also recommend that Respondent be ordered to make whole Lee Jacobs and all other unit employees for any loss of pay they incurred as a result of Respondent's unilateral changes in working hours and backpay computation, and its unilateral termination of Saturday deliveries, by the payment to each of a sum of money equal to that which he or she normally would have earned before the reduction in working hours and overtime from the date, in each instance, when the particular hours or overtime were reduced until the restoration of the *status quo ante* of these conditions of employment, plus interest to be computed in the manner set forth in *Florida Steel Corporation, supra*, and *Isis Plumbing & Heating Co., supra.*

I shall also recommend that Respondent preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amounts of backpay due under the terms of this recommended remedy.

Having found that Respondent has failed and refused to bargain collectively in good faith with the Union as the exclusive representative of the employees in the appropriate unit, I will further recommend that Respondent be ordered to bargain collectively, upon request, with the Union as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, to embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining representative for the period provided by law, it shall be construed that the initial year of certification begin on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.[14]

[Recommended Order omitted from publication.]

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[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[14] See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962).

Illinois Bell Telephone Company *and* Carol Gilbert. Case 13-CA-18818

January 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 22, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer and response to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Illinois Bell Telephone Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. On March 25, 1980, Administrative Law Judge C. Dale Stout died after the hearing in the instant case had closed. On May 18, 1981, before the filing of briefs, Administrative Law Judge Benjamin Schlesinger was designated to prepare and issue a Decision based on the record made before Administrative Law Judge Stout. It is the Board's established policy to attach great weight to an administrative law judge's credibility findings, insofar as they are based on demeanor. However, in contested cases, the Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of evidence, and the Board is not bound by the administrative law judge's findings of facts, but bases its findings upon a *de novo* review of the entire record. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Administrative Law Judge Schlesinger's credibility findings are based on factors other than demeanor, and, in consonance with the Board's policy set forth in *Standard Dry Wall Products, Inc., supra,* we have independently examined the record in this case. We find there is no basis on the record in this proceeding for reversing his credibility determinations or his findings of fact based thereon.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard before Administrative Law Judge C. Dale Stout, now deceased, on February 4 and 5, 1980, in Chicago, Illinois, based on an unfair labor practice charge filed by Charging Party Carol Gilbert on June 14, 1979,[1] and a complaint issued on August 15, alleging violations of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* On May 18, 1981, I was designated as the administrative law judge to determine whether Respondent Illinois Bell Telephone Company has violated the Act, which it denies in all respects.

It is admitted, and I conclude, that Respondent, an Illinois corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. It is engaged in the business of providing telephone service, has during the calendar year preceding the complaint derived gross revenues in excess of $100,000 in the course and conduct of its business operations, and during the same period has received goods and services valued in excess of $50,000 at its Illinois locations directly from points located outside the State of Illinois. It is also admitted, and I conclude, that Communications Workers of America District 5 (herein the Union) is a labor organization within the meaning of Section 2(5) of the Act and has been, at all times material herein, the collective-bargaining representative of employees, including Gilbert, at its Lake Shore, Illinois, facility.

In April 1979, Gilbert, a directory assistance operator employed by Respondent since 1972, transferred to Respondent's Lake Shore facility and was given her first monthly evaluation by Group Manager Joyce Brumgart on May 2, who criticized Gilbert's 168 minutes of time out-of-board (TOOB), which is the amount an operator is away from the work station for any reason.[2] Brumgart stated that Gilbert's TOOB in April was "totally unacceptable," and that she must show "immediate and substantial improvement."

Gilbert grieved this warning, complaining, *inter alia,* that her TOOB was unfairly calculated, that she was refused access to the records of her TOOB, and that Brumgart refused to state how much TOOB was acceptable, so that Gilbert did not know what improvement was necessary to satisfy Respondent. Her grievance was presented by a union steward to June Lambertino, Respondent's manager and an admitted supervisor under Section 2(11) of the Act who was in charge of first-level grievances, and was pending disposition at the time of the hearing herein.

On June 8, Brumgart reviewed Gilbert's performance in May. Brumgart, although complementing Gilbert on her productivity, noted that her 123 minutes of TOOB was an improvement, but was still not acceptable. Gilbert's request for the presence of a union representative was rejected, as was her request for the records to substantiate her TOOB, a request which Brumgart stated she would discuss with her manager, Lambertino. Returning to her board, Gilbert called to make an appointment with Lambertino, whom she met after lunch that day.

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[1] All dates hereinafter set forth refer to the year 1979, unless otherwise stated.

[2] TOOB includes time for going to a restroom, getting a drink of water, or moving to a different telephone board because of malfunction of equipment or because of drafts.

259 NLRB No. 167

There is no question that Gilbert asked Lambertino for a "furlough," which is time off which may be granted if there are sufficient employees to fill in for the employee. She also asked, although the extent of her discussion is at issue, to obtain her TOOB records and, when those were refused, said, according to Lambertino, "You're bullshit." Gilbert's testimony was different. She stated that, when Lambertino denied her the records, she then asked what was an acceptable amount of TOOB, to which Lambertino replied: "Zero minutes." Gilbert's reply was "Bullshit." In either event, there is no question that Lambertino immediately suspended Gilbert, a suspension which lasted for 2-1/2 days, without pay, and on June 11 announced to Gilbert that she had been put on "final warning," which meant that any further infraction would cost Gilbert her job. At least as of mid-November, and I infer as of the time of the hearing, the final warning remained on Gilbert's record.

No matter how the evidence is viewed, Gilbert was engaged in protected concerted activities because she was grieving her job review by Brumgart, who had once again criticized Gilbert for her "unacceptable" TOOB, and was seeking information pertinent to her grievance. Although Gilbert's request of Lambertino for a furlough was clearly personal and not protected, her discussion of TOOB was concerted because it involved implementation and enforcement of the grievance procedure of the company-union collective-bargaining agreement which is an "extension of the concerted activity giving rise to that agreement," protected by Section 7 of the Act. *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company*, 139 NLRB 1516, 1519 (1962); *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).[3] In addition, the grievance was a matter of mutual concern to other workers, as illustrated by newsletters which Gilbert published with at least one other employee, protesting harassment about restroom breaks, discipline caused by malfunctioning equipment, and monitoring employees' whereabouts to establish cause for discipline—all of which were concerns of a constituent local of the Union.

Respondent argues that Gilbert was not enforcing a provision of the labor agreement, but surely she was protecting herself from the potential loss of her job. If, indeed, her TOOB was unacceptable, and if it were not improved, loss of employment was a likely consequence.[4] Her attempt through the grievance procedure would have an impact on the terms and conditions of employment of all her fellow employees. Respondent also argues, citing some authority, that Gilbert acted outside the agreement's grievance procedure and thus engaged in unprotected activities. That is not so, and I specifically discredit Lambertino's testimony that grievances are only presented by union stewards. The agreement provides that individual employees may pursue their own grievances, as follows:

> 3.06 Nothing in this Agreement shall be construed as restricting the rights of employees, individually or collectively, to present grievances to the Company, through the regular channels of the Company's administrative organization.
>
> 3.07 The Company agrees, however, that after a grievance has been referred to a Union representative and such representative has dealt with a Company representative with respect thereto, no Company representative will discuss the matter with the employee or employees involved unless a Union representative is given an opportunity to be present at any such discussions or conferences.[5]

My review of the record persuades me that Gilbert's recollection of her meeting with Lambertino on June 8 was much more precise than that of Lambertino. Gilbert's uncontradicted, clear, and detailed narration of her conferences with Brumgart, in which she specifically set forth all her complaints, grievances, and arguments; her zeal in being the "watchdog" of every alleged breach by Respondent of the bargaining agreement, including her filing of five or six grievances over a 3-month period and her intense involvement in the affairs of the Union;[6] and her preparation of newsletters criticizing Respondent's treatment of its employees, all convince me that Gilbert's detailed testimony of what she and Lambertino talked about on June 8 is more probable. I, therefore, find that, at that meeting, Gilbert told Lambertino that she had some issues regarding working conditions that she wished to discuss; that she made a further request for records of her TOOB which had earlier been denied to her by Brumgart; that she asked and received an answer to the name of the form on which information was recorded; that there was a thorough discussion of Lambertino's reasons for refusing to release the records to Gilbert; that Gilbert replied that records of the names of other employees' TOOB could be covered or only Gilbert's records could be copied, in order to allay Lambertino's fears that the privacy of other employees would be invaded; that Lambertino switched the conversation to the matter of Gilbert's knowledge of what was expected of her, calling Gilbert "dear heart"; that Gilbert professed that she did not know, to which Lambertino said "Zero minutes out-of-board," and Gilbert replied, "Bullshit."

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[3] The Board's *Interboro* doctrine has not been universally embraced in enforcement proceedings. It withstood attack in *N.L.R.B. v. Selwyn Shoe Manufacturing Corporation*, 428 F.2d 217, 221 (8th Cir. 1970); *N.L.R.B. v. Ben Pekin Company*, 452 F.2d 205, 206 (7th Cir. 1971); (but see *N.L.R.B. v. Slotkowski Sausage Company*, 620 F.2d 642 (7th Cir. 1980); and *Roadway Express, Inc.*, 217 NLRB 278 (1975), enfd. 532 F.2d 751 (4th Cir. 1976). Contra, *Kohls v. N.L.R.B.*, 629 F.2d 173 (D.C. Cir. 1980); *Krispy Kreme Doughnut Corp. v. N.L.R.B.*, 635 F.2d 304 (4th Cir. 1980); *N.L.R.B. v. Northern Metal Company*, 440 F.2d 881 (3d Cir. 1971); *N.L.R.B. v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973) (but see *Anchortank, Inc. v. N.L.R.B.*, 618 F.2d 1153, 1160–61 (5th Cir. 1980)); *ARO, Inc. v. N.L.R.B.*, 596 F.2d 713 (6th Cir. 1979).

[4] Lambertino conceded that an employee could be warned for excessive TOOB.

[5] Gilbert attempted to use this provision as a double-edged sword. When she was counseled by Brumgart on June 8, she complained that she could not be disciplined without a union steward being present, because she had previously filed a grievance involving TOOB. Even though she took this position, she still had the right to present her grievance to Lambertino later in the day.

[6] Gilbert was a past executive board member of Local 5016, which is a constituent part of the Union.

Fairly read, it is clear that Gilbert was concerned that she was being treated disparately from the other employees. If she were being targeted for adverse criticism because of her TOOB, it was her right to ascertain whether other employees, who she testified without contradiction also had TOOB, were being similarly counseled and what conduct she would have to engage in to satisfy Respondent. Rebuffed by Brumgart earlier that day, Gilbert asked for an appointment with Lambertino to pursue this matter, as she had a right to do under Respondent's collective-bargaining agreement.

Because Gilbert was complaining of her evaluation that morning, Board law involving a grievance meeting is applicable. The Board has long held that parties in grievance discussions should not be inhibited in pursuing their claims and that merely because a union representative employee uses obscenities, the protection afforded the activity by Section 7 of the Act is not lost and the use of an obscenity may not constitute justification for an employer to discipline its employee. *Thor Power Tool Company*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Crown Central Petroleum Corporation* v. *N.L.R.B.*, 430 F.2d 724 (5th Cir. 1970); *United States Postal Service*, 250 NLRB 4 (1980); *Hawthorne Mazda, Inc.*, 251 NLRB 313 (1980). The use of vulgarities can never be judicially applauded, but it cannot be said that Gilbert's rejoinder was entirely unprovoked. Emergencies do occur, and for Respondent to insist that an employee's performance must be unacceptable unless the employee is chained to the working place, without a moment of leave, seems at least somewhat exaggerated.[7] On the other hand, Respondent undoubtedly has some justification in not drawing an absolute line between acceptability and lack of it to ensure that employees do not take advantage of even a minimal amount of time; so there was reason for Respondent to adhere to its position. But, merely because Gilbert supported her own argument with an epithet does not downgrade the discussion of the disagreement to a point where she ought to be denied the protected right to pursue the grievance. *Dreis & Krump Manufacturing Company, Inc.* v. *N.L.R.B.*, 544 F.2d 320 (7th Cir. 1976).[8]

Accordingly, I conclude that Respondent, by warning and suspending Gilbert, violated Section 8(a)(1) of the Act and that its activities, occurring in connection with its business operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent suspended Gilbert for 2-1/2 days without pay, I shall recommend that Respondent be ordered to make her whole for any loss of earnings she may have suffered thereby, with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9] I shall also recommend that Respondent be required to expunge and remove from all of its records any references to the warning and suspension it gave to Gilbert.

Upon the foregoing findings of fact and conclusions of law, the briefs filed by the General Counsel and Respondent, and the entire record,[10] and purusant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Illinois Bell Telephone Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees by suspending them or issuing to them final warnings for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make Carol Gilbert whole for any loss of pay she suffered by reason of her unlawful 2-1/2 days' suspension, computed in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Revoke, expunge, and physically remove from its records any warnings and suspension notices and any references thereto relating to the suspension of Carol Gilbert for 2-1/2 calendar days beginning on June 8, 1979.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and all other records required to ascertain the amounts of any backpay due under the terms of this Order.

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[7] Gilbert denied that she cursed at Lambertino. The word "bullshit" is defined by "The American Heritage Dictionary of the English Language, 1969," as: "Foolish, uninformed, or exaggerated talk." Although "vulgar slang," it was appropriate to define what Gilbert intended to convey.

[8] Respondent cites *Atlantic Steel Company*, 245 NLRB 814 (1979) to support its actions. There, however, the Board refused to protect the use of an obscenity as it would "a spontaneous outburst during the heat of a formal grievance proceeding." *Id.* at 816. As to the factors of the protection —"(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice"—the Board stated: "To reach a decision, the Board . . . must carefully balance these various factors." *Ibid.* The Board did not find that opprobrious conduct causes the loss of Sec. 7 rights only when provoked by illegal activity. Rather, that is only to be considered. Parenthetically, I find that the first three factors have clearly been met.

[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[10] The General Counsel moved to correct the official transcript in various respects. There having been no opposition, the motion is granted and the transcript is amended accordingly.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Post at its Lake Shore, Illinois, facility copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices employees are customarilay posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

We will not suspend, issue final warnings to, or otherwise punish our employees for exercising such rights.

We will not in any like or related manner do anything that interferes with, restrains, or coerces our employees with respect to these rights.

We will make Carol Gilbert whole for any loss of pay she suffered by reason of her unlawful suspension for 2-1/2 calendar days beginning on June 8, 1979.

We will revoke, expunge, and physically remove from our records and files any warnings and suspension notices relating to the suspension of Carol Gilbert beginning on June 8, 1979.

Illinois Bell Telephone Company

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[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL-CIO *and* Colton-Wartsila, Inc.

Colton-Wartsila, Inc. *and* Local Union No. 226, International Brotherhood of Pottery and Allied Workers, SIUNA, AFL-CIO, Petitioner. Cases 31-CB-3966 and 31-RC-4863

January 27, 1982

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On November 2, 1981, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, the Charging Party-Employer filed exceptions and a supporting brief, and the Respondent-Petitioner filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL-CIO, and that, pursuant to Section 9(a) of the Act, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees employed by the Employer at its facility located at 330 W. Citrus Street, Colton, California, 92324; excluding all other employees, including office, clerical, accounting, technical and professional employees, employees represented by labor organizations other than the Petitioner, watchmen, guards and supervisors as defined in the Act.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in San Bernardino, California, on August 4, 1981. On December 19, 1980,[1] the Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing, based on an unfair labor practice charge filed on October 31, alleging a violation of Section 8(b)(1)(A) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, herein called the Act. On that same date, the said Regional Director issued a report on objections, an order consolidating cases, and an order directing hearing and notice of hearing, finding that one objection to conduct affecting the results of the election conducted in Case 31-RC-4863 could best be resolved through a hearing and, as that objection concerned the subject matter already included as an allegation in the complaint issued in Case 31-CB-3966, consolidating the two cases for hearing and decision. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material, Colton-Wartsila, Inc., herein called the Employer, has been a corporation duly organized under and existing by virtue of the laws of the State of California, with an office and place of business located in Colton, California, where it has been engaged in the manufacture and sale of sanitary ware. In the course and conduct of these business operations, the Employer annually sells and ships goods or services valued in excess of $50,000 directly to customers located outside the State of California. Therefore, I find, as admitted in the answer, that at all times material the Employer has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] The Charging Party-Employer has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[1] Unless otherwise stated, all dates occurred in 1980.

259 NLRB No. 175

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL-CIO, herein called Respondent, has been a labor organization within the meaning of Section 2(5) of the Act.

III. CHRONOLOGY OF EVENTS

The sole issue presented in these consolidated cases is whether, during a conversation on October 15, kiln operator Richard Ele had been told, by International Representative Jesse Garcia and by Tenth Vice President Thomas B. Perazzo,[2] that Respondent would, in essence, pay $600 to Ele if he would support Respondent in the representation election scheduled for October 16 in Case 31-RC-4863 and, additionally, if he would persuade other employees to do likewise. Before addressing the evidence directly pertaining to that issue, certain background events must be explained.

Ele had commenced working at the Colton facility, now operated by the Employer, in 1954 when operations there were conducted by Colton Manufacturing, Inc., the Employer's predecessor. At some point in time, Respondent had become the bargaining representative of the employees in a production and maintenance unit at the Colton facility. Ele became a member of Respondent, and monthly dues were deducted from his paycheck. However, in January 1978, Ele had become a foreman, a nonunit position, and had obtained a withdrawal card from Respondent. Ele continued to serve as a foreman until October 1978 when, at his own request, he again became a kiln operator. He testified that, following his return to this bargaining unit position, he had made efforts to rescind the withdrawal card that he had executed and to resume again his full membership status in Respondent. Due to apparent inadvertence, however, dues were not deducted from Ele's paychecks after his return to the unit.

Ele testified that he had not become aware that his dues were not being deducted until Respondent went on strike against Colton Manufacturing, Inc., from February 1 to June 4, 1979. Ele participated in that strike and while it was in progress, he learned that Respondent did not consider him eligible to receive strike benefits because it had received no dues from him during the period after he had ceased being a foreman. Nevertheless, Ele continued participating in the strike for its duration and, in the ordinary course of affairs, would have received $600 in total strike benefits had he been considered eligible to receive them.

As a result of a decertification petition, filed by employee Fedor Benic, on September 10, 1979, a majority of the employees in the production and maintenance unit at the Colton facility voted against continued representation by Respondent in an election conducted on October 12, 1979. However, the matter did not end there. In June, Respondent commenced a new campaign to organize the production and maintenance employees working at the Colton facility, which at this time was being operated by the Employer. As a result of this campaign, Respondent filed the petition in Case 31-RC-4863 on August 14, and an election was scheduled for October 16. During the preceding week, Perazzo was distributing handbills to employees at the Colton facility. When one was offered to Ele, the latter complained about his failure to have received strike benefits from Respondent during the 1979 strike. Perazzo, who was unfamiliar with Ele and with the events of that strike, promised to investigate Ele's assertion and to ensure that Ele received the amount which he claimed as strike benefits if it turned out that he was indeed entitled to it.

Later Perazzo described the incident to Garcia who, unfamiliar with the events surrounding the 1979 strike, checked Respondent's records, ascertaining that Ele had not received strike benefits during the strike because his dues had not been paid. Garcia, accompanied by Perazzo, then journeyed to Ele's home, but on that occasion Ele was not there. Respondent's two representatives returned to Ele's home on October 15, the day before the election. On that date, they did have an opportunity to speak with Ele and it is that conversation that is the subject of the complaint and is the only one of the Employer's objections that has been consolidated for hearing in this proceeding.

With regard to this conversation, Ele testified that while he had been working in the yard of his home, cutting glass to replace missing panes in his garage window, Garcia and Perazzo had driven up and had walked over to where he was working. Initially, according to Ele, Garcia had explained that Respondent's records disclosed that Ele had not been eligible to receive strike benefits because he had not been paying dues, but then had added that Ele deserved the money because he had worked in a union shop and had promised, "We'll get you the pay—we can get your pay." Ele testified that when he had pointed out that Sam Fullerton[3] had said that Ele could not obtain the money, Garcia had replied that Fullerton "isn't here now. He's out of it," that International President Lester Null "is out here now in this area and we'll go see him and see whether we can get some money for you," and that "[w]e can get some money for you now but, after the election, we can get it all after the Union gets in." Garcia added, "We know we've got the election won, but a little insurance don't hurt. . . . Do you have any friends that would vote for the Union?"[4] Ele replied that he had a lot of friends who would do so if Respondent treated them "right." Then, he mentioned that he was owed $750 for strike benefits, but Garcia responded that the correct amount was $600. When Ele again expressed skepticism about being paid, Garcia replied, according to Ele, "Well, we'll get you some now. We'll go see Mr. Null and we'll get you some and we'll give you the rest after the Union gets in."

Both Garcia and Perazzo denied expressly that the former had promised cash or strike benefits to Ele if he would vote for Respondent in the election. Moreover, both of them denied that Ele had been promised cash or strike benefits in return for persuading other employees to vote for Respondent. As had Ele, both Perazzo and Garcia testified that the latter had initiated the October 15 conversation by explaining that Ele had not been entitled to strike benefits because he had not been paying dues prior to the strike. Moreover, both of them agreed that Fullerton's name had arisen during the conversation. However, both testified that this had occurred when Ele had asserted that Fullerton had promised to secure the strike benefits and then had persuaded Respondent not to pay them to Ele. Both union officials testified that Garcia had replied to Ele's remark by saying that Lester Null had assured everybody in Respondent that Fullerton was no longer involved with Respondent and that Garcia and Perazzo were in charge of it. Both agreed that Perazzo had told Ele that Respondent expected to win the upcoming election. Both of them testified that one or the other had concluded the conversation by saying that Ele's support would be appreciated. Garcia testified that this was a normal concluding remark made to employees during an election campaign.

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[2] It is admitted that at all times material Garcia and Perazzo had each been an agent of Respondent, acting on its behalf, within the meaning of Sec. 2(13) of the Act.

[3] Sam Fulleerton was an official of Respondent at the time the strike had been in progress.

[4] Ele testified that Garcia and Perazzo "mentioned about my friends several times" during this conversation.

The General Counsel and the Charging Party-Employer presented four additional witnesses. One, Victo Heavilin, is Ele's nephew and had been working in and around Ele's garage on October 15 during the conversation discussed above. Heavilin testified that, through the missing window panes, he had overheard one of Respondent's officials say to Ele, "If you could help us get in, we could get you $600, but we can't promise all of it to you." Other than the concluding remark, "We'll keep in touch," which he also attributed to one of the two officials, Heavilin testified that he had not heard any other comments made during that conversation.

Ele testified that, after Garcia and Perazzo had left, he had contacted other employees to tell them what had occurred. Ele identified three other employees with whom he had spoken: Alfred Villarreal, Robert Hudson, and Benic. According to Ele, he telephoned Villarreal and said that "Mr. Garcia and the Union are going to give me my strike pay." Ele further testified that "I mentioned the $600 I believe that they said they was [sic] going to get me, but I don't remember any other words with him except just telling him that I was going to get some money." Villarreal, however, testified only that Ele "told me that two men from the Union came by his house and offered him some money if he would vote for the Union." Villarreal denied that Ele had identified the two men by name and denied that Ele had said what amounts he had been offered.

Ele testified that, after speaking to Villarreal, he had gone to Hudson's home where, according to Ele, he had related to Hudson that "the Union was going to pay my strike pay, that I was going to get some now and I would get more after the Union got in." When asked initially what had been said to him by Ele, Hudson testified only that Ele had said that "two people from the Union had come to visit him" and "that he [Ele] would would get some money if he was to vote for the Union, that he would get part of this money then and probably after the election get the rest of his money that was due him. I think we talked about $500 or $600." After examining his pretrial examination, Hudson added that Ele had said that "they had offered him some money, that, if he would vote for the Union and if he would get some of the guys to help him bring the Union back in, they could get him the rest of the money." Yet, before Hudson had testified, Ele, when called as a witness for the General Counsel, had denied specifically that, during his October 15 conversation with Garcia and Perazzo, anything had been said about him (Ele) actually voting for Respondent in return for the strike benefits payment. Rather, according to Ele, Garcia had said only that Ele would get all of the strike benefits if Respondent won the election.

Finally, Ele testified that he had spoken with Benic by telephone and that he had told Benic, "I was going to get some money. They was [sic] going to bring me some money, and then, when the Union got in, I'd get the rest of my money." According to Ele, Benic had retorted simply that such an arrangement was illegal. Benic testified that Ele had explained that Garcia and Perazzo had promised to attempt to secure the strike benefits for Ele and that they had promised "to give him some money now and, after the election, they're going to give him the rest." Benic testified that he told Ele, "if they did that, that's illegal because, by the rules of the NLRB for the election, any bribery or any soliciting . . . was illegal."

The election was conducted on October 16 from 6:30 to 7:30 a.m. and from 2:30 to 3:30 p.m.[5] Ele testified that he had reported to the polling place that morning before 7 a.m. "to stop Bob Hudson from voting for the Union,"[6] in essence, because Garcia and Perazzo had not returned to his house the preceding evening with partial payment of the strike benefits and, accordingly, Ele "was mad because I didn't get the money that night."

IV. ANALYSIS

When they testified, it did not appear that the witnesses called by the General Counsel and by the Charging Party were candidly relating the events that had transpired on October 15 and 16. Rather, it appeared that they were attempting to tailor their accounts of those events, pertaining to and surrounding Garcia's and Perazzo's conversation with Ele, in a manner that would establish and fortify a case against Respondent. Certainly, Ele had a motive for doing so. As his initial conversation with Perazzo, during the week preceding the election, demonstrates, he had been upset at not having received strike benefits for the period that he had been on strike in 1979. Further, Ele admitted that, on the morning of the election, he had continued to be "mad" about not having received those benefits. Although he asserted that his anger that morning had been occasioned by Respondent's failure to deliver the partial payment to him during the preceding evening, it is equally inferable that he had been "mad" because Garcia and Perazzo had told him on October 15 that Respondent was adhering to the position that he was not entitled to those benefits. Heavilin, of course, is Ele's nephew. Benic had been the employee who had filed the decertification petition in 1979. There has been no showing that his lack of sympathy for representation by Respondent had changed since that time. Accordingly, while it is no doubt accurate, as the General Counsel argues, that Garcia and Perazzo had a "substantial stake . . . in the outcome of the election and of this proceeding," it is equally accurate that at least some the General Counsel's and Charging Party's witnesses, particularly Ele, could hardly be characterized fairly as being without interest in the outcome of these matters.

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[5] This election was conducted in a bargaining unit of:

> All production and maintenance employees employed by the Employer at its facility located at 330 W. Citrus Street, Colton, California, 92324; excluding all other employees, including office, clerical, accounting, technical and professional employees, employees represented by labor organizations other than the Petitioner, watchmen, guards and supervisors as defined in the Act.

[6] Hudson testified that he had not voted in the election at all that day.

In point of fact, while the General Counsel and Charging Party assert that Heavilin's testimony, in effect, tends to corroborate that of Ele, concerning the promise assertedly made to the latter by Garcia and Perazzo, comparison of their testimony tends to show the contrary. Thus, although Heavilin claimed that he had overheard an assurance to try to get $600 for Ele if the latter helped Respondent "get in," he testified also that the speaker had qualified that assurance by adding "but we can't promise all of it to you." Yet, in his description of the purported promise made by Garcia and Perazzo, Ele made no reference to such a qualification. To the contrary, his description of it was unqualified: all of the strike benefits that Ele would have received in 1979 would be paid to him if Respondent prevailed in the election. True, some portions of Ele's various descriptions of the October 15 conversation are susceptible of an interpretation that Garcia had expressed doubt concerning whether the benefits could be paid, at all, to Ele ("We'll go and check with Mr. Null and see.") But, at no point did Ele describe either Garcia or Perazzo expressing any reservation, similar to that described by Heavilin, about whether the entire $600 would be paid if the decision was made to pay Ele at all. Accordingly, Heavilin's testimony, concerning the scrap of conversation that he assertedly overheard, does not tend to corroborate Ele's account of what purportedly had been said to him on October 15 by Garcia and Perazzo.

Inconsistencies also arise from comparison of the various versions advanced of Ele's purported dissemination to other employees of the remarks made by Garcia and Perazzo. For example, as set forth above, Ele claimed that, when he had spoken to Villarreal, he (Ele) had related that Garcia was going to give him strike pay in the amount of $600. Yet, Villarreal denied expressly that, during their telephone conversation, Ele had mentioned either the amount that he had been offered or the names of Respondent's representatives. Hudson, whose memory of what Ele assertedly had said to him had to be refreshed from his pretrial affidavit, claimed that Ele had related that part of the price for receiving the strike benefits would be Ele's agreement to vote for Respondent in the election. Yet, Ele denied that anything had been said specifically by Garcia and Perazzo about Ele actually voting for Respondent. Indeed, at no point did Ele testify that he told Hudson that the strike benefits had been promised to him in return for his assurance that he would vote for Respondent in the election.

Possibly the most significant inconsistency arose from Ele's and Benic's accounts of their purported telephone conversation following Garcia and Perazzo's visit of October 15. During direct examination, Ele testified that he had called employees other than Villarreal on the evening of October 15 and then testified that he had spoken with Benic, telling him, as set forth above, that "I was going to get some money. They was [sic] going to bring me some money, and then, when the Union got in, I'd get the rest of my money." The substance of this account, of course, comports with Ele's description of his conversation with Garcia and Perazzo. However, during cross-examination, Ele switched direction and testified that his conversation with Benic had not occurred until the following morning, October 16. Benic agreed that he had not spoken with Ele until the morning of October 16, testifying, as described above, that Ele had reported that Respondent's agents had promised "to give him some money now and, after the election . . . to give him the rest."

Yet, the election had been scheduled to commence at 6:30 a.m., October 16. Thus, by the time Ele had spoken to Benic that morning it would have been obvious that Respondent was not going to pay part of the strike benefits to Ele prior to the election, as Ele claimed that Garcia and Perazzo had promised to do. Indeed, Ele acknowledged that he had gone to the Colton facility at 7 that morning, before having spoken with Benic, because he had been "mad" about not having received any money from Respondent and had wanted to stop Hudson from voting for it. In these circumstances, it would have been illogical for Ele to have told Benic that Respondent "was going to bring me some money," as Ele described it, or was "going to give him some money now," as Benic testified. For, by his own admission, by the time he had spoken to Benic, Ele knew that that was not "going to" happen.

Of course, it could be argued that Ele had been doing no more than advising Benic of the promise that had been made by Respondent's officials. Yet, it seems unlikely that Ele would have withheld from Benic the fact that the initial part of that promise had been broken by Respondent. Certainly, Benic provided Ele ample opportunity to disclose that the preelection portion of the full payment had not been made. For, Benic testified, as set forth above, that he had responded to Ele's description of the promise by pointing out that "*if they did that*, that's illegal . . . ." (Emphasis supplied.) In the final analysis, what appears to have happened is that, in their haste to fortify the case that Respondent had made an illegal promise that Ele had disseminated to other employees, Ele and Benic lost track of the setting against which their asserted telephone conversation had occurred.

Both the General Counsel and the Charging Party argue that it simply made no sense for Garcia and Perazzo, both vitally concerned that Respondent prevail in the election, to take time out simply to tell an employee something that would tend to lead that employee to vote against Respondent. While a superficially logical argument, it overlooks certain factors. First, neither Garcia nor Perazzo had been involved in the 1979 strike, or in the decision at that time to deny strike benefits to Ele. Second, neither Garcia nor Perazzo had ever met Ele prior to the latter's encounter with Perazzo at the Colton facility during the week prior to the election. Consequently, neither official of Respondent had ever had the opportunity to discuss with Ele the latter's complaint about not having received his strike benefits. Third, in describing their conversation during the week prior to the election, both Ele and Perazzo agreed that the former had said only, in essence, that he had walked the picket line for 13 weeks and had been denied strike benefits. Neither of them testified that Ele had explained fully to Perazzo, at that time, what had caused Respondent to deny strike benefits to Ele. Thus, so far as the record discloses, Perazzo had been unaware that Ele already knew that he had been denied those benefits because his dues had not been paid during the period immediately preceding the strike. Finally, so far as the record discloses, Respondent's records did not show that Ele had been made aware of the reason that Respondent had denied him strike benefits in 1979. In sum, it was hardly illogical for Garcia and Perazzo to assume that Ele was unaware of the true reason that he had been denied strike benefits in 1979 and, based on that assumption, for them to understand how Ele could be mistakenly justified in believing that he had been "cheated."

It is against this background that Garcia decided, having ascertained from Respondent's records why the strike benefits had not been paid to Ele, that, as Garcia testified, "[W]e'd better let this guy know why he didn't receive any benefits, you know, so he'd get that part of it straight. So we went to explain to him why he never received any benefits." It may be Pollyannaish, but hardly uncommon in the course of human affairs, to believe that people will accept even an adverse decision if accorded a logical explanation for it. Here, Perazzo had been confronted with a facially valid complaint by an employee who appeared not to be aware of the reason he had been deprived of a benefit to which he seemingly was entitled. Upon discovering the reason for that deprivation, Garcia and Perazzo sought out Ele to explain that the deprivation had not been wrongful or capricious, but rather, in Respondent's view, had a valid basis: the lack of dues payments on Ele's behalf during the period preceding the strike. In these circumstances, it cannot be said that Garcia and Perazzo acted illogically in considering it possible that, once having heard that explanation, Ele might change his mind about opposing representation by Respondent—or, as Garcia pointed out, at least that he might stop villifying Respondent by saying that he had been "cheated" out of these benefits.

But, if Garcia and Perazzo's visit to Ele was not illogical in the circumstances, it can hardly be said that the scenario portrayed by Ele was a logical one. For, to accept Ele's testimony about the October 15 conversation would be to conclude that Respondent's agents had promised to deliver money to him prior to the election, to secure his support in that election, and then had undermined their own purported effort by failing to return with the partial preelection payment. Both Garcia and Perazzo appeared sufficiently knowledgeable to perceive that any favorable change in Ele's attitude toward Respondent resulting from their promise quickly would be undermined by failure to fulfill their side of the bargain. Accordingly, it appears unlikely that they would have put themselves in the position of promising to perform an act before the election, in return for Ele's support in it, if they had any question concerning their ability to perform that promised act.

The foregoing considerations, among others not all of which are enumerated specifically herein, confirm my impression at the hearing, based on their demeanor, that Ele and the other witnesses called by the General Counsel and the Charging Party were not testifying candidly. Inasmuch as there is no credible evidence that Respondent's officials made any unlawful or objectionable remarks of the nature alleged in the complaint and report on objections, I shall recommend that the complaint be dismissed, that the objection be overruled, and that Respondent be certified as the bargaining representative of the employees in the above-described bargaining unit.

CONCLUSIONS OF LAW

1. Colton-Wartsila, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL–CIO, has not violated the Act in any manner alleged in the complaint.

Based on the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that Case 31–RC–4863 be severed from Case 31–CB–3966, that the objection in Case 31–RC–4863 be overruled, and that Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL–CIO, be certified as the collective-bargaining representative of the employees in the appropriate bargaining unit.

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[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herin shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Liberty Pavilion Nursing Home *and* Professional and Health Care Division, Local 1445, United Food and Commercial Workers Union, AFL-CIO. Case 1-CA-18108

January 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 21, 1981, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge: An unfair labor practice charge was filed in this case on December 2, 1980. Amended charges were filed on December 11, 1980, and on January 5, 1981. A complaint issued on January 15, 1981. A hearing was held in Boston, Massachusetts, on August 13, 1981. The General Counsel alleges that Respondent Employer violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to execute a written contract with the Charging Party Union after having "reached full and complete agreement with respect to the terms and conditions of employment" of Respondent's employees in an appropriate bargaining unit. Respondent Employer denies that it has violated the Act as alleged.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by the General Counsel, I make the following:

FINDINGS OF FACT

Respondent Home is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. The Union is admittedly a labor organization within the meaning of Section 2(5) of the Act. On December 17, 1979, the Union was certified as exclusive bargaining agent of the following unit employees:

> All full-time and regular part-time service and maintenance employees including dietary employees, dietary aides, housekeeping employees, ward clerks, nurses aides, orderlies, laundry employees, receptionists, bookkeeper and assistant bookkeeper employed by the Respondent at its Danvers, Massachusetts facility, but excluding all professional employees, technical employees, RN's, LPN's, social workers, occupational therapists, chef, head dietician, guards and supervisors as defined in the Act.

Union Representative Paul Dufault testified that commencing about February 1, 1980, the parties met at approximately 14 bargaining sessions and "reached an agreement" on a collective-bargaining contract on August 25, 1980. The "agreement" was "ratified by the Union's membership" on September 9, 1980. Later, on October 29, 1980, the Union delivered to counsel for Respondent "a contract in final form for signing" and submission to the Massachusetts Rate Setting Commission.[1] The "contract" (G.C. Exh. 2) provides, *inter alia*:

> APPENDIX A—WAGES
>
> The individual straight time hourly rate of pay of all employees shall be increased by the following amounts on the following dates:
>
> Effective July 1, 1980, a general increase of 25¢ per hour;
>
> Effective November 1, 1980, a general increase of 25¢ per hour;
>
> Effective July 1, 1981, a general increase of 50¢ per hour.
>
> New employees shall receive a starting rate of 3.60 per hour and after (sixty (60)) days, 3.85 per hour, and shall receive the general wage increases set forth above.
>
> * * * * *
>
> The terms set forth in Appendix A—Wages—reflect the settlement reached between the Home and the Union subject to approval of the Massachusetts Rate Setting Commission. Any retroactive monies to July 1, the effective date, shall also be subject to approval of said Commission. It is understood that the Home shall make application for implementation of those wages set forth in Appendix A and that the Union will also apppear before the Commission with the Home in order to secure the wage adjustment agreed to in negotiations and no retroactive monies will be paid until approval of the Commission.

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[1] The role of the Commission, insofar as pertinent here, is discussed below.

Dufault further testified that he later "checked" with the Massachusetts Rate Setting Commision in order to ascertain whether the Home had "presented" the "contract" and "application" for "approval." Dufault discovered that "the owner of the Home, Gerald Martin, had failed to sign the particular agreement" and, consequently, "the Rate Setting Commision had failed to rule on the application because of the failure of the Home to sign the agreement." Dufault explained:

> We had to go into state court and get a motion to get the Home to furnish the necessary documentation to the Rate Setting Commission, so that they could comply with what the Commission requested in order to secure some rate adjustments, so that the employees could get a pay raise.

Following this court action: the Home "executed the contract, and qualified it, on May 13, 1981, and submitted it to the Rate Setting Commission." (See G.C. Exh. 3.)[2]

According to Dufault, the Commission thereafter "granted" the Home what amounted to a .24 increase in their daily room rate allowance. The notification from the Commission to the Home, dated July 20, 1981, states (G.C. Exh. 4):

> This is to inform you that the [Commission], after consideration of your petition for an adjustment to the fiscal year 1981 interim rate of payment, took the following action:
>
> A change in the rate from $36.08 to $36.32 effective 3/1/81.

The Home, in its application to the Commission, had requested "an increase in our interim rate of at least $1.90." See Resp. Exh. 1.[3]

James E. Sullivan, director of the bureau of longterm care in the Massachusetts Rate Setting Commission, explained that his Commission "sets rates of payment to providers of health care, such as hospitals, nursing homes and ambulances," and these "rates will be paid for by the Department of Public Welfare." Director Sullivan, in further explaining how the Commission determined in July 1981 to allow the Home a .24 increase in its rate (see G.C. Exhs. 4 and 5), testified as follows:

> Q. The petition [of the Home] seeks an interim rate increase of $1.90 per patient per day. Is that correct?
>
> A. Yes.
>
> Q. Does that figure in the petition, $1.90, accurately reflect the cost of a wage increase pursuant to the contracts, Exhibits #3 and 4, I believe?
>
> A. I don't know.
>
> Q. Did the Commission take into consideration the wage increase contemplated by the collective bargaining agreement in computing an interim rate increase based upon the petition, Respondent's Exhibit #1?
>
> A. No.
>
> Q. Could you tell us why the Commission did not take into consideration in determining an interim rate increase pursuant to Respondent's Exhibit #1, that's the petition for an interim rate?
>
> A. Yes. The Commission does not take into account raises contemplated, but relies on the fact that the provider [the Home] provide evidence that costs have increased beyond the base year plus the cost adjustment factor.
>
> Q. So is it fair to say that the Rate Setting Commission or the rate structure in the Commonwealth of Massachusetts is predicated on—or rate of reimbursement is predicated on—an actual cost, an expenditure?
>
> A. Yes.
>
> Q. The Rate Setting Commission will not consider costs that are anticipatory, i.e., for example in the collective bargaining agreement.
>
> A. Not in this section of the regulations.
>
> Q. As it relates to wages?
>
> A. Yes.
>
> Q. So is it fair to say that the parties to the collective bargaining agreement can never obtain prior approval to any rate increase provided in a collective bargaining agreement?
>
> A. That's fair to say.

The director added: "The .24 increase [which the Commission allowed] was based on evidence supplied in June [198] that the June 13th payroll [of the Home] represented an amount that was in fact higher than the *base year 1979* plus [*a cost adjustment factor of*] 12.94 percent." The cost adjustment factor, the director noted, essentially reflects the Consumer Price Index as adjusted to the industry involved here.

In addition, Director Sullivan also testified:

> Q. Do I understand you to say that in Appendix A of General Counsel's Exhibit #2 [if] the wages reflected there were actually implemented, the Commission will allow reimbursement for those rates?
>
> A. I can't say that. The Commission certainly would consider them, and there would then be evidence that they were being paid. Then that evidence would be taken and measured against whether or not the Commission was already reimbursing those amounts

* * * * *

> Q. On a number of occasions, both by my questions and the court's you've indicated that if the wage increases as contemplated by this collective bargaining agreement were implemented, that the

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[2] The Employer, in signing the "agreement" (G.C. Exh. 3), noted, *inter alia*, above his signature that it "is signed" pursuant to the court's order subject to "whatever appellate remedies" are available.

[3] Dufault claimed that since the Home had received a percentage of the "increase" requested, a "percentage of that should go back to the employees as part of wage increase." Dufault, however, was unable to explain what portion of the 24-cent increase allowed by the Commission should be allocated to employee wages and, consequently, how much employee wages should in fact be increased, if at all.

Rate Setting Commission would act and would reimburse. Is that correct?

A. No, I haven't said that.

Q. I guess I misunderstood you.

A. I think I can just clarify that.

Q. Okay, go ahead.

A. If these wages based on these contracts were paid, and the provider submitted evidence of that payment, that it would then be compared with the rate because it is conceivable that a nursing home could enter a contract, increase wages, pay them, and already be reimbursed within the rate. In fact, it is almost inevitable that in some portion, that would occur.

JUDGE ITKIN: In other words, what you're saying is that 24 cents increase already allowed may cover part of the total $1.90 if that base figure is correct.

THE WITNESS: That is correct.

* * * * *

Q. Can you here today speak on behalf of the Commission with regard to whether or not an increase would be granted to cover the increased costs if the wage increases covered by the collective bargaining agreement were implemented?

A. I can speak on behalf of the Commission, but I couldn't answer that in a yes or a no.[4]

Discussion

It is settled law that "when an oral agreement is reached as to the terms of a collective-bargaining contract, each party is obligated, at the request of the other, to execute that contract when reduced to writing, and failure or refusal to do so constitutes an unfair labor practice." *Oil Chemical and Atomic Workers International Union and its Local 7-507 (Capitol Packing Company)*, 212 NLRB 98, 108 (1974). It is also settled law that, where there is "no meeting of the minds" as to essential terms of an agreement which may be traced to "ambiguity for which neither party is to blame," there is in effect no "contract" which the parties can be directed to execute. *Capitol Packaging Company, supra*, 212 NLRB at 107-108, quoting from Reinstatement Contracts, §501 (1932). In sum, as the Restatement notes:

> When, however, misunderstandings may be traced to ambiguity for which neither party is to blame, or for which both parties are equally to blame, and the parties differ in their understanding, their seeming agreement will create no contract. [*Id.* at 108.]

Also see *B. F. Goodrich Chemical Co., etc.*, 232 NLRB 399, 401-401 (1977), where the Administrative Law Judge, in dismissing a complaint, noted, with Board approval, "What does emerge in my opinion is a mutual misunderstanding concerning inclusion of the qualifying language at issue here, for which misunderstanding neither party is at fault. . . . I accordingly conclude that Respondent did not violate the Act by refusing to execute" the document.

The evidence of record here, summarized *supra*, is essentially undisputed. The parties, after some 14 bargaining sessions, arrived at what they believed to be a full and complete "agreement." However, with respect to that portion of the "agreement" pertaining to "wages," the parties expressly made this provision "subject to approval of the Massachusetts Rate Setting Commission," including "any retroactive monies," stating further that "no retroactive monies will be paid until approval of the Commission." Thus, commission approval was to be a *condition precedent* to the implementation of the wage provision. And, as Director Sullivan credibly explained, his Commission will not approve rate increases based on a "contemplated. . . . collective bargaining agreement"; the Commission will only reimburse for an "actual cost or expenditure"; and, therefore, it is "fair to say that the parties to the collective bargaining agreement can never obtain prior approval to any rate increase provided in a collective bargaining agreement." Accordingly, as a consequence of this mistake or misunderstanding, an essential portion of this "agreement" pertaining to wages cannot be implemented.

Neither party has been shown here to be at fault or to blame for this mistake or misunderstanding. There is therefore no meeting of the minds as to an essential contractual provision. Moreover, there is no demonstrated basis on which I can rely in correcting this mistake or misunderstanding so as to reflect the agreement of the parties. Implementation of the wage provisions was expressly made "subject to approval" by the Commission. To implement this contract so as to render it operative and meaningful, I would be required to rewrite the agreement, changing the *condition precedent* to a *condition subsequent*, directing payment of the wage increases, and providing for reimbursement to the Employer in the event the Commission fails to grant approval commensurate with the wage increases. I perceive this to be beyond my authority under the Act and certainly beyond the boundaries of this complaint. Likewise, I cannot sever the wage provisions from the entire "agreement" and require signing what remains. That too is contrary to the seeming agreement of the parties.

In sum, the General Counsel has failed to sustain his burden of proof here and the complaint is dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce as alleged.

2. Charging Party Union is a labor organization as alleged.

3. The General Counsel has failed to establish by a preponderance of the evidence that Respondent violated Section 8(a)(5) and (1) of the Act as alleged.

4. The complaint will therefore be dismissed in its entirety.

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[4] Pelino Campea, associated with Regional Management Resources, Inc., testified, on behalf of the Home, that the "wage costs" for the Home between 1979 and 1980 "rose higher than the 12.94 wage adjustment allowed by the Rate Setting Commission."

ORDER[5]

I recommend that the complaint herein be dismissed in its entirety.

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

University of Southern California *and* California Teamsters Public, Professional & Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. Case 31–CA–11272

January 28, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on June 26, 1981, by California Teamsters Public, Professional & Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, herein called the Union, and duly served on University of Southern California, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on July 24, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 22, 1981, following a Board election in Case 31–RC–4721, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about June 10, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On August 3, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 14, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 24, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its opposition to the Motion for Summary Judgment, as in its answer to the complaint, Respondent contends that it is not obligated to bargain with the Union because the certification issued to the Union in Case 31–RC–4721 is invalid by reason that the Board erroneously denied Respondent's request to set aside the election and order a new election. The General Counsel submits that Respondent's contention should be discounted as an attempt to relitigate issues which were or could have been disposed of by the Board in the prior representation proceeding. We agree.

A review of the entire record, including that in Case 31–RC–4721, reveals that on April 16, 1980, the Regional Director for Region 31 approved a Stipulation for Certification Upon Consent Election executed by the Union and Respondent. Pursuant to this, a secret-ballot election was held on June 6, 1980, which resulted in a tally of 20 votes for, and 19 against, the Union, with 1 determinative challenged ballot. Following the election, the parties signed an agreement stipulating that the employee who had cast the challenged ballot was ineligible to vote. In view of this agreement, the parties received a corrected tally of ballots.

On June 13, 1980, Respondent, by letter, filed with the Regional Director six timely objections to conduct affecting the results of the election. The Regional Director issued his Report on Objections on July 31, 1980, recommending that all six objections be overruled without a hearing. Thereafter, Respondent filed timely exceptions to the Regional Director's recommendations regarding its Objections 1 through 5.

On October 21, 1980, the Board issued its Decision and Direction, which adopted the Regional Director's findings and recommendations, except that it remanded for hearing the issues raised by Respondent's Objection 5. On November 6, 1980, Respondent filed an untimely motion for reconsideration of the Board's Decision. On November 7, 1980, the Board denied Respondent's motion as untimely.[2]

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[1] Official notice is taken of the record in the representation proceeding, Case 31–RC–4721, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] In our Decision and Direction, issued on October 21, 1980, we stated:

Continued

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On November 14, 1980, the Regional Director issued a notice of hearing on objection. Thereafter, a hearing regarding Respondent's Objection 5 was held on December 10 and 11, 1980. On February 26, 1981, the Hearing Officer issued a report, recommending that Respondent's objection be overruled and that a certification of representative be issued. The Hearing Officer's findings and recommendations were adopted by the Board on May 22, 1981, when it issued its Decision and Certification of Representative, certifying the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

Thereafter, the Union, by letter dated May 26, 1981, requested that Respondent meet and confer with it for the purposes of collective bargaining. Respondent, by letter dated June 10, 1981, acknowledged receipt of the Union's letter and stated it refused to recognize and bargain collectively with the Union because it considered the Union's certification to be invalid.

In its answer, and in its response to the Notice To Show Cause, Respondent alleges four affirmative defenses. As a first affirmative defense, it alleges that the Regional Director, in his Report on Objections, improperly recommended that each of said objections be overruled and that a certification of representative be issued. As a second affirmative defense, Respondent alleges that the Board erroneously sustained the Regional Director's recommendations as to Objections 2, 3, and 4 and that it erroneously failed to respond to Respondent's exception to the Regional Director's recommendation that Objection 1 be overruled. As a third affirmative defense, Respondent alleges that the Hearing Officer, in her Report on Objections and Recommendations, improperly recommended that Respondent's Objection 5 be overruled and that a certification of representative be issued to the Union. As a fourth affirmative defense, Respondent alleges that the Board erroneously adopted the Hearing Officer's findings and recommendations and improperly issued a certification of representative to the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a California corporation, maintaining its principal place of business in Los Angeles, California, where it is now and continuously has been engaged in the operation of a nonprofit university. Its annual gross revenues exceed $1 million. Annually, it purchases and receives goods or services valued in excess of $50,000 from sellers or suppliers located within the State of California, which sellers or suppliers receive such goods in substantially the same form directly from outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

California Teamsters Public, Professional and Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and recommendations, except that it finds that substantial issues of fact and law have been raised regarding the conduct described in Objection 5, which can best be resolved after a hearing.

Thus, we made it clear that Respondent's Objections 1 through 4 and 6 had been overruled. However, since we wanted to clarify our holding as to Objections 2, 3, and 4, we added a footnote that specifically addressed each of these.

Respondent's motion for reconsideration alleged that the Board failed to address its exception to the Regional Director's recommendation as to Objection 1. We denied this motion as untimely. However, even if it had been timely filed we would have denied it. Merely because we did not specifically address Objection 1 in a footnote does not mean that we failed to rule on it. In our Decision and Direction we considered Objection 1 and the Regional Director's disposition of it, and, after reviewing the record in light of the exceptions and brief, adopted his recommendation that it be overruled.

[3] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All parking lot attendants and utility attendants employed by Respondent at its University Park and Health Sciences campuses; excluding office clerical employees, janitors, guards, professional employees, all other employees and supervisors as defined in the Act, as amended.

2. The certification

On June 6, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 22, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about May 26, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 10, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since June 10, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. University of Southern California is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. California Teamsters Public, Professional & Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All parking lot attendants and utility attendants employed by Respondent at its University Park and Health Sciences campuses; excluding office clerical employees, janitors, guards, professional employees, all other employees and supervisors as defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 2, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective

bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 10, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, University of Southern California, Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with California Teamsters Public, Professional and Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All parking lot attendants and utility attendants employed by Respondent at its University Park and Health Sciences campuses; excluding office clerical employees, janitors, guards, professional employees, all other employees and supervisors as defined in the Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its University Park and Health Sciences campuses copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Repondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with California Teamsters Public, Professional & Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All parking lot attendants and utility attendants employed by us at our University Park

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and Health Sciences campuses; excluding office clerical employees, janitors, guards, professional employees, all other employees and supervisors as defined in the Act, as amended.

UNIVERSITY OF SOUTHERN CALIFORNIA

District #1, Pacific Coast District, Marine Engineers Beneficial Association *and* Cheryl S. Priest *and* Doris G. Hardesty. Cases 5-CA-11688 and 5-CA-11688-2

January 28, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 23, 1981, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions [2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, District #1, Pacific Coast District, Marine Engineers Beneficial Association, Washington, D.C., its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against our employees because they join, support, or engage in activities on behalf of a union seeking to represent our employees.

WE WILL NOT threaten to discharge or take other reprisals against our employees because they join, support, or engage in activities on behalf of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the National Labor Relations Act.

WE WILL offer Doris G. Hardesty and Theodore A. Kane, Jr., immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions and WE WILL make them whole for any loss of earnings and benefits they may have suffered by reason of their discharges, with interest.

DISTRICT #1, PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Washington, D.C., on June 16, 17, 18, and 19, 1980, upon a complaint in Case 5-CA-11688-2 issued on January 21, 1980 (based on a charge filed November 19, 1979), and a complaint in Case 5-CA-11688 issued on March 26, 1980 (based on charges filed on November 14, 1979, and December 28, 1979), consolidated by an order issued on May 23, 1980. The complaint alleges that the above-named Respondent (herein

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge's conclusion that the November 13, 1979, discharge of Doris Hardesty violated Sec. 8(a)(3), and we agree with his rejection of Respondent's argument that its president, Jesse Calhoon, had decided to discharge Doris Hardesty on November 6, 1979, before he learned of Hardesty's union activities, because Joseph Miller had told Calhoon he would no longer work with Hardesty. Contrary to the Administrative Law Judge, however, we find that the record is not fully developed on Miller's state of mind on November 6 regarding Hardesty's work and his alleged hope for its improvement. Nonetheless, we find that the record does establish that Miller did not tell Calhoon on November 6 that he thought Hardesty should be discharged, and that Miller did not write a memorandum recommending Hardesty's discharge until November 9.

[2] In affirming the conclusion that Respondent violated Sec. 8(a)(3) when it discharged Doris Hardesty, we do not rely on the Administrative Law Judge's statement that the pretextual nature of the reasons for Hardesty's discharge which Respondent presented during the course of this proceeding follows from a determination of Respondent's real motive for the discharge. Nor do we rely on his analysis of the test in cases involving allegedly discriminatory discharges which we established in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). However, we also do not interpret the Administrative Law Judge's statement concerning Respondent's real motive for Hardesty's discharge to mean that he did not fully analyze the record in this proceeding. Rather, we find that the record as a whole supports the Administrative Law Judge's factual findings and his conclusion that Hardesty was unlawfully discharged, particularly in view of Respondent's direct statements to her when she was discharged concerning her attempts to organize Respondent's employees, and the absence of prior complaints to her about her work.

Member Jenkins would find any application of the burden of proof and sufficiency of rebuttal test set forth in *Wright Line, a Division of Wright Line, Inc., supra*, unnecessary in this case because the reasons set forth by Respondent for Hardesty's discharge have been found to be pretextual. Also, Member Jenkins notes that he would award interest on any backpay owed on the basis of his position set out in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

259 NLRB No. 169

MEBA) violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (herein the Act), by discharging Doris G. Hardesty and Theodore A. Kane, Jr., because of their activities on behalf of Office and Professional Employees International Union, Local No. 2 (herein OPEIU), and violated Section 8(a)(1) of the Act by questioning employees concerning activities on behalf of OPEIU, and by threatening employees with reprisals because of support of and assistance to that Union. The answers to the complaints deny commission of the unfair labor practices alleged.

Upon the entire record in this case, from observation of the witnesses and their demeanor, and after due consideration of the briefs filed by the General Counsel and Respondent,[1] I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

MEBA, an unincorporated association, which is a labor organization with offices in Washington, D.C., engaged in representing licensed marine engineers and other licensed marine officers in the maritime industry, during a recent annual period received dues payments from its members in the maritime industry in excess of $3 million and received at its offices in Washington, D.C., during this period products valued in excess of $2,000 from points outside the District of Columbia.

It is admitted, and I find, that MEBA is an employer as defined in Section 2(2) of the Act, engaged in commerce and operations affecting commerce as defined in Section 2(6) and (7) of the Act, and that OPEIU is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

As has been noted, the General Counsel asserts that MEBA, in addition to committing certain alleged violations of Section 8(a)(1) of the Act, discharged Doris Hardesty and Theodore Kane because of their activities on behalf of OPEIU. Respondent denies this and, in addition, contends that Hardesty and Kane were not employees protected by the Act, asserting that Hardesty should be classified as managerial, and Kane as a managerial trainee. Respondent further argues that, even if Hardesty may be considered as an employee under the Act, she was discharged because of her job performance. The General Counsel contests these contentions.

III. THE FACTS

The following findings of fact are based on a consideration of the record as a whole. No attempt has been made to note every apparent or nonapparent conflict in the evidence. Testimony in the record which is inconsistent with findings made herein is not credited on the basis of my evaluation of the reliability of the witnesses, and the entire record.

A. *MEBA Headquarters Organization*

MEBA's main office is in Washington, D.C., as has been noted. The office is headed by Jesse M. Calhoon, president of MEBA. His administrative assistant is William Devine. The MEBA vice president in this office is Leon Shapiro. MEBA controller is Francis A. Laurito, who also exercises some of the functions of a personnel director. Also employed in the Washington office until January 1979 was Fred Schamann, with the title of director of research and development, whose position will be considered in more detail hereinafter. Joseph S. Miller, who has no regular or assigned office space in the MEBA headquarters, has represented MEBA, as one of several clients, for many years as a lobbyist. He seems to report for the most part to Calhoon.

The headquarters staff seems very loosely structured. There appear to be no written tables of organization and no written job classifications containing specific job content. When an issue was raised as to the unequal application of MEBA job severance policy to two employees, MEBA was unable to find any written statement of that policy.[2]

B. *Kane's Alleged Managerial Status*

MEBA President Calhoon testified that Kane was employed with the expectation that after 3 years of training he would take over the functions then being performed by Fred Schamann, who then, as has been noted, bore the title of director of research and development. It thus becomes necessary to consider at the outset Schamann's qualifications and functions.

1. Fred Schamann

Schamann, beginning about the age of 17 (he was apparently about 49 at the time of the hearing), seems to have had extensive experience in the maritime industry. When Calhoon first became aware of him, Schamann was involved in a training program conducted by Admiral Rickover to prepare engineers for duty aboard nuclear-powered surface vessels. Though originally scheduled for a shorter period, this training eventually took 3 years. According to Calhoon, Schamann was very strong in mathematics and, in Calhoon's opinion, was practically a nuclear physicist when he completed this program.

About this time, Calhoon concluded that MEBA was in need of someone who could perform some complicated cost analyses (which Calhoon referred to as "creating an economic module") apparently then required in collective bargaining for MEBA contracts, a person who also could do research and analysis of the impact of new technological changes upon the maritime industry, and represent MEBA in dealing with certain international organizations.

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[1] On August 19, 1980, I received a request from counsel for MEBA for permission to file an attached reply to the General Counsel's brief. Thereafter, the General Counsel filed a motion to strike Respondent's request, which motion is itself a rebuttal to Respondent's requested reply brief. I have read all of these documents, and they contain nothing that I would not have derived from the record and the original briefs. I see no necessity to pass upon Respondent's request or the General Counsel's motion. In October, Respondent also called my attention to the Board's recent Decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[2] Although Calhoon insisted that MEBA is as rigidly structured as a Navy ship, Miller, who had represented MEBA for years, stated (with respect to his "loose direction" of Hardesty, considered hereinafter), "MEBA is very loosely structured, and very successfully so, I think."

Notwithstanding Schamann's qualifications, Calhoon states that he expected that it would take Schamann 3 additional years' training for the position and therefore hired Schamann as a management trainee. He had Schamann take courses in public speaking and international law. At the end of a 3-year period, Schamann assumed the newly created title of director of research and development. In addition to the tasks for which Schamann was specifically employed, or in conjunction with them, Calhoon emphasized in his testimony, Schamann also participated in collective bargaining for MEBA and its affiliates. Schamann received a salary of $54,000.

During the summer of 1978, Calhoon had reason to believe that Schamann would be leaving MEBA headquarters, probably in January 1979, to assume another post with the union, for which Calhoon had sponsored him, and about this time, Calhoon states he began looking for a replacement for Schamann.

2. Kane's qualifications

Calhoon became aware of Kane through a resume of Kane's qualifications that he received. This showed that Kane had attended high school in Indiana, worked as a patternmaker and equipment operator for a firm in Indiana, during which time he held various local union offices, including that of president of Local 10 of the Molders Union, that he had a degree in political science and speech communication from Indiana State University, and had successfully completed certain labor-oriented courses at the University of Wisconsin and in the vicinity of Washington, D.C. In 1977, Kane became employed as a legislative intern with the AFL-CIO in Washington. Thereafter, though not shown on the resume, Kane was temporarily employed by AFSCME, AFL-CIO, in Washington.

In addition, as known to Calhoon as a result of the interview discussed below, Kane had also participated in the negotiation of one collective-bargaining agreement while an officer of the Molders Local and had some limited experience with an organizing campaign. Kane had no prior experience with ships or the maritime industry.

3. The interview with Calhoon

Calhoon states that, in the course of seeking a replacement for Schamann, he interviewed Kane, among others.[3] Calhoon further testified that at this interview he went through "the entire litany of what the Research and Development Director was" and "what the training program would be," asserting that he told Kane that the training program would be approximately 3 years (or in excess of 3 years), initially under Schamann, who would instruct Kane in the construction and operation of economic modules and the costing out of contracts, that at this meeting he discussed Kane's deficiency in mathematics and asserts that evaluation of Kane's performance in negotiations of economic modules with management in 1980 for the 1981 negotiations of the offshore contracts would be critical to his retention on the job. Calhoon further states that he told Kane that "I would be using him as a troubleshooter, and in small negotiations, he would be representing the Union in the negotiations . . . and . . . if he could accomplish the mathematical parts, then I would put him in training in the international arena, and this would still be training under Fred Schamann [who] would stay with him until he was capable . . . to take over representation of MEBA in the international area."[4]

Kane testified that during this interview Calhoon did not specify what his duties would be, but advised that he would act as an aide to Calhoon, and do whatever he assigned, that they talked about Kane's union background and experience, his knowledge of organizing and participation in collective bargaining. In the course of discussing collective bargaining, Kane believes that his lack of proficiency in math came up, and that Calhoon may have told him that he would need specific training before he could cost out contracts on his own, and may well have said that costing out contracts was a most important aspect in the negotiation of MEBA contracts. However, Kane denied that he ever received any instructions with regard to any training program for management employees that MEBA had or that he was ever advised that he was being placed in any kind of training program.[5] Kane recalled no conversation during this interview about the job of director of research and development or Fred Schamann, though after he was employed, he was told to learn some of the things that Schamann was doing.[6]

To the extent material to this case, I am convinced that Kane's recollection of this interview is more reliable than Calhoon's. Certainly Kane's actual experience was that of an aide doing whatever Calhoon needed to be done, and Kane's asserted training appears to have been more casual and haphazard than organized or formal. Though Calhoon seems to assert that he expected Kane's indoctrination to be largely under the tutelage of Schamann, it is clear that Calhoon could not have anticipated that Schamann would be able to work closely with Kane for more than about 4 or 4-1/2 months out of the 3 years Calhoon asserted Kane would be in training, for Schamann was expected to leave in January 1979. As it turned out, because Calhoon assigned Kane to a project in Florida (discussed hereinafter) which took from November 1978 to July 1979, Kane and Schamann were in the same office together for only about 2 months. Though Calhoon asserts that he considered sending Kane to a school to improve his math, this was not done.

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[3] Respondent asserts that there were two interviews with Kane, the first being aborted when it was discovered that Kane then had a job with another AFL-CIO union, and a second, substantive interview occurring later. Kane referred to only one interview, occurring about a week and a half before he was hired on September 18, 1978. I am satisfied that this is the same occasion which Respondent contends was the second interview.

[4] After Kane was hired, Calhoon told Kane that he had decided to assign certain duties formerly taken care of by Schamann in "the international area" to another agent. There is no evidence of any other discussion of this function with Kane or of any effort to train Kane for this function.

[5] After he was employed, Kane was given a desk between two secretaries in the hall outside Schamann's office and was told by Calhoon's administrative aide, William Devine, that he was "to train under" Schamann during the time the latter remained in Washington.

[6] Kane recalled that in talking to Calhoon about Schamann at a congressional reception, in late October, Calhoon said that he expected some "things out of [Kane]: One was to become an economist, be able to run a union meeting and possibly handle preparations for negotiations." Kane states that he "hoped" to be promoted to Schamann's position after Schamann left.

4. Kane's employment

Kane was hired on September 18, 1978, at a salary of $22,500. He was first assigned to work with Schamann, who gave him certain bargaining agreements to compute labor cost analyses, Schamann correcting the errors that Kane made in these exercises. Also at Schamann's direction, Kane contacted other maritime unions and management to secure bargaining contracts. Kane took wage tables from these contracts and assembled them for Schamann's use. Kane also did some contract analyses.

In November 1978, Calhoon requested Kane to go to Florida to assist an affiliate of MEBA, Florida Association of Professional Employees (herein FAPE), in collective bargaining with the Boeing Company.[7] He was told to report to Calhoon weekly and whenever he returned to Washington. Kane was given a first class air ticket to travel to Florida. Controller Laurito says this is a management privilege at MEBA.[8] At first, Laurito gave Kane travel advances for his trips to Florida, but in late January or early February 1979, as this assignment continued, assigned Kane a credit card, instead of cash advances, another management privilege, according to Laurito. Kane regularly turned in expense reports. At Devine's suggestion, Kane also began turning in certain authorization forms, showing his projected travel and purpose, for Calhoon's advance approval.

Kane successfully negotiated a bargaining agreement for FAPE, which that organization approved and signed. During the course of this activity, another union sought to raid FAPE. Calhoon suggested the assistance of an attorney. Kane suggested that FAPE file a petition with the National Labor Relations Board and appeared on its behalf at a Board proceeding. Kane assisted FAPE during the election campaign which FAPE won. Kane apparently assisted FAPE in securing a contract for these employees.[9] Calhoon expressed himself as pleased with Kane's performance.

During this period, after Schamann left, Kane was moved from his desk in the hall into Schamann's office, which was one of the largest on the floor, and given the title which Schamann had held. His salary, however, remained the same.

In the early summer of 1979, Calhoon requested Kane to investigate a member's inquiry concerning a certain chemical being used in boiler water aboard ships. Kane checked with congressional offices, Government agencies concerned with health and safety, and the Library of Congress concerning the questioned chemical and he visited some ships. He concluded that the substance was very dangerous and wrote an article on the subject which was published in the MEBA house organ.

At the request of an executive vice president of MEBA, Kane researched and did a comparison of two ships for a hearing in which the vice president was to participate.

Before his retirement, MEBA Agent Winstock, whose office was in New York, negotiated Government contracts and handled grievances under the Government contracts from their inception to the national level. It was decided after his retirement to have those grievances handled by local agents to the district level and by headquarters personnel from that point to the national level. Kane was advised that he was expected eventually to take care of the Government contracts, including participation in the negotiating of those contracts and processing grievances under the Government contracts from the district level. Pursuant to these instructions, Kane began to establish a liaison with the Army Corps of Engineers and others who represented the Government, as well as local MEBA agents handling these grievances. Devine referred two grievances under the Government contracts to Kane. He investigated them and contacted the two grievants, each of whom decided to drop his grievance, which Kane reported to Devine. Kane handled no other grievances.

In October 1979, Kane was instructed to attend a meeting of trustees of the MEBA pension plan in the expectation that this would assist him in his duties in connection with the negotiation of the MEBA offshore agreement. He attended, but did not participate.

During the period of his employment, Kane did not attend any meetings (except possibly the trustees' meeting mentioned above) which were devoted to discussion of MEBA policies and did not make any contribution affecting any such policies so far as the record shows.

Kane was discharged on November 9, 1979, under circumstances discussed hereinafter.

C. *Hardesty's Employment and Alleged Status*

Doris Hardesty and MEBA President Calhoon had known one another for several years prior to 1978, when Calhoon assisted Hardesty in securing employment with the Joint Maritime Congress, where she received a salary of $35,000 for work as a legislative representative. Hardesty was not happy with her assignment at the Joint Maritime Congress, desiring to work more with political matters, and apparently the executive director of that organization, David Leff, was not satisfied with her work. When Hardesty approached Calhoon in August 1979[10] for employment with MEBA, according to Leff, he told Calhoon that Hardesty was an unsatisfactory employee who would not follow orders and was trying to organize employees of the Joint Maritime Congress and MEBA. Leff says that Calhoon replied that perhaps Hardesty needed a firmer hand than she was receiving at the Joint Maritime Congress.

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[7] Another MEBA agent, Bernie Winstock, apparently located in the New York office, had been assigned to service FAPE, and also to handle matters concerning bargaining agreements between MEBA and certain Federal Government agencies (referred to as Government contracts). Winstock had recently retired.

[8] Kane refers to the fact that MEBA members travel first class. I am aware of maritime contracts that provide that, when crewmembers are paid off their ship away from home, they must be given first class air fare to their home port.

[9] In the course of this campaign, Kane prepared written material for FAPE (one pamphlet printed at MEBA expense with Calhoon's approval), and on occasion took members to dinner, the cost of which was paid in some instances by FAPE, in other instances by MEBA.

[10] All dates hereinafter are in 1979, unless otherwise noted.

At the time Hardesty was employed by Calhoon in late August, at the same salary which she had received at the Joint Maritime Congress, MEBA transferred a legislative representative (lobbyist) on its staff to the Joint Maritime Congress. According to Hardesty, whose testimony I credit, when Calhoon hired her, she was told that her work with MEBA would encompass (1) legislative activity, "which meant attending hearings before congressional committees on maritime matters, analyzing proposed legislation that would affect [the union], preparing fact sheets on such legislation, and I was working on testimony for Mr. Calhoon on a maritime matter when I was fired"; (2) political issues, in which she "was to analyze the voting record of members of Congress . . . related to maritime affairs, to try to keep a handle on what was happening in the presidential primary . . . and report to Mr. Calhoon on political matters . . . ."; (3) "also to work on development of coalition type relationships with other unions and public service organizations."[11] The only designation of her job to the public (as shown on her business cards) was "Headquarters Staff."

Shortly after Hardesty was hired, she was summoned to a meeting in Calhoon's office with the MEBA president and Joseph Miller, MEBA's professional lobbyist. Calhoon there informed her that, with respect to her duties as a legislative representative, she was to report to Miller and be under his direct supervision.[12] Calhoon explained that he thought she would be able to learn much from Miller. The record as a whole makes it clear that Miller quickly developed an antipathy to Hardesty, which she probably reciprocated, though it is indicated that she was hopeful that the relationship between them would improve. Their difficulty in communicating with one another was compounded by the fact that Miller visited MEBA headquarters infrequently and Hardesty had some difficulty in reaching him by telephone.

1. The daily worksheets

Within a few days after the meeting in Calhoon's office, Miller "suggested" to Hardesty that she begin to keep daily records of all of her activities, which he would like to see. Though originally admittedly a "suggestion," Miller, not having received any daily worksheets by September 11, sent Hardesty a memo asserting: "Now, I want it understood that this is an instruction. Henceforth, I will expect daily worksheets and would appreciate your written confirmation of this instruction." On the next day, September 12, Hardesty sent Miller a memo stating that the daily work records were being typed.

In the worksheets thereafter submitted to Miller (with copies to Calhoon) Hardesty included a number of purely personal activities, to which Miller strenuously objected.[13] However, it is noted that Miller, himself, in addition to verbally telling Hardesty to keep a "blow by blow" account of her daily activities, showed her examples of daily worksheets which he kept for his own purposes in which he dutifully recorded his own personal activities (e.g., breakfast with family; watching television)[14] in making day-to-day notations.

There is no question but that Hardesty thought that the requirement that she keep detailed daily records of her activities during the workday was frivolous and a waste of her time.[15] After submitting worksheets for the period from September 4 through 13, although Miller continued to insist on daily reports, Hardesty did not submit any further daily worksheets.

2. Hardesty's work

Hardesty performed several assignments in political areas directly for Calhoon,[16] in which Miller was not involved. One such project was a trip Hardesty made to Florida with Calhoon's approval to check on the activities of one of the candidates in the Presidential primary there. Calhoon told Hardesty that she should go, observe, "keep [her] mouth shut," and report back to him. Upon her return she was reimbursed by MEBA for her expenses.

Toward the end of her tenure with MEBA, Hardesty volunteered to draft testimony for Calhoon to give on legislation in which he was interested. Hardesty was working on this at the time she was discharged. Though Calhoon now complains that this assignment was not finished, it does not appear that he ever complained to Hardesty before she was discharged that this project had not been completed.

On legislative matters, Miller's instructions to Hardesty generally were to make and enlarge her contacts with the Congress, particularly with staff members who might be helpful in keeping her informed as to legislation important to MEBA, to attend hearings of committees involved with maritime matters, and generally to watch legislation of interest to MEBA. Miller also instructed Hardesty to watch certain specific legislation. The record contains several memos from Hardesty to Miller concerning these matters and other items that Hardesty thought were of significance.[17]

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[11] Though Calhoon indicated that Hardesty was hired only as a lobbyist, it is clear that Hardesty did, in fact, perform in broader areas. Indeed, it would be somewhat surprising that Calhoon would have "swapped" a lobbyist already employed unless he expected Hardesty could provide a broader range of services.

[12] I do not credit the testimony, particularly that of Miller, that Miller was to supervise Hardesty's activities other than in the legislative area.

[13] Examples of these include Hardesty's activities during the day on behalf of her children, household problems, the time at which she made coffee in the office, took a short walk, and took a train home at the end of the day.

[14] When faced with this, Miller sought to explain these personal notations away as occurring only on weekends, asserting that such notations do not appear during the regular workweek. The record shows otherwise. I was not impressed with Miller's candor as a witness and do not credit his testimony except as consistent with findings made herein.

[15] In a memo, to Hardesty, dated September 17, Miller not only objected to the personal references in the daily worksheets she submitted, but also advised that he wanted more detail, e.g., not only who she talked to, but what they talked about.

[16] Calhoon sought to disassociate himself from what Hardesty accomplished, on the basis that these matters were not assigned, but matters for which Hardesty volunteered. Calhoon says that he now "sees" that Hardesty only performed tasks for which she volunteered. However, the record is convincing that Calhoon either approved, or did not object to, the projects for which Hardesty assertedly volunteered. Lastly, I find no assignment made by Calhoon—for which Hardesty did not volunteer—which Hardesty did not perform. There is no showing that Calhoon criticized Hardesty for any such asserted failure.

One specific assignment made by Miller is of particular significance. About the same time that Miller suggested to Hardesty that she keep daily records of her activities, she was also assigned to a task which may be referred to as the Kings Point project. This involved a series of articles recently published by The Philadelphia Inquirer critical of the Kings Point Merchant Marine Academy. These articles tended to support a position espoused by MEBA President Calhoon, which position had been undermined by other reports in a television investigative news series. Miller and Calhoon agreed that it would be advisable to have the Inquirer articles inserted in the Congressional Record by a member of Congress who agreed with Calhoon's position. Hardesty was to draft introductory material to be used by the member of Congress, referred to as "lead-ins."

On September 11, the same day Miller sent Hardesty the memo instructing her to submit daily worksheets, he sent her a second memo, stating that "nothing, to my knowledge, has been done on [the Kings Point project]," which he asserts Hardesty was informed was "a first priority project." Miller instructed, "Please report immediately to me, in writing, as to your progress." On September 12, Hardesty replied that she was working on the Kings Point project. On September 17, in the same memo in which Miller criticized Hardesty's worksheets, he also sharply noted that the worksheets did not indicate that she was working on the Kings Point project. (In her testimony Hardesty indicated that some of the congressional contacts shown on the worksheets related to this project.) Attached to a memo dated September 14, Hardesty submitted to Miller and Calhoon her "preliminary drafts" of the Kings Point lead-ins.[18]

3. Miller's complaints to Calhoon

Miller testified that he considered Hardesty's failure to submit proper daily worksheets "appalling" insubordination. On November 6, at a luncheon with Calhoon, Miller asserts that he told Calhoon that Hardesty's "performance" had been "thoroughly unsatisfactory so far as I was concerned; that I felt completely unable to reach Mrs. Hardesty and communicate with her and that she had by this time indicated no willingness whatever to work under my supervision." Miller says that Calhoon replied, "that's been her M.O. in everything she's been involved with, ever since she's been in town, and I guess we've failed, too."[19] Of some significance, as noted hereinafter, Calhoon did not ask Miller at this time to put his recommendation as to Hardesty in writing, until, as Miller put it, "after our luncheon and Mr. Calhoon had had some time to think on it."[20]

During this luncheon, Calhoon contends Miller took the position that Calhoon had to get rid of Hardesty or get rid of him. Miller, however, stated that he was still, at that time, willing "to give her all the benefit of the doubt . . . something might happen . . . that she might be salvageable. Because . . . I fervently hoped that she'd turn out well . . . ."

Nothing further seems to have occurred with respect to Hardesty until November 9, the day that Calhoon discovered that Kane and Hardesty were attempting to secure authorization cards for union representation from staff employees, as discussed hereinafter. Miller asserts that during a conversation with Calhoon, during the morning of November 9, "the matter of Mrs. Hardesty was discussed . . . . It was a rather cryptic conversation, as I recall that I suggested to Mr. Calhoon that I would give him a memorandum on the subject, and he thought—he told me to go ahead with it."[21] That afternoon Miller went to the MEBA office where he dictated a memo recommending Hardesty's discharge, as discussed hereinafter.

D. *The Discharges*

1. The attempt to organize MEBA employees

A clerical in the MEBA office, Cheryl Priest, was assigned to act as secretary for both Hardesty and Kane. On November 8, Hardesty discovered that Priest had been discharged by Laurito, without consultation with her or, apparently, Kane. She sought to protest on Priest's behalf to Calhoon and Laurito, without success. A number of the clerical employees spoke to Hardesty about the distress and anxiety that Priest's discharge was causing the clericals. When the clericals began talking about unionization, Hardesty suggested that they meet after office hours at a nearby place. Hardesty secured authorization cards from the AFL–CIO and, at the meeting that evening, clericals signed cards authorizing the AFL–CIO, or a designated affiliated union, to represent them (apparently Hardesty expected this to be OPEIU). Kane and Hardesty signed authorizations also.

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[17] In the course of her activities, Hardesty took various persons to lunch at restaurants in Washington. She was reimbursed by MEBA for these expenses. Hardesty understood that it was part of her duties to promote the legislative goals and policies set by MEBA officers, in her contacts with "people on the Hill."

[18] Miller testified that Hardesty did not complete any assignments that he gave her. However, none of these deficiencies are specifically referred to, except the Kings Point project. So far as the record shows this is the only assignment of which Miller complained to Hardesty (unless the worksheets be considered an assignment). Miller admittedly received the Kings Point work submitted by Hardesty, but now says it was unsatisfactory. However, this was never communicated to Hardesty before she was discharged.

[19] On cross-examination, Miller volunteered that, in mid-October, he had made a similar complaint to Calhoon, stating at that time that he "had to wash his hands of her because I could get no responses from her." Calhoon indicated receiving several such complaints from Miller.

[20] At another place, Miller indicated that, in his experience with Calhoon, there is a "gestating period" after "Calhoon is informed . . . of things." Calhoon's testimony, however, tended to indicate that he asked Miller at this luncheon to write such a memo, e.g., "when I met with Miller and he told me he'll no longer supervise her, he'll no longer take responsibilities and I said put it in writing . . . ." On the basis of the record, as a whole, I credit Miller in this instance.

[21] It is noted that this telephone call was not noted on Miller's daily worksheet for that date, notwithstanding the care with which Miller indicated that he prepared these documents. In this case Miller asserted that he did not record short telephone calls.

The next day, November 9, Hardesty and Kane went into the office of Victor Rollo, editor of the MEBA house organ, about noontime.[22] They asked if Rollo would support an outside union as bargaining representative. Hardesty asked if Rollo would sign an authorization card, which made Rollo quite nervous and upset. He refused to support the idea of a union or sign a card, stating that "You don't know them like I do." Rollo refused to go to lunch with Kane and Hardesty.

2. Kane's discharge

Apparently immediately after Kane and Hardesty left his office, Rollo went to see Calhoon. According to the MEBA president (Rollo did not testify), Rollo, a man in his 60's, was trembling and "visibly shaken." Calhoon asserts that Rollo complained that he could not "work under this pressure"; that Kane and Hardesty had come to his office "and closed the door, and told me to sign some union card and that they had checked with you and this was your wishes." Calhoon states that, after assuring Rollo that his job was not in jeopardy, he sent Rollo home to calm his nerves.

When Kane returned from lunch, he was called into Calhoon's office, where the latter said, according to Kane, "I understand you were in Mr. Rollo's office this morning and asked him to join a union. Is that true?" Kane replied, "No. I didn't ask him to join a union. I asked him if he might support one, or thought it was a good idea." Calhoon then told Kane, "Pick up your check, you're through." Kane left.

Calhoon, on his part, asserts that he discharged Kane for two reasons: First because he solicited Rollo to join a union, which Calhoon did not think proper in Kane's asserted management position, and, secondly, because Kane had intimidated Rollo. When asked how he thought Rollo had been intimidated, Calhoon responded that the intimidation occurred because Kane closed Rollo's office door, not because Rollo was asked to sign a union card. I cannot credit this. The two men had been employed in the same office over a year. There is no evidence of animosity between them, or any threat of force on this occasion or any prior occasion. I do not believe that the mere closure of the door, if in fact it was closed, and not the message in the conversation threw Rollo into a panic. I find it difficult to credit that Calhoon thought so.[23]

3. Hardesty's discharge

Shortly after Kane and Hardesty returned from lunch on November 9, Hardesty called Kane to suggest that they go to see Calhoon to seek recognition for the AFL–CIO, or its designated union, as the representative of the MEBA headquarters staff employees. Kane said that it was too late, that he had already been discharged. Hardesty left to avoid a confrontation with Calhoon that afternoon.

That afternoon, as previously noted, Miller went to the MEBA office where he dictated a memorandum to Calhoon recommending Hardesty's discharge, stating, in pertinent part, as follows:

> On August 30, 1979, you instructed Doris Hardesty that she would be under my supervision in her new post with MEBA.
>
> Shortly thereafter, I requested to Mrs. Hardesty that she undertake certain assignments. To this date she has yet to complete the first one.
>
> I then requested that she provide me with daily work sheets, a practice which I have followed for many years. I felt that these work sheets would be necessary for me in order to evaluate her performance and to assist her in her new duties.
>
> Except for 3 or 4 work sheets, in which she attempted to poke fun at the idea, she has refused to comply with my instructions.
>
> I have admonished her in person and in writing on several occasions but, to no avail. (See attached memoranda)
>
> Since then, I have had no contact with Mrs. Hardesty, nor do I have any idea of what her activities have been on behalf of this organization.

The attached memoranda are those Miller sent Hardesty with respect to the Kings Point project and in regard to Miller's instruction that she keep daily worksheets, the last memo dated September 21.

Hardesty and Calhoon next met on November 13, during a recess in a meeting Calhoon was attending. According to Hardesty's testimony (the following is a synthesis of her testimony on direct and cross-examination), she asked to talk to Calhoon privately to tell him her side of the story, that Calhoon accused her "of trying to organize," asserting that he had told her "not to get involved in this union activity. You can't be part of it anyway. It's none of your business to be involved with the other employees." Hardesty asserts that the conversation turned to the unfavorable conditions of work at MEBA, the concerns of the secretaries, and the fact that, when her secretary was fired summarily, she felt it was her business to become involved, because "there was no reason that it could not happen to the rest of us." Hardesty asserted that there was precedent for a clerical and professional unit. She further told Calhoon that she had done nothing that was not in his best interests.

Apparently at this point in the conversation, Calhoon asked why Hardesty was having difficulty getting along with Miller, and asked why she had never turned in the lead-ins for the Kings Point project. Hardesty replied that she had submitted the lead-ins to Miller, and that the problems she and Miller had, one with the other, could be solved and that Miller's hostility towards her could be eliminated if she did her work "and didn't cross him," and this could be accomplished without bothering Calhoon or Shapiro.[24]

Calhoon told Hardesty, according to her account, "Well, you know that if there was a union, people with only a year or so or only a few months to go on their pension, due to gain their pension benefits, would lose their benefits." Hardesty protested that would not be legal, that he could not take the employees' pension benefits away from them, to which Calhoon responded that he would do so.

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[22] Rollo is admittedly an employee under the Act.

[23] Calhoon states that he did not believe Hardesty intimidated Rollo on this occasion.

[24] Hardesty recalled that Calhoon said that Miller had not been critical of her.

Hardesty testified that she had read Calhoon's testimony that "when Marine Engineers get old or maimed, he does not allow them to be thrown on the garbage heap as long as they can do their jobs. And I suggested that that situation also applied to us. That we couldn't allow Cheryl Priest to be thrown on the garbage heap."

At this point, Hardesty recalls, Calhoon said, "Well, you've made your choice. No gal is going to get in the way of my priorities. You either quit or be fired." Hardesty denied that Calhoon said that Miller's evaluation of her work, or Miller's memorandum, had anything to do with her termination.

Calhoon's version of this conversation (which undoubtedly lasted about half an hour) is considerably briefer. According to MEBA President Calhoon, he received "a quite lengthy speech on the evils of M.E.B.A., how terrible it was. The personnel was demoralized, it wasn't progressing . . . and when the speech was over, I said, 'Doris, Joe Miller has given me a memorandum saying' . . . that she cannot work for him and . . . recommends that I ask for her resignation. I get another speech and some discussion back and forth at that point, and I said, 'Doris, you've got a choice, submit your resignation or be fired' . . . and I said, 'Doris, that's it.'"

Hardesty picked up her check and her belongings at the MEBA office the next day.

Inasmuch as this conversation may be critical to the resolution of the issue of Hardesty's discharge, I have given it close consideration. Three things become particularly apparent: While Hardesty's account of the conversation is specific and detailed, Calhoon's, for the most part, is generalized and nonspecific; both agree that Hardesty's poor relationship with Miller was discussed, Calhoon placing more emphasis on this, Hardesty less; and lastly, and most importantly, Hardesty's version shows that her union organizing efforts, and their likely consequences, were predominant in the conversation, which Calhoon does not mention in his version of the conversation, but also, significantly, he does not deny.

Upon consideration of all of the factors, including the relative credibility of the witnesses, I credit Hardesty's account of the conversation.[25]

IV. ANALYSIS AND CONCLUSIONS

A. *The Managerial Status of Hardesty and Kane*

It is now settled that "managerial" personnel, although not specifically excluded from the protection of the Act, are by past practice and judicial interpretation not covered by the statute. See *N.L.R.B.* v. *Bell Aerospace Company, etc.*, 416 U.S. 267 (1974); *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672 (1980). In *Bell Aerospace*, the Court noted that, in enacting the Taft-Hartley Act, amending the National Labor Relations Act, Congress did not specifically exclude managerial personnel from the Act because they assumed such personnel to be "*executives and are excluded from the Act in any event*." 416 U.S. at 283.[26]

However, it is not always simple to determine which individuals fall within this group of excluded managerial executives. In *Yeshiva University*, the Court defined the group as follows:

> Managerial employees are defined as those who "'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" *N.L.R.B.* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 288 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323, fn. 4 (1947)). These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." 416 U.S. at 283. Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. See *id.* at 286–287 (citing cases). Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. [444 U.S. at 682–683.]

To this may be added the Court's admonition in *Bell Aerospace*, "Of course, the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are 'managerial' must be answered in terms of the employees' *actual* job responsibilities, authority, and relationship to management." (416 U.S. at 290, fn. 19. Emphasis supplied.)

1. Doris G. Hardesty

Upon consideration of all the factors presented, I find that Hardesty was not a managerial employee as defined by the courts and the Board and is an employee within the protection of the Act. Indeed, it is difficult to conceive an organization in which the secretary to a true executive would be fired by the office manager without notice to or consultation with such alleged executive; or in which such claimed executive could get so little satisfaction when she protested such action; or in which such asserted executive would be placed under the direct supervision of a private contractor lobbyist, and, according to Respondent MEBA, be finally discharged because she refused to keep a daily, detailed log of her work activities to suit the instruction of the independent contractor-lobbyist, all of which occurred to Hardesty. In fact, such instruction implies a demeaning constraint quite incompatible with the status of executive.

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[25] Hardesty's assertion that Calhoon said that Miller had not been critical of her was not sufficiently developed. This may have occurred in several different contexts. Hardesty admits that Calhoon was aware that Miller and she were having difficulty with one another. I am inclined to believe that the discussion of this relationship lay somewhere between the two versions.

[26] The Court, 416 U.S. at 284, quoted from the court of appeals decision in *Bell Aerospace*: "Congress failed to enact that portion of [the] *Packard* dissent relating to . . . *executives*, not because it disagreed but because it deemed this . . . unnecessary." (Emphasis supplied.) The Court further noted, *Id.* at 284, fn. 13, "Moreover, it cannot be denied that Congress thought that 'executives' were excluded from the Act for the House Report so stated in express terms."

A major activity of Hardesty was to keep advised of legislation and congressional action which might affect MEBA, for the purpose of keeping Miller and MEBA President Calhoon informed. In the course of performing this function, Hardesty made contacts with congressional staff and others, occasionally taking some of these persons to lunch at MEBA expense. Hardesty understood that, insofar as possible, it was part of her function, under Miller's direction, to promote MEBA's legislative policies, and she attempted to do so.

In addition to memoranda to Miller and Calhoon on legislative matters, Hardesty made a number of suggestions to Calhoon for action by MEBA, such as that she be permitted to travel to Florida to observe a Presidential candidate's campaign in the primary (this was granted on the condition that she "keep her mouth shut"; while there she was reimbursed for her expenses), and that MEBA sponsor a luncheon for a particular congressman (Calhoon agreed because he favored the congressman). Many of her suggestions were disapproved or ignored. Calhoon's testimony was to the effect that, for the most part, he did not find her suggestions useful.

In addition, Hardesty was one of MEBA's representatives to the meetings of AFL-CIO Committee on Political Education (COPE), in which she seems to have acted as an observer.

Respondent argues in its brief that Hardesty's activities were those of a lobbyist, and as such she was engaged in promoting MEBA's legislative goals, that she represented MEBA to the public, was reimbursed for expenses, and was not closely supervised; further, that she could recommend policy actions (such as the luncheon for a congressman), and if she did not have authority to decide policy, she had authority to decide how to implement it. Respondent cites several precedents, mostly in an industrial context, as supporting its argument that one or more of these factors imply managerial status. These have been duly considered. However, other cases, more closely analogous, in a labor union context, indicate the contrary.

Thus the Board has held that because union staff personnel engage in political activities, including assignments to attend meetings of COPE,[27] or represent the union to the public,[28] or incur expenses or pledge the union's credit in the ordinary course of staff duties,[29] or make recommendations which may influence the union's policy or business decisions,[30] this does not necessarily indicate that such personnel are managerial employees. Nor does the fact that the staff employee performs his functions without close supervision, and thus may exercise discretion in carrying out his work, brand the employee an executive type.[31]

While Hardesty sought, admittedly, to promote MEBA policy in her daily activity, there is no evidence that she did so "by taking or recommending discretionary actions that effectively control or implement employer policy." Nor does the record indicate that Hardesty's activities—mainly involved with information gathering—involved formulation and effectuating MEBA policies (it is noted that the rule is stated in the conjunctive—both must be shown), or that she exercised "discretion within or even independently of established employer policy," as stated by the Court in *Yeshiva University*.

Lastly, Respondent argues that Hardesty's large salary and the fact that she had a large office and a secretary (which she shared with Kane) mark her as managerial. The fact that Hardesty had an office and a part-time secretary (over whose employment she had little or no control) is quite compatible with a nonmanagerial status. Her large salary, in a more structured or hierarchical organization, would be more persuasive, if combined with other factors indicating executive position. However, these factors do not exist here.

2. Theodore A. Kane

Respondent contends that Kane at the time of his discharge was a management trainee, in training for the position of director of research and development. In reliance on the Board's Decision in *Curtis Industries, Division of Curtis Noll Corporation*, 218 NLRB 1447 (1975), Respondent argues that Kane must be treated as occupying managerial status, not protected by the Act.

This adds an additional difficulty to the formidable problems otherwise presented in merely determining whether Kane falls within the guidelines set up by the court for managerial status. That determination, as the Court stated in *Bell Aerospace*, is to be determined "in terms of the employees' *actual* job responsibilities, authority and relationship to management." (Emphasis supplied.) This additional concept requires inquiry also into whether the position for which Kane was allegedly hired, and for which he was assertedly being trained, was itself a managerial position; also whether Kane was, in fact, being trained for that position within the meaning of *Curtis Industries*, and whether Kane had any reasonable expectation at the time he was discharged of succeeding to the alleged managerial functions associated with that position.

Clearly Kane's actual job responsibilities, authority, and relationship to the Union during his employment with MEBA do not mark him as managerial within the

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[27] See, e.g., *Retail Clerks International Association, AFL-CIO*, 153 NLRB 204, 215 (1965).

[28] See *American Federation of Labor and Congress of Industrial Organizations*, 120 NLRB 969 (1958); *Retail Store Employees Union, Local 880, etc.*, 153 NLRB 255, 257-258 (1965).

[29] See *American Federation of Labor and Congress of Industrial Organizations, supra; Retail Store Employees Union, Local 880, supra* at 257; *Grand Lodge International Association of Machinists and Aerospace Workers, AFL-CIO*, 159 NLRB 137, 138 (1966) (file expense reports). Cf. *Brotherhood of Locomotive Firemen and Enginemen*, 145 NLRB 1521, 1535-36 (1964) (supply clerk held managerial, who may pledge the union's credit annually for $60,000 to $100,000 for supplies for an administrative office serving 75,000 members; can thus "significantly pledge an employer's credit.")

[30] See *Retail Store Employees Union, Local 428, AFL-CIO*, 163 NLRB 431, 438 (1967); *American Federation of Labor and Congress of Industrial Organizations, supra.*

[31] *American Federation of Labor and Congress of Industrial Organizations, supra; Retail Store Employees Union, Local 880, supra.*

Board and court precedents. The majority of his time was spent in collective bargaining, advising and assisting a local affiliate of MEBA, including participation before the Board on behalf of that affiliate, preparing to engage in collective bargaining on behalf of MEBA itself, processing grievances and engaging in some research projects, and incurring routine expenses in connection therewith. Kane further seems to have been involved in working with a local representative in sharing responsibility for processing certain grievances under MEBA Government contracts, in accordance with a policy decision made by the MEBA executive board. Kane also attended one meeting of the board of trustees of the MEBA pension plan, as an observer, to assist him in preparing for participating in bargaining for certain MEBA contracts. However, Kane did not actually participate or engage in such bargaining.

The Board has consistently held that the exercise of such functions as collective bargaining, processing grievances, assisting local labor organizations, and participating in Board proceedings on behalf of such organizations by union staff personnel is not managerial. *Grand Lodge, IAM, supra; Retail Clerks International Association, supra; Retail Store Employees Union, Local 880, supra; American Federation of Labor and Congress of Industrial Organizations, supra*. Indeed, I do not understand MEBA to claim that Kane's actual responsibilities and duties while employed by MEBA were managerial as defined by the Board and the court. Rather, the contention is that Kane was not within the protection of the Act because he was assertedly a trainee for a position that was allegedly managerial—that of director of research and development.

The position and title of MEBA director of research and development appear to have been created to fit the qualifications and abilities of its initial occupant, Fred Schamann. Schamann had a lifetime of experience with ships and the maritime industry, and apparently had exceptional mathematical ability and some years of intense technical training in the operation of nuclear-powered surface vessels. According to MEBA's brief, Schamann was "assigned the task of creating an economic module . . . to be used in computing total employment cost" in collective bargaining;" was personally responsible for negotiating an agreement on total employment costs" with employer bargaining groups; had the duty of "monitoring and evaluating the impact of rapid technological changes" in the maritime industry; and served as the MEBA representative to an international organization of free labor unions and as the MEBA advisor to the U.S. representative to a United Nations subsidiary. To assist in this latter function, MEBA had Schamann take courses in international law and public speaking. And finally, according to MEBA, Schamann was assigned, when needed, to assist MEBA affiliates and to negotiate collective-bargaining agreements for them. Schamann's salary was in excess of $50,000.

Kane, when employed, had no experience with ships or the maritime industry, though he had been an officer of a production local in Indiana, where he had some limited experience with organizing activities and collective bargaining. When MEBA President Calhoon employed Kane, he knew that Kane did not have the mathematical skills to perform the cost analyses which were a main function of Schamann.

Though Calhoon asserts that he hired Kane to train for 3 years to replace Schamann, it is clear that Calhoon had no systematic course of training in mind. Kane, who understood that he was being employed to assist Calhoon and do whatever was required, was under the tutelage of Schamann for a short time—about 2 months—during which time Schamann gave him exercises to do relative to costing out contracts.[32]

Thereafter, Kane was informed that he would not be doing work in the international arena which Schamann had been doing.

It is assumed for the purposes of this Decision that some or most of Schamann's functions were managerial (though an argument could be made that, on this record, there is no showing that he formulated and effectuated management policies, however technically important his job may have been.[33]) However, by the time Kane was discharged, it is clear that these functions had substantially changed. Thus, it seems obvious that Calhoon was aware, at a very early stage of Kane's employment, that Kane would not fill Schamann's shoes. He did not have the background or skills of the older man, and Calhoon was making no real effort to provide any formal training to qualify him. One important aspect of the position, that of dealing in the international arena, had already been removed. Basically, what was left were the functions of collective bargaining and grievance processing. But, as has been noted, these are functions which ordinarily are not managerial. Nor is there any showing that Kane, if he were permitted to participate in the upcoming negotiations for new contracts, would have had a managerial function to perform within the guidelines set forth in *Yeshiva University, supra*.

In essence, Kane did not possess the qualifications to perform Schamann's functions, nor was he given the sustained training required to equip him to do so. Thus, when he was given the title of director of research and development, after Schamann left, he was given a job that was tailored to fit his special qualifications. This position (aside from the title) was not the one held by Schamann, and was one that I find was not managerial within the guidelines set forth above. This is emphasized by the fact that, when Kane was given the title (and the office that went with it), his salary (less than half what Schamann was receiving) remained the same.

Because the work that he was doing was not managerial, because I am not convinced that Kane was really ever trained for a management position within the meaning of *Curtis Industries, supra*, and because it is clear to me that the position he was finally given was not managerial within the meaning of the cases, I find that Kane was, at all times material, an employee within the meaning of the Act.

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[32] Calhoon says that, as a result of these exercises, Schamann informed him that Kane lacked the necessary math competence. Calhoon states that he contemplated sending Kane to school to improve his math but, significantly, did not do so.

[33] Calhoon referred to Schamann as the second most important man in the organization.

B. *The Discharges*

1. Kane

MEBA does not contend that its discharge of Kane was justified under the Act, if Kane is found to be an employee within the meaning of the Act. Calhoon testified that Kane was discharged for attempting to get an employee to sign an authorization card or support an outside union and causing the employee extreme emotional distress in the process by closing the door to the employee's office. I have previously expressed my doubts as to this latter reason. However, in any event, I have had occasion, some years ago, to note that:

> The mere fact, however, that [an employee] may have been opposed to unionization, or was easily upset by its advocacy, cannot serve . . [as] an additional restraint upon the proper exercise by an employee of rights guaranteed under Section 7 of the Act. . . . Such activity tends, as the facts in the present case show . . . to increase the tension of those susceptible of stress . . . . However, this does not clothe the employer with immunity to discipline an employee because of otherwise legitimate union activities because such activities offended other employees who might hold opposing views on that subject. *Welsh Industries, Inc.*, 154 NLRB 463, 477 (1965), enfd. 385 F.2d 538 (6th Cir. 1967).]

On the basis of the above, and the entire record, I find that Respondent MEBA, by discharging Theodore A. Kane, Jr., violated Section 8(a)(3) and (1) of the Act.

2. Hardesty

At the outset, Respondent MEBA argues that Hardesty's discharge on November 13 cannot be said to have been caused by her union activities because, it is asserted, Calhoon had decided to fire her on November 6, prior to those activities. This is based on Calhoon's testimony to the effect that, on the latter date, Miller gave Calhoon to understand that Calhoon had to get rid of Hardesty or Miller would discontinue his services for MEBA; that Calhoon at that time asked Miller to support his accusations against Hardesty in writing; and that the discharge took place shortly after Miller supplied that memorandum (which occurred on the same day that Hardesty's union activities came to Calhoon's attention).

The difficulty with this position lies in the fact that, as has been previously found, for reasons stated, Miller did not give Calhoon reason to understand on November 6 that he would leave if Hardesty was not terminated. Nor did Calhoon ask Miller on that date to give him a memo on Miller's difficulties with Hardesty, and, in fact, according to Miller's testimony, he suggested on the morning of November 9 that he would provide Calhoon with a memo that day. I am convinced that Calhoon had not decided, finally, on November 6, to discharge Hardesty. Miller himself states that at that time he had hopes that she would improve and rehabilitate herself.

However, in any event, the real issue here is why did Calhoon discharge Hardesty on November 13. This may be determined best by what was said at that meeting. During that conversation, Calhoon not only brought up Hardesty's poor relations with Miller, but also accused her of trying to organize the staff, reminding her that he had previously told her not to become involved in such union activity; Hardesty argued that the staff needed union protection, to which Calhoon asserted that, if they became unionized, he would see to it that they lost pension benefits; after Hardesty further argued that he could not do this, and reminded him of his own strong support for MEBA members, Calhoon told Hardesty, "Well, you've made your choice. No gal is going to get in the way of my priorities. You either quit or be fired."

These comments are convincing that Calhoon intended to and did fire Doris G. Hardesty for her activities in attempting to unionize the MEBA staff and, by such action, I find, MEBA violated Section 8(a)(3) and (1) of the Act.

In coming to this conclusion, I have considered MEBA's argument that Calhoon had expressed himself on other occasions as being neutral, or unconcerned as to whether employees in MEBA headquarters staff became organized. However that may be, on this occasion Calhoon showed himself strongly opposed to Hardesty and Kane becoming involved in such activity and disciplined them for it, which discipline violated their rights and the rights of the other employees under the Act.

Respondent MEBA suggests, citing *Wright Line, supra*, that that case supports its position. I have carefully considered that precedent also. *Wright Line* is concerned, as I have been in this case, with determining the *real reason* for the discrimination against certain employees by their employers. In *Wright Line*, the Board abandoned one analysis, the so-called in part test, sometimes employed in past cases where the evidence tended to show that a possible legitimate reason for discharge as well as an illegal motive in discriminating against employees existed and holds that, except where the employer's alleged legitimate reason is pretextual, such "dual motive" cases may be resolved by means of a "burden of proof" test.

I have found, for the reasons set forth above, that MEBA's real reason for terminating Hardesty was her protected union activities. It follows, therefore, that MEBA's insistence on other reasons for that action must be held pretextual. Further, Respondent's failure credibly to overcome the General Counsel's proof that Hardesty was discharged for her protected activity constitutes a failure to carry the burden of proof of its affirmative defense.

3. Alleged interference

The General Counsel argues that MEBA President Calhoon violated the Act by questioning Kane as to whether he had solicited employee Rollo to sign a union authorization card, and by telling Hardesty that MEBA employees would lose pension benefits if they were unionized. These activities, in the context in which they occurred, clearly tended to interfere with the exercise by employees of rights guaranteed under the Act and thus violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent MEBA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Doris G. Hardesty and Theodore A. Kane, Jr., each is an employee within the meaning of Section 2(2) of the Act.

3. AFL-CIO and OPEIU, AFL-CIO, each is a labor organization within the meaning of Section 2(5) of the Act.

4. By coercively interrogating and threatening its employees with reprisal, as found above, Respondent MEBA violated Section 8(a)(1) of the Act.

5. By discharging Doris G. Hardesty and Theodore A. Kane, Jr., for engaging in activities on behalf of and supporting a labor organization, Respondent violated Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent MEBA has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent MEBA cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent MEBA discriminated against Doris G. Hardesty and Theodore A. Kane, Jr., in violation of the Act, it will be recommended that Respondent MEBA offer Doris G. Hardesty and Theodore A. Kane, Jr., immediate and full reinstatement to the position that each held at the time each was discharged or, if such position no longer exists, to a substantially equivalent position, without prejudice to the seniority or other rights or benefits each possessed, and make each of them whole for any loss of pay or benefits which each may have suffered by reason of his (or her) discharge, by payment to each of them of a sum of money equal to that each would have earned as wages and other benefits from the date of termination to the date of reinstatement, less net earnings during that period and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[34]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[35]

The Respondent, District #1, Pacific Coast District, Marine Engineers Beneficial Association, Washington, D.C., its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, employees because they join, support, or engage in activities on behalf of a labor organization.

(b) Threatening employees with discharge or other reprisal if they join, support, or engage in activities on behalf of a labor organization.

(c) Coercively interrogate employees concerning the union activities of employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights protected under Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which it is found will effectuate the purposes of the Act:

(a) Offer Doris G. Hardesty and Theodore A. Kane, Jr., immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, and make each of them whole for any loss of earnings or benefits each may have suffered by reason of their discharges, in accordance with the provisions set forth in the section herein-above entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post in conspicuous places at its operations in Washington, D.C., copies of the attached notice marked "Appendix."[36] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's president, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

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[34] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[35] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[36] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Boston Mutual Life Insurance Company *and* Francis A. Thone. Case 1-CA-17993

January 28, 1982

DECISION AND ORDER

By Chairman Van de Water and Members Jenkins and Hunter

On September 18, 1981, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Boston Mutual Life Insurance Company, Methuen, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

Statement of the Case

Norman Zankel, Administrative Law Judge: This case was heard before me on July 13-15, 1981, at Boston, Massachusetts.

Upon an original charge filed on October 24, 1980,[1] by Charging Party Thone, the Regional Director for Region 1 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on December 5.

In essence, the complaint alleges that the Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), when, on or about April 24, it threatened to discharge Thone because of his concerted or union activities. Also, the complaint alleges that the Employer discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act by discharging Thone on May 8.

The Employer filed a timely answer which admitted certain matters but denied the substantive allegations and that it had committed any unfair labor practices.

All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and meet material evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. Counsel for the Board's General Counsel and the Employer's counsel submitted post-trial briefs, the contents of which have been carefully considered.

Upon consideration of the entire record, the briefs, and my observation of the witnesses and their demeanor, I make the following:

Findings and Conclusions

I. JURISDICTION

Jurisdiction is uncontested. The Employer's answer admits, and I find it is, and at all material times has been, a Massachusetts corporation. The Employer maintains its principal office and place of business in Canton, Massachusetts, from which it is engaged in the retail sale and servicing of life insurance policies. The Employer maintains a number of regional offices. Only the regional office located at 240 Pleasant Street, Methuen, Massachusetts, is involved herein.

The Employer's total assets are in excess of $1 million and consist of cash, stocks, loans, and real estate located in Massachusetts and elsewhere. The Employer's annual premiums received exceed $500,000 of which premiums in excess of $50,000 are derived from outside Massachusetts. The Employer's annual gross revenues exceed $500,000.

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[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs, adequately present the issues and the positions of the parties.

[2] The Administrative Law Judge incorrectly attributed the statement that Charging Party Thone was "a pain in the the ass" to Respondent's vice president and regional sales director, John A. Topjian. The record testimony reveals that this statement was made by Regional Sales Manager Eugene D. DiPirro. In our view, this error does not undermine the ultimate finding that Respondent discharged Thone in violation of Sec. 8(a)(3) inasmuch as the Administrative Law Judge also found, and we agree, that Topjian also stated, in reference to Thone: "we have to get that bastard." Thus, the requisite finding of animus made by the Administrative Law Judge in reference to Topjian remains undisturbed.

In addition, Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980); *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130 (1981); or *Limestone Apparel Corp.*, 255 NLRB 722 (1981). In his view, *Wright Line* end its progeny concern identifying the cause of discharge where a genuine lawful and a genuine unlawful reason exist. Where, as here, the asserted lawful reason is found to be a pretext, only one genuine reason remains—the unlawful one. Thus, the *Wright Line* analysis is not pertinent in cases such as this. See *Castle Instant Maintenance/Maid, supra.*

[3] In determining backpay liability, Member Jenkins would compute interest thereon in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[1] All dates hereinafter are 1980 unless otherwise stated.

259 NLRB No. 172

Upon the foregoing, and the record as a whole, I find the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based on the Employer's admission, and the record as a whole, I find that Insurance Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Thone's employment began on September 28, 1970. Throughout his employment, Thone was a debit insurance agent. It is undisputed Thone was discharged on May 8.

Thone's employment with the instant Employer was not continuous. It was interrupted twice, by a discharge and a suspension. Thus, on December 27, 1974, Thone was discharged after an audit uncovered a deficiency of $331.41 in his accounts. He was reinstated on February 10, 1975, at the Union's behest. Thereafter, Thone was suspended from May 27, 1977, through May 31, 1977, for insubordination.

Thone's employment was punctuated by a series of oral and written reprimands and warnings. Thus, on November 16, 1971, he was orally reprimanded for applying dividends to premiums without customer authorization.

When Thone was reinstated on February 10, 1975 (after his discharge), he received a written warning that "any further deficiency in your accounts or other violations of . . . rules and regulations will result in your immediate termination from the Company."

On March 15, 1977, Thone was orally reprimanded for failure timely to submit a case for lapsing.

On December 17, 1979, Thone received a written reprimand for failure to submit a policy for lapse. That reprimand warned "future violations may result in disciplinary action, up to and including suspension or termination."

On March 11, 1980, Thone was reprimanded in writing for failing timely to submit a case for lapse. He was warned "future violations will result in disciplinary action, up to and including suspension or termination."

During his employment, Thone was a member of Insurance Workers International Union, AFL-CIO (herein the Union). From approximately March 1975, Thone served as the Union's office chairman (hereafter called steward). He was the local Union's vice president since February 1978, and a member of its negotiating committee in January 1980.

The Employer and Union maintained a continuous collective-bargaining relationship covering the debit agents since 1953. The most recent collective-bargaining agreement between them is effective January 15, 1980, through January 14, 1982. Thone participated in the negotiations which culminated in that agreement.

Investigation and processing of grievances was part of Thone's steward duties. Additionally, Thone testified without contradiction, that the duties of that office entailed the "appraisal [sic] of the new agents and the senior agents of what protection they had under the contract that the Union had with the Company, and to assist them in whatever way I might to better understand their job, and be happy and successful in it."

Debit agents sell insurance policies and maintain collections of customers whose accounts appear in their collection books. They also are expected to prevent existing policies from lapsing, a process known as conservation.

At all material times, the Employer's relevant supervisory hierarchy was as follows: Roy G. Daniels, vice president and director of district agencies; John A. Topjian, vice president and regional sales director; Eugene D. DiPirro, regional sales manager; Donald Morrison, regional sales supervisor; and Thomas Stankard, staff (or sales) manager. All but Daniels and Topjian regularly were assigned to the Employer's Methuen office. The latter regularly worked at the Employer's Canton, Massachusetts, home office.

DiPirro's ascension to his position as regional manager at Methuen is relevant. He assumed that position in approximately June 1979. DiPirro's predecessor in that job was Raymond Longshaw, Jr. Longshaw was regional manager from at least December 27, 1974, until DiPirro replaced him. Jimmie Bletsis was regional manager before Longshaw. Thone testified, without contradiction, that he filed approximately 10 grievances.[2] One of them was filed with Longshaw and the others with DiPirro.

All grievances filed are submitted to Topjian, if not resolved within a district office, such as Methuen. Also, Daniels is made aware of grievances, although he is not directly involved in the grievance procedure.

Apparently, Thone's grievance activity accelerated in late 1979. The grievances, and their disposition, are outlined as follows:

(1) August 6, 1979: Grievance complained of unnecessary and uncompensated paperwork and threats of financial reprisal upon agents for what was claimed to be "company oversights." DiPirro denied the grievance. Topjian overruled DiPirro.

(2) December 17, 1979: Claimed that Thone was entitled to receive a commission upon business written by another debit agent, Schau. DiPirro denied the grievance. Topjian reversed the denial. The grievance was granted on January 28, 1980.

(3) February 6, 1980: Thone grieved that his staff manager had been discriminatory in that customers had been transferred from Thone's account book to the book of debit agents in other geographic areas but had not transferred accounts from other debit agents' books to Thone's when the customers became situated in the geographic area serviced by him. DiPirro did not respond to this grievance. It remained pending at Thone's discharge.

(4) March 20, 1980: Grieved that collection books of new agents were not "blocked" by the Employer in the usual manner. (To "block" a book requires marking each page to indicate the date to which a customer had paid at the time a new agent assumes responsibility for that particular collection book). DiPirro discussed this grievance with Thone. Both Thone and DiPirro recalled that Thone explicitly complained that agent Karen Green-

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[2] Only five grievances appear in the record, as described *infra*.

berg's book was not blocked. DiPirro testified, without contradiction, that he immediately took corrective action.

(5) March 31, 1980: Thone grieved a written reprimand of March 11 from DiPirro. The warning was given purportedly because Thone neglected to timely submit a policy for lapsing. Thus, DiPirro warned Thone "future violations will result in disciplinary action, up to and including suspension or termination." This grievance remained pending at Thone's discharge.

The following are the facts leading to Thone's discharge.[3] On May 8 DiPirro delivered a letter dated May 6, signed by Daniels. The letter advised that Thone was discharged effective May 8 because he "falsified D.L.P.'s on M.D.O. dividend up-date requests."[4]

In effect, Thone was charged with having breached a fiduciary relationship with customers. By the asserted "falsification," the Employer contends Thone permitted use of policyholders' earned dividends without the policyholders' knowledge or authorization.[5]

Four options are available to policyholders regarding the application of their dividends. Those options are: (a) cash payment to policyholder; (b) used to pay premiums; (c) applied to acquire new policies; or (d) remain on deposit with the Employer, at interest. This fourth option also automatically authorizes the Employer to apply the dividend to overdue premium payments in order to prevent lapse.

Option (d) automatically applies to all policies. To exercise any of the other three options, a policyholder is required to sign a "Dividend Request" form.

Premium payments on MDO policies are due the first day of each month. If premiums are not paid on the first day of any particular month, and again not paid on the first of the following month, the policy is subject to lapse. Thus, on the 15th of the second consecutive month where timely premiums are not paid, and no dividends are available for application to premiums, the policy will be lapsed. If dividends are available for premium payment, a so-called M card is prepared by the debit agent servicing the customer's accounts.

The M card is the basis, *inter alia*, for application of dividends to premiums. The debit agent inserts the date of last payment. The M card is then submitted to the agent's staff manager in the district office. The cards are further submitted to a regional supervisor who, in turn, forwards them to the home office. There, the cards are processed. Authorization slips which indicate the amount of dividends available for application to premium payments are returned to the district office.

The events which directly led to Thone's discharge began on or about March 13. On that date, Stankard, then Thone's staff manager, had reviewed certain dividend authorization forms for some of Thone's accounts. He advised Thone of discrepancies he uncovered. Thus, Stankard told Thone that the dividends authorized exceeded the sum which appeared justified by Thone's account book.

M card requests for application of dividends to premiums require that only so much of accumulated dividends as are required to pay arrearages in premiums are initiated by the debit agents. The vice inherent in the discrepancies claimed by Stankard to exist had the effect of increasing Thone's compensation which, in part, was based on a percentage of collected premiums.

Stankard reported his findings to Morrison, then Thone's regional sales supervisor. Morrison compared the nine allegedly improper dividend authorizations to Thone's collection book. Morrison concluded that Stankard's report of apparent discrepancies was correct.

Morrison reported his findings to DePirro. Later, on March 13, DiPirro, in the presence of Morrison and Stankard, confronted Thone. DiPirro accused Thone of falsifying the dates of last payment on the dividend update requests, the M cards. Thone protested he did not believe he did so but, in any event, he commented to the effect that the situation presented no "big deal."[6] DiPirro told Thone his books would have to be audited.

Morrison was instructed to conduct the audit by DiPirro and Topjian. The nine customers whose accounts were involved were visited. Only one of the customers wanted the dividend applications reversed. Meanwhile, on March 21, DiPirro wrote Topjian. He recounted the confrontation with Thone over the nine incidents of apparent "falsification." The dividends had not yet actually been applied to the premium payments of those customers. Thus, DiPirro's March 31 report states, "I am not presently going to apply these dividends, as I believe by law we do not have the right to use them." DiPirro also informed Topjian that he counseled Thone concerning the "seriousness of . . . manipulating policyholders funds."

When Morrison completed the audit, he submitted a written report to DiPirro. In salient part, that report concludes:

> Audit shows agent Fran Thone . . . had a [sic] industrial shortage of $76.35 & a MDO overages of $115.59. *Mr. Thone has had a history of sloppy bookkeeping methods. It was next to impossible to verify DLP's in his collection book when compared to policyholders'* (——). Mr. Thone has many cases with blind advances as a result of Div. being paid and never being applied to the customer's PRB. Div. are not marked in red in the collection book and no markings indicate when the div. were applied. The adjustments of $76.35 industrial and $115.59 of MDO have been made on a form 87. The difference has been placed on a MDO overage coupon. [Emphasis supplied.]

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[3] There is a plethora of evidence which describes the technical functions of debit agents, and the Employer's policies and operations in that connection. I shall allude only to that which is considered material and relevant.

[4] DLP refers to date of last payment of a premium. MDO is an abbreviation for monthly debit ordinary, which are policies on which customers make monthly premium payments.

[5] The analysis, *infra*, will assume the accuracy of the Employer's assertions. In view of this, and my findings based on that assumption, I conclude it is unnecessary to decide whether or not Thone's conduct actually was of the heinous nature claimed by the Employer.

[6] Both Thone and DiPirro recalled Thone's use of the quoted words.

Morrison's uncontradicted testimony reflects that DiPirro was present with him when he wrote his audit report and assisted him in doing so.[7]

On April 9, DiPirro forwarded the audit report to Topjian. DiPirro's cover letter also complained about Thone's performance in matters not involved in the audit. Thus, DiPirro enclosed a letter from customer MacDonald. DiPirro commented that Thone apparently caused MacDonald's policy to lapse improperly. In this connection, DiPirro stated, "I am sure that if necessary I could substantiate as many as 15 or 20 additional cases, identical to . . . [MacDonald's]."

DiPirro's April 9 submission also discusses customer Carbonneau whose business was lost, according to DiPirro, "due to Mr. Thone's poor business practices and lack of service." DiPirro noted, also, that Stankard "has had more than a dozen complaints over the past 2 months concerning Mr. Thone's refusal to provide service requested by policyholders, and clients who stated they do not want him to come to their house again because of his manners." DiPirro enclosed a sample of a page from Thone's collection book. This was enclosed to support DiPirro's claim that Thone "continues to operate in a manner not complying with Company procedures." In his April 9 submission to Topjian, DiPirro also indicated that Thone had received several letters of warning in the past from the Employer's management officials. DiPirro's April 9 letter also states Thone "is attempting to undermine our operation, especially with junior agents by making comments like 'as soon as you write your friends and relatives, the Company will get rid of you.'" Finally, the April 9 letter recommended Thone's immediate termination.

Topjian forwarded DiPirro's April 9 letter, or a copy, to Daniels. Daniels was out of town on April 11, the date the letter was received in his office. No action was taken on the letter until approximately the last week in April. Then, Daniels discussed the contents of DiPirro's April 9 letter and decided to terminate Thone.[8]

Thone has not been recalled since his discharge.[9] It is undisputed that the commissions Thone would have realized from the "falsification" would have been approximately 30 cents a week for 13 weeks.

B. *Credibility*

Credibility of the respective witnesses is the foundational element for resolution of the alleged unlawful discharge threat. Moreover, witness credibility governs an understanding of the motivational factor necessary to support a *prima facie* case of discrimination.

The ultimate choice in resolving credibility issues and findings of fact is based on my observation of the demeanor of the witnesses, the weight of the respective evidence provided by them, established or admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. *Northridge Knitting Mills, Inc.*, 223 NLRB 230 (1970); *Warren L. Rose Casting, Inc., d/b/a V & W Castings*, 231 NLRB 912 (1977); *Gold Standard Enterprises, Inc., et al.*, 234 NLRB 618 (1978).

Additionally, I have carefully weighed all the testimony, bearing in mind the general tendency of witnesses to testify as to their impressions or interpretations of what was said rather than attempting to give verbatim accounts.

In the credibility contest between the General Counsel's witnesses who testified as to what occurred during conversations with some of the Employer's officials and the witnesses presented by the Employer upon the same subject matter, a fair assessment of the testimony convinces me that the versions presented by the General Counsel's witnesses are the most reliable.

In addition to the above-described criteria used to resolve credibility, there are a number of objective factors contained in the record which aid in that regard. These factors follow:

1. Unrefuted testimony supports the credibility of Thone and Leland Greenberg

Thone testified that, in January or February, DiPirro "lectured" him on the duties of a steward. In particular, Thone testified that DiPirro admonished him not to look for things about which to file grievances.

DiPirro was asked to refute neither that he had a discussion involving the subject matter claimed by Thone nor that he even spoke to Thone in January or February. This aspect of Thone's testimony remains unrefuted.

Thone's testimony in this connection is plausible. He candidly acknowledged that he spoke with employees in pursuit of his steward's duties. (His description of those duties has been described hereinabove.) In this context, and in view of DiPirro's failure to rebut this aspect of Thone's testimony, I find it likely DiPirro would have "lectured" Thone as the latter described.[10]

Thone's rebuttal testimony further illuminates this matter. Thus, he candidly admitted that he told new agents that the Employer would terminate him as soon as they wrote policies on friends and relatives. This admission was made, though potentially detrimental to Thone. DiPirro had used those remarks of Thone to support the assertion to Topjian that Thone was disloyal and undermining the Employer to its employees. Thus, Thone's rebuttal testimony forms a plausible predicate for DiPirro to have "lectured" Thone, as claimed. I conclude that the totality of the above-described circumstances lends credence to Thone.

Leland Greenberg testified that he had a private conversation with DiPirro concerning Thone's steward activities. Thus, Greenberg stated that, on December 17, 1979, DiPirro asked him to speak with Thone and tell him to "knock off the small b— going on familiarizing the new agents with procedures." Greenberg asserted that DiPirro said if Thone "didn't knock it off, that he'd be terminated." Further, Greenberg claimed he told DiPirro he could not terminate Thone for doing his job.[11] According to Greenberg, DiPirro responded, "We'll find a way. We can terminate him," and commented that Thone had a history of having problems with management and management was "gunning" for Thone.

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[7] Morrison, without contradiction, testified that the underscored language of his report had been dictated by DiPirro. The effect of DiPirro's assistance will be discussed in the analysis section, *infra.*

[8] The Employer maintains no formal written rules or regulations regarding discipline. District managers possess, and have exercised, discharge authority. The usual practice when termination decisions are made is for district managers to request employees to resign. Daniels' participation in discharges was unusual. In 1978 he discharged one employee, in 1979 none, and in 1980 only one other prior to Thone.

[9] The Union filed and processed a grievance over the discharge. However, no arbitration has been pursued.

[10] This finding is buttressed by DiPirro's allusion to such activity in his April 9 letter to Topjian, a matter which will be further discussed *infra.*

DiPirro's account of the December 17 conversation is confusing. He recalled that he had a conversation with Greenberg which concerned Thone's actions in the office. However, DiPirro unequivocally denied he asked Greenberg to do anything to stop Thone's activity. Instead, DiPirro testified that Greenberg approached him and asked "if there was any way I [DiPirro] could quiet or slow Mr. Thone down in some" of his complaints because "he [Greenberg] was there to sell insurance and make money and didn't have the time to get involved in meetings and things of that nature."

DiPirro testified that he responded he could do nothing and invited Greenberg to take up the matter directly with Thone. Further, DiPirro denied he made any threat to terminate Thone during this conversation with Greenberg.

Interestingly, DiPirro was not asked to refute Greenberg's testimony that *Greenberg* commented to *DiPirro*, that he believed Thone could not be terminated for doing his job.

As a rebuttal witness, Greenberg denied initiating the December 17 conversation. Specifically, he denied the conversation began by asking DiPirro to slow Thone down.

As indicated, DiPirro's accounts of conversations with Leland Greenberg were confusing, at the very least. Indeed, such testimony may be perceived as an evasive tactic. This latter view stems from DiPirro's narration of another conversation Leland Greenberg claimed to have had with DiPirro in April 1980. The latter conversation is particularly critical. DiPirro is alleged to have made the unlawful discharge threat in violation of Section 8(a)(1) during the April discussion.

Thus, during his cross-examination, DiPirro testified that the conversation in which he claimed Greenberg asked him to slow down Thone occurred at the end of March or the beginning of April. However, when DiPirro was asked to recount what was said during that conversation his responses make it clear that he confused the substance of the conversation which he admitted he had privately with Leland Greenberg with another conversation which he further admitted was held with Greenberg and his wife.

Greenberg, his wife, and DiPirro all agreed they had a conversation at some time. As will be further described, *infra*, the Greenbergs corroborated each other regarding DiPirro's issuance of the unlawful discharge threat. DiPirro's acknowledgment that he spoke privately with Leland Greenberg when Greenberg is supposed to have asked to slow Thone down tends to confirm Greenberg's testimony that two conversations occurred—the first in December 1979 and the second in April 1980.[12] Greenberg presented comprehensive testimony concerning what was said at each of these meetings. On the other hand, DiPirro's testimony effectively obscures the issue of how many conversations occurred between him and Leland Greenberg.

Seen either as honest confusion or as not-so-subtle evasion, I conclude that these circumstances render DiPirro less reliable a witness than both Leland and Karen Greenberg.

Furthermore, I conclude that Leland Greenberg's account of the December 17 conversation is more reliable than DiPirro's for other reasons. First, the words attributed to DiPirro are consistent with Thone's testimony that he had been told to stop looking for material on which to file grievances. Second, I find it improbable that Greenberg would have complained about spending time in meetings, as DiPirro claimed. The record shows that Greenberg was a union activist. In fact, he replaced Thone as steward after Thone's discharge. It is difficult to imagine one who assumes such a position would be at all upset with the performance of the same union obligations he himself undertakes to perform.

Greenberg's and Thone's testimony regarding conversations they had with DiPirro become more convincing when examined in the light of Thone's description of a conversation he had with DiPirro on December 17, 1979. The two of them, according to Thone, discussed the grievance of the same date filed over Thone's claim that he was entitled to business written by agent Schau. Thone testified that DiPirro said if the grievances were not withdrawn, DiPirro "would basically 'get me' [Thone] on one thing or another." DiPirro acknowledged that they spoke concerning the grievance but denied that he threatened to "get" Thone.

I credit Thone. His description of what DiPirro said to him on December 17 is consistent with what Greenberg claimed DiPirro said to him the same date. It is plausible that Greenberg would have been told to have Thone "knock off the b—" and that if Thone did not do so, the Employer would find some way to terminate him virtually simultaneously with the request of Thone that he withdraw the Schau grievance or the Employer would "get" him.[13]

There exists yet another reason which makes Leland Greenberg's testimony more probable than DiPirro's. The record shows that DiPirro had become impatient with Thone's apparent acceleration in filing grievances. Thus, the grievances of August 6 and December 17, 1979, were answered by DiPirro within a day or two of filing. However, the grievances Thone filed on February 6 and March 31, 1980, went unanswered by DiPirro. I consider this circumstance some, but not dispositive, evidence of the likelihood that DiPirro made the April discharge threat (the explicit terms of which will be discussed *infra*) as related by Leland and Karen Greenberg.

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[11] Greenberg's comment apparently is a reference to the functions of a steward.

[12] The Employer's brief apparently concedes that two conversations occurred.

[13] The record does not show precisely the time elapsed between DiPirro's separate discussions with Thone and Greenberg on December 17 or which conversation preceded the other. However, I conclude that these omissions do not detract from the inherently consistent character of the two events.

It is more probable that Greenberg's purported observation of disbelief that Thone could be fired for doing his job as steward would be made by one who demonstrates such fealty to the Union.

Indeed, DiPirro's own testimony enhances the probability of Greenberg's. Thus, with regard to the March 20 grievance concerning the blocking of agents' books, DiPirro's testimony reflects that he was disturbed by Thone's having filed the grievance. Thus, DiPirro testified that he spoke with Thone after receiving the grievance. According to DiPirro, he told Thone that the grievance was a matter which Thone "could have come in and discussed with me . . . as a courtesy-type thing rather than take the time to file a grievance on it which I had to answer, and we [management] were absolutely wrong." DiPirro's testimony continued: He claimed Thone asked, "Are you saying I can't file grievances?" DiPirro claimed he responded, "No, I am not. You absolutely file one if you feel you have to." Nonetheless, DiPirro testified, "I just felt it was something that, if he [Thone] had mentioned, would have been done right away." (This last seemingly exculpatory remark does not diminish the general attitude with which I find DiPirro demonstrated a clear annoyance at Thone's grievance filings.)

Upon all the foregoing, I conclude that wherever conflicts exist between Leland and Karen Greenberg on one hand, and DiPirro on the other, the former two witnesses should be credited.

2. Crucial testimony of DiPirro

The crucial testimony of DiPirro was more vague than that of Leland and Karen Greenberg, and was adduced through leading questions. As noted above, the unlawful 8(a)(1) conduct is alleged to have occurred during the April conversation between DiPirro and the Greenbergs. I have already observed that DiPirro was confused and/or evasive regarding his conversations with Leland Greenberg.

Moreover, DiPirro's recollection was vague. He needed to be prompted by leading questions. When first recounting the contents of the April conversation, DiPirro testified that he could not remember how it started. However, DiPirro, consistent with both Greenbergs, acknowledged they spoke in his office. Nonetheless, during direct examination, DiPirro was asked the following leading question: "I think you said you were having a conversation with Greenberg who was standing in the door—" DiPirro responded (interrupting)," "Uh-huh." Thus, it was counsel, not DiPirro, who placed the conversation at his office door.

Additionally, it was counsel, not DiPirro, who indicated that Greenberg "brought up this question about is there anything that could be done about Mr. Thone [sic]." At first, DiPirro testified, "I don't really recall how it [the conversation] started."

Yet another attempt was made, during DiPirro's direct examination, to elicit a definitive response. DiPirro finally was asked, "Did Mr. Greenberg initiate a conversation with you about this complaint against Mr. Thone having falsified the DLP?" DiPirro answered, "Yes."

The above-described content of DiPirro's testimony makes it extremely difficult to place reliance upon his recollection. Indeed, his initial response indicated that he could not remember how the conversation started. In contrast, the Greenbergs, especially Leland, presented comprehensive, direct, sure, and spontaneous narrations of what occurred. Each was unshaken by cross-examination. Accordingly, I credit their accounts of the April conversation.[14]

3. The General Counsel's witnesses

The General Counsel's witnesses were corroborated by those of Respondent in positive terms and by the failure to refute their testimony. There are two areas where DiPirro presented testimony consistent with that of Thone and Greenberg. In isolation, these matters may seem insignificant. However, in the context of the vagueness of DiPirro's testimony, I conclude that such corroboration provides some added basis of reliance upon Thone and Greenberg.

Thone testified that when DiPirro confronted him in March with the DLP "falsification," he (Thone) commented that DiPirro should not make such a "big deal" out of it. When examined from the bench, DiPirro recalled that Thone had said "'Don't make a big deal out of it, or a big issue, one or the other." Seemingly, this bit of corroborative testimony is of little importance. However, witness credibility herein is a key factor in resolving the issues. Virtually every major area contains conflicting evidence from the opposing witnesses. The search for the truth must, therefore, be based on microscopic analysis.

I recognize that to conclude, as I do, that DiPirro has corroborated Thone is equally susceptible to the conclusion that Thone has corroborated DiPirro. However, it has already been demonstrated that DiPirro was vague, confused, and imprecise. Viewed in its totality, I find Thone's testimony internally consistent, inherently logical, forthright, precise, and comprehensive. These factors persuade me that the corroborative evidence should be utilized to enhance Thone's credibility.

As to corroboration of Leland Greenberg, when DiPirro finally unraveled his testimony concerning his conversation with Greenberg over the DLP "falsification," DiPirro claimed (consistent with Greenberg) that he referred to Thone's former disciplinary problems. Thus, DiPirro testified that he told Greenberg he could not overlook Thone's "situation." According to DiPirro, Greenberg asked him to "drop it."

In his testimony concerning the April conversation, Greenberg testified, in part, that DiPirro asked Greenberg to tell Thone to stop filing grievances or he would be terminated.

I credit Greenberg. The agreement between DiPirro and Greenberg that DiPirro referred to Thone's disciplinary history provides a logical sequence to Thone's narration. I have earlier noted that DiPirro was disturbed over Thone's increased grievance filings. DiPirro had "lectured" Thone about them. Also, Greenberg's testimony regarding the April conversation is consistent with that of what occurred between him and DiPirro on December 17, 1979. In the earlier conversation, DiPirro warned that Thone would be terminated unless he discontinued familiarizing new agents with procedures.[15] Finally, I have noted that DiPirro expressed concern over Thone's grievance activity in his discussion regarding the March 20 grievance. At that time DiPirro himself testified that he would have preferred Thone to discuss the blocking of books with him on an informal basis.

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[14] The salient details appear below.

In the foregoing backdrop, it is plausible that the April conversation occurred as described by Greenberg. DiPirro was armed with Thone's disciplinary history. Earlier, he had alluded to the plausibility that Thone might be again disciplined. DiPirro clearly was disturbed by Thone's grievance and other steward activity. In this context, I conclude that Greenberg's testimony to the effect that the April discharge threat actually was made by DiPirro flows out of logical progression from the prior events and the setting in which the April conversation occurred.

Even accepting DiPirro's testimony as true, the same result follows. Thus, assuming Greenberg actually asked DiPirro to "drop it," such a remark reasonably is a consequence of the alleged unlawful threat Greenberg attributed to DiPirro. Unless Greenberg had been confronted with some type of threat, the request to "drop it" has no predicate and is unexplained.

In another area I consider important, DiPirro made no effort to refute the testimony of the General Counsel's witness Morrison. As reported above, Morrison testified DiPirro helped him prepare the audit report. Specifically, the emphasized language appearing *supra*, was provided in the audit report by DiPirro. He was not asked to deny he had participated in the preparation of Morrison's audit report, as claimed by Morrison. The failure to attempt rebuttal of Morrison's testimony lends credence to his account.

4. Employer witness Daniels

Employer witness Daniels was self-contradictory and evasive. Although DiPirro recommended Thone's discharge in his April 9 letter to Topjian, it was Daniels who made the final decision and wrote the May 6 termination letter. During his direct examination, Daniels unequivocally denied knowledge of Thone's union activities. In this connection, he asserted without contradiction, that he is not directly involved in the grievance procedure. Nonetheless, Daniels acknowledged that he is made aware of grievances filed.

Later, during his testimony, Daniels admitted that, at the time he terminated Thone, he knew Thone was union steward at the Methuen office. Further, Daniels asserted that he discussed the Employer's reaction to the audit report with Topjian prior to the decision to terminate Thone. Daniels' testimony proceeded:

> Q. Did you know anything in detail about what he was doing as office chairman in the office?
>
> A. Not as office chairman.

Interestingly, Daniels was not then asked to be more specific. His direct examination did not return to the subject of Daniels' knowledge of what grievances might have been filed by Thone. Instead, Daniels' testimony ended with his unequivocal denial that he considered Thone's union activities in the decision to discharge.

I conclude the above discussion of Daniels' testimony contains a subtle self-contradiction which gives rise to a demonstrable effort to evade. Daniels' initial claim that he had no knowledge of Thone's union activity is directly contradicted by his admission that he was aware Thone was union steward. Also, Daniels' carefully phrased response that he was unaware of what Thone was doing "as office chairman" is contradictory to Daniels' practice of being advised of grievance filings. These contradictions, considered in the light of the predischarge discussions between Daniels and Topjian, render it difficult to believe Daniels was not apprised of *all* of Thone's activities. This is especially true because the Employer digressed from its normal termination practices in Thone's case.

The record reflects that the normal termination procedure does not involve Daniels. Customarily, district managers request employees to resign rather than be discharged. In the 2 years immediately preceding Thone's discharge, Daniels participated in the termination of only two others. If Thone's union activities had not been a consideration in Daniels' discharge decision it is unlikely he would have become involved in the instant case. Thus, I do not credit his unequivocal denial to the contrary.

5. Morrison's testimony

Morrison's testimony regarding Topjian's statements of animus is more plausible than Topjian's denial. Morrison testified, *inter alia*, that Topjian referred to Thone as a "pain in the a—" more than once since January 1980. DiPirro was not asked to deny he made these remarks.

Also, Morrison testified that Topjian spoke to him shortly before Morrison conducted the March audit over the alleged DLP "falsification." At that time, Topjian asked for a description of the M card procedures. During their conversation, according to Morrison, Topjian said, "We'll have to get this b— and we will."

Morrison's testimony was extensive and comprehensive. He appeared relaxed and testified in a forthright and direct manner. DiPirro's testimony was quite brief. He unequivocally denied telling Morrison the Employer would have to "get" Thone. However, as noted, Topjian did not seek to refute the reference to Thone as a "pain in the a—."

I credit Morrison's undenied testimony that Topjian had called Thone a "pain in the a—." Those references occurred as early as January 1980. The audit was conducted 2 months later. I find it plausible that Topjian said the Employer would "get this b—" at that time.

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[15] The December remark is not alleged as a violation of the Act.

Such remark is the logical culmination of Topjian's view of Thone as a "pain in the a—."

The undisputed evidence makes it plausible that Topjian harbored the feelings and uttered the expressions attributed to him by Morrison. Thus, Topjian regularly was involved in grievance processing. Each of the grievances Thone filed reached Topjian. Twice, Topjian overruled DiPirro's denial of grievances filed by Thone (the August 6, 1979, and December 17, 1979, grievances). The three additional grievances filed by Thone in early 1980 also reached Topjian's attention.

I conclude that these events, coupled with Topjian's failure to deny he made the "pain in the a—" comment, lend credence to Morrison's testimony regarding what Topjian said to him. Accordingly, wherever conflicts exist in their testimony, I credit Morrison.

6. Conclusions

Apparent deficiencies in the testimony of the General Counsel's witnesses are insufficient to cause them to be discredited.

(a) Karen Greenberg testified that, on April 20, DiPirro spoke to her and Leland Greenberg. Karen (Leland's wife) recalled DiPirro said, "please tell Thone if he didn't stop filing grievances they'd find a way to get rid of him." Leland Greenberg testified that DiPirro displayed a "folder" and said "these are the problems we're having with him [Thone], and we have enough on him. We're going to get rid of him. He's caused enough trouble and we want him out, and you better tell him just to knock off all he's doing. Tell Thone to stop filing grievances or he'd be terminated."

The Employer argues that neither Karen nor Leland Greenberg should be credited. I have already discussed why I credit Leland over DiPirro.

As to Karen, the Employer claims the indisputable chronology vitiates reliance on her testimony. I disagree.

It is true, as the Employer observes, that DiPirro's discharge recommendation (April 9) preceded the conversation during which the Greenbergs claim DiPirro threatened Thone's discharge for filing grievances. The Employer argues it is implausible to believe the threat postdated the recommendation. In other circumstances, the Employer's contention might have merit. However, I find the chronology not inconsistent with other statements of DiPirro on April 20. Also, it is consistent with extrinsic events. Thus, Leland Greenberg's account shows DiPirro had asserted the Employer was "going to get rid of" Thone. I consider that statement an allusion, albeit not specific, to DiPirro's April 9 discharge recommendation. Also, I conclude the reference to the "problems" Thone was causing and the conclusion "he's caused enough trouble" to be expressions of DiPirro's own consternation over Thone's grievance activity.

Finally, the chronology shows that on April 20 no action yet had been taken by either Topjian or Daniels upon the discharge recommendation. In this context, I find it likely DiPirro would have asked that Thone be warned to "stop filing grievances" or suffer termination. I consider it unlikely that DiPirro would have announced his recommendation to the Greenbergs, his subordinate employees,[16] before his superiors acted on it. It is more reasonable that DiPirro would have said something, as I find he did, which would afford him a way to extricate himself from the possibility that his discharge recommendation were rejected, and to lay a foundation for a possible future discharge recommendation.

Karen Greenberg possibly might be discredited because she was patently evasive. In August 1980, the Employer discharged Leland Greenberg. The reason asserted was that he made misrepresentations to policyholders. Leland grieved his discharge into arbitration, filed unfair labor practice charges with the Board and a civil action against the Employer for slander. The arbitration, Board, and court proceedings were pending when Karen Greenberg testified.

On cross-examination, Karen Greenberg was asked the reason for Leland's discharge, whether or not policyholders complained to the Employer about Leland's activities, and whether the Employer conducted any investigation regarding her husband, and the precise location of their April 20 conversation with DiPirro. To each of these questions, Karen responded, "I don't recall."

Given the apparent notoriety attendant to Leland's discharge, I find it unreasonable to believe Karen actually had no recollection of the events relating to it. Clearly, she was evasive. Nonetheless, this evasive conduct does not warrant my disbelief of her total testimony. A trier of fact is not required to believe the entirety of a witness' testimony. *Maximum Precision Metal Products, Inc., Renault Stamping Ltd.*, 236 NLRB 1417 (1978).

As to the questions regarding her husband's discharge, Karen Greenberg's reluctance to provide candid responses is understandable, though I do not condone such testimonial demeanor. Her direct testimony was extremely brief. It was limited to a description of DiPirro's alleged unlawful discharge threat on April 20 and was presented to corroborate that of her husband. Counsel for the General Counsel interposed an objection, on relevance grounds, to the questions regarding the circumstances surrounding her husband's discharge. I overruled that objection based on my perception of apparent relevance to the credibility issue. Thus, the probity of such evidence was left for my evaluation at this time.

In the peculiar circumstances herein, I conclude the evasive responses to the questions relating to Leland's discharge do not detract from Karen Greenberg's overall credibility upon the subject matter of the April 20 conversation with DiPirro. The pendency of the arbitration, Board, and civil court actions reasonably has an inhibiting impact upon Karen. Moreover, those questions were not germane to her testimony concerning the issues before me. These factors clearly contributed to Karen's reticence.

I do not regard the failure to recall the location of the April 20 conversation so aggravated as to warrant rejection of Karen's otherwise credible testimony of what DiPirro said. Whether Karen stood outside or was in DiPirro's office is of little significance. What is more important is whether she heard what was said. No perceivable effort was made to test her on such matter.

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[16] Karen started work for the Employer as a debit agent at the end of January or the beginning of February 1980. She remained employed there until around the beginning of June 1980.

Karen Greenberg did not narrate DiPirro's words *in haec verba* as her husband. Clearly, she testified to what she independently heard. The record reveals nothing to show her testimony had been rehearsed with her husband. I find her version of what DiPirro said substantially consistent with that of her husband, who has already been credited for reasons previously stated.

Upon all the foregoing, and all other discussion applicable to the April 20 conversation, I credit that aspect of Karen Greenberg's testimony and find that, on April 20, DiPirro, in the presence of both Greenbergs, said Thone would be discharged unless he stopped filing grievances.

(b) Leland Greenberg's credibility is challenged by the Employer on several grounds. Explicitly, the Employer submits that Greenberg is a hostile witness who sought refuge in the Act's protection to immunize himself from attack. The Employer contends Greenberg's self-interest in the pending arbitration, Board, and civil court actions provides the basis for him to be less than candid.[17] By implication, the Employer suggests the circumstances of Greenberg's own termination taint his testimonial assertions.

I agree that the Employer's arguments provide valid considerations in resolving credibility. However, I conclude that these factors, viewed in light of the record as a whole, do not diminish Greenberg's credibility.

First, I have earlier discussed some reasons Greenberg should be credited, *supra*. Second, Greenberg's account of the April 20 threat by DiPirro was credibly corroborated by his wife. Third, Greenberg's demeanor was impressive. He was forthright, direct, comprehensive, and precise. He was unshaken during cross-examination. Particularly, I noted no apparent hostility in his demeanor. The Employer has provided no transcript citations which objectively demonstrate the claimed hostility. Leland Greenberg testified pursuant to a subpena served upon him by the General Counsel.

In the above context, I conclude that the Employer's assertions relative to Greenberg's credibility are based on surmise and speculation. These formulations do not necessarily prove hostility. I decline to make credibility determinations based on such tenuous grounds when the other above-described sources are available. Accordingly, I reject these credibility arguments which the Employer propounds.

(c) As to Morrison, the Employer asserts his "image had been tarnished by his admission of his own, previously undisclosed, violations of his duty to the Company and its policyholders." Also, the Employer observes that Morrison sat in close proximity to Leland Greenberg and Thone throughout the hearing and his testimony shows "an eagerness" to cast his testimony in a light most favorable to Thone or adverse to the Employer.

The reference to Morrison's tarnished image apparently refers to his testimony that even he had "falsified" DLPs. That revelation was elicited by counsel for the General Counsel clearly to provide some evidence that the Employer treated Thone in a disparate manner. Morrison had not been subjected to any disciplinary action for his infraction. There is no evidence that the Employer was aware of Morrison's dereliction. In any event, as will be shown below, I do not base my decision on the merits upon a claim of disparate treatment.

Morrison's testimony does not taint his credibility. It shows no eagerness to slant it. Morrison simply responded to a legitimate area of inquiry by counsel for the General Counsel. He told what he knew. In this connection, there is evidence that debit agent Dubois had similarly placed incorrect DLPs on M cards. Dubois was not disciplined. There is evidence to justify the Employer's failure to act against Dubois. Nonetheless, Dubois' situation tends to show that Morrison was not fabricating evidence when he claimed he, too, had made incorrect DLP entries.

I place no significance in Morrison's choice of seats in the hearing room. He was a witness for the General Counsel. All such witnesses were more or less grouped together during the course of the hearing. This aspect of the Employer's challenge to Morrison has no merit.

The assertion that Morrison seemed eager to give testimony supporting the General Counsel's case is rejected. As previously noted, and as will be further demonstrated below, I consider Morrison's testimony regarding preparation of the audit report an important element of the General Counsel's *prima facie* case. In that area, the Employer made no effort to refute Morrison's testimony. Specifically, his assertions that the audit report contains references to Thone's work which were effectively inserted by DiPirro remain undenied. Such uncontradicted testimony belies this aspect of the attack upon Morrison's credibility.

Finally, the record shows that Morrison left his job with the Employer in August 1980 under disagreeable circumstances. Morrison had resigned, apparently voluntarily. However, he and Topjian then disagreed with Morrison's personal timetable for leaving. Morrison told DiPirro of his displeasure with Topjian. I find this incident an insufficient basis to discredit Morrison. I have assessed this circumstance against Morrison's general demeanor, his uncontradicted testimony, and all other factors discussed which relate to his credibility, and conclude that the record as a whole shows him to be a credible witness.

C. *Analysis*

1. Interference, restraint, and coercion

In complaint paragraph 8(a) it is alleged that, on or about April 24, DiPirro threatened employees with discharge for engaging in protected concerted or union activities.

As earlier observed, this allegation is based on DiPirro's April 20 statement to the Greenbergs to the effect Thone would be terminated unless he stopped filing grievances.

The Employer contends that there is no evidence that Thone had been engaged in conduct protected by the Act. The Employer argues at length that the evidence herein does not show Thone's activity was designed to "attempt to induce, prepare for, or contemplate group action." Specifically, the Employer contends "Thone's contacts with group agents cannot be considered protected activity."[18]

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[17] In this connection, it is self-evident that each Employer official who testified in its behalf is equally vulnerable to attack on grounds of self-interest.

I conclude that the Employer's arguments are misplaced. The General Counsel claims it is Thone's grievance filings and advice regarding the employees' collective-bargaining rights which comprise the requisite protected activity. It is well established that grievance filing is within the umbrella of the Act's protection. The underlying rationale of this principle is designed to promote the viability of collective bargaining. It assures employees of maximum benefits of their collective-bargaining agreement. E.g., *Crown Wrecking Co., Inc.*, 222 NLRB 958, 962-963 (1976). Indeed, the right to file grievances, and have them adjusted, is explicitly granted in Section 9(a) of the Act.

Arguably, the Employer is correct that the subject warnings given to new agents exceed permissible activity. The Supreme Court, in *N.L.R.B.* v. *Local Union No. 1229, International Brotherhood of Electrical Workers* [*Jefferson Standard Broadcasting Company*], 346 U.S. 464, 472 (1953), stated, "There is no more elemental cause for discharge of an employee than disloyalty to his employer."

Thereafter, the Board has had occasion to consider types of employee conduct which might establish such disloyalty as to remove the conduct from the protection of the Act. In *Jeannette Corporation*, 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3d Cir. 1976), the Board held that employees who breached confidential salary information in violation of their employer's rule were engaged in protected activity; in *Community Hospital of Roanoke Valley, Inc.*, 220 NLRB 217 (1975), enfd. 538 F.2d 607 (4th Cir. 1976), disparagement of an employer or its business activities were held protected; in *American Arbitration Association, Inc.*, 233 NLRB 71 (1977), the sending of letters and a questionnaire to the employer's clients concerning its dress code was held concerted activity, although the sarcastic and denigrating tone of the letters removed the employees from the Act's protection; and in *Automobile Club of Michigan, et al.*, 231 NLRB 1179 (1977), the Board agreed that an employee press release was defamatory but nonetheless held that the employees were engaged in protected activity. The Board concluded that the employer's remedy was a suit in defamation and not disciplinary action against the employees.

In *N.L.R.B.* v. *Circle Bindery, Inc.*, 536 F.2d 447, 452-453 (1st Cir. 1976), enfg. 218 NLRB 861 (1975), it was held that the fact the employer might lose business because of an employee's advice to his union that the employer was preparing a booklet which did not carry a union label did not render such conduct unprotected.

In the case at bar, I conclude that the warnings against writing policies on friends and agents reasonably are tantamount to legitimate advice regarding the employees' collective-bargaining rights and obligations. The parties' collective-bargaining agreement contains a quite broad reservation to the Employer (art. VII, discharge) regarding termination. In salient part, that clause retains in the Employer "full and complete power of discharge and discipline of all employees for just and sufficient cause . . ." with a grant to the Union of a privilege to arbitrate such matters.

The parties stipulated that the Employer maintains no rules and regulations governing employee conduct and discipline. In these circumstances, it is reasonable that a steward should be free to impart to the new agents his understandings and beliefs concerning possible discipline. To prevent such discussion effectively would undermine the Union's representational standing granted by the Act.

In my view, Thone's actions in this regard were not so indefensibly disloyal as to remove them from their protected character. Advising employees of their rights under a collective-bargaining agreement is an activity which the Act protects. In *Clara Barton Terrace Convalescent Center, etc.*, 225 NLRB 1028 (1976), a union official's letter, "abrupt or officious in tone," which protected grievance rights, was held within the Act's protection. Herein, I conclude Thone's advice to new agents was in furtherance of his duties which, in part and in his words, were the "appraisal [sic] of . . . what protection they had under the contract."

The sinister significance attached to Thone's warnings to the agents by DiPirro looms as a figment of DiPirro's apparent resolve to rid himself of Thone. The record shows that it was Stankard who reported to DiPirro that Thone was advising against writing policies for friends and relatives. DiPirro made only a shallow investigation. Thus, he contacted only one unidentified agent from whom he determined that Thone did give such advice. However, the interpretation which the Employer claims is objectionable strictly was DiPirro's. There is no evidence he made any effort whatsoever to confront Thone with his comments. Had he done so, he surely would have received the same explanation provided by Thone in the witness chair and which I have found to be reasonable.

Upon all the foregoing, I conclude that Thone's grievance filings and giving advice as steward to new agents constituted protected union activity.

The test for 8(a)(1) conduct is whether it reasonably tends to interfere with, restrain, and coerce employees in the exercise of their statutory rights. *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492 (1979), citing *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

The credited evidence shows, that on April 20, DiPirro said Thone would be discharged unless he stopped filing grievances. I conclude the clear meaning of those words imparts a threat of disciplinary action conditioned upon ending the activities found herein to be protected.

The remark was made to both Greenbergs, each of whom was employed by the instant Employer at the time.

No extensive analysis or discussion is necessary to demonstrate the coercive character of DiPirro's statement. Indisputably, it bears adversely upon employees' Section 7 rights. In the instant case, DiPirro's statement impedes the statutory and contractual right to file grievances and the general ability of Thone, as steward, to communicate with the employees whom he represents on matters appropriate for maintenance of the stability of the collective-bargaining relationship. See *Ohio Ferro-Alloys Corporation*, 209 NLRB 577, 578 (1974); *Superior Motor Transportation Co., Inc.*, 200 NLRB 892, 893 (1972).

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[18] This is an apparent reference to the inclusion in DiPirro's April 9 letter of Thone's warnings to new agents that they would be terminated if they wrote business on friends and relatives.

Accordingly, I find that the Employer violated Section 8(a)(1) of the Act as alleged in complaint paragraph 8(a).

2. Discrimination

In the aggregate, complaint paragraphs 9-13 allege that Thone's May 8 discharge and subsequent failure to be reinstated are discriminatory within the meaning of Section 8(a)(3) and (1) of the Act.

The Employer's position may be fairly summarized as follows: The Employer and the Union have maintained a long-standing collective-bargaining relationship void of evidence of union animus; none of the General Counsel's witnesses testified to any statement or other indicia of such animus; and the record shows that the alleged "falsification" which caused misapplication of policyholder funds was not a common practice among the agents. Thus, the Employer argues that Thone, by his misconduct, provoked his discharge. Affirmatively, the Employer pleads that "Thone was discharged for a record of offenses beginning in 1971" and culminating in the "falsification" of DLPs discovered in March 1980.

Both the General Counsel and the Employer submit that the instant case is not one which involves a so-called dual motive. In any event, the Employer argues that the evidence has sufficiently rebutted any *prima facie* case which may have been established by the General Counsel.

In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board declared that in dual motive cases the General Counsel must first prove the existence of a *prima facie* case showing that the alleged discrimination was motivated by antiunion considerations. Thereafter, the burden of proof shifts to Respondent to demonstrate it would have taken the action alleged as discriminatory even in the absence of the employees' protected activity. The test of causality applied by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), was adopted by the Board.

Recently, the Board has indicated the same test may apply to so-called "pretext" cases. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). See also *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130 (1981).

In *Quality Broadcasting Corp. of San Juan d/b/a WQBS—AM Radio Station "La Gran Cadena,"* 254 NLRB 960 (1981), the Board reconsidered its Decision and Order in 241 NLRB 318 (1979), in the light of various relevant decisions of the First Circuit Court of Appeals which had jurisdiction over the subject matter involved in *Quality Broadcasting*. Specifically, the First Circuit addressed the issue of the element of motivation requisite to the General Counsel's *prima facie* case of alleged discrimination under the Act. Thus, the Board took cognizance of *N.L.R.B.* v. *Eastern Smelting and Refining Corporation*, 598 F.2d 666 (1979); *Liberty Mutual Insurance Company* v. *N.L.R.B.*, 592 F.2d 595 (1979); *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 550 F.2d 1292 (1977); and *N.L.R.B.* v. *Billen Shoe Co., Inc.*, 397 F.2d 801 (1968). Additionally, the Board's reconsideration of the *Quality Broadcasting* decision was made in the light of *Wright Line*.

The Board's reconsideration of *Quality Broadcasting* resulted in issuance of a Supplemental Decision and Order. Therein, the Board concluded at footnote 4 that case was "essentially a pretext case, i.e., one in which the Employer's defense of business justification is found to be without merit. The General Counsel presented a *prima facie* case that the discharge . . . was unlawfully motivated . . . . Although Respondent attempted to demonstrate that it discharged [the discriminatee] because of poor work performance, it was unable to present convincing evidence in support of that defense." Further, the Board concluded "although the instant case is a pretext case, not a dual motivation case, we find that under any analysis Respondent's discharge . . . violated . . . the Act." In so concluding, the Board noted that the tests applied both by the Board and its Administrative Law Judge were consistent with the First Circuit pronouncements of the applicable standard to be used in the type of issue presented in *Quality Broadcasting*. The Board further observed that its *Wright Line* test places a greater burden of proof on the General Counsel than is required by *Mt. Healthy*. The Board stated, at footnote 5 in *Quality Broadcasting*, that the First Circuit "appeared to have moved away from the 'dominant motive' test towards adoption of the test outlined in *Mt. Healthy*."

The First Circuit recently had another occasion to consider the motivational issue in 8(a)(3) cases. Thus, in *Wyman-Gordon Company* v. *N.L.R.B.*, 654 F.2d 134, 141 (1981), a dual motive case, the court declared "the initial inquiry is whether the Board has made a *prima facie* showing that a "'significant" improper motivation' underlay the discharge decision." The court cited its decisions in *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1981), and *Statler Industries*, 644 F.2d 902, 905 (1981). Additionally, the court reiterated that the burden of proof shifts to a respondent to establish "that it had a good reason, sufficient in itself, to produce the discharge." *Ibid*. The court noted this shifting burden "does not impose an overall burden upon the Company to prove itself innocent of violating the statutes. Rather, the Company must come forward with evidence to the point where no longer does a preponderance of the evidence establish a violation." 91 LC at ¶18,174.

The composite of the foregoing decisional authority of the court and Board presents consistent views of the evidentiary burdens which are to be utilized in resolving the allegations of discrimination in the case at bar. My analysis, based thereon, appears below.

First, I conclude, in agreement with the parties, that the instant matter presents a pretext issue. As will be explicated below, the Employer's defense that Thone's purported "falsification" of DLPs in March 1980, together with his prior history of discipline, was a serious consideration and justification for his discharge is not convincing.

3. The General Counsel's *prima facie* case

a. *Protected activity*

The above-described findings of fact show that Thone had been, at all material times, engaged in protected union activity which consisted of grievance filing and processing, and of advising employees of their collective-bargaining rights. No further discussion of this *prima facie* element is necessary. I find this ingredient of the General Counsel's present herein.

b. *Knowledge*

The record contains ample evidence of this *prima facie* element. Indeed, it is undisputed. The Employer admits it was fully aware of Thone's grievance activities. Moreover, DiPirro's April 9 letter and his "lecturing" of Thone over looking for things upon which to file grievances demonstrate his awareness of Thone's counseling other employees regarding their collective-bargaining rights.

c. *Antiunion motivation*

I conclude that there is substantial direct and circumstantial evidence of unlawful motivation. Such evidence consists of:

(1) The variety of DiPirro's expressions of hostility toward Thone's exercise of protected activities. These expressions are: the December 17 remark to Thone that the Employer would "get" him made in the context of asking Thone to withdraw the Schau grievance; the December 17 request to Greenberg to have Thone knock off the "b— s—," concerning his counseling activities; the "lecturing" of Thone not to look for matters over which to file grievances.[19]

(2) Topjian's comments to Morrison that "we have to get the b—" and that Thone was a "pain in the a—." These statements are illuminating. They provide a nexus for evaluating the true causation of Thone's discharge. Apparently, Topjian's principal contact with Thone was through the grievance procedure. Topjian was intimately acquainted with Thone's activity in that connection. Topjian regularly worked in the Canton home office, separated from Thone. Thus, the profane references to Thone reasonably are equated with, and demonstrate, Topjian's dislike of Thone's protected activities.

(3) DiPirro's instructions to Morrison to insert DiPirro's detrimental conclusions about Thone into the audit report. I conclude that DiPirro's intervention is indicative of the depth of his animosity toward Thone resulting from the latter's protected activities. I recognize the possibility that DiPirro's hostility may be considered based purely upon personality differences between him and Thone. This is particularly true in context of having been overruled on grievance dispositions twice by Topjian. However, the record in its entirety shows Thone had been persistent in his protected activity. It was, therefore, in this setting that DiPirro's animosity nurtured. DiPirro's state of mind regarding Thone was directly related to Thone's protected activity. In such circumstances, his animus assumes a proscribed effect. See *Magnetics International, Inc.*, 254 NLRB 520 (1981).

(4) Thone's April 20 threat of discharge which has been found to constitute a violation of Section 8(a)(1). Such unlawful conduct strongly supports a finding of unlawful motivation.

(5) DiPirro grossly exaggerated the documentation supporting his April 9 discharge recommendation. DiPirro's letter, forwarding the audit report, related more than the alleged "falsification." He included a reference to customer MacDonald and then claimed he could "substantiate as many as 15 or 20 additional" identical cases. The quoted language is conjectural on its face. No documentation was provided.

DiPirro then set forth his generalized conclusionary comment that the loss of customer Carbonneau's business was due to Thone's poor business practices and inattentiveness to customer service. However, DiPirro provided no specific support for this characterization of Thone's work habits.

The April 9 letter referred to more than a dozen customer complaints made to Stankard over Thone's demeanor. No specific information attended this generalized observation.

DiPirro enclosed a *single* page from Thone's collection book to support his generalized claim that Thone was ignoring company procedures. In my view, such selective action tends to support a conclusion that DiPirro was attempting to distort circumstances against Thone.

DiPirro then reminded Topjian of Thone's disciplinary history. I will conclude, *infra*, this history could have played no operative part in the decision to discharge Thone. Accordingly, this historical reference is viewed as an element of exaggeration.

Finally, DiPirro's April 9 letter contains what is, perhaps, the most revealing bit of exaggeration and evidence of unlawful motivation. That reference is to Thone's advice to new agents not to write policies for friends and relatives. I have earlier noted that the casting of Thone's advice in terms unflattering to the Employer was DiPirro's abberration, pure and simple. His investigation of the incident was shallow. To have included his conclusions based upon it is strong evidence of the length to which DiPirro would go to rid himself of Thone.

In sum, I conclude that the totality and tenor of DiPirro's April 9 letter shows DiPirro harbored animus against Thone's protected activities and provides a reasonable basis for an inference that the discharge recommendation was discriminatorily motivated.

Upon all the foregoing discussion concerning the element of motivation, I conclude that the General Counsel has satisfied his burden.

4. The Employer's defense

I conclude that the Employer's defense does not withstand scrutiny. It is true there is no evidence that the Union enjoyed less than harmonious relationships with the Employer. There is no evidence the Employer has a proclivity to violate the Act. Nonetheless, these factors must be balanced against the credited evidence showing antipathy to Thone's protected activities.

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[19] In this connection, I find no cogent evidence that Thone's activities disrupted the Employer's operations. There is only DiPirro's bare assertion to that effect.

Ostensibly, the Employer had good reason to discipline Thone. His previous offenses and disciplinary history might well support the subject discharge. However, as noted, the Employer's burden of proof requires a showing that it would have discharged Thone even if he had not been engaged in protected activity. I conclude that this burden has not been met.

(a) The Employer's reliance upon Thone's disciplinary history is not persuasive. Thone was *merely orally reprimanded* on November 16, 1971, for applying dividends without customer authorization. That offense was similar, if not identical, to that which the Employer asserts caused the instant discharge. The letter reporting the 1971 incident reflects that Thone had apparently signed a customer's signature to a dividend application request. Such activity is, at least, tantamount to a "falsification."

The February 1975 infraction involved a deficiency in Thone's accounts. He was explicitly warned that further violations would result in his "immediate termination." The March 1977, December 1979, and March 11, 1980, disciplines were imposed for Thone's failure to timely lapse policies. He was *only orally reprimanded* for the first such offense. The second two resulted in *written warnings*. These second and third warnings advised he would be suspended or terminated for future violations.

The above history shows the Employer long tolerated numerous breaches by Thone of his work obligations. Even repetitions of a particular offense (submission of lapses on time) were no more severely punished than by a written warning, although previous written warnings spoke of vulnerability to suspension or termination. Additionally, in 1971, Thone engaged in a "falsification" of sorts. At that time, that offense warranted only an oral reprimand.

I agree with the Employer that the disciplinary history is a most relevant factor herein. This is so because written rules and company policy do not exist. It may be argued that their absence justifies the Employer imposing whatever discipline it chooses, at any time and for any reason it selects, on a case-by-case basis. However true that may be, the Employer's actions must be evaluated in the light of all circumstances.

Thone was discharged twice. In 1974, his accounts showed a monetary deficiency. He could not explain that condition. In contrast, the instant discharge occurred over insertion of wrong DLPs on M cards. There is no showing the Employer suffered any financial loss. Thone's benefit would have been minimal—30 cents per week for 13 weeks! Moreover, Morrison's audit showed that eight of the nine customers were satisfied with the result of Thone's activity. Only one wanted the dividend application to be reversed. Finally, DiPirro's April 9 letter shows that the alleged misuse of funds actually had not occurred. Thus, the letter concludes, "I am not presently going to apply these dividends, as I believe by law we do not have the right to use them." Thus, it appears, without deciding, that Thone's 1980 offense was less egregious than that of 1971. The quoted words cast substantial doubt that the alleged "falsification" occurred at all.

Had Thone's discharge occurred in the absence of his apparently accelerated protected activities, there would be a basis for accepting the Employer's contentions. However, those protected activities, together with DiPirro's and Topjian's verbal reactions thereto, are critical intervening factors which impact upon the Employer's evidentiary burden. The various expressions of animus remove respectability from the claim that Thone was terminated for good cause. Rather, I conclude that they fortify the General Counsel's contention that the defense is pretextual.

(b) Daniels' denial that Thone's protected activity was not an element in the discharge is refuted by his demeanor and other circumstances. I have noted that Daniels was evasive in a critical area. Moreover, whatever value he provided the Employer is vitiated by the evidence that the Employer deviated from past practice in Thone's discharge. Regional managers have general authority to terminate employees. That authority was exercised as to Thone in 1974 by Longshaw. Nonetheless, it was Daniels, and not Regional Manager DiPirro, who effectuated the 1980 discharge.

The two agents who had been discharged by Daniels in 1978 and 1980 prior to Thone were terminated by him for patently more serious offenses. Thus, agent Keene had advised customers to withdraw their funds from permanent life insurance and agent LeGarde requested customers to surrender their policies for cash and apply such cash to policies with a competitor.

Daniels' termination of Thone, as an isolated event, presents only suspicious circumstances. However, compared to the nature of the offenses for which he personally earlier imposed discharge, there appears to be no reason for him to have become involved in Thone's case. Given the peremptory discipline authority of regional managers, it is not unreasonable to conclude that DiPirro's failure to impose Thone's 1980 discharge was based on special circumstances. I conclude herein that the Employer has not satisfactorily adduced evidence that such special circumstances existed. There is scant, if any, evidence to explain why it was Daniels who discharged Thone. It is reasonably inferable that the protected activities played a part in Daniels' discharge decision. Cf. *Fayette Cotton Mill*, 245 NLRB 428 (1979).

(c) The Employer has not proved that Thone's infraction was sufficient cause for discharge. The Employer contends it was not a common practice among agents to insert wrong DLPs on M cards.

All of the Employer's witnesses who alluded to this subject disclaimed knowledge that agents had engaged in this practice. However, the Employer produced no debit agents to testify on this issue. Thus, the Employer's proof rests upon credibility resolutions. I have credited Morrison's assertion that he inserted the wrong DLPs. Even though the Employer may have been ignorant of that fact, that Morrison engaged in such conduct diminishes the strength of the Employer's contentions to the contrary. There is a lack of credible evidence to sustain this aspect of the defense.

(d) There is no substance to the Employer's claim that there is no direct evidence of animus.

The credited evidence shows that DiPirro unlawfully threatened to discharge employees for filing grievances. Thus, I conclude that the Employer has not borne its burden in this respect.

The foregoing discussion convinces me that the Employer has not shown it had good reason, sufficient in itself, to discharge Thone. There is insufficient evidence effectively to rebut the General Counsel's *prima facie* case. That *prima facie* case, in its totality, leads me to conclude that the Employer's defense is a pretext. The various warnings of possible termination given to Thone throughout his employment cannot be considered mere rhetoric. Had each subsequent offense warranted termination, the Employer surely would have imposed that discipline. It is apparent that the Employer considered Thone's offenses, however slight, actionable only when accompanied by his pervasive protected union activity. On the state of this record, I find that DiPirro's and Topjian's expressed annoyance and resentment of Thone's accelerated grievance filing and counseling activities in his role as steward comprised the initial and motivating cause of his discharge. Thus, the General Counsel's burden of proof of causality has been satisfied.

Upon all the foregoing, I find that Thone was discriminatorily discharged as alleged in the complaint.

CONCLUSIONS OF LAW[20]

1. Boston Mutual Life Insurance Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Insurance Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act when DiPirro, on April 20, told Leland Greenberg and Karen Greenberg that Thone would be discharged unless he stopped filing grievances.

4. By discharging Francis A. Thone on May 8, 1980, because he engaged in the protected union activities of filing grievances and counseling other employees in his role as office chairman, the Employer discriminated against employees in violation of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Employer violated Section 8(a)(3) and (1) of the Act I shall recommend it cease and desist from engaging in such conduct in the future and affirmatively take such action as will dissipate the effects of its unfair labor practices.

To remedy Thone's discriminatory discharge, the Order shall require the Employer to offer him immediate and full reinstatement to his former position of employment as debit agent in the Employer's Methuen, Massachusetts, office or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights, privileges, and benefits to which he was entitled, and to make Thone whole for any loss of earnings he may have suffered as a result of the discriminatory discharge, by payment of a sum equal to that which he would have earned, absent the discrimination, to the date of the Employer's offer of reinstatement. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Inasmuch as the record contains no evidence of a proclivity to violate the Act, I conclude that it is not necessary that the Order contain broad proscriptive language. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). However, the Employer shall be ordered to refrain from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

Upon the above findings of fact, conclusions of law, the entire record of this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, Boston Mutual Life Insurance Company, Methuen, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to discharge employees unless they stop filing grievances.

(b) Discharging any of its employees because they engage in union activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of any of the rights guaranteed them in Section 7 of the act:

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to Francis A. Thone to his former position as debit agent in the Methuen, Massachusetts, office or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights, privileges, and benefits; and make him whole in the manner prescribed above in the section entitled "The Remedy" for any loss of pay or other benefits suffered by reason of his discharge on May 8, 1980.

(b) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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[20] In view of the Conclusions of Law set forth below, the Employer's written motion to dismiss is denied in its totality.

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its Methuen, Massachusetts, location copies of the attached notice marked "Appendix."[22] Copies said notice on forms provided by the Regional Director for Region 1, after being duly signed by an authorized representative of the Employer shall be posted by the Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Goverment

After a hearing in which all parties were represented by their attorneys and were given the opportunity to present evidence in support of their respective positions, it has been found that we violated the National Labor Relations Act, as amended, in certain ways and we have been ordered to post this notice and to carry out its terms.

The Act gives all employees the following rights:

To organize themselves into labor organizations

To form, join, or support unions

To bargain as a group through a representative they choose

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all such activities except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

In recognition of these rights, we hereby notify you that:

WE WILL NOT threaten to discharge any of you because you file grievances.

WE WILL NOT discharge any of you because you engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of any of the rights described above.

WE WILL offer Francis A. Thone immediate and full reinstatement to his former position with us as a debit agent in our Methuen, Massachusetts, office or, if that position no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights, privileges and benefits; and WE WILL make him whole, with interest, for all loss of earnings resulting from his discharge on May 8, 1980.

BOSTON MUTUAL LIFE INSURANCE COMPANY

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[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Datagraphic, Inc. *and* **Brian Maynard** *and* **Louis Walker, Jr. Cases 3-CA-9858 and 3-CA-10102**

January 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On August 14, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and briefs in support thereof and in reply to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

AMENDED CONCLUSIONS OF LAW

Insert the following as new Conclusion of Law 4, and renumber the subsequent paragraphs accordingly:

"4. By impliedly promising employees that, if they voted against the Union, Respondent's president would bequeath the shares of Respondent to the employees upon his death, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Datagraphic, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as new paragraphs 1(b) and (c) and reletter the subsequent paragraph accordingly:

"(b) Impliedly promising employees that if they vote against Graphic Arts International Union, or any other labor organization, Respondent's president will bequeath the shares of Respondent to the employees upon his death.

"(c) Discharging or otherwise disciplining any supervisor because said supervisor failed or refused to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge employees for activities protected by Section 7 of the Act.

WE WILL NOT impliedly promise employees that if they vote against Graphic Arts International Union, or any other labor organization, the company president will bequeath the shares of the Company to the employees upon his death.

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[1] Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We adopt the Administrative Law Judge's conclusion that Respondent's asserted reasons for discharging Supervisor Maynard were pretextual. In so doing, we note that the reasons given Maynard at the time of his discharge, i.e., that he was an ineffective supervisor, did not carry out company policies, and improperly used supervisory discretion, were general and conclusory and may have been references to his refusal to commit unfair labor practices. Furthermore, although at the hearing Respondent presented vague testimony that Maynard was discharged because of communication problems with employees and because of his poor handling of inventory, the record fails to establish that any such problems were other than isolated instances. Finally, there is no evidence that Respondent at any time informed Maynard that he had shortcomings in these areas which could result in his discharge or otherwise adversely affect his employment.

[3] The Administrative Law Judge found, and we agree, that Respondent impliedly promised employees that, if they voted against the Union, Respondent's president would bequeath the shares of the Company to the employees upon his death. The Administrative Law Judge, however, failed to make a specific finding as to whether this conduct was unlawful. We conclude that such reasonably tended to interfere with the employees' rights and therefore was violate of Sec. 8(a)(1) of the Act. We shall amend the Administrative Law Judge's Conclusions of Law and modify his recommended Order and notice accordingly.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL NOT discharge or otherwise discipline any supervisor because said supervisor failed or refused to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL offer full and immediate reinstatement to Brian Maynard and Louis Walker, Jr., to their positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make whole Brian Maynard and Louis Walker, Jr., for any loss of earnings they may have suffered by reason of their discharges, with interest.

DATAGRAPHIC, INC.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in Rochester, New York, on March 10-12, 1981. Charges were filed on June 20 and November 10, 1980, and complaints were issued on July 25 and December 18, 1980,[1] alleging that Datagraphic, Inc. (herein called Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. Respondent filed answers denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and Respondent.

Upon the entire record of the case,[2] including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New York corporation, with its principal office and place of business in Rochester, New York, is engaged in the manufacture and sale of business forms and related products. During the 12 months preceding the issuance of the complaints, Respondent directly sold goods valued in excess of $50,000 from its plant in Rochester to consumers located in States other than New York. Respondent admits that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

II. THE LABOR ORGANIZATION INVOLVED

Graphic Arts International Union (herein called the Union) is a labor organization within the meaning of Section 2(5) of the Act. See *Roytype, Division of Litton Business Systems, Inc.*, 199 NLRB 354 (1972).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The complaints, as amended, allege that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Brian Maynard because he refused to engage in surveillance of Respondent's employees' union activities; by threatening to change the shift of Louis Walker, Jr., because of his union activities; by issuing Walker a negative evaluation, withholding a pay increase, and discharging him because of his union activities; and by impliedly promising benefits to Respondent's employees if they would vote against the Union. Respondent denied the allegations. The issues, accordingly, are:

1. Was Brian Maynard's discharge a violation of the Act?
2. Was Louis Walker threatened with a change of shift, issued a negative evaluation, and denied a pay increase because of his union activities?
3. Was Louis Walker discharged because of his union activities?
4. Was there an implied promise of benefits to the employees if they would not vote for the Union?

B. *The Facts*

1. Background

During the spring of 1980, Respondent's employees began to discuss the unionization of Respondent's plant in Rochester. The Union was approached by the employees in April[3] to assist them in organizing. Meetings were held with the Union's president and International representative, and employees signed union authorization cards. A petition was filed by the Union on May 2 with the National Labor Relations Board, seeking to represent all production and maintenance employees at the Rochester plant. An election was held on June 26, but the outcome was not immediately known because three challenged ballots had been cast and were sufficient in number to affect the results. The challenged ballots were subsequently resolved, and on July 28 a revised tally was issued which showed that of the 25 votes counted, 11 had been cast for, and 14 against, the Union.

2. Brian Maynard

Maynard began his employment with Respondent in June 1972. In 1978 he was promoted to the position of pressroom foreman, the position which he held at the time of his discharge. Maynard testified that a meeting was held in April, present were: Allan Shackelford, attorney for Respondent; George Baker, Respondent's president; Carl Cattau, the Rochester plant manager; and the supervisors. Maynard credibly testified that Shackelford and Baker said they were going to "combat" the Union and advised the supervisors, that "there were going to be plenty of meetings with the supervisors, because they were going to be involved with a campaign against the Union." At a subsequent meeting with supervisors, Shackelford told them that they were not permitted to "threaten, interrogate, promise or spy on employees."

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[1] The complaint in Case 3-CA-10102 was further amended on February 6, 1981, and at the hearing.

[2] Certain errors in the transcript are hereby noted and corrected.

[3] All dates refer to 1980, unless otherwise specified.

Maynard testified that on June 9, Cattau called him into his office and told him, "Brian, you are the only person who isn't coming forth with tidbits of union information for me." He told Maynard that as of June 11, Maynard would be shifted from operating the Schrieber 800 press[4] and instead be working on the floor where he would "again be involved on a one-to-one basis with the employees." Maynard credibly testified as follows:

> Q. Did Carl say anything else during this meeting?
>
> A. Yes, he did. He told me to use my family ties and personal relationships with fellow employees at work or at home or at a bar or on and off company property, 24 hours a day, to break-up the union drive.
>
> Q. Did he say what you were supposed to do?
>
> A. Yes. He told me to tell people that he didn't believe the reason because he had heard only a couple of weeks before the petition was filed. He figured that the union involvement stemmed back way before this. And he felt the people ought to give him a chance to show him that he could do a good job. And he knew that there were promises that were made to people in the past that weren't upheld. He told me there's a chance in the Rochester Plant, if the union got in, that the company would fold. This was two weeks before the election. The election, as far as straw were taken, were still on the union side. He was worried about it. He asked me to use these points, when I talked to these people, because a lot of them I was close with, some of them I was related to; that he thought I could persuade these people to vote for the company.

Maynard further credibly testified as follows:

> Q. Did you say that the company would fold—what did you say about that again?
>
> A. That there was a chance that the Rochester Plant would close down if a union got in.
>
> Q. And what were you supposed to do with this information?
>
> A. Use it to persuade the employees that I was close with and with family ties, to vote for the company instead of the union.

In addition, Maynard credibly testified:

> Q. [D]id he ask you to use your family contacts and personal relationships to find out anything?
>
> A. Yes. He wanted me to find out information, whatever I could on who was voting which way and report back to him.
>
> Q. Did he say anything about what if the union lost?
>
> A. Yes. He did.
>
> Q. What did he say?
>
> A. He said that some people might say he was cleaning house, but he was going to smile as they went out the door.
>
> Q. Did he say who was going to go out the door?
>
> A. Yes. He stated that he was going to get the troublemakers out.

Maynard testified that on June 13 he asked to have a meeting with Cattau. At the meeting, he told Cattau that he had been advised that it was illegal for him to do what Cattau had requested. Approximately 1-1/2 hours later Cattau asked to see Maynard. At this time Cattau said, "[Y]ou are terminated because you are an ineffective supervisor; did not carry out the company policies and improper use of supervisor discretion."

Michael Dill, who was production manager of Respondent during 1980, also credibly testified that at a meeting held prior to the election, Cattau mentioned that "George Baker would be working on a plan to turn the company over to the employees in one form or another, when he passed on." Dill testified that in late May or early June, after it appeared that the Union would win the election, Respondent's strategy changed. Dill was requested to talk to several of the employees concerning the Union. Dill corroborated Maynard's testimony that at the time of his discharge, Cattau told him he was being discharged because he was inadequate as a supervisor. In addition, Dill testified that Cattau listed the reasons he was firing Maynard as "improper use of supervisory discretion and I'm not sure if it was unwilling or unable to support company policies."

Cattau testified that at the meeting with Maynard on June 9 he insisted that Maynard initiate conversations with all employees. He stated that he terminated Maynard because of his failure to follow company policy and his failure to act as a supervisor.

Cattau further testified as follows:

> Q. During the course of the campaign, what statement did you make to the employees regarding the possibility of their getting ownership of the company at some point in time?
>
> A. Prior to the election, during one of the weekly meetings that I held; a few days prior to that I had come across a piece of literature in the company files pertaining to the fact that Mr. George Baker had requested a law firm in Atlanta, Georgia, in the latter part of 1979, to investigate the possibility that upon his death the employees of Datagraphic would receive shares or holdings in the Company.

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[4] The Schrieber press had been delivered in January or February and Maynard had worked on it steadily until June 11.

> Q. Okay. What was the general subject of the conversation of which you mentioned this to the employees?
>
> A. At that point in time, in our meeting we were discussing benefits. And this was not a benefit being given to the people then, but we were discussing benefits in general; the benefits that they were receiving then and possible benefits in the future.

With respect to the change in policy concerning election tactics, Cattau was asked why he wanted the names of the employees, as opposed to just a tally. He answered:

> [W]e were not really getting enough information; they were not bringing forward the information needed to see how we stood in the campaign. I then took it upon myself to direct them to give individual names and by writing the names and by making a list out of them so that we could get a better feel as to how we were doing in the campaign, and possibly have more of a knowledge as to either changing our strategy in the campaign or to know how we were doing at that point in time.

Maynard's testimony is to a large extent corroborated by the testimony of both Dill and Cattau. On June 9, when it appeared that the Union was winning the election, Respondent decided to change its strategy. Maynard was asked to initiate conversations with employees concerning the Union. I conclude that he was asked to find out from the employees what their feelings were about the Union. In addition, I conclude that he was asked to pass on the information to the employees that if the Union were successful, there was the chance that the Rochester plant would be closed. I find that Maynard was discharged because he refused to involve himself in what he regarded to be illegal activity. I find that the reason given by Cattau for the discharge, that Maynard was an ineffective supervisor, was a mere pretext. I find that the reason Maynard was discharged was because he refused to comply with Cattau's directive that he initiate conversations to ascertain what the feelings of the employees were concerning the Union.

3. Louis Walker, Jr.

a. *Discharge*

Walker began his employment with Respondent in April 1977. He testified that the union organizing drive began in the spring of 1980, that he went to all of the union meetings which were held before the election, that he signed an authorization card for the Union to represent him, and that he helped solicit others to sign cards.

Walker testified that on October 28 he and another employee, Terry Graham, were standing in front of their presses talking. Vincent DiNicola, another employee, came up to them and overheard their conversation. Walker and Graham complained to DiNicola that DiNicola was getting overtime, whereas Walker and Graham were not. I credit DiNicola's testimony as to what then ensued. DiNicola testified that Walker said to him "I know why you got all the overtime, because Carl is your buddy." DiNicola was very upset by the insinuation that he was a "buddy" of the plant manager. He then returned to his press, but soon came back to where Walker was standing, and took a swing at a pile of boxes that was next to Walker.[5] At thar point DiNicola left the plant. Later in the afternoon DiNicola called Cattau. After telling Cattau what had happened between himself and Walker, Cattau told DiNicola that he was going to fire Walker. Walker testified that that afternoon Cattau called him into his office, showed him the handbook rule against "provoking a fight or any kind of fighting or disruption in the plant," and terminated him.

A number of witnesses testified that there had been several fights in the plant both prior, and subsequent, to the incident between Walker and DiNicola. No one was fired at these times for fighting. Maynard testified that no one was ever fired for fighting or provoking a fight during the 8 years that he was employed at Respondent. Walker and Graham similarly testified. Flynn testified that he was involved in a fight with DiNicola several months after Walker was fired. Ken Heath, a supervisor, saw the altercation and approached Flynn and DiNicola, telling DiNicola to go back to his press. Neither of the two was terminated for the altercation. Similarly, Drew and Dill testified that no one had been fired for fighting provoking a fight.

It is not clear from the record whether Walker "provoked" the fight. While I credit DiNicola's testimony that Walker called DiNicola a "buddy" of Cattau, I do not decide whether that constitutes "provocation." With respect to who struck the first blow, I credit DiNicola's testimony that he did not attempt to strike Walker, but instead attempted to, and did, strike a stack of boxes. There is no question that both Walker and DiNicola were engaged in a "fight" or argument. However, the testimony is uncontroverted that no one had been terminated for such behavior either before or after the incident. Indeed, DiNicola and Dill testified that there was constant teasing going on in the plant. Inasmuch as there was constant teasing going on and no one had previously been discharged for fighting, I do not believe that the actual reason for Walker's termination was the fighting. I believe that the reason for Walker's discharge was his prior union activities, and I find that the reason given for Walker's termination, namely, that he was engaged in fighting or provoking a fight, was a mere pretext.

b. *Threat to change shifts*

Walker testified that in August Cattau asked him to work nights. Walker stated that he could not because his wife was pregnant. Cattau then responded that he could wait until after his wife gave birth but "then he wanted me on nights." Walker further testified that he was in fact not required to work nights.

Maynard testified that Walker was never ordered to go on the night shift. Dill testified that Cattau wanted to transfer Walker to the night shift because there were more people on the day shift than on the night shift and because Walker was able to run the 8-1/2- and 11-inch printers. When it was pointed out to Cattau that, because of Walker's seniority he had preference with respect to which shift he wished to work, Cattau changed his mind and decided that Walker would not be transferred to the night shift.

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[5] While Walker testified that DiNicola took a swing at him, I credit instead DiNicola's version of the facts. On this point no one corroborated Walker's version. In addition, the record reflects, and I observed, that DiNicola is shorter and weighs less than Walker. It is unlikely that DiNicola would have attempted to strike Walker.

With respect to the reason for the intended transfer, Cattau testified as follows:

> Q. Why did you want Louie Walker, Jr., to go on the second shift?
>
> A. At that point in time, as a General Manager I found it very necessary to run as much equipment back to back, meaning from one shift to another, as I could. The flow of work going out of the building was very poor. Louie had the capability of running such pieces of equipment. I then proceeded to request him to go on night work. At that point in time the company was losing thousands of dollars every month and I had to do whatever I could to change that.

I find that the General Counsel has not sustained his burden of showing that a threat was made because of Walker's union activities. I find that Cattau had a valid reason for requesting the change in work hours. When it was pointed out to him that Walker had seniority rights with respect to shift preference, the request to change shifts was canceled. Accordingly, the allegation is dismissed.

c. *Negative evaluation and denial of raise*

Walker testified that on July 16, after the election, he received a poor evaluation and, accordingly, was not granted a raise. Dill testified that Walker was an average employee but that he was "doing below his potential." Dill recommended "a small token raise, maybe ten or twenty cents; not outstanding but something to show we have a little faith in him." Dill testified that Cattau told him, "[W]ell, Mike, you have got all of these 'needs improvement' on here. It is obvious to me that he should not get a raise."

I conclude that the General Counsel has not sustained his burden of showing that Walker was issued a negative evaluation because of his union activities. Respondent claims that the negative evaluation was issued because Walker was performing poorly. Dill did not controvert that contention. He conceded that Walker was "doing below his potential" and that he showed a number of "needs improvement" on the evaluation. Indeed, the evaluation shows six checks in the "average" category and seven checks in the category marked "needs improvement." Dill recommended a "token" raise merely to show that "we still have a little faith in him." Essentially, therefore, it was Dill who gave Walker the poor evaluation, and there is nothing in the record to indicate that this was done because of Walker's union activities. Accordingly, the allegation is dismissed.

4. Implied promise of benefits

Walker credibly testified that, at one of the meetings that was held between the employees and Cattau prior to the election, Cattau told the employees that "George Baker had said that if anything happened to him or if he ever died, that the companies, all three plants would be split up with the employees that were working there at that time." This conversation took place at one of a series of weekly meetings held after the petition was filed. Walker testified that at such meetings Cattau would tell the emloyees the "bad points" about having a union. Similarly, Graham testified that, after the petition was filed, weekly meetings were held between Cattau and the employees, at which time Cattau said "we didn't need a union." Graham further testified that at one of the meetings Cattau said that "George Baker was having his lawyers draw up papers so that when he died the company would be divided up between the employees." Flynn testified to like effect. Dill testified that the meetings of employees were split, so that the procompany employees attended one meeting and the prounion employees attended a separate meeting. At one of the meetings attended by the prounion employees, held prior to the election, Dill testified that "it was basically pointed out that the company had big plans and couldn't make any promises. But George Baker would be working on a plan to turn the company over to the employees in one form or another, when he passed on; but he couldn't go into it any further at that time."

The statements concerning Baker's turning the Company over to the employees were made at meetings specifically called to discuss the benefits of not having a union. Indeed, Dill testified that it was specifically mentioned in the meetings attended by the group consisting of the "pro-Union" employees. Accordingly, I find that Respondent implied to the employees that if they voted against the Union at some point in the future the president, George Baker, would see to it that at his death the shares of Respondent would be distributed to the employees.

C. *Discussion and Analysis*

1. Discharge of Maynard

It is well settled that a supervisor cannot be lawfully discharged for declining to commit an unfair labor practice. *Belcher Towing Co.*, 238 NLRB 446, 447 (1978), enfd. in part 614 F.2d 88 (5th Cir. 1980). I have found that Maynard was instructed to do various things which would have constituted unfair labor practices. Thus, Maynard was told that there was a chance that the Rochester plant would fold if the Union was elected. He was to use this information to persuade employees to vote against the Union. Such a remark, if made to employees, would violate Section 8(a)(1) of the Act. See *Publishers Printing Co., Inc.*, 233 NLRB 1070, 1072 (1977), enfd. 625 F.2d 746 (6th Cir. 1980). In addition, I have credited Maynard's testimony that Cattau wanted him to "find out information, whatever I could on who was voting which way and report back to him." Such conduct on the part of Maynard would have constituted coercive interrogation of employees concerning their union activities in violation of Section 8(a)(1) of the Act. See *Osco Drug, Inc., a wholly owned subsidiary of Jewel Food Companies, Inc.*, 237 NLRB 231, 233 (1978).

Accordingly, I conclude that Maynard was requested to engage in activities which would have constituted unfair labor practices in violation of Section 8(a)(1). His discharge, because of his failure to violate Section 8(a)(1), is in itself an unfair labor practice in violation of Section 8(a)(1) of the Act.

2. Discharge of Walker

With respect to the discharge of Walker on October 28, Respondent had been aware of Walker's prounion sympathies. Dill testified that Walker was identified to Cattau as being "a hard-core union supporter." Respondent's attitude towards the Union is also clear. I have credited Maynard's testimony that Cattau told him to use his personal relationship with employees to persuade them to vote for the Company and "break up the union drive." With respect to the timing of the discharge, it occurred approximately 4 months after the election. I believe that in the interval Respondent was looking for a proper "excuse" so as to be able to terminate what it regarded as the "hard-core" union supporters. See *Butler-Johnson Corporation*, 237 NLRB 688, 690 (1978), enforcement denied on other grounds 608 F.2d 1303 (9th Cir. 1979).

I conclude that the General Counsel has made a *prima facie* showing to support the inference that the protected activity was a motivating factor in Respondent's decision to discharge Walker. See *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). As discussed above, I regard Respondent's contention that Walker was discharged for fighting as mere pretext—this, in view of the uncontroverted testimony that no employee was discharged for fighting or provoking a fight, either before or after Walker's termination.[6] Clearly, therefore, Respondent has not shown that the "same action would have taken place even in the absence of the protected conduct." See *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Accordingly, I conclude that Respondent, by its discharge of Walker, violated Section 8(a)(1) and (3) of the Act.

3. Motion to amend complaint

The General Counsel has moved to amend the complaint to include, as a separate violation of Section 8(a)(1), Respondent's instructions to its supervisors to provide it with the names of the union adherents and instigators. This motion was first made in the General Counsel's brief (p. 25, fn. 61). Respondent has objected to the motion on the ground that Respondent "did not have the opportunity to truly litigate the matter or consider it in its brief."[7]

The motion was first made after the close of the hearing in the General Counsel's brief. Respondent was not given an opportunity to meet the allegation at the hearing or in its brief. Inasmuch as Respondent was not aware that the conduct in question would be considered to be a separate violation, it did not adequately deal with the matter on cross-examination. I conclude that the matter has not been fully litigated. Accordingly, the General Counsel's motion to amend the complaint is denied. See *Chandler Motors, Inc.*, 236 NLRB 1565 (1978).[8]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Brian Maynard for his refusal to commit unfair labor practices, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. By discharging Louis Walker, Jr., for his union-related activities, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Secion 2(6) and (7) of the Act.

6. Respondent did not violate the Act in any other manner alleged in the complaints.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discharged Brian Maynard and Louis Walker, Jr., in violation of the Act, I find it necessary to order Respondent to offer them full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings they may have suffered from the time of their termination to the date of Respondent's offers of reinstatement.

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[6] The Board has held that an employer's exaggeration of a minor incident out of proportion to its importance and a severe penalty for that offense indicates a pretextual reason for that action. See *Electri-Flex Company*, 238 NLRB 713, 725 (1978).

[7] Copies of a letter dated May 4, 1981, from counsel for Respondent and a letter dated May 6, 1981, from the General Counsel are admitted into the record as ALJ Exhs. 1 and 2, respectively.

[8] The General Counsel concedes that "no evidence was presented as to whether employees explicitly knew" of the directive. It would appear that the General Counsel thus recognizes that the matter was indeed not "fully litigated."

[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[10]

The Respondent, Datagraphic, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Brian Maynard and Louis Walker, Jr., immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its facility in Rochester, New York, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations of the complaints as to which no violations have been found are hereby dismissed.

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[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Bourne's Transportation, Inc. *and* **Anthony R. Direnzo. Case 1-CA-16244**

January 28, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 1, 1981, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled proceeding in which it directed, *inter alia*, that Respondent Bourne's Transportation, Inc., its officers, agents, successors, and assigns, make whole employee Anthony R. Direnzo for loss of earnings suffered by reason of Respondent's discrimination against him. Thereafter, Respondent and the General Counsel entered into a stipulation which provided in substance that Respondent had no objection to the Board's June 1 Order, conceding that it was valid and proper in all respects, and that the only issue in dispute was the amount of backpay due Direnzo under the terms of the Board's Order. A controversy having arisen over the amount of backpay due under the terms of the Order, the Regional Director for Region 1, on September 21, 1981, issued and duly served on Respondent a backpay specification and notice of hearing, alleging the amount of backpay due and notifying Respondent that it should file a timely answer complying with the Board's Rules and Regulations, and Statements of Procedure, Series 8, as amended.

Respondent failed to file an answer to the backpay specification. By letter dated October 16, 1981, counsel for the General Counsel informed Respondent of the requirement to file an answer and of the General Counsel's intention to file a Motion for Summary Judgment if no answer was received by October 23, 1981. On November 23, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and for transfer to the Board for decision, and on November 30, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's motion should not granted. Respondent has not filed an answer, a response to the October 23 letter, a response to the Motion for Summary Judgment, or a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.54 of the Board's Rules and Regulations, Series 8, as amended, provides, in pertinent part, as follows:

> (a) . . . The respondent shall, within 15 days from the service of the specification, if any, file an answer thereto . . .
>
> (c) . . . If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate.

The backpay specification, issued and served on Respondent on or about September 21, 1981, specifically states that Respondent shall, within 15 days from the date of the specification, file with the Regional Director for Region 1 an answer to the specification and that, if the answer fails to deny the allegations of the specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and Respondent shall be precluded from introducing any evidence controverting them.

Respondent has failed to respond to the Notice To Show Cause and, therefore, the allegations of the specification stand uncontroverted. As Respondent has not filed an answer to the specification nor offered any explanation for its failure to do so, the allegations of the specification with respect to its liability, in accordance with the Board's Rules set forth above, are deemed to be admitted as true and are so found by the Board, without taking evidence in support of said allegations.

Accordingly, on the basis of the allegations of the backpay specification, the Board finds the facts as set forth therein to be true, grants the General Counsel's Motion for Summary Judgment, and concludes that the backpay due Anthony R. Direnzo is as stated in the computations of the specification and orders that payment be made to him and on his behalf of those amounts.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bourne's Transportation, Inc., Brockton, Massachusetts, its officers, agents, successors, and assigns, shall make whole employee Anthony R. Direnzo by payment to him of backpay in the amount of $1,972.49, and payment on his behalf of $317.94 in pension and health and welfare fund payments, plus interest to be computed in the manner specified in *Florida Steel Corporation*, 231 NLRB 651 (1977), until payment of all moneys due, less tax witholding required by Federal and state laws.

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[1] 256 NLRB 281.

Friederich Truck Service, Inc. and FTL, Inc. *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50. Case 14–CA–14290

January 29, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 18, 1981, Administrative Law Judge David P. McDonald issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent Friederich Truck Service filed exceptions and supporting briefs, and Respondents filed briefs in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Friederich Truck Service, Inc., O'Fallon, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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[1] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

DAVID P. MCDONALD, Administrative Law Judge: The hearing in this case was held in St. Louis, Missouri, on January 22 and 23, 1981, and is based upon unfair labor practice charges filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50, herein called the Union, on September 30, 1980,[1] as amended on November 7. On November 10, a complaint was issued on behalf of the General Counsel of the National Labor Relations Board, by the Regional Director for Region 14 and subsequently amended at the hearing.[2] The complaint alleges that Friederich Truck Service, Inc., herein called FTS, established FTL, Inc., as an *alter ego*, and violated Section 8(a)(1), (3), and (5) of the Act.

All parties have been afforded full opportunity to appear, to introduce evidence and cross-examine witnesses, and to file briefs. Based upon the entire record,[3] from my observation of the demeanor of the witnesses,[4] and having considered the parties' post-hearing briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent FTS admits that it is an Illinois corporation engaged in the interstate transport of freight and commodities throughout the St. Louis metropolitan area. It maintains its principal office and place of business at 630 E. State Street, in the city of O'Fallon, Illinois. It further admits that during the 12-month period ending September 30, a representative period, it derived, in the course and conduct of its business operations, gross revenues in excess of $50,000 for transportation of freight and commodities from the State of Missouri directly to points outside Missouri. Accordingly, I find that Respondent FTS is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent FTL admits that it is a Missouri corporation engaged in the interstate transport of freight and commodities throughout the St. Louis metropolitan area. It maintains its principal office and place of business at 400 Brookes Drive, in the city of Hazelwood, Missouri. It further admits that from September 22, 1980, to January 22, 1981, it has in the course and conduct of its business operation within the States of Missouri and Illinois received gross revenues in excess of $50,000 for the transportation of freight and commodities between points located in Missouri and Illinois. Accordingly, I find that Respondent FTL is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Respondents admit, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.[5]

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[1] All dates herein refer to 1980, unless otherwise indicated.

[2] The General Counsel's motion to amend the complaint was granted. Par. 6(a) was amended to indicate the layoff dates of Ronald Renner and Gerald Fix as on or about September 19, 1980. Par. 8(c) was amended to read: "Employees to work for less than contract wages and other terms of conditions of employment."

[3] Counsel for the General Counsel's motion to correct the transcript has been granted.

[4] Witnesses were sequestered.

[5] Since 1975 the Union has been the exclusive bargaining representative of Respondent FTS' employees who are engaged in local pickup, delivery, and assembly of freight within the area located within the jurisdiction of the Union, not to exceed a radius of 25 miles. FTS has recognized the Union in successive collective-bargaining agreements effective April 1, 1976, through March 31, 1979, and April 1, 1979, through March 31, 1982.

259 NLRB No. 53

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

The principal issues raised by the complaint and the hearing are as follows:

1. Is Respondent FTL an *alter ego* of Respondent FTS?

2. Did Respondent FTS violate Section 8(a)(1), (3), and (5) of the Act by:

(a) Laying off employees and by failing and refusing to pay employees contract wages and overtime pay as specified in the applicable collective-bargaining agreement?

(b) Encouraging its employees to withdraw from the Union?

(c) Bypassing the Union to deal directly with its employees, without giving the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent FTS' employees?

(d) Establishing FTL, Inc., as an *alter ego* nonunion company in order to avoid its collective-bargaining obligations?

B. *Facts*

1. Friederich Truck Service, Inc.

FTS was incorporated by Frank L. Tempia, his mother, Pearl Friederich,[6] and his wife, Doris Tempia, on December 1, 1954, in the State of Illinois. The original purpose of the corporation as stated in the articles of incorporation have not changed: ". . . to engage in the business of transporting personal property of every type and description by motor vehicle for hire." There are 100 outstanding common shares. Both Frank Tempia and Pearl Skaer each own one share. Skaer has a life estate in the remaining 98 shares with the remainder in the name of Doris Tempia. On December 7, 1974, the following individuals were elected officers: president, Frank L. Tempia; vice president, Frank N. Tempia; and secretary-treasurer, Doris Tempia. On December 3, 1977, the following individuals were elected officers: president, Frank L. Tempia; vice president, Frank N. Tempia; secretary, Doris V. Tempia; and treasurer, Steven J. Tempia.[7] At a special meeting of the shareholders of Friederich Truck Service, on August 15, 1980, both Frank N. and Steven Tempia tendered their resignations as officers and members of the board of directors. Pearl Skaer was elected to fill the unexpired term of Frank N. Tempia.

FTS has been engaged in the interstate and intrastate transport of freight and commodities both as a common carrier, contract carrier, and a commercial zone carrier, as authorized by the Interstate Commerce Commission and various state authorities. As a contract carrier, FTS handled the account for Venture Stores, for all points between Chicago, Illinois; Davenport, Iowa; Merrilville, Indiana; St. Louis and Kansas City, Missouri; and Overland Park and Kansas City, Kansas. As a common carrier its authority extends from St. Louis and St. Louis County to various points in Illinois, not to exceed 50 miles from the Missouri border. A commercial zone is a deregulated zone. The size of the zone depends on the population of the city. In this particular case the exempt zone is 25 miles from the city limits of St. Louis or East St. Louis.[8] The union employees were responsible for the work performed in the commercial zone. Respondent FTS also uses owner-operators to perform its contract authority and common carrier work. The owner-operators are not employees of FTS.

Two-thirds of all of FTS' business consists of hauling freight and commodities for the Venture Stores in the St. Louis metropolitan area. In addition, it services Venture Stores in the Chicago area. This hauling not only includes delivery of freight from the Venture warehouse in Hazelwood, Missouri, to the various regional stores, but also includes the hauling of piggyback trailers from the railroad terminals to the Venture warehouse. FTS also hauls freight for Famous-Barr, Welsh Industries, and Star Bedding. Occasionally, it also hauls for Schnuck's Market.

Frank Tempia Leasing, herein called the Leasing Company, is a sole proprietorship owned and operated by Frank L. Tempia. It is located in Lebanon, Illinois, approximately 6 miles from FTS. It owns approximately 120 trailers, all of which are leased to Venture, and 4 tractors, 2 of which are leased to FTL through FTS.

The FTS facility in O'Fallon, Illinois, is owned by Frank L. Tempia and leased to FTS. The property consists of a two-story building, a mechanic's shack, and a garage for the maintenance of vehicles. Apparently the building itself is a converted residence. FTS owns three straight trucks and six tractors. Three of its own tractors are leased to FTL along with two tractors it leased from the Leasing Company. Of the three remaining tractors owned by FTS, it uses one tractor and the other two are available for leasing to anyone.

Tempia emphasized that he does not own, lease, control, manage, or in any way have an interest in FTL. In fact, he had never even seen the FTL headquarters in St. Louis County.

2. FTL, Inc.

Frank N. Tempia testified that during the late spring or early summer of 1980, he and his brother discussed the possibility of forming their own corporation, since FTS was not showing a profit. They wanted their own business and an opportunity to make a living. Upon their resignation from FTS, Frank N. and Steven incorporated FTL, Inc. on August 28, with offices located at 400 Brookes Drive, Hazelwood, Missouri. The brothers own equal shares of all outstanding stock.[9] Frank N. is president, Orville Zimmerman is vice president, and Steven is secretary-treasurer. All three men serve as the board of directors.

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[6] Pearl Friederich's last name is now Skaer.

[7] Frank N. and Steven J. Tempia are the sons of Frank L. and Doris V. Tempia.

[8] Frank N. Tempia testified he believed the zone to be 20 miles from the city limits of St. Louis and East St. Louis.

[9] On September 3, 19, and 26, 1980, Frank L. Tempia loaned $2,000, $1,000, and $2,000 respectively to FTL, Inc. The loans were secured by three promissory notes with a 3-year maturity date. The loans were made by Frank L. Tempia personally and not in the name of FTS. The purpose of the loans was to assist his sons in starting their new business venture. The $5,000 served as the initial capitalization for FTL.

Article 8 of its articles of incorporation defines the purpose of FTL, Inc. as: ". . . own and lease motor vehicles and to transport personal property by motor vehicle for hire." The business commenced on September 22 as a commercial zone carrier. In that capacity it is limited to delivery of freight within an area not to exceed 20 or 25 miles from the corporate limits of St. Louis and East St. Louis.

FTL does not own any tractors, trailers, straight trucks, or computer equipment. Its Hazelwood headquarters consist of an office and a parking lot, where the five tractors are parked when not in use. It does not have or need a loading dock or truck terminal, since the tractors are only used to pick up and deliver trailers at other locations.

Shortly after its inception, FTL entered into a series of leases with FTS. Three of the leases were dated September 5, for three tractors, and bore the signatures of Calvin Ford as FTL's authorized lessor signature. The fourth and fifth leases were for a spotter tractor and a standard tractor, dated September 19 and 29, respectively. Doris Tempia signed the last two leases. The leases were standard printed forms used by FTS whenever it leases its equipment to anyone including owner-operators. The leases were for 1 year and required the lessor:

> [t]o keep said vehicle and equipment in good operating condition during the term of this lease and to pay for all maintenance and general upkeep of said vehicle and equipment including the replacement of and repair of all tires and tubes, all motor repairs, all mechanical, electrical repairs, oil changes, added oil, lubrication and washing, fuel and fuel taxes, toll charges on roads, bridges, and tunnels, to pay for all license tags on vehicles and equipment herein leased and taxes except as might be otherwise provided.

When these trucks are not in use, they sit idle and FTS is not allowed to use them. The rental fee was $8 per hour. Frank Tempia, Sr., based on his life-long experience in the trucking industry, testified that this amount was a fair and reasonable fee. He stated:

> Considering that we rent ourselves from other people and we rent to other people tractor and driver with all services for $20.00 an hour, in this particular case $8.00 an hour for a tractor and they furnish the driver and they furnish the fuel and the oil and the p.m., it is a fair price.

In addition to the tractor leases, FTL also leased from FTS on September 15 "priority" computer usage time "of ten (10) hours per week in which the Lessee shall have sole-use of the Lessor's complete computer system for programming or operational purposes" for $150 per month and "for the useage of the Lessor's 2nd floor office space and equipment . . . (for) $100.00 per month." The computer and office space is located at FTS' O'Fallon, Illinois, headquarters. FTL has made payments in accordance with the provisions of these seven leases. It does not lease tractors or computer time from anyone other than FTS. FTL also rented office equipment such as desks, chairs, and office furniture from FTS, which is used by FTL at its Hazelwood facility. More recently FTL purchased the equipment. Both the rental and purchase were handled on an informal basis and were not covered by written documents.

The office staff of FTL consists of Frank N., Steven, and Calvin Ford. Both brothers perform duties which are similar to their former responsibilities when employed by FTS. Frank N. handles the customers and accounting. He contacts customers by telephone and in person. None of their customers ever go to FTS' O'Fallon office to conduct business with FTL. To handle the accounting work, it is necessary for Frank N. to go to the computer at the FTS headquarters. The computer is utilized for payroll, as well as freight bills and billing statements. When he works with the computer it is for the exclusive benefit of FTL and he no longer performs computer service for FTS. Steven is in charge of personnel and insurance claims. Since this business is new and their staff is limited, both brothers also perform whatever task that may arise. Calvin Ford is the former dispatcher for FTS and Freeburg Truck Service. He now performs the same duties for FTL.

At the inception of its business, FTL advertised in St. Louis' two daily newspapers, the Globe Democrat and St. Louis Post-Dispatch. Approximately 50 drivers appeared at the Hazelwood office in response to the advertisement. The FTL drivers, Don Wolff, John Vickery, Sam Godat, Olan DeLap, Bruce Kuck, and Dennis Hatches, are not represented by a labor organization and are paid $8 per hour, with the exception of Hatches who is paid $9.16 per hour as a spotter driver. None of the drivers were former employees of FTS, although Don Wolff and Dennis Hatches had worked for Frank Tempia Leasing. Both Charles Riley, a mechanic for FTS, and Dean Uebel, a former FTS driver and occasional owner-operator, may have worked a shift for FTL but neither remained beyond a day.

FTL's primary customer is the Venture Stores.[10] The brothers solicited this business from John Nahm, assistant traffic manager for Venture Stores. They had previously known him when they represented FTS in its dealings with Venture Stores. Approximately 80 percent of their work is with Venture. They also service Schermer, Schnucks Grocery, Welsh Industries, McCulloch, Star Bedding, and International. They have unsuccessfully sought the accounts of Famous Barr, Street Industries, Benjamin Ansehl, Grand Prix, Pyramid, Schlueter, and C & R Metals. In servicing these customers, FTL is not allowed to go beyond the commercial zone.

3. Pre-August meetings

All of the drivers who testified agreed that there had been a series of meetings in 1980 dealing with the financial conditions of FTS. Although the record is unclear as to the number and dates of these meetings, there was very little difference in the recollection of the witnesses concerning the general subject matters that were discussed. Generally the meetings dealt with FTS' deteriorating financial condition. On one occasion when Frank L. Tempia returned from Chicago he called the employees together and told them he was trying to set up an operation with Venture Stores. He explained they all must work together to save the Company, which was going down hill. In May or June, he informed the assembled drivers that the Company had lost several accounts. FTS had previously carried six tractor drivers and four straight truck drivers. Due to the decline in business, the drivers were reduced to five tractor drivers and two straight truck drivers. With the exception of Ronald Renner, all the drivers who testified agreed that business had decreased before the August meeting. However, Ronald Renner admitted that he was only able to work 1 month in the previous 5 months. Ronald Harris testified, "Well, it had been general knowledge that the company was in financial trouble for quite some time."

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[10] *Venture Stores consists of a large chain of discount stores owned by Famous Barr. Due to the size of Venture, FTL is only one of many trucking firms that handle Venture's freight.*

4. August meeting

Frank L. Tempia gathered his employees for a meeting at the O'Fallon, Illinois, office of FTS on an evening in August. The employees who attended were Dennis Renner, Marlin Fix,[11] Gerald Fix, Frank Gabriel, Ron Harris, Ron Renner, Steve Stovey, Tom Smith, Dean Uebel,[12] Bill Overbey, and Anthony Tempia.[13] Neither Frank N. nor Steven Tempia attended this meeting.

Frank L. Tempia began the meeting by explaining the Company had made vigorous efforts to cut their cost in every area. The had tried various money saving ideas, such as buying a truckload of tires for a greater discount, as opposed to buying them one at a time. None of their efforts were of sufficient impact to offset their business losses. The Company was in serious financial difficulties since it was unable to compete with nonunion trucking companies. Dennis Renner testified that the announcement did not come as a surprise to anyone. He was personally aware that FTS had been underbid by other companies. Both National Distributor and Ken's Express Service had taken substantial portions of FTS' local business. Ken's Express Service had secured the Colonel Days account, a division of Venture, with stores located on the Venture parking lot.

Tempia then suggested he would like the drivers to take a $2-an-hour cut in wage and possibly have the employees pay half of their health and welfare expenses. His comments precipitated bickering between the various employees. Someone suggested that if the Company was actually destitute Tempia should go to the Union and allow it to inspect the books. If in fact the Company was in serious trouble, the Union might be willing to work something out so that FTS could stay in business. Tempia responded that nobody was going to look into his books. Frank Gabriel preferred to drop out of the Union before he would take a $2 cut, because he had a large family to support. Tempia responded that he could not get away with dropping the Union since he had a contract.[14] Bill Overbey remarked that he did not care what happened, but he would refuse to give up his union card since he was approaching retirement and could not risk losing his health and welfare and pension. Dennis Renner said he would not want to drive nonunion but suggested that perhaps they should at least look into insurance with a private company. He recommended an insurance salesman with Equitable Life, from whom he had purchased a life insurance policy. Ron Harris then turned on Dennis Renner and said, "You like it so much why don't you take out a policy!"

Through all this bickering, Marlin Fix, the union shop steward, remained silent. Then his brother Gerald Fix looked over at Marlin and stated, "Just sit there, number one man and don't say nothing." This heated comment was an apparent reference to the fact that Marlin was a senior driver and therefore was safe from potential layoff. Marlin remained silent. In fact, there was no evidence offered that he negotiated with Tempia, nor did he inform his Union of this meeting.

There existed a collective-bargaining agreement between the Union and FTS, which provided a wage scale. However, FTS did not notify the Union that it was conducting meetings with union members concerning changes in wages and benefits.

The meeting ended with Tempia requesting the men to discuss his suggestions and then he warned them that he may start another company in order to survive or make other arrangements to have freight delivered. Gabriel testified that he had been employed by FTS for 7 years. When he was hired he was told the Company was unable to pay union scale wages, but it would as soon as its financial status improved. During those 7 years, FTS never paid scale and Tempia repeatedly told Gabriel, that he would open another company under an assumed name if the O'Fallon facility closed.

Apparently, the general consensus of the drivers was that they had already conceded too much to Respondent FTS and therefore they did not agree to the $2 hourly pay cut nor a change in the payment of their health and welfare. FTS did not cut the hourly wage nor did it require the employees to pay a share of their welfare.

5. John Edward Gonzales

John Edward Gonzales became the business representative for the Union as of December 15, 1976. In that capacity he was assigned the duty to represent the Union in its dealings with FTS. He had previously worked as a shop steward for 8 years.

Gonzales explained that a shop steward is not elected by his fellow workers but selected by and with the approval of the Union. When Gonzales discovered that

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[11] Dennis Renner had been the elected shop steward, until at some unknown time he announced he no longer wished to serve. Thereafter, Marlin Fix assumed the duties of shop steward. There was no election and he was not appointed by the Union. However, during the August meeting he was recognized by his fellow workers as their shop steward.

[12] Dean Uebel was the only nonunion driver who attended the August meeting.

[13] Anthony Tempia is the son of Frank L. Tempia. He is employed by FTS as a mechanic and does not represent management.

[14] Gabriel testified that Tempia did not comment after he offered to drop his union membership.

Marlin Fix was acting as the steward, he notified FTS in a letter dated September 22 that Ronald Harris was the new steward. Fix had never been appointed by the Union.

Gonzales testified he had never been notified by FTS that it was conducting a series of meetings directly with union members, which dealt with wage and benefits. He also explained that even if Marlin Fix had been the legitimate steward, his presence would not change the character of the August meetings, since neither a steward nor business representatives have the authority to negotiate a change in the wage scale of an existing collective-bargaining agreement.

On August 14, Steve Stovey filed a grievance, complaining that employees with less seniority were being worked and he had been laid off. The first meeting in regard to this grievance was held at the Belleville Teamsters office where Frank L. Tempia, Steve Stovey, Ron Harris, and Gonzales were present. During the conference it was determined that both Ron Harris and Stovey had taken the drivers' test and were licensed to drive tractor-trailers. It was Tempia's position that neither of them was qualified, regardless of the license. He stated that, in the event that he was required to pay these grievances, he would have no alternative but to open another company and use nonunion drivers, as other trucking companies were doing in Missouri. At the next meeting, September 9, the grievance was settled by Harris accepting 1 day of pay instead of 2 and Stovey accepting 10 days instead of 20.

6. Wages and layoff

Although Respondent FTS provided its payroll records for inspection and Frank L. Tempia answered extensive cross-examination, neither the records nor Tempia shed any appreciable light on the hourly rate each truckdriver received. The Company simply did not maintain records which would show the number of hours each driver worked. The records provide only a gross and net wage figure. Therefore, it was impossible to determine the hourly wage by inspecting the company records. Tempia stated they paid scale, but was unable to state what was the wage rate. In contrast, all of the drivers said that for years they had worked below scale in an attempt to save the Company. The Union was never informed of this fact.

In April 1979, Ron Harris attended a meeting with Respondent FTS, where an agreement was reached concerning wages. A new contract had come into effect April 1, and the drivers wanted to discuss the effect the new wage rate would have on them. They were below scale. Frank L. Tempia agreed to provide employees with the increase provided in the collective-bargaining agreement, plus 25 cents, in an effort to raise the wage rate to within $1 of the actual scale called for in the contract upon its expiration in April 1982. The testimony of those who were laid off reveals that they received $10.22 per hour, instead of the contract rate of $11.97 per hour.

In September, FTS began to lay off its drivers. Steve Stovey was laid off on September 5; Ronald Harris, Thomas Smith, Ronald Renner, and Gerald Fix were laid off on September 19; Frank Gabriel and Dennis Renner were laid off on September 22. The Union was not informed of these layoffs.

C. *Analysis and Conclusions*

1. Wages under the collective-bargaining agreement

Although Frank L. Tempia testified that FTS paid whatever was the agreed scale wages for drivers, the record fails to substantiate his assertions. In fact, all of the drivers testified that when they were laid off they were receiving $10.22 an hour rather than $11.97, which was the amount called for in the current collective-bargaining agreement.

In order to resolve this disputed fact, it is necessary to determine the credibility of the various witnesses. I do not credit Tempia's assertion that FTS paid scale wages. In this area of his testimony he was very evasive. Initially he could not remember what the Company paid the drivers. Then he finally answered in general terms that it paid scale. Perhaps, it is understandable, that any officer of a corporation may have difficulty in remembering the exact hourly wage paid to various workers. However, in the instant case, the crucial question is not the exact amount paid but whether the wage complied with the collective-bargaining agreement. The credible record is overwhelming that the wage was less than scale. Indeed, the Company had a long history of paying less than union scale. For many years, Tempia had circumvented the Union by dealing directly with the drivers. Year after year the drivers were told they must accept less than the contract wage in order to save the Company. Gabriel recalled in a very clear, concise, and credible manner an incident which occurred when he was hired in 1973. At that time he was informed by the Company that they were unable to pay scale, but they would comply with the collective-bargaining agreement as soon as it became financially feasible. This theme was played over and over during Gabriel's 7 years of employment. In view of the testimony of the drivers and the history of FTS, I find it absolutely impossible to accept Tempia's statement, that it paid scale. In fact, the record is replete with credible evidence, proving he was a prime participant in the perpetration of this particular unfair labor practice.

The General Counsel argues and I agree that Respondent FTS violated Section 8(a)(1) and (5) of the Act by paying its drivers less than the collective-bargaining wage scale without having afforded the employees' collective-bargaining representative prior notice and an opportunity to negotiate and bargain with respect to wages. In essence, such conduct represents a repudiation of the collective-bargaining agreement. *Western Pacific Roofing Corporation*, 244 NLRB 501 (1979); *Yates Industries, Inc.*, 238 NLRB 167 (1978); *Fairfield Nursing Homes*, 228 NLRB 1208 (1977).

2. Circumventing employees' collective-bargaining representative

The fact that Frank L. Tempia called a meeting of FTS employees, where he suggested they should consider a $2 an hour pay reduction and a sharing of the cost of health and welfare benefits, is not in dispute. Tempia was not even questioned on direct or cross-examination concerning this meeting. Although FTS was a party to a collective-bargaining agreement, which set wages, it never notified the Union of its desire to modify the contract. During this August meeting, the drivers were not represented by a union official with the authority to negotiate such changes. At one point, a driver suggested to Tempia that if FTS was in such serious financial difficulty then he should allow the Union to inspect the books. If his fears were substantiated, then the Union might agree to amend the contract. This offer was summarily rejected. It is obvious that Tempia preferred dealing directly with the men. This direct confrontation had the added advantage of dividing the workers and playing upon their individual fears. The August meeting quickly descended into bickering chaos. Each worker sought a solution which would resolve his individual problem. One was willing to forsake the Union if he could save the $2 for his large and needy family. Another worker, who was approaching retirement, was willing to accept the pay cut to save his union pension.

The evidence was unquestioned that Gonzales, the union business agent, was never informed of this meeting and therefore was not given an opportunity to represent the interest of the Union's members. I reject the argument that the drivers were represented by their steward, Marlin Fix. As was explained by Gonzales, Marlin Fix was not properly selected and therefore not a steward. Even if one assumed Marlin Fix was the steward, he would not have possessed the authority to negotiate wage and welfare benefits. It is also interesting to note that Marlin remained mute during the entire meeting and did not even notify the Union of what had occurred.

It is clear that by the above unilateral conduct, Respondent FTS dealt with employees in contravention of its duty to bargain and negotiate with the Union as the exclusive representative of its employees. Such conduct is a well-recognized violation of Section 8(a)(1) and (5) of the Act. *Chester Valley, Inc.*, 251 NLRB 1455 (1980); *Pacific Intercom Co.*, 255 NLRB 184 (1981).

3. Laying off union drivers

The General Counsel has accurately summarized the events following the August meeting. The drivers refused to accept Respondent FTS' proposals to reduce wages and to create an employee-funded health and welfare plan. One month later Steven Stovey, Ronald Harris, Thomas Smith, Frank Gabriel, Ronald Renner, Gerald Fix, and Dennis Renner were laid off. It is the position of the General Counsel that these layoffs were in direct response to the drivers' refusal to accept the company proposals and also reflect a long history of disdain for its collective-bargaining obligations. In contrast, Respondent FTS defends the layoffs by arguing that they were based on sound business judgment. Its share of the commercial zone traffic had declined substantially and therefore it had no choice in the matter. It is true that FTS commercial zone work had declined prior to the inception of FTL. Several of the union drivers testified that prior to the August meeting they were aware that two rival St. Louis nonunion freight companies had won a substantial portion of FTS' business. Thus the question is raised whether Respondent FTS was motivated to layoff its drivers by decline in business or because of the drivers' refusal to acquiesce to the Employer's proposal to lower wages and create an employee-funded health plan. Was the decline in business simply a pretext to free the Company of its collective-bargaining obligations?

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board has provided a clear explanation as to the distinction that must be maintained between "pretext" and "dual motive." It is pretextual when the evidence reveals that what the employer had advanced as a legitimate business reason for its action is in fact a sham, in that the purported rule or circumstances advanced by the employer did not exist or was not in fact relied upon. As previously indicated, Respondent contends the layoffs were based on sound business judgment, namely, a decline in business. If in fact, the Company, in good faith, considered the decline in business, such reliance is not pretextual. However, Respondent may still be guilty of unfair labor practices, if its actions fall within the purview of the dual motive, as defined in *Wright Line, supra*.

Obviously, Respondent FTS, through its president, Frank L. Tempia, preferred to deal directly with its union drivers and ignore its obligations under the collective-bargaining agreement. Tempia stated in no uncertain terms that the Company could not survive if the men refused to accept a pay cut. He perceived only two possible choices to the Company's financial quagmire.

If the cost were not reduced through the pay cut then the operation would cease. The fact that the employees recognized the threats to their Union and their own personal security was graphically illustrated by their emotional outburst that accompanied Tempia's proposals. Within a month after their refusal to accept the wage reduction and change in benefits, the men were laid off. Clearly this sequence of events was not coincidental and when considered collectively it supports the proposition that the General Counsel has made a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to lay off the drivers. Once this is established, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. Respondent FTS has failed to meet this burden.

Although both Tempia and the drivers expressed their opinion that the commercial zone work had decreased, not a scintilla of evidence was offered to prove the extent of the decline. Surely, an analysis of past and present corporate account receivables, billing sheets, customer contracts, and tax records would reveal the extent of the Company's losses. Without some proof, I am left to speculate whether sound business judgment justified the abrupt layoff of seven men. The economic condition of FTS may well have justified the above layoffs. However, the record is void of probative evidence which would firmly support such a premise.

Even if one assumes that the layoffs were based on sound business judgment, the burden would still shift to Respondent to prove that the layoffs would have taken place even in the absence of the drivers' exercise of protected conduct. FTS has not met this burden.

FTS' flagrant disregard for the protected rights of its workers and its obligation under the collective-bargaining agreement is confirmed by an examination of Frank L. Tempia's past conduct. For years he was able to impose his will on his drivers. In a perfunctory manner he would periodically bind FTS to a collective-bargaining agreement with the Union and then ignore its provisions. Without providing the Union with an opportunity to represent its members over wage and benefit changes, Tempia would go directly to the drivers. In a coercive manner, he played upon the fears of his employees that their jobs would cease if they did not accept below scale wages. Finally, the workers reached a point where they felt they could no longer retreat. It was in that atmosphere, following their refusal to accept the $2-per-hour wage cut, that the layoffs began. So long as the drivers were willing to submit to the demands of the Company and ignore their rights under the collective-bargaining agreement, labor harmony flourished.

Having considered the foregoing, I find that although Respondent FTS may have taken into account the decline in business in arriving at its decision to layoff the drivers, I am not convinced that it would have reached the same decision absent the protected conduct. The drivers' refusal to accept a lower wage and a change in benefits was the "motivating factor" in the Company's decision to layoff the drivers.

4. *Alter ego*

a. *Applicable principles*

As originally stated in *L. E. Davis d/b/a Sakrete of Northern California, Inc.*, 137 NLRB 1220 (1962), and reaffirmed in *Holiday Inn of Benton*, 237 NLRB 1042, 1044 (1978), the Board looks to four principal factors in determining whether two arguably separate employers will be treated as a joint employer. These factors are: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. While no individual factor has been held to be controlling, emphasis is placed on the first three factors, particularly centralized control of labor relations. *Stoll Industries, Inc.*, 223 NLRB 51, 53–54 (1976), enfd. 551 F.2d 301 (2d Cir. 1977); *Gerace Construction, Inc. and Helger Construction Company, Inc.*, 193 NLRB 645 (1971). *Alter ego* status will generally be found where the two enterprises have "substantially identical management, business purpose, operation, equipment, customers, and supervision as well as ownership." *Crawford Door Sales Company, Inc. and Cordes Door Company, Inc.*, 226 NLRB 1144 (1976).

b. *Common ownership—financial control*

Frank N. Tempia and Steven J. Tempia are equal and sole owners of FTL, Inc. They have never owned or had financial control of FTS. FTS is owned by Frank L. Tempia, Pearl Skaer, and Doris Tempia. It should also be noted that even before Frank N. Tempia and Steven Tempia resigned their positions with FTS, neither of them owned any portion or exercised any financial control over FTS.

It is true that Frank L. Tempia personally lent $5,000 to his sons' new corporation. This loan was secured by a series of promissory notes which will mature in September 1983. The record is void of any indication that this transaction was not conducted in an "arm's length" atmosphere. To say this loan provided Frank L. Tempia with financial control over his sons' enterprise would require rank speculation.

The only other financial connections between the two corporations are a series of leases. The record substantiates the assertions, by Respondents, that all of the leases were negotiated through an "arm's length" transaction. Indeed, the record is totally void of any evidence which would challenge their assertions. It was a common practice for FTS to lease their tractors to anyone. The standard rental fee for a driver and a fully fueled and maintained tractor was $20 per hour. Since FTL leased the tractor for $8 per hour, paid their own drivers $8 per hour, and was required to furnish the fuel, I find the leases on the tractors were reasonable and legitimate. Similarly, the leases for the rental of computer time and the second floor of the FTS headquarters were introduced without an indication that the agreed amounts were lower than the true market value. In addition, FTL has fully paid the amounts required by the leases. Therefore, I am compelled to conclude that all of the leases were negotiated and administered in an "arm's length" manner. The agreed amounts were reasonable and do not represent a method by which FTS could funnel funds to FTL by providing below market rentals, nor in any manner provide FTS with a method of financially controlling FTL.

In the present case, I do not find probative evidence which would reveal common ownership or financial control by FTS. The General Counsel has relied on *Sakrete of Northern California, Inc., supra*, and other cases, which are readily distinguishable, ". . . as they involved situations where both enterprises were either wholly owned by members of the same family or nearly totally owned by the same individuals . . . ." *Clinton Foods, Inc., d/b/a Morton's I.G.A. Foodliner; and its alter ego or joint employer Sam & Ed's Inc.*, 240 NLRB 1246, fn. 2 (1979). Although in the instant case both companies are owned by members of the same family, the ownership of the two enterprises is not identical. However, I am mindful that identical corporate ownership is not the *sine qua non* of *alter ego* status. *Crawford Door Sales Company, Inc. and Cordes Door Company, Inc., supra.*

c. *Common management*

As in the case of ownership, management in these two corporations is totally distinct. After their resignation on August 15 as officers and directors, the Tempia brothers never again participated in the management of FTS. Their attention was turned to their own company. Likewise Frank L. Tempia his wife, and mother continued to devote their energies to FTS and never participated in the running of FTL.

d. *Interrelation of operations and centralized control of labor management*

It is undisputed that the articles of incorporation of each company set out nearly identical business purposes. In general, the articles provide for the transporting of personal property. Although their stated purpose is nearly the same, in reality there are significant variances. FTL, a Missouri corporation with headquarters in Hazelwood, Missouri, was founded in 1980. Its ability to haul freight is limited by the geographical boundaries of the commercial zone. As a result, it cannot carry freight beyond 20 or 25 miles from the corporate limits of St. Louis and East St. Louis. In contrast, FTS, an old established Illinois corporation, cannot only haul freight within the commercial zone but also as a common and contract carrier throughout Missouri and Illinois, as well as parts of Kansas and Indiana.

It is also true that Venture Stores is the primary customer of both corporations. However, there is no evidence to show that FTS shifted its Venture business to FTL. Indeed, the record is clear that FTS began losing substantial portions of the Venture business to other freight companies before FTL was formed. Of course, the balance of FTS' business was not in competition with FTL since it dealt with freight hauling beyond the common carrier zone.

As previously stated, FTL leased all of its tractors from FTS. These tractors were for the exclusive use of FTL. With the exception of the computer, the two companies did not share any equipment. The use of the computer was not interrelated. Frank N. Tempia operated the computer, in keeping with the lease, for business matters pertaining only to FTS, while Doris Tempia utilized the computer for FTS and the Leasing Company.

After reviewing the surrounding circumstances, I find that, although these two companies had nearly identical business purposes, they were maintained as two totally independent corporations in regard to their operations. This separation of management is equally true in regard to the control of labor management. At all times Frank L. Tempia controlled labor management of FTS. This was true even when his sons were officers, directors, and employees of FTS. When the sons formed their own company, Steven Tempia was in charge of personnel. Other than the brothers, Calvin Ford was the only worker who had previously been an employee of FTS. The control of labor management of these two freight companies was never in the hands of the same individuals.

I credit the recollection of Gonzales and the drivers that on several occasions Frank L. Tempia threatened to establish a nonunion freight company if the drivers failed to accept his proposals or if he was forced to comply with a grievance. However, I do not accept the argument that these blustering statements represent proof that Tempia established FTL or that the former is the *alter ego* of FTS. To arrive at such a conclusion would unjustifiably bind the Tempia brothers to statements by a third party not within their control. At the very most, Tempia's statements may raise an inference to be considered along with all of the evidence.

On the basis of the above, I find that FTS and FTL are two separate and independent corporations. FTL is not the *alter ego* of FTS and therefore I shall recommend that all complaints filed against FTL be dismissed in their entireties.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent FTS, as set forth above, occurring in connection with its described operations, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondents Friederich Truck Services, Inc., and FTL, Inc., are employers within the meaning of Section 2(2) of the Act, engaged in commerce and in businesses affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent FTL, Inc., did not violate the Act and is not the *alter ego* of Respondent Friederich Truck Service, Inc.

4. By laying off and refusing to reinstate Stephen Stovey, Ronald Harris, Thomas Smith, Ronald Renner, Gerald Fix, Frank Gabriel, and Dennis Renner, for their refusal to acquiesce in the proposed unilateral changes in the terms of the collective-bargaining agreement, Respondent FTS violated Section 8(a)(3) and (1) of the Act.

5. The unit appropriate for collective bargaining is:

> All truckdrivers, warehousemen, helpers, dockmen, checkers, power-lift operators, hoisters, and such other employees engaged in the local pick-up, delivery, and assembling of freight within the area located within the jurisdiction of the Local Union, not to exceed a radius of 25 miles.

6. At all times material, the Union has been the exclusive collective-bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

7. By bypassing the Union and directly dealing with employees by (a) paying them less than the contractual wage scale required by the collective-bargaining agreement, and further (b) proposing in a company meeting to the union employees that they accept additional wage cuts and participate in an employee-funded health and welfare plan, in contravention of the existing collective-bargaining agreement and without obtaining the Union's consent to those changes and modifications, Respondent FTS has violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. FTS has not violated the Act in any other manner than as specified above.

THE REMEDY

Having found that FTS has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and that certain affirmative action be taken by it to effectuate the policies of the Act. I shall recommend that FTS be ordered to restore the wages, hours, and terms and conditions of employment to the levels required by its collective-bargaining agreement with the Union, and to make whole its employees for any losses suffered, since March 30, 1980, as a result of its unlawfully paying less than the hourly wage provided in the collective-bargaining agreement,[15] with interest on the amounts owing, to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see also *Olympic Medical Corporation*, 250 NLRB 146 (1980). In addition, Respondent FTS shall restore Stephen Stovey, Ronald Harris, Thomas Smith, Frank Gabriel, Dennis Renner, Ronald Renner, and Gerald Fix to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay, including loss of fringe benefits, they may have suffered by reason of the discrimination against them. Backpay shall be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be paid on the amounts owing and to be computed in the manner prescribed in *Florida Steel Corporation, supra*; see generally, *Isis Plumbing & Heating Co.*, 139 NLRB 716 (1962), enforcement denied on different grounds 322 F.2d 913 (9th Cir. 1963).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[16]

The Respondent, Friederich Truck Service, Inc., O'Fallon, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to abide by the terms of the collective-bargaining agreement with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50, effective by the terms of said agreement from April 1, 1979, through March 31, 1982, by directly dealing with employees and by entering into a private agreement with employees to pay them at a wage scale less than the contractual wage rate required by the collective-bargaining agreement with the Union.

(b) Laying off, suspending, discharging, or otherwise discriminating against employees with regard to wages, hire or tenure of employment, or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed them by the National Labor Relations Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Comply with the terms and conditions of the above-described collective-bargaining agreement and make the drivers whole for any wage losses they have suffered after March 30, 1980, as a result of FTS paying below the wage scale rates found in the said collective-bargaining agreement, in the manner set forth above in the section of this Decision entitled "The Remedy."

(b) Offer Stephen Stovey, Ronald Harris, Thomas Smith, Frank Gabriel, Dennis Renner, Ronald Renner, and Gerald Fix immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth above in the section entitled "The Remedy."

(c) Upon request, bargain collectively with the Union with respect to wages, hours, and conditions of employment of Respondent's drivers who are represented by the Union and are covered by the aforesaid collective-bargaining agreement, and who constitute an appropriate bargaining unit under the Act.

(d) Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay and reinstatement rights set forth in the section entitled "The Remedy."

(e) Post at its O'Fallon, Illinois, facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 14, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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[15] The record reveals that for many years FTS has paid less than the hourly wage called for in the successive collective-bargaining agreements. Although it is difficult to pinpoint when this practice began, Gabriel testified that FTS told him when he was hired in November 1973 that they could not pay full scale. In the instant case, there is no evidence that Respondent fraudulently concealed from the Union that it paid hourly wages below the rate set by the collective-bargaining agreement.

Therefore, the remedial order for a retroactive date is limited by Sec. 10(b). *Don Burgess Construction Corporation d/b/a Burgess Construction and Don Burgess and Verlon Hendrix d/b/a V & B Builders*, 227 NLRB 765 (1977), enfd. 596 F.2d 378 (9th Cir. 1979).

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50, as exclusive bargaining representative of our employees in the following appropriate unit with regard to rates of pay, wages, hours, and other terms and conditions of employment:

All truck drivers, warehousemen, helpers, dockmen, checkers, power-lift operators, hoisters, and such other employees engaged in the local pickup, delivery, and assembling of freight within the area located within the jurisdiction of the Local Union, not to exceed a radius of 25 miles.

WE WILL NOT fail and refuse to abide by the terms of the collective-bargaining agreement with the International Brotherhood of Teamstes, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50, effective by the terms of said agreement from April 1, 1979, through March 31, 1982, by directly dealing with employees and by entering into a private agreement with employees to pay them at a wage scale less than the contractual wage rate required by the collective-bargaining agreement with the Union.

WE WILL NOT lay off, suspend, discharge or otherwise discriminate against employees with regard to wages, hire or tenure of employment, or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

WE WILL NOT offer to bargain or bargain directly with employees in the above-described bargaining unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of any right guaranteed them by the National Labor Relations Act.

WE WILL comply with the terms and conditions of the above-described collective-bargaining agreement and make the drivers whole for any wage losses they have suffered after March 30, 1980, as a result of FTS paying below the wage scale rates found in the said collective-bargaining agreement, with interest.

WE WILL offer Stephen Stovey, Ronald Harris, Thomas Smith, Frank Gabriel, Dennis Renner, Ronald Renner, and Gerald Fix immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, with interest.

FRIEDERICH TRUCK SERVICE, INC.

Detroit Plastics Products Company *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 236, UAW. Case 7-CA-19801

January 29, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on September 14, 1981, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 236, UAW, herein called the Union, and duly served on Detroit Plastics Products Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on October 6, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 18, 1981, following a Board election in Case 7-RC-16138, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that at all material times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 26, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising as affirmative defenses that the results of the election were invalid inasmuch as the Union had engaged in improper preelection conduct.

On November 9, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 17, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed an opposition to counsel for the General Counsel's motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent admits its refusal to bargain but attacks the Union's certification on the basis that Respondent's objections in the underlying representation case were improperly overruled. Counsel for the General Counsel argues that there are no matters warranting a hearing as the issues concerning the Union's certification were litigated and determined in the underlying representation case. We agree with counsel for the General Counsel.

A review of the record, including the record in Case 7-RC-16138, indicates that pursuant to a Stipulation for Certification Upon Consent Election a secret-ballot election was held on January 30, 1981, in the unit found appropriate. The Union won the election. Thereafter, Respondent filed timely objections to the election alleging that the Union had engaged in improper preelection conduct. Specifically, Respondent alleged that prior to the election the Union (1) informed employees that it would know how each person voted, and (2) distributed a leaflet to employees which allegedly indicated that only employees signing authorization cards before the election would be eligible for a waiver of initiation fees.[2] After investigation, the Regional Director, on March 6, 1981, issued a notice of hearing on objections, in which he concluded that substantial and material issues of fact existed with respect to Respondent's objections, and that these issues could best be resolved after a hearing. A hearing was held on March 20, 1981. On April 3, 1981, the Hearing Officer issued his Report on Objections recommending that Respondent's objections be overruled in their entirety. On April 13, 1981, Respondent filed exceptions and a brief in support thereof to the Hearing Officer's recommendations contending, *inter alia*, that the Hearing Officer erred as to his credibility findings, and reiterating

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[1] Official notice is taken of the record in the representation proceeding, Case 7-RC-16138, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] The Union's leaflet to the employees stated, *inter alia*, that "Members of the UAW pay two hours' pay a month or 1.1% of their monthy salary and *we have waived the initiation fee for all eligible employees.*" Respondent contended that the word "eligible" in the Union's leaflet is ambiguous and susceptible to misinterpretation by the employees.

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its argument that the Union's initiation fee waiver was ambiguous and violated the rule set forth in *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). On June 18, 1981, the Board issued its Decision and Certification of Representative (not reported in volumes of Board Decisions) wherein the Board, having reviewed the record in light of the exceptions, found that Respondent's exceptions raised no material issues of law or fact, adopted the Hearing Officer's findings and recommendations, and certified the Union as the collective-bargaining representative of the employees in the appropriate unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Michigan corporation, is engaged in the manufacture, sale, and distribution of automobile parts. During the year ending December 31, 1980, a period representative of Respondent's operations, Respondent received goods and services valued in excess of $50,000 directly from suppliers located outside the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

III. THE LABOR ORGANIZATION INVOLVED

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 236, UAW, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees, including material handlers and shop janitors, employed by the Employer at its facility located at 35135 Groesbeck Highway, Mt. Clemens, Michigan; but excluding truck drivers, machine repair employees, the office janitor, inspectors, the label maker, the tool crib attendant, die setters, shipping and receiving employees, casual employees, office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On January 30, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 7, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on June 18, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about August 13, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 13, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.[4]

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[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] Respondent admits that it has refused to bargain with the Union in response to the Union's requests for bargaining commencing on August 13, 1981. Further, on October 1, 1981, Respondent, by letter of that date, informed the Union that it would not engage in collective bargaining because it believed the certification of the Union was improper.

Accordingly, we find that Respondent has, since August 13, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Detroit Plastics Products Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 236, UAW, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees, including material handlers and shop janitors, employed by Respondent at its facility located at 35135 Groesbeck Highway, Mt. Clemens, Michigan, but excluding truckdrivers, machine repair employees, the office janitor, inspectors, the labelmaker, the toolcrib attendant, diesetters, shipping and receiving employees, casual employees, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 18, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 13, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Detroit Plastics Products Company, Mt. Clemens, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 236, UAW, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including material

handlers and shop janitors, employed by the Employer at its facility located at 35135 Groesbeck Highway, Mt. Clemens, Michigan; but excluding truck drivers, machine repair employees, the office janitor, inspectors, the label maker, the tool crib attendant, die setters, shipping and receiving employees, casual employees, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 35135 Groesbeck Highway, Mt. Clemens, Michigan, place of business copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 236, UAW, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time production and maintenance employees, including material handlers and shop janitors, employed by the Employer at its facility located at 35135 Groesbeck Highway, Mt. Clemens, Michigan; but excluding truck drivers, machine repair employees, the office janitor, inspectors, the label maker, the tool crib attendant, die setters, shipping and receiving employees, casual employees, office clerical employees, guards and supervisors as defined in the Act.

DETROIT PLASTICS PRODUCTS COMPANY

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Denver Post of the National Society of the Volunteers of America *and* United Nurses, Professionals, and Health Care Employees, Division of United Food and Commercial Workers, Local No. 7, AFL-CIO, CLC. Case 27-CA-7361

January 29, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on June 16, 1981, by the United Nurses, Professionals, and Health Care Employees, Division of United Food and Commercial Workers, Local No. 7, AFL-CIO, CLC, herein called the Union, and duly served on Denver Post of the National Society of the Volunteers of America, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 27, issued a complaint on June 26, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 16, 1981, following a Board election in Case 27-RC-6168, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about May 21, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive representative, although the Union has requested and is requesting it to do so. On July 8, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

Thereafter, on or about September 21, 1981, the Respondent and the Union entered into an amended stipulation for an entry of Order requesting the Board to find that Respondent has refused to bargain with the Union. The parties stipulated, *inter alia*, that Respondent has refused to bargain for the sole purpose of having the U.S. Court of Appeals for the Tenth Circuit determine whether the Board properly asserted jurisdiction over Respondent in Case 27-RC-6168, that the Respondent and the Union had full opportunity to introduce any and all evidence that either party desired in the representation proceeding, and that the Board considered all of the evidence and concluded that the weight of the evidence supported the assertion of jurisdiction. The Respondent waived any further consideration by the Board of the issues presented herein. The Respondent and the Union requested that an Order be entered "without the necessity of any further procedural action."

On September 24, 1981, counsel for the General Counsel filed directly with the Board a "Motion for Issuance of Decision and Order" requesting the Board to transfer this proceeding directly to the Board and to issue a Decision and Order forthwith without any further actions by or notice to the parties.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the amended stipulation and the entire record in this proceeding.

It is hereby ordered that this proceeding be, and it hereby is, transferred to the Board for issuance of a Decision and Order, pursuant to which the Board hereby makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent has at all times material herein been an unincorporated nonprofit religious association organized under and existing by virtue of the laws of the State of Colorado with its principal office and place of business located in Denver, Colorado. At all times material herein, Respondent has provided social services at its Brandon, Columbine, Victim Assistance, Triad, Bannock, and Fillmore facilities, located in various locations within the city of Denver.

In the course and conduct of its operations, Respondent annually receives goods valued in excess of $50,000 directly from points and places located outside the State of Colorado, and has a gross volume of business in excess of $250,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and

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[1] Offical notice is taken of the record in the representation proceeding, Case 27-RC-6168, as the term "record" is defined in Secs. 102.68 and 101.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Company*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

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that it will effectuate the policies of the Act to assert jurisdiction herein.[2]

II. THE LABOR ORGANIZATION INVOLVED

United Nurses, Professionals, and Health Care Employees, Division of United Food and Commercial Workers, Local No. 7, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time counselors of the Employer at its Brandon, Columbine, Victim Assistance, Triad, Bannock, and Fillmore facilities, but excluding all office/clerical employees, volunteers, program attorney, guards and supervisors as defined in the Act, and all other employees.

2. The certification

On April 8, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 27, designated the Union as their representative for the purpose of collective-bargaining with Respondent.[3]

The Union was certified as the collective-bargaining representative of the employees in said unit on April 16, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about May 20, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 20, 1981, and at all times thereafter, the Union has requested that Respondent furnish information relevant and necessary to the collective-bargaining process, including names, job classifications, and starting dates of bargaining unit employees, wages and hours of work, overtime wages, incentives, and various benefits and payments concerning said unit employees. Commencing on or about May 21, 1981, and continuing at all times thereafter, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective-bargaining of all employees in said unit and has refused, and continues to refuse, to supply the aforesaid information relevant and necessary to collective bargaining.

Accordingly, we find that Respondent has, since May 21, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. In addition, having found that Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with information relevant for collective bargaining, we shall require Respondent to furnish the Union with such information.

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[2] Respondent contended in the underlying representation proceeding, Case 27-RC-6168, that it is exempt from the Board's jurisdiction on the grounds that it is a religious organization engaged in a religious mission and on the basis of pervasive contacts with the city of Denver and the Federal Government. On March 9, 1981, following a hearing before a hearing officer of the Board, the Regional Director for Region 27 issued a Decision and Direction of Election rejecting these contentions and finding that Respondent is an employer within the meaning of Sec. 2(2) of the Act. Thereafter, Respondent filed with the Board a timely request for review of the Regional Director's Decision and Direction of Election. The request for review was denied by the Board on April 8, 1981. Respondent has raised no issues in the instant proceeding which would require the Board to reexamine the decision made in the representation proceeding. Rather, Respondent has requested that the Board enter an order finding that Respondent refused to bargain. Respondent states in the amended stipulation that it has requested the Board to do so in order to expedite the resolution of the jurisdictional issue herein on appeal to the United States Court of Appeals. We therefore find that Respondent has not raised any jurisdictional issues which are properly litigable in this unfair labor practice proceeding, and find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

[3] The tally of ballots showed that 24 votes were cast for and 4 votes against the Union, with 2 challenged ballots.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Denver Post of the National Society of the Volunteers of America is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Nurses, Professionals, and Health Care Employees, Division of United Food and Commercial Workers, Local No. 7, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time counselors of the Employer at its Brandon, Columbine, Victim Assistance, Triad, Bannock, and Fillmore facilities, but excluding all office/clerical employees, volunteers, program attorney, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 16, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about May 21, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and, by refusing to provide information relevant and necessary for collective bargaining, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusals to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Denver Post of the National Society of the Volunteers of America, Denver, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Nurses, Professionals, and Health Care Employees, Division of United Food and Commercial Workers, Local No. 7, AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time counselors of the Employer at its Brandon, Columbine, Victim Assistance, Triad, Bannock, and Fillmore facilities, but excluding office/clerical employees, volunteers, program attorney, guards and supervisors as defined in the Act, and all other employees.

(b) Refusing to provide to the aforesaid labor organization information relevant and necessary for collective bargaining, including names, job classifications, starting dates, wages and hours of work, overtime wages, incentives, and benefits and payments concerning unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement, and provide to said labor organization requested information necessary and relevant to collective bargaining.

(b) Post at its Brandon, Columbine, Victim Assistance, Triad, Bannock, and Fillmore facilities copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Nurses, Professionals, and Health Care Employees, Division of United Food and Commercial Workers, AFL–CIO, CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to provide to the above-named Union information relevant and necessary for collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time counselors at our Brandon, Columbine, Victim Assistance, Triad, Bannock, and Fillmore facilities, but excluding office/clerical employees, volunteers, program attorney, guards and supervisors as defined in the Act, and all other employees.

WE WILL furnish to the above-named Union necessary and relevant information sought by the Union, including the names, job classifications, starting dates, wages and hours of work, overtime wages, incentives, and benefits and payments concerning unit employees.

DENVER POST OF THE NATIONAL SOCIETY OF THE VOLUNTEERS OF AMERICA

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

J & L Refrigerated Trucking, Inc. *and* Michael F. Lordell. Case 17-CA-10330

February 1, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Upon a charge filed on April 30, 1981, by Michael F. Lobdell, an individual, herein called employee Lobdell, and duly served on J & L Refrigerated Trucking, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a complaint on May 28, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the National Labor Relations Act, as amended.

The charge was filed on April 30, 1981, by employee Lobdell, and duly served on Respondent by certified mail on or about the same day. On May 28, 1981, the Regional Director issued a complaint and notice of hearing, which was duly served on Respondent by certified mail on or about the same day. When no answer was filed, counsel for the General Counsel on July 15, 1981, sent, by ordinary mail, a letter advising Respondent that it had failed to timely file an answer to the complaint, as required, and requesting Respondent to file an answer by July 22, 1981. When no answer was filed thereafter, counsel for the General Counsel on August 14, 1981, sent, by certified mail, another letter advising Respondent that it had failed to file an answer to the complaint as required by the Board's Rules and Regulations and informing Respondent of the consequences of its failure to timely file an answer thereto; namely, that such would have the effect of admitting all of the allegations in the complaint. The letter further advised Respondent that consideration would be given to filing to the Board a Motion for Summary Judgment if no answer were filed by August 24, 1981. The foregoing letter was received by Respondent on August 15, 1981. On September 4, 1981, counsel for the General Counsel sent, by certified mail, another letter to Respondent advising it that no answer to the complaint had been received, that if no answer were filed the allegations would be deemed admitted, and further informing Respondent that consideration would be given to filing to the Board a Motion for Summary Judgment if no answer were filed by September 18, 1981. The foregoing letter was received by Respondent on September 5, 1981. Respondent did not, thereafter, file an answer.

On October 15, 1981, counsel for the General Counsel filed directly with the Board a motion for judgment on the pleadings. Subsequently, on October 22, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's motion should not be granted. Respondent has not filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, provides, *inter alia*:

> All allegations in the complaint, if no answer is filed . . . shall be deemed to be admitted to be true and shall be so found by the Board . . . .

As set forth above, Respondent has not filed an answer to the complaint; the time within which to file having passed, we find all allegations in the complaint to be true. There being no issues in dispute, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent, a corporation, with a place of business in Lee's Summit, Missouri, has been engaged in the business of interstate transportation of goods and materials. Respondent, in the course and conduct of furnishing transportation of goods and materials in interstate commerce, annually derives gross revenues in excess of $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE UNFAIR LABOR PRACTICES

On or about April 6, 1981, Respondent discharged employee Lobdell and, since that date, has failed and refused, and continues to fail and refuse, to reinstate him to his former position of employment. Respondent engaged in the acts and conduct described above because employee Lobdell concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

On the basis of the foregoing, we find that Respondent has interfered with, restrained, or coerced, and is interfering with, restraining, or coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and Respondent thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

We shall order that Respondent offer Michael F. Lobdell immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. Moreover, we shall order that Respondent make him whole, with interest, for any loss of earnings he may have suffered as a consequence of the action taken against him by payment to him of a sum equal to what he would have earned, less net earnings, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest on the backpay shall be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[1]

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, by discharging Michael F. Lobdell and by failing and refusing to reinstate him to his former position of employment, has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, J & L Refrigerated Trucking, Inc., Lee's Summit, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Michael F. Lobdell immediate and full reinstatement to his former position or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole, with interest, for any loss of earnings he may have suffered as a result of the action taken against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Lee's Summit, Missouri, copies of the attached notice marked "Appendix."[2]

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[1] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act because they have concertedly complained to us regarding the wages, hours, and working conditions of our employees, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Michael F. Lobdell immediate and full reinstatement to his former position or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered due to the action taken against him, with interest.

J & L REFRIGERATED TRUCKING,
INC.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC *and* Mechanical Systems, Inc. and International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 111, affiliated with AFL-CIO

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Lodge No. 60 of Peoria and Central Illinois *and* Mechanical Systems, Inc. and International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 111, affiliated with AFL-CIO. Cases 33-CD-240 and 33-CD-241

February 1, 1982

DECISION AND DETERMINATION OF DISPUTE AND ORDER QUASHING NOTICE OF HEARING

By Members Fanning, Jenkins, and Zimmerman

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Mechanical Systems, Inc. (the Employer), alleging that International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC (the International Brotherhood), and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Lodge No. 60 of Peoria and Central Illinois (Lodge 60), had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by Lodge 60 rather than to employees represented by International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 111, affiliated with AFL-CIO (Local 111).

Pursuant to notice, a hearing was held on March 19, 1981,[1] before Hearing Officer Ronald J. Symkowiak and on March 23, before Hearing Officer Stephen S. Shostrom. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, each party filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings made at the hearings by the Hearing Officers and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The Employer, a Delaware corporation with an office and place of business in Rockford, Illinois, is engaged in the construction of mechanical systems for various manufacturing establishments located inside and outside the State of Illinois. During the past year, the Employer has had a gross volume of business in excess of $500,000, and during the same period, has purchased and received goods valued in excess of $50,000 from points located directly outside the State of Illinois. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the International Brotherhood, Lodge 60, and Local 111 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

In May 1980, the Employer contracted with Blount Brothers, a construction management firm, to perform work at the John Deere Foundry located in Silvis, Illinois. The task was to improve the ventilation and air pollution control system of the foundry by modifying and expanding the facility's ventilation system. This ventilation system is basically comprised of hoods, ducts, and baghouses which are also known as dust collectors. The project involves four baghouses. Of the three existing baghouses, two were to be modified and updated, and the third was to be disconnected from the system. A fourth baghouse, known as a reverse air system baghouse because of its reverse air cleaning system, was to be errected.

The Employer schedules the performance of work pursuant to what it calls the "critical path method." Essentially this means that work needs to be performed and completed at each phase before the next phase can be initiated. On this project, the time sequence is extremely critical because certain work (e.g., replacing ducts) can only be performed when the foundry is shut down. The annual shutdown period begins the third week of July and ends the first week in August. During the 1980 shutdown, the Employer began work on the project which involved dismantling certain existing ducting and installing new ducting. This work was performed exclusively by employees represented by Local 111 pursuant to the terms of an agreement (called the National Maintenance Agreement) entered into in April 1980 between the Employer and the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (the International Association). The work was successfully completed within the allotted time period.

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[1] All dates herein refer to 1981 unless otherwise specified.

Sometime after the summer shutdown work was completed, Dick Johns, executive secretary of the Building Trades Council, requested that the Employer hold a conference with all the local craft unions. The first meeting was held at the Employer's offices in Silvis, Illinois, in October 1980. The craft unions present were the Iron Workers (Local 111), the Boilermakers (Lodge 60), the Millwrights, the Sheet Metal Workers, the Plumbers, and the Electricians. In response to the question of whether an assignment had been made, the Employer's general manager, Stephen J. Teeple, informed the representatives that Local 111 represented employees had performed all the shutdown work and that he saw no reason why they could not continue and finish. Teeple also informed the group that the work was being performed pursuant to the National Maintenance Agreement. At the end of this meeting, and at two subsequent meetings held in January, Gerald Goodwin, president of Lodge 60, made a plea for assignment of part of the work on the new baghouse and ductwork to the Boilermakers. During one of the subsequent meetings, Goodwin delivered to representatives of the Employer and Local 111 what appeared to be an agreement between the Iron Workers and the Boilermakers. Goodwin suggested that the work be divided consistent with this agreement. At each of the January meetings, Leroy Russell, business agent for Local 111, claimed all the work for the Iron Workers.

Thereafter, through efforts of Lodge 60, both the International Brotherhood and the International Association became involved in an effort to resolve this local jurisdictional dispute. Although there appeared to be a tentative agreement that the Employer would comply with any compromise reached between Local 111 and Lodge 60 through their respective Internationals, the Employer by telegram dated February 11 informed all parties that the work was assigned exclusively to Local 111. That same day, Robert Cunningham, the representative for the International Brotherhood who had been assigned to resolve the instant dispute, telephoned Teeple about a site change for the next scheduled meeting (the first involving International representatives). In the conversation, Teeple informed Cunningham that an assignment had already been made to Local 111. After a brief heated discussion wherein Cunningham complained that the assignment made all his efforts to reach an agreement an exercise in futility, Cunningham, according to Teeple, concluded by stating, "I will have to do what I will have to do" and that he "supposed all the other crafts will do the same." Cunningham testified that he told Teeple, "I guess I will just have to do what I will have to do and suppose all the other crafts will do the same, that they will be filing jurisdictional disputes, the Electricians, the Millwrights, and whatever." Later that evening, Goodwin called Teeple at home to discuss the assignment, stating that he believed Lodge 60 would be assigned the work pursuant to the "agreement." However, Teeple reiterated that he preferred having to deal with only one craft, and, in this case, it would be ironworkers. Goodwin ended the conversation by stating, "I've got to do what I've got to do, because that is my work and I'm going to get it."

The following morning, February 12, Teeple received a telephone call from Norm Gittleson, job foreman, informing Teeple that there was a picket line outside the main entrance of the project. There were between 10 to 15 Lodge 60 pickets carrying signs reading:

INFORMATIONAL
Mechanical Systems Unfair
Baghouse Assignment

One of the pickets was Goodwin. The pickets remained at the entrance most of that day. The following day, approximately the same number of pickets were at the entrance carrying signs reading:

ALL WE WANT IS OUR WORK

However, the pickets left near mid-day and have not since reappeared. It was later determined that Goodwin removed the pickets after receiving instructions from International Brotherhood Representative Joseph C. Meredith to do so. On February 12, the Employer filed charges alleging that the International Brotherhood and Lodge 60 had each violated Section 8(b)(4)(D) of the Act by the actions taken to secure work for Lodge 60.

B. *The Work in Dispute*

The work in dispute involves a portion of the construction of a nonpressurized reverse air baghouse by the Employer at the John Deere Foundry in Silvis, Illinois. The Employer has subcontracted certain work involving cranes and the installation of electrical systems and these tasks are not in dispute here.

C. *The Contentions of the Parties*

The Employer contends that both the International Brotherhood and Lodge 60 violated Section 8(b)(4)(D) of the Act through oral threats by their representatives and by engaging in unlawful picketing at the John Deere Foundry jobsite. The Employer argues that there is no agreed-upon method of settling the dispute. On the merits of the dispute, the Employer contends that the disputed work should be awarded to employees represented by Local 111 because these employees have the requisite skills, and because such an award will result in greater efficiency and economy, and will comport with the Employer's preference and practice and with its collective-bargaining agreements with the International Association and Local 111.

Local 111 contends that Lodge 60, through oral threats and subsequent picketing, has violated Section 8(b)(4)(D). It takes no position regarding the International Brotherhood. It argues that there is no agreed-upon method for resolving the dispute. Regarding the merits of the dispute, it contends that the disputed work should be awarded to it because employees represented by it have the requisite skills to perform the work required, the Employer prefers working ironworkers exclusively, there exists collective-bargaining agreements between the Employer and both the International Association and Local 111 covering the disputed work, and considerations of efficiency and economy favor an award to it.

Lodge 60 does not dispute that there is reasonable cause to believe that it has engaged in conduct violative of Section 8(b)(4)(D) of the Act, but it does not admit to having violated the Act. It contends, however, that there is no reasonable cause to believe that the International Brotherhood has violated the statute and that the notice to the International Brotherhood should be quashed. Regarding the dispute, it contends that there exists an International agreement to which both it and Local 111 are bound and that an assignment should be made consistent with the agreement. On the merits of the dispute, it contends that the historical distribution of this kind of work and existing International agreements favor an assignment of the disputed work to it. Further, it contends that industry and area practice plus the skills of its members favor such an assignment.

D. *Applicability of the Statute*

Before the Board may proceed with the determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that (1) Section 8(b)(4)(D) of the Act has been violated, and (2) there is no agreed-upon method binding on all parties for the voluntary adjustment of the dispute. All parties agree, and we find, that there is no such agreed-upon method[2] although Lodge 60 relies heavily on an agreement between the Unions, which is described below, and contends that the Board should make an award in accord with that agreement.

With regard to the reasonable cause issue, the record establishes that on February 11 Goodwin informed Teeple that he intended to get the disputed work for Lodge 60 and on the following 2 days Lodge 60 members participated in picketing to secure that work. In these circumstances, we find that there is reasonable cause to believe that Lodge 60 has violated Section 8(b)(4)(D) of the Act.

With respect to the International Brotherhood, the only evidence presented at the hearing concerning a possible violation of Section 8(b)(4)(D) is the testimony of Teeple and Cunningham regarding their telephone conversation on February 11. Cunningham did not deny telling Teeple that he would do what he had to do in an attempt to get the assigned work. However, Cunningham further stated that he coupled this statement with a reference to the filing of a jurisdictional dispute. Furthermore, the evidence establishes that the International Brotherhood neither participated in nor sanctioned the picketing. In fact, the pickets were subsequently removed based on direct orders from Joseph C. Meredith, assistant director of the Construction Division of the International Brotherhood. In these circumstances, we find that, without more, Cunningham's statement, as testified to by Teeple, is ambiguous and, standing alone, is insufficient to establish a violation of Section 8(b)(4)(D).[3] Therefore, we find that there is insufficient evidence to conclude there exists reasonable cause to believe that the International Brotherhood engaged in any conduct violative of Section 8(b)(4)(D). Accordingly, the notice of hearing issued against the International Brotherhood in this proceeding will be quashed.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to various factors.[4]

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[2] We also find that the evidence in the record is insufficient to warrant the conclusion that all parties reached an actual agreement governing the assignment of the disputed work.

[3] Cf. *United Mine Workers of America, Local Union 1368 (Bethlehem Mines Corporation)*, 227 NLRB 819, 820–821 (1977).

[4] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL–CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[5] The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements and certifications

There are no certifications of the Board awarding jurisdiction of the work in dispute to employees represented by either of the Unions involved in the present proceeding. However, the Employer is a party to collective-bargaining agreements with the International Association and with Local 111. The Employer has been a party to the National Maintenance Agreement since April 1980 and a party to the Local 111 agreement since December 11, 1980. There is no issue that the disputed work is covered by these agreements. At no relevant time has the Employer been a party to a collective-bargaining agreement with either the International Brotherhood or Lodge 60. Thus, this factor favors an award to the employees represented by Local 111.

2. International agreements

Lodge 60 submitted a "letter of understanding," dated February 8, 1972, to which the International Brotherhood and the International Association are parties, and argues that the work in dispute should be assigned in accord with that agreement.[6] This letter of understanding was the result of a jurisdictional dispute involving the erection of a nonpressurized baghouse at a Valley Consolidated Industries jobsite in 1972. Although the record contains evidence that this letter of understanding has been used to resolve jurisdictional disputes in the industry, it is not binding on the parties, but has been used as a tool to attempt to settle disputes between the parties. While Lodge 60 asserts here that the work should be assigned in conformity with the agreement, Lodge 60 is presently engaged in the erection of several baghouses in the area[7] and the division of work set out in the letter has not been followed on those projects. In any event, the Employer is not a party to this understanding and therefore cannot be bound. Thus, we find that this letter of understanding does not constitute a material factor in the resolution of the instant jurisdictional dispute, and we do not rely on it in making our determination as to which group of employees should be awarded the work.

3. Industry practice

Lodge 60 submitted documentary evidence it received from sister locals indicating that the 1972 letter of understanding had been used throughout the industry to resolve jurisdictional disputes. However, as noted above, Lodge 60 is not maintaining any consistent practice of dividing work on baghouses with employees represented by other craft unions and, in certain instances, has awarded itself all work on baghouses. Furthermore, the testimony of Teeple establishes that, while the Employer has little experience in the construction of baghouses, his previous employer, Great Lakes Crane, Inc., used ironworkers exclusively when performing baghouse work. We find that there is insufficient evidence to establish an industry practice with respect to the division of work on baghouses, and, accordingly, this factor favors neither group of employees.[8]

4. Skills

The record reveals that there are no unusual or highly specialized skills required for the erection of the baghouse or to perform other disputed work. The bulk of the work involves the assembly of components which are fabricated elsewhere and transported to the project. Employees represented by Local 111, while lacking experience in the construction of baghouses, receive substantial training through its apprentice program. Additionally, certain of the work has already been performed by employees represented by Local 111 to the satisfaction of the Employer. Employees represented by Lodge 60, on the other hand, are experienced in the construction of baghouses and are, in fact, presently constructing five in the area. As conceded by the parties, employees in either craft can, if called upon, completely erect a baghouse. Therefore, this factor does not favor an assignment to one group of employees as opposed to the other.

5. Efficiency and economy

The Employer contends that factors of efficiency and economy favored its assignment to Local 111 represented employees. First, the use of one craft would allow it to shift employees readily from one task to another, an extremely important consideration because the "critical path method" requires this flexibility. Second, assigning the work to one craft eliminates potential layoffs when what would normally be considered other craft work is completed. Third, sustaining its assignment would avoid changing the supervisory structure by eliminating the need to hire additional foremen to handle the other crafts. Finally, Local 111 represented employees are also already familiar with the site from their prior work on it. We find that efficiency and economy favor the Employer's assignment of the disputed work to employees represented by Local 111.

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[5] *International Association of Machinists, Lodge No. 1743, AFL–CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

[6] The 1972 letter of understanding divides the construction or erection of nonpressurized baghouses between three crafts: Boilermakers, Ironworkers, and Millwrights. The Boilermakers in this proceeding is claiming only that work assigned to it under the letter of understanding.

[7] One baghouse is being constructed in Oglesby, Illinois, while four others are being constructed at the Rock Island Arsenal in Rock Island, Illinois.

[8] In light of this finding, we make no ruling on the Employer's and Local 111's contention that Lodge 60's evidence on this factor is in any event hearsay.

6. The Employer's past practice and preference

There is evidence establishing that the Employer has had extensive experience working with ironworkers and that on other projects throughout the country it has entered into local agreements in conjunction with the National Maintenance Agreement. Here, consistent with its practice, it signed an agreement with Local 111 after employee-members had performed work for the Employer during the 1980 summer shutdown of the John Deere Foundry. The Employer asserts that work performed by Local 111 represented employees during that period was performed in a timely and competent manner; and it continues to be satisfied with work performed by these employees. We therefore find that these factors favor an award of the work in dispute to employees represented by Local 111.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors, we conclude that the employees represented by Local 111 are entitled to perform the work in dispute. In reaching this conclusion, we have relied on the collective-bargaining agreements between the Employer and Local 111 and its International, factors of efficiency and economy, and the Employer's past practice and preference. In making this determination, we are awarding the work in dispute to the employees of the Employer who are represented by Local 111, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Mechanical Systems, Inc., who are represented by International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 111, affiliated with AFL-CIO, are entitled to perform work for Mechanical Systems, Inc., at the John Deere Foundry in Silvis, Illinois, involving a portion of the construction of a nonpressurized reverse air baghouse.

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers AFL-CIO, Lodge No. 60 of Peoria and Central Illinois, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Mechanical Systems, Inc., to assign the work in dispute to its members.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Lodge No. 60 Peoria and Central Illinois, shall notify the Regional Director for Region 33, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the work in dispute in a manner inconsistent with the above determination.

ORDER

It is hereby ordered that the notice of hearing issued in Case 33-CD-240 against the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC, be, and it hereby is, quashed.

United Union of Roofers, Waterproofers & Allied Workers, Local 189 *and* Northwest Foam Systems, Inc. and Carpenters Local No. 286, United Brotherhood of Carpenters & Joiners of America, AFL-CIO. Case 19-CD-393

February 12, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Northwest Foam Systems, Inc., herein called the Employer, alleging that United Union of Roofers, Waterproofers & Allied Workers, Local 189, herein called Roofers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by Roofers rather than to employees represented by Carpenters Local No. 286, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, herein called Carpenters.

Pursuant to notice, a hearing was held on August 26, 1981, before Hearing Officer Melvin R. Kang. The Roofers did not appear for the hearing and the hearing went forward without it. The Employer and Carpenters appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. No briefs were filed by the parties.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties present stipulated, and we find, that the Employer is a State of Montana corporation with an office and place of business in Great Falls, Montana, where it is engaged in the business of applying urethane insulation on buildings and roofs. It was further stipulated, and we find, that based on the period from May to August 1981 the Employer will realize projected gross revenue in excess of $500,000 and that during the past 3 months it purchased goods valued in excess of $50,000 from suppliers located outside the State of Montana. On the basis of the foregoing, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

259 NLRB No. 171

II. THE LABOR ORGANIZATIONS INVOLVED

The parties present stipulated, and we find, that the Roofers and Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

Early in 1981, the Employer contracted with the Cascade County government to perform construction work at the Cascade County Convalescent Hospital and Cascade County Courthouse Annex. James H. Rohlk, the Employer's owner and president, testified that this building construction does not allow for internal application of insulation. Thus, the specifications written by the county required that the insulation would "be applied exterior . . ." and coated with an ultraviolet protection over the urethane foam that was applied.

On or about May 1, 1981, the Employer and the Carpenters entered into a collective-bargaining agreement covering the Employer's employees. The recognition clause of the agreement states:

> *Section 1.* The Employer recognizes the Union as the sole and exclusive bargaining agent for all employees performing bargaining unit work historically covered by this Agreement and covered by occupational and geographical jurisdiction of this Union. The coverage of this Agreement shall be all bargaining unit work historically covered by this Agreement and normally performed by insulators over which the Employer has control. . . .

At or about the same time the Employer assigned all urethane insulating foam application tasks to employees who are members of and represented by the Carpenters.

On or about May 4, 1981, an agent of the Roofers demanded that such work be assigned to employees who are members of that labor organization rather than to those represented by the Carpenters. On or about July 28, 1981, the Roofers picketed the Employer at its jobsites at the Cascade County Convalescent Hospital and at the Cascade County Courthouse Annex. The picket signs bore the following legend:

Jurisdictional Dispute with Carpenters Local No. 286 Roofers Local 189

B. *The Work in Dispute*

The disputed work involves the assignment of all tasks associated with the application of urethane insulating foam at the Employer's jobsites at the Cascade County Convalescent Hospital and the Cascade County Courthouse Annex.

C. *Contentions of the Parties*

The Employer and the Carpenters, at the hearing, basically took the same position.[1] Thus, they contend that the Employer has assigned the disputed work in accordance with their contract. In addition, they contend that the disputed work is essentially the application of insulating materials and that this work has traditionally been within the jurisdiction of the Carpenters. Finally, they contend that other employers in the area performing the same work also have contracts with the Carpenters.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

The record reveals that on or about May 4, 1981, the Roofers agents and representatives demanded that the work in dispute be assigned to employees who are represented by the Roofers rather than employees who are represented by the Carpenters. On or about July 28, 1981, the Roofers picketed the Employer at its jobsites at the Cascade County Convalescent Hospital and the Cascade County Courthouse Annex with signs stating the existence of a jurisdictional dispute between Carpenters Local No. 286 and Roofers Local 189. At the hearing, the Carpenters representative stated that it would continue to claim the disputed work. The record contains no evidence that the Roofers will not also continue to claim the disputed work. The record does, however, contain evidence that employees of other employers expressed reluctance to cross the picket line and that the picketing caused a delay in the expected performance date or completion date of the contract between the Employer and the county government. On the basis of the foregoing, we find there is reasonable cause to believe that the picketing by the Roofers violated Section 8(b)(4)(D) of the Act. Further, the parties present at the hearing stipulated that there does not exist any agreed-upon method for the voluntary adjustment of the dispute. Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires that the Board make an affirmative award of disputed work after giving due consideration to various factors.[2] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[3]

The following factors are relevant in the determination of the dispute before us.

1. Collective-bargaining agreement

The Employer and the Carpenters are signatories to a contract which contains a provision which covers the work in dispute. The Employer has no collective-bargaining agreement with the Roofers. We therefore find that this factor favors awarding the disputed work to the employees represented by the Carpenters.

2. Company practice

James H. Rohlk, the Employer's owner and president, conceded that the type of insulation involved in this case is novel and unique and, at the time of the hearing, had been in the area for a brief period of time. Accordingly, we find that there is insufficient evidence in the record to favor an award of the disputed work to either group of employees on the basis of the Employer's past practice.

3. Relative skills

The evidence in the record regarding skills does not favor an award to either group of employees.

4. Employer preference

Since on or about May 1, 1981, the Employer has used employees represented by the Carpenters to perform the disputed work. It is satisfied with the results of its assignment and prefers that employees represented by the Carpenters continue to do this work. Thus, the Employer's preference favors an assignment of the disputed work to the employees represented by the Carpenters.

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[1] As noted previously, neither party filed a brief.

[2] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[3] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

5. Area practice

Although it was contended that the area employers generally use carpenters to perform insulation work, the Employer's president also stated that the type of insulation herein is novel and unique to the area. Accordingly, as the record does not reveal a clear area practice, we find that area practice is not a factor favoring either group of employees.

Conclusion

While the record as a whole does not contain evidence of many of the factors we deem relevant in awarding disputed work, it does contain evidence that the Employer assigned the disputed work to the employees represented by the Carpenters on the basis of its collective-bargaining agreement with that labor organization. Further, the record reveals that the Employer is satisfied with the performance of the carpenters and prefers that they continue to perform the work in dispute. On the basis of the foregoing, we conclude that the employees who are represented by the Carpenters are entitled to perform the work in dispute and we shall therefore award the work in dispute to them. In making this determination, we are awarding the disputed work to employees who are represented by the Carpenters, but not to that Union or its members. Additionally, the scope of our award is limited to the controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Northwest Foam Systems, Inc., who are represented by Carpenters Local No. 286, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, are entitled to perform all tasks associated with the application of urethane insulating foam at the Employer's jobsites at the Cascade County Convalescent Hospital and the Cascade County Courthouse Annex.

2. United Union of Roofers, Waterproofers & Allied Workers, Local 189, is not entitled, by means proscribed by Section 8(b)(4)(D) of the Act, to force or require Northwest Foam Systems, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, United Union of Roofers, Waterproofers & Allied Workers, Local 189, shall notify the Regional Director for Region 19, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

Denzil S. Alkire, a sole proprietorship; Upshur Enterprises, Inc.; and Mountaineer Hauling & Rigging, Inc. *and* United Mine Workers of America, District 31, Local No. 2028. Case 6-CA-11190

February 1, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 24, 1979, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

As more fully described by the Administrative Law Judge, the record shows that, from approximately December 1974 until December 15, 1977, Denzil S. Alkire (Alkire) operated a trucking business as an individual proprietorship hauling coal, rock, and other materials in the Buckhannon, West Virginia, area. Alkire's business consisted of hauling materials under nonunion conditions until 1975, when Alkire began hauling coal for the Badger Coal Company (Badger). This work for Badger soon accounted for 90 percent of Alkire's operations. Alkire's drivers became union members and were covered by the terms of Badger's contract with the United Mine Workers (UMW) when they hauled coal from union mines. Alkire's mechanics and other shop employees were not covered by the union contract.

On September 15, 1977, the same day that a grievance by Alkire's employees alleging that they were not receiving union scale was adjusted, Alkire formed Upshur as a corporation. Following the commencement of a strike by Alkire's employees on December 6, 1977,[1] and Alkire's announced dissolution of "D. S. Alkire Trucking" and termination of Alkire's employees on December 15, 1977, the Upshur corporate entity became involved in operating the trucking business on approximately January 1, 1978.

It was on this same date, approximately January 1, 1978, that Dennett Houdteshell verbally agreed to take over the trucking business from Alkire. However, it was not until February 8, 1978, that Mountaineer (formed by Owner-President Houdteshell) was incorporated or until March 27, 1978, that an agreement of sale was executed by Alkire with Houdteshell for Mountaineer. This written agreement was conditioned upon Houdteshell's obtaining a loan for the purchase price from the Small Business Administration and private banks. Pending the consummation of the sale, Houdteshell leased the business from Alkire.

The complaint allegations to which the General Counsel's exceptions are directed involved certain actions taken by Respondents because the employees engaged in a strike. Specifically, these allegations are that Respondents violated Section 8(a)(1) and (3) of the Act by requiring the employees to file new employment applications as a condition of employment and by failing to recall certain employees, and delaying the recall of other employees, who were economic strikers and who had made unconditional offers to return to work. The alleged requirement to file new employment applications occurred on February 8, 1978, and the failures or delays in reinstatement occurred after the strike ended on March 27, 1978.

The Administrative Law Judge found that in December 1977 Alkire terminated his employees for a nondiscriminatory and lawful reason; namely, because he was going out of business. He went on to point out that an employer has an absolute right to go out of business regardless of the motivation and found that the evidence fails even to demonstrate a discriminatory motive. In addition he found that, as Alkire lawfully terminated his employees in December 1977, Upshur and Mountaineer could lawfully require former employees of Alkire to file new job applications as a condition of employment. In view of those findings, the Administrative Law Judge found that it becomes immaterial whether Mountaineer was a successor employer because, since Alkire did not commit any unfair labor practices for which Mountaineer could be held liable, Mountaineer owed no greater legal obligation to Alkire's former employees than it did to any other prospective job applicants. Hence, the Administrative Law Judge found that the remaining questions for consideration were—and limited his discussion to—whether Straight, acting on behalf of Mountaineer, failed or refused to hire any of the alleged discriminatees because of their union or concerted

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[1] On December 6, 1977, the National Bituminous Coal Agreement of 1974 expired by its terms, and the United Mine Workers engaged in an industrywide strike which lasted until approximately March 27, 1978, when a new contract was negotiated. In early April there was a wildcat strike at Badger, and as a result Badger did not resume full operations until middle or late April 1978. The events involving Respondent's employees essentially paralleled these dates.

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activities and, if so, whether Alkire and/or Upshur were also responsible for such conduct.

For reasons discussed below, we find that the Administrative Law Judge failed to analyze properly the complaint allegations. Central to these allegations is whether an *alter ego* relationship existed among Alkire, Upshur, and Mountaineer. While the Administrative Law Judge paid lip service to the General Counsel's *alter ego* contentions,[2] he failed to examine fully the relationship among the Respondents during the critical period from January 1, 1978, until August 1, 1978. Thus, he found that "Upshur and Mountaineer were joint employers, and therefore that both were responsible for any personnel actions which were taken during this period." But he failed to examine fully the complaint allegation that Upshur was a successor and *alter ego* of Alkire, or that Mountaineer was a successor and *alter ego* of Alkire and Upshur.

The legal principles to be applied in determining whether two factually separate employers are in fact *alter egos* are well settled. Although each case must turn on its own facts, we generally have found *alter ego* status where the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership.[3] There is no room for disagreement on this record regarding the substantially identical business purpose, operation, equipment, and customers of Alkire, Upshur, and Mountaineer. Thus we shall concentrate our discussion on the management, supervision, and ownership of these three named Respondents.

Denzil Alkire operated his trucking business as a sole proprietorship until December 15, 1977. Beginning in January 1978, Upshur, which Denzil Alkire formed in September 1977, became involved in the operation of the trucking business.[4] At all times material here, Denzil Alkire and his family owned and controlled Upshur. Thus, it is plain that control of the trucking business did not change in January 1978 and that Upshur was a successor and *alter ego* of Alkire.[5]

Although the relationship between Alkire-Upshur and Mountaineer is more complex, the economic realities of the relationship demonstrate that Houdteshell and Straight were essentially the managers of, and Mountaineer was the *alter ego* of Alkire-Upshur with respect to, the trucking business during the times material here. In reaching this conclusion, we have relied on the following record evidence.

The record shows that Mountaineer was able to "lease" Alkire's business for 6 months without ever investing any of its own capital or acquiring a real financial interest in the business assets. Thus, Mountaineer made no downpayment or deposit on the business equipment and facilities.[6] Mountaineer was not required to invest any of its own capital in rental payments. Mountaineer was not required to pay other business expenses such as license fees, property taxes, truck insurance, and maintenance costs. Other expenses were deducted from business receipts before the profits were remitted to Alkire. In contrast to Mountaineer's noninvestment of financial resources in the business, Alkire "loaned" Mountaineer $12,000 to cover the first payroll, purchased new equipment in the name of Upshur, and co-signed for 10 new trucks purchased in Mountaineer's name.

Nor did Mountaineer reap any of the benefits associated with business ownership. Instead, Houdteshell, Mountaineer's owner and president, received a $400 a week salary which was deducted from the receipts as an operating expense. In effect, Houdteshell received a guaranteed salary without regard to having any profits to draw on.[7] By contrast, Alkire received the same salary as Houdteshell and the lease provided tnat Alkire would receive 100 percent of the net profits.

Although there are no written provisions in the lease agreement governing the manner in which Alkire's trucking business was to be operated by Mountaineer, the record reveals that Alkire continued to play a substantial role in the actual operation of the business during the period when the alleged discrimination against Alkire's employees took place. Thus, Alkire computed or helped compute job bids. Alkire purchased supplies. Alkire sought and obtained financing and permits from the State of West Virginia to operate the trucks remaining in Alkire's name. Although Straight handled labor relations matters for Mountaineer, the record shows that Alkire recommended that at least one employee be hired and he was consulted before another employee was placed on the payroll. In short, Alkire continued to have influence and played a substantial role in the operation of the trucking business from his position as salaried consultant during the time that Upshur and Mountaineer were operating the trucking business.

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[2] The Administrative Law Judge found that "as the General Counsel correctly points out in his brief, in order to determine the status of the alleged discriminatees, it is first necessary to examine the relationships among the three Respondents during the critical period from mid-December, when Alkire sent the termination letters to his employees, until July 22, when H & A purchased the business."

[3] *Crawford Door Sales Company, Inc.*, 226 NLRB 1144 (1976). Also see *Big Bear Supermarkets #3*, 239 NLRB 179 (1978); *Edward J. White, Inc., and its alter ego, Repairs, Inc.*, 237 NLRB 1020 (1978); *Ramos Iron Works, Inc., and Rasol Engineering*, 234 NLRB 896 (1978); *Co-Ed Garment Company and its Alter Ego Delta Manufacturing Corporation*, 231 NLRB 848 (1977).

[4] The management and supervision of Upshur rested in the hands of Denzil Alkire, Houdteshell, and Straight. Houdteshell had been a driver for Alkire prior to December 1977 and was in charge of the business while Alkire was in Florida in January 1978. Straight had been Alkire's dispatcher with some supervisory responsibilities. It will be recalled that, during the first quarter of 1978, the hauling business consisted of nonunion jobs until the strike was settled.

[5] *Associated Transport Company of Texas, Inc., and Transamerica Transport, Inc.*, 194 NLRB 62, 63 (1971).

[6] By contrast Alkire's sale to H & A included a $50,000 downpayment and specified monthly payments against a deed of trust held by Alkire.

[7] Compare *Big Bear Supermarkets*, 239 NLRB at 182 (Holmes' "Draw on Anticipated Profits").

Alkire testified that Houdteshell was to receive "a fair salary and not an excessive amount because I didn't want to delete [sic] any of the assets of the company."

On the record as whole, we find that Houdteshell's position was essentially that of a manager of the trucking operations, that Alkire-Upshur and Mountaineer were joined in a single integrated business, and that Mountaineer was Alkire's *alter ego* at least during the period the lease was in effect. In so finding we rely on the substantially identical business purpose, operation, equipment, and customers of Respondents, Alkire's role in the actual operations of Mountaineer, and, particularly, the economic realities of the lease agreement whereby Mountaineer invested no capital and Alkire retained all the financial risks and received all the profits which demonstrated that Mountaineer was directly or indirectly subject to the economic power of Alkire.[8]

It is plain from the foregoing findings and the record as a whole that this is not a case involving, simply, an employer's right to go out of business. Thus, Alkire did not sell his trucking business until July 1978 and then he sold not to Mountaineer but to H & A. Until that time, Alkire continued to own all the assets and received all the profits from the business. Although Alkire made an oral agreement to sell the business to Houdteshell in January 1978, the business continued to operate under the Upshur name, Alkire's *alter ego*, at least until March 27, 1978. Thus, the Administrative Law Judge found, properly, that "during the period from February 8 to March 27, when the business as being operated and managed by Houdteshell and David Straight, in the name of Upshur, that Upshur and Mountaineer were joint employers, and therefore were both responsible for any personnel actions which were taken during this period."

The alleged unlawful conduct involving the requirement that Alkire's employees file new job applications as a condition of employment with Mountaineer occurred in this period, during which, as the Administrative Law Judge properly found, Upshur and Mountaineer were joint employers. Despite his finding that Upshur and Mountaineer were "both responsible for any personnel actions taken during this period," the Administrative Law Judge failed to consider that Upshur was an *alter ego* of Alkire, and consequently failed to analyze the effect of Alkire's involvement in the personnel action of the joint employers.

It is well established that an *alter ego* has the same obligation to employees as the original employer. We have found that the record evidence here establishes that Upshur was a successor and *alter ego* of Alkire and that Mountaineer was a successor and *alter ego* of Alkire and Upshur. Thus, regardless of whether Alkire's layoff or termination of his striking employees in December 1977 violated the Act,[9] it is plain that Upshur and Mountaineer violated Section 8(a)(1) and (3) of the Act by requiring in February 1978 the striking Alkire employees to file new job applications as a condition of employment.[10]

Finally, we turn to the complaint allegation that Mountaineer violated Section 8(a)(1) and (3) of the Act by failing to recall certain Alkire employees who were economic strikers and who made unconditional offers to return to work. The record shows that, within a short time after the strike ended on March 27, Mountaineer switched 12 drivers who had been working nonunion jobs to the union jobs of hauling Badger coal. Of these 12 employees 9 were strikers who had applied for reinstatement. The other three employees were new hires who had not worked for Alkire at the time of the strike.

The record also shows that 18 of the 26 union drivers employed by Alkire prior to the strike had submitted formal written applications for employment with Mountaineer. Such applications were equivalent to unconditional offers to return to work.[11] In addition, UMW Representative Gary Jordan asked Straight if he intended to employ two other employees who had not submitted applications. Such remarks in the circumstances here indicated that these two employees were interested in returning to work and satisfied the requirement of unconditional offers to return.[12]

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[8] *Big Bear Supermarkets, supra; Am-Del-Co., Inc.*, 225 NLRB 696, 701 (1976); *Marquis Printing Corporation*, 213 NLRB 394, 401 (1974).

The Administrative Law Judge found that Denzil Alkire consistently acted in the manner of a person who wished to get out of business as soon as possible and whose continuing involvement in the business was for the purpose of preserving a saleable asset until the sale could be consummated. However, the gravamen is, as Alkire acknowledged in his testimony, that Alkire maintained control of the business. Absent an arm's-lengths transaction, Alkire and its *alter ego* effectively remained a single employer for the purposes of this proceeding.

[9] No exceptions were filed to the Administrative Law Judge's dismissal of the complaint allegations that Alkire violated the Act by discriminatorily laying off his employees on or about December 6, 1977.

[10] *Atlantic Creosoting Company, Inc.*, 242 NLRB 192 (1979) (Member Jenkins dissenting on other grounds).

[11] Cf. *K-D Lamp Company*, 229 NLRB 648, 649 (1977) (employees signed a recall list); and *Donelson Packing Co., Inc. and Riegel Provision Company*, 220 NLRB 1043, 1049-50, 1057 (1975) (employees filled out job applications).

As an *alter ego* of Alkire-Upshur, Mountaineer had the same obligation to reinstate economic strikers as Alkire.[13] Thus, any economic striker who made an unconditional offer to return to work must be reinstated to his former position, unless he has been permanently replaced or some other legitimate business reason for the refusal to reinstate exists.[14] The burden of proving the permanent replacement or other business justification is on Respondents here.[15]

The General Counsel established a *prima facie* case by showing that: (1) the alleged discriminatees participated in a lawful economic strike, and (2) upon the employees' unconditional offer to return, Respondents refused to offer certain of them reinstatement to their former positions, or their substantial equivalents. At this point the burden shifted to Respondents to prove that they had legitimate and substantial business justification for failing to reinstate the employees.

Respondents did not contend, as an affirmative defense, or present evidence to show, that the employees named in the complaint were not reinstated because they had been permanently replaced.[16] Nor have Respondents presented evidence as to why they failed to resume work at pre-strike levels with a full employee complement.[17] Accordingly, we find on the record before us that Respondents have failed to satisfy their burden of providing evidence that they had legitimate and substantial business justification for failing to reinstate the employees named in the complaint.[18]

CONCLUSIONS OF LAW

1. Denzil S. Alkire, a sole proprietorship, and its *alter ego* Upshur Enterprises, Inc., as well as Upshur Enterprises Inc., and its *alter ego* Mountaineer Hauling & Rigging, Inc., constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Mountaineer Hauling & Rigging, Inc., is the *alter ego* of Upshur Enterprises, Inc., in the operation of Respondents' trucking operations in the Buckhannon, West Virginia, area.

3. United Mine Workers of America, District 31, Local No. 2028, is a labor organization within the meaning of Section 2(5) of the Act.

4. By conditioning reinstatement of striking employees upon their submitting a new application form, Respondents engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. By unlawfully refusing to reinstate certain employees, and by delaying the reinstatement of certain other employees, named below, Respondents engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondents did not violate the Act by any conduct not found herein to constitute an unfair labor practice.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

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[12] *Kentron of Hawaii Ltd., Subsidiary of LTV Aerospace Corporation*, 214 NLRB 834, 841-842 (1974); *Kelso Marine, Inc., Kel Stress Division*, 199 NLRB 7, 13 (1972).

[13] The Administrative Law Judge's discussion of Respondent's treatment of the Alkire employees for the purpose of recall and reinstatement following the conclusion of the strike on March 27 is misplaced. The Administrative Law Judge delved into whether Mountaineer refused to hire Alkire employees discriminatorily. Finding no discrimination, he found it unnecessary to determine whether Alkire was a joint employer with Mountaineer.

The first issue the Administrative Law Judge should have considered was the relationship of Mountaineer to Alkire-Upshur. Thus, since the record shows that Mountaineer was an *alter ego* of Upshur, Mountaineer had the same obligation to the striking employees as Alkire. *The Bell Company, Inc., etc.*, 225 NLRB 474 (1976); *Helrose Bindery, Inc. and Graphic Arts Finishing, Inc.*, 204 NLRB 499 (1973); and *Loren Service, Inc., Draber Press, Inc., Bernard Dramen and Harold Berman*, 208 NLRB 763 (1974).

[14] *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967); *Bushnell's Kitchens, Inc.*, 222 NLRB 110 (1976).

[15] *N.L.R.B.* v. *Fleetwood Trailer Co., supra* at 378, where the Supreme Court described the principles controlling reinstatement rights of unreplaced economic strikers as follows:

> Section 2(3) of the Act . . . provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by Secs. 7 and 13 of the Act . . . . Under Section 8(a)(1) and (3) . . . it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, *unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. N.L.R.B.* v. *Great Dan Trailers*, 388 U.S. 26, 34 (1967). *The burden of proving justification is on the employer.* [Emphasis supplied.]

[16] As described above, Mountaineer moved 12 employees from nonunion jobs to union jobs after March 27, 1978, when the strike ended and union work resumed. Among these 12 employees were 3 employees who had not worked for Alkire. It is apparent that these three new employees were not hired as permanent replacements for union jobs, which resumed after March 27, prior to the unconditional offers to return to work on February 1978 by the employees named in the complaint.

[17] The Administrative Law Judge described in detail the various reasons offered by Respondents for refusing to reinstate the employees named in the complaint. Such reasons ranged from lack of education or poor driving record to failure to file a job application or simply forgetting the employee. But such reasons had no bearing on economic decision to eliminate certain strikers' jobs. See *Pillows of California*, 207 NLRB 369 (1973). See also fn. 18, *infra.*

[18] Houdteshell testified that Mountaineer did not have any duty to rehire any of the Alkire employees. Although Houdteshell's misplaced view of Mountaineer's obligation to Alkire's employees offers some explanation, it offers no excuse for Respondents' failure to present evidence of legitimate and substantial business justification for failing to reinstate the employees named in the complaint.

Respondents violated Section 8(a)(1) and (3) of the Act by unlawfully failing and refusing to recall John Courtney, Larry Courtney, Ogden Bragg, William Davis, Harvey Lattea, Bob Small, Larry Lantz, and James Detamore and by delaying the recall of John McNeely from March 27, 1978, to May 19, 1978. The General Counsel concedes that Alkire's sale of the trucking business to H & A, an event which terminated backpay, was an arm's-length transaction and he requests backpay only until August 1, 1978.[19] Accordingly, we shall order Respondents to make whole the named employees for any loss of earnings and other benefits suffered as a result of Respondents' discrimination against them. The loss of earnings shall be computed as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). We shall also order that Respondents mail a copy of the attached notice to each employee who was on their payroll as of August, 1978, as well as to the named discriminatees, at their last known mailing address as shown in Respondents' records.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Denzil S. Alkire, a sole proprietorship; Upshur Enterprises, Inc.; and Mountaineer Hauling & Rigging, Inc., Buckhannon, West Virginia, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally requiring striking employees to execute new job application forms as a condition of employment.

(b) Discouraging membership in any labor organization by unlawful discrimination in regard to hire or tenure of employment or any term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Make whole the following employees for any loss of earnings they may have suffered by reason of Respondents' discrimination against them, in the manner set forth as described in "The Remedy" section of this Decision and Order:

John Courtney
Larry Courtney
Ogden Bragg
William Davis
Harvey Lattea
Bob Small
Larry Lantz
James Detamore
John McNeely

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Mail to all employees who were employed by Respondents as of August 1, 1978, at their last known mailing address copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondents' representative, shall be mailed by Respondents immediately upon receipt thereof.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act other than those found in this Decision and Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Following a hearing in which all parties had the opportunity to participate and offer evidence, it has been found that we violated the National Labor Relations Act, as amended. We have been ordered to post this notice and to abide by what we say in this notice.

WE WILL NOT require striking employees to execute new job application forms as a condition of employment.

WE WILL NOT discourage membership in any labor organization by discriminating in regard to hire or tenure of employment or any terms or conditions of employment.

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[19] The precise date that Alkire's sale to H & A became effective is not clear from the record, and shall be resolved in compliance proceedings.

[20] Member Jenkins would compute interest on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL make whole the following employees for any loss of pay they may have suffered as a result of the discrimination against them, plus interest:

John Courtney
Larry Courtney
Ogden Bragg
William Davis
Harvey Lattea
Bob Small
Larry Lantz
James Detamore
John McNeely

Denzil S. Alkire, a sole proprietorship; Upshur Enterprises, Inc.; and Mountaineer Hauling & Rigging, Inc.

DECISION

Statement of the Case

Marvin Roth, Administrative Law Judge: This case was heard at Buckhannon, West Virginia, on December 21 and 22, 1978. The charge and amended charge were filed, respectively, on April 24 and July 3, 1978, by United Mine Workers of America, District 31, Local No. 2028 (herein the Union). The complaint, which issued on July 6, 1978, and was amended on November 3, 1978, alleges that Denzil S. Alkire, a sole proprietorship, Upshur Enterprises, Inc., and Mountaineer Hauling & Rigging, Inc. (herein respectively Alkire, Upshur, and Mountaineer and collectively Respondents). violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The gravamen of the complaint is that Upshur and Mountaineer were and are successors to and/or *alter egos* of Alkire, that Alkire laid off and purported to terminate employees John Courtney, John McNeely, Larry Courtney, Larry Lantz, James Detamore, Harvey Lattea, Ogden Bragg, William Davis, and Robert Small, because of their union and concerted activities, that Alkire and Mountaineer discriminatorily required them to file new employment applications as a condition of employment, and that Respondents discriminatorily delayed in recalling from layoff and reinstating John McNeely and John Courtney, and discriminatorily failed and refused to recall or reinstate the other alleged discriminatees. Respondents by their respective answers deny *alter ego* or successor status, and deny the commission of the alleged unfair labor practices.

All parties were afforded full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Upon the entire record in this case[1] and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by the parties, I make the following:

Findings of Fact

I. THE BUSINESS OF RESPONDENTS

From about December 1, 1974, until about December 15, 1977, Denzil S. (Chub) Alkire operated at his office and place of business in Buckhannon, West Virginia, a trucking business as an individual proprietorship hauling coal, rock, and other materials by truck in and around Buckhannon, for customers including Badger Coal Company (herein Badger). Upshur, a West Virginia corporation, was formed in September 1977 and at all times material was wholly owned by the Alkire family. The nature of its activities will be discussed, *infra*. Mountaineer, also a West Virginia corporation, was incorporated on February 8, 1978, and until October 2, 1978, was wholly owned by Dennett (Slim) Houdteshell, who was its president. In 1978 Mountaineer was engaged at Buckhannon in the business of hauling coal, rock, and other materials by truck for enterprises including Badger. During 1977, Alkire, in the course and conduct of its business operation, provided services to Badger, from which Alkire derived gross income in excess of $50,000. During 1978, Mountaineer in the course and conduct of its business operation provided services to Badger, from which services Mountaineer derived gross income of $50,000. During 1977 and 1978 respectively, Badger purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of West Virginia for use within West Virginia. During the same period of time, Badger sold, shipped, and delivered goods and materials valued in excess of $50,000 to enterprises located outside West Virginia from its facilities located within West Virginia. I find that, at times material to this case, Alkire and Mountaineer were employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it would effectuate the purposes of the Act for the Board to assert its jurisdiction in this case.

II. THE LABOR ORGANIZATION INVOLVED

The evidence adduced in this case indicates that the Union is an organization in which employees participate and which exists for the purpose, in whole or part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, and conditions of work. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Developments up to December 6, 1977*

Prior to 1975, Alkire engaged in hauling on a relatively small scale, and his business substantially consisted of hauling material under nonunion conditions. However, in 1975 Alkire began hauling coal for Badger. Badger's employees were covered by the United Mine Workers (UMW) National Bituminous Coal Wage Agreement of

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[1] The official transcript of proceedings is hereby corrected.

1974. Therefore, as Alkire's driver employees were hauling coal from union mines, they became covered by the terms of that agreement when they performed such work. Alkire either was or became a signatory to the UMW agreement. Badger coal hauling soon accounted for more than 90 percent of Alkire's operations. Alkire's drivers became union members, and the Union functioned as their collective-bargaining representative. Alkire's mechanics and other shop employees were deemed by the Union as being engaged in work at a nonunion location, and therefore were not covered by the UMW agreement. Alkire also utilized the services of owner-operators who were covered by the agreement when hauling Badger coal.

Alkire soon ran into a serious problem. In order to obtain a contract to haul Badger coal, he agreed to a price which precluded him from paying the UMW agreement wage scale without operating at a loss.[2] Alkire's drivers repeatedly complained that they were not receiving union scale. Alkire raised their hourly wage from time to time, in response to their complaints, but their pay scale remained below the union rate. On September 12, 1977,[3] 10 of Alkire's drivers filed a written grievance, alleging that they were not receiving union scale, and wished to be made whole. At the time, Alkire had about 26 driver and equipment operator employees who were covered by the UMW contract. The grievance was signed by six of the alleged discriminatees in this case (Robert Small, John Courtney, Larry Courtney, Jim Detamore, John McNeely, and Larry Lantz) and four employees who are not alleged as discriminatees (Bruce Davis, John Helmick, George Jack, and Kenny Lee). The grievance was signed and endorsed by the Union's mine committee, which consisted of employees Ogden Bragg, Don Parks, and Don Oldaker. Of these, only Bragg is alleged as a discriminatee. Employees William Davis and Harvey Lattea are also alleged as discriminatees, although their names do not appear on the grievance.

In response to the grievance, Alkire admitted that he was paying below union scale, but asserted that his drivers had agreed to accept subscale wages. He insisted that he could not pay union scale and still afford to remain in business. The employees met with Alkire, and also met among themselves and with UMW District 31 Representative Garry Jordon. The employees voted unanimously to demand union scale. Indeed, they indicated their sentiments to Alkire. When Alkire told the assembled employees that he could not afford to operate under union scale, they responded with applause. Jordon was evidently understanding of Alkire's plight, but in view of the employees' position, he indicated to Alkire that he had no alternative but to insist upon union scale. On paper, the grievance was informally resolved by Alkire's agreement to abide by the UMW contract. In fact, Alkire gave his employees a 50-cent-per-hour increase, which still left them below union scale. Some of the employees expressed willingness to go along with this arrangement until a new rate could be negotiated, while others were outspokenly dissatisfied. Alkire's dispatcher, David Straight, who even then performed some functions of a supervisory nature, was aware that such differences existed. However, with only a few exceptions, which will be discussed, the record does not indicate which employees expressed such views. The evidence also does not indicate that any employee quit, went on strike, filed a grievance, or took any other action in protest of the continuing *ad hoc* arrangement.[4]

On September 15, the same day that the grievance was adjusted, Alkire formed Upshur as a corporation. However, Alkire continued to run his trucking business as an individual proprietorship until he shut down operations in December. The Upshur corporate entity did not become involved in the trucking business until January 1. William Davis, who was a committeeman in 1976 and early 1977, testified that in June 1977 Alkire told him that he was going to form a corporation to get rid of the troublemakers. Alkire testified that he may have told Davis that he was forming a new corporation, but that the purpose was to handle other, nontrucking operations. I am not persuaded that either testimony reflects the real reason why Alkire formed Upshur. As will be discussed, I have not found Davis to be a credible witness as to the reason why he did not file a job application with Mountaineer in the spring of 1978. If in June 1977 Alkire referred to a corporation such as Upshur, then it is difficult to see how Alkire could have expected to get rid of "troublemakers" that way, since the corporation would have been owned, operated, and controlled by Alkire. It is unlikely that Alkire would have referred to a corporation such as Mountaineer; i.e., a corporation owned by other persons. The evidence fails to indicate that, in June 1977, Alkire contemplated selling his trucking business, or that he reasonably could have foreseen the developments which led to his transaction with Dennett Houdteshell and the formation of Mountaineer. The timing of Alkire's action indicates that, in fact, Alkire formed

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[2] Evidence adduced at the hearing indicates that this is not an unusual situation in the coal hauling business. As will be discussed, when Houdteshell failed to obtain a loan with which to purchase Alkire's business, Alkire sold the business to H & A Coal Hauling, Inc., which temporarily hauled coal for Badger. However, Badger refused to award a contract to H & A because H & A's bid was too high. Thereafter, the coal was hauled by owner-operators.

[3] All dates herein refer to the period from September 1, 1977, through August 31, 1978, unless otherwise indicated.

[4] Alkire and Upshur contend that, in determining whether Respondents unlawfully terminated or refused to recall or reinstate the alleged discriminatees, I cannot consider the events concerning the September grievance, e.g., on such questions as motive, animus, and knowledge of union or concerted activity, because the events occurred more than 6 months prior to filing of the instant charges. The difficulty with this argument is that the General Counsel's case is not "inescapably grounded" on evidence concerning the grievance or other matters predating the limitation period. *Local Lodge No. 1424, International Association of Machinists* [*Bryan Manufacturing Co.*], 362 U.S. 411, 422 1960). Here, the General Counsel contends that discriminatory motive is also shown by evidence within the limitation period, e.g., alleged pretextual reasons for refusing to recall the alleged discriminatees, and statements made during that period, and that, apart from motive, the alleged discriminatees were denied their recall rights as economic strikers. Therefore, events predating the limitations period may, if relevant, be fully considered as evidence on the merits of the complaint. *Paramount Cap Manufacturing Co.*, 119 NLRB 785 (1957), enfd. 260 F.2d 109, 112–113 (8th Cir. 1958); see also *N.L.R.B.* v. *Carpenters District Council of Kansas City and Vicinity, AFL–CIO* [*J. E. Dunn Construction Co.*], 383 F.2d 89, 95–96 (8th Cir. 1967).

Upshur as a means of protecting himself from personal liability in the event that his business was forced by legal action or otherwise to pay the UMW contract wage rate. Indeed, Alkire anticipated that such action would cause him to operate the business at a loss. As will be discussed, when the business was temporarily operated in the Upshur name, it was done for a similar reason; namely, to protect Alkire from personal liability at a time when Alkire was no longer actively involved in running the business.

On December 6, the National Bituminous Coal Agreement of 1974 expired by its terms, and United Mine Workers engaged in an industrywide strike which lasted until on or about March 27, when a new contract was negotiated. In early April there was a wildcat strike at Badger, and as a result Badger did not resume full operations until mid- or late April. The complaint alleges that, on or about December 6, Alkire laid off the alleged discriminatees, that they commenced a strike, and that Alkire took such action in violation of Section 8(a)(1) and (3) of the Act. Alkire and Upshur, in their answer, admit that the employees went on strike, but deny that they were laid off. No evidence was presented as to the circumstances under which the employees ceased working for Alkire on December 6. Consequently, the pertinent allegations of the complaint can be sustained only to the extent admitted by Alkire. I find that, as of December 6, Alkire's employees were engaged in an economic strike over the terms of a new UMW contract. The allegation that Alkire discriminatorily laid off his employees on December 6 is both misleading and incomprehensible. It is evident that, even if Alkire's employees did not go on strike, Alkire would have been forced to lay them off because of the shutdown of Badger's mines, which accounted for nearly all of his business. Therefore, I am recommending that the allegation that Alkire discriminatorily laid off his employees on or about December 6 be dismissed.

B. *Developments After December 6, 1977*

In mid-December, Alkire sent a letter to each of the union-represented employees, informing them that "as of December 15, 1977, D.S. Alkire Trucking has been dissolved and gone out of business." Alkire added that he was negotiating with a corporation which was interested in leasing or purchasing some of his equipment, and that the corporation might be interested in hiring people to operate the equipment. Alkire testified that, when the strike began, he decided to go out of the hauling business because he was unable to make a profit. Alkire testified that he promptly set about looking for a purchaser. He contacted several prospective purchasers, but decided against an outright sale of the equipment because this would result in a permanent loss of jobs in the community. Alkire then turned to Dennett Houdteshell, one of his drivers. Houdteshell had about 15 years' experience in handling trucks and heavy equipment, both as an owner and as an employee.He had recently fallen on evil days, having served a prison term for receiving and selling stolen goods. Alkire and Houdteshell discussed, negotiated, and arrived at the terms of an agreement. Alkire agreed to sell his trucking business to Houdteshell for $250,000. Houdteshell then applied for a Small Business Administration rehabilitation loan in order to finance the purchase. It is uncontradicted that the Small Business Administration approved the loan in January 1978, but effective as of July 1978, when Houdteshell's parole period would end. In the meantime, Houdteshell unsuccessfully tried to arrange earlier financing through the sale of land owned by his father-in-law. It is also uncontradicted that, in July 1978, the Small Business Administration unexpectedly refused to grant the loan, because of the present pending unfair labor practice litigation. The General Counsel, in his brief, expresses skepticism that Alkire ever seriously expected to sell his business to a person such as Houdteshell. The General Counsel's position is based more on suspicion than hard evidence. It is evident from the record that coal hauling in and around Buckhannon has typically not been a business for conglomerates or well-established firms. Apart from his unfortunate brush with the law, Houdteshell's experience and qualifications to engage in the coal hauling business were not significantly different from those of Denzil Alkire, who preceded him, or James Lee, who followed him.[5] The General Counsel also attaches significance to the fact that, in July 1978, Alkire had no apparent difficulty in finding a financially able purchaser for the business, i.e., Lee, after SBA disapproved the loan to Houdteshell. However, in July 1978, the business was more marketable than in December 1977. In July 1978 the business was fully operative, whereas, in December 1977, the business was virtually moribound as a result of an industrywide strike which had just begun. From mid-December 1977, until the time of this hearing, more than a year later, Denzil Alkire consistently acted in the manner of a person who wished to get out of the hauling business as soon as possible, and whose continuing involvement in the business was for the purpose of preserving a saleable asset (i.e., the business) until a sale could be consummated. The General Counsel does not contend that the sale of the business to the Lee family corprorationn, H & A Coal Hauling, Inc. (herein H & A), in July 1978 was anything other than a bona fide arm's-length transaction between Denzil Alkire and James Lee. As of the time of this hearing, Alkire was completely out of the hauling business, and was actively engaged in a different business. However, this is not the end of the inquiry. Rather, as the General Counsel correctly points out in his brief, in order to determine the status of the alleged discriminatees, it is first necessary to examine the relationships among the three Respondents during the critical period from mid-December, when Alkire sent termination letters to his employees, until July 22, when H & A purchased the business.

About January 1, Houdteshell verbally agreed to take over the business from Alkire. However, no contract was executed until March 27. On that date Alkire and Houdteshell (the latter as president of Mountaineer) entered into a written agreement of sale and lease whereby

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[5] Indeed, after the loan fell through, Houdteshell sold the Mountaineer name to Lee and went into a different hauling business. Three of the alleged discriminatees (John McNeely, John Courtney, and Larry Courtney) worked for Houdteshell for a time.

Mountaineer agreed to purchase the trucking business from Alkire for $250,000. The parties further agreed that, pending the sale, Alkire would lease the entire business to Mountaineer. The agreement was conditioned upon Mountaineer obtaining a loan for the purchase price from SBA and private banks. Alkire verbally agreed that Houdteshell would have until July 31 to obtain the money. The business included trucks and other equipment which were subject to a total indebtedness of about $700,000. Alkire agreed to make all payments on the outstanding indebtedness, and to pay all license fees, taxes, insurance, and maintenance expenses on vehicles and other equipment, and could claim depreciation. Mountaineer was to pay all operating expenses, including wages. As rent, Mountaineer agreed to pay Alkire 100 percent of the net profit after expenses, which included Houdteshell's salary. The parties orally agreed that Houdteshell would receive a salary of $400 per week. In sum, pending the sale the parties agreed that Houdteshell would receive only a salary from the business. Moreover, Houdteshell was, in substance, although not in form, guaranteed his salary. When the profits of the business were insufficient to meet Houdteshell's salary, Alkire's corporation, Upshur, loaned him money to make up the difference. Houdteshell also withdrew nearly $9,000 from the business, although he did so without Alkire's approval, and Alkire expressed the view that Houdteshell had no right to do this. One accountant maintained the books for both corporations, and she apportioned costs and expenses in accordance with her understanding of the agreement between Alkire and Houdteshell. The agreement further provided that the parties would agree upon an employment contract for Alkire for a period of at least 1 year following consummation of the sale. During the period of the lease Alkire was nominally retained by Mountaineer as a management consultant at a salary of $400 per week, which he received in addition to the net profit of the business, as provided in the agreement.

Until January 1, 1978, the business continued to be maintained in Alkire's name. Alkire retained only his clerical help, and no trucking work was performed during the latter part of December. On January 3, Alkire left for Florida, leaving Houdteshell in charge of the business. Except for a brief trip, Alkire did not return to West Virginia until early February. In the meantime, Houdteshell functioned as a watchman, although he used this dormant period to familiarize himself with the business. Trucking operations did not resume, even on a limited scale, until at least February 8, and during this period Houdteshell and the office personnel were the only functioning employees. From January 1 until the agreement of sale and lease was executed on March 27, the business was conducted in the name of Upshur, and Houdteshell was retained on Upshur's payroll. Alkire testified that he made this arrangement for tax purposes. As indicated, I find that Alkire made this arrangement to protect himself from personal liability at a time when he was no longer actively involved in running the business.

Mountaineer was incorporated on February 8. Houdteshell was its president and David Straight was vice president and general manager. As indicated, Straight had been Alkire's dispatcher. Under Alkire, Straight had some supervisory responsibilities. He directed work and disciplined employees. However, Alkire normally handled hiring and firing of personnel. Straight worked for Alkire until Alkire sent out the termination notices in mid-December. Thereafter, Straight went on the Upshur payroll until February 10, when he began working, at least, nominally, for Mountaineer. Houdteshell placed Straight in complete charge of personnel and dispatching matters, including hiring and firing of employees, while Houdteshell devoted himself primarily to obtaining work for the business. On or about February 10, Straight notified prospective employees of Mountaineer, including the former Alkire employees, that Mountaineer was taking job applications. Straight testified that he did not consider any individual for employment unless the individual filled out a written application. During the period from February 8 until March 27, when the business functioned in the name of Upshur, Straight hired 7 employees for nonunion work (6 garage personnel and 1 driver) and 12 employees for union work; 5 of the 6 nonunion employees and 9 of the 12 union employees were former Alkire employees. None of the 10 employees who initially signed the September grievance were hired during this period. However, Straight hired two of the three committeemen who endorsed the grievance. Donald Parks was hired as a union operator on February 13, and Donald Oldaker as a union driver on March 27. The complaint does not allege that Respondents or any of them unlawfully refused to recall or reinstate the alleged discriminatees prior to March 27. Rather, the complaint alleges, in sum, that on or about December 15 Alkire unlawfully purported to terminate his employees, that on or about February 8 Alkire and Mountaineer unlawfully required them to file new employment applications as a condition of employment, and that since on or about March 27 Respondents have unlawfully failed and refused to recall or reinstate the alleged discriminatees. After March 27 Mountaineer (in whose name the business was thereafter conducted) did not hire any employees for union work. In April and May Mountaineer hired 11 employees for nonunion work, of whom 1, John McNeely, one of the alleged discriminatees, transferred to union work. Also in May, Donald Oldaker transferred from union work to nonunion work. As Badger did not resume full operations until mid- or late April, and Badger comprised most or all of Mountaineer's union work, it is evident that there was not much union work available until at least that time.

I find that in December Alkire terminated his employees for a nondiscriminatory and lawful reason; namely, because he was going out of business. An employer has an absolute right, under the Act, to go out of business regardless of the motivation. *Textile Workers Union of America* v. *Darlington Manufacturing Co.*, 380 U.S. 263, 268 (1965). In the present case, the evidence fails even to demonstrate a discriminatory motive. The fact that Alkire's employees were then engaged in an economic strike did not immunize them against such permissible conduct. I further find that, during the period from February 8 to March 27, when the business was being operated and managed by Houdteshell and David Straight, but in the name of Upshur, that Upshur and Mountaineer were joint employers, and therefore that both were responsible for any personnel actions which were taken during this period. *Springfield Retirement Residence, a Division of Episcopal Community Services, Inc. and Whelan Food Services, Inc.*, 235 NLRB 884 (1978). As Alkire lawfully terminated his employees in December, Upshur and Mountaineer could lawfully require former employees of Alkire to file new job applications as a condition of employment. Therefore, I find that Alkire did not violate the Act by terminating his employees, and that Upshur and Mountaineer did not violate the Act by requiring those employees to file job applications as a condition of employment.

In view of the foregoing findings, it becomes immaterial whether Mountaineer was a successor employer. As Alkire did not commit any unfair labor practice for which Mountaineer could be held liable, Mountaineer owed no greater legal obligation to Alkire's former employees than it did to any other prospective job applicants. In sum, Mountaineer's sole obligation was to refrain from failing or refusing to hire them for discriminatory reasons. *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 280, fn. 5 (1972). Therefore the remaining questions for consideration are, in sum, whether Straight, acting on behalf of Mountaineer, failed or refused to hire any of the alleged discriminatees because of their union or concerted activities and, if so, whether Alkire and/or Upshur was also responsible for such conduct.

David Straight testified that, in hiring employees for Mountaineer, he considered former Alkire employees. Indeed, most of those hired were former Alkire personnel. Straight testified that, of the three applicants hired for union work who were not former Alkire employees, Houdteshell told him to hire one (Lloyd Burgess), who was Houdteshell's brother-in-law, one (James Davis) was recommended by Alkire, and the third (Kenny Moore) was personally known to Straight. Straight further testified that he did not follow seniority insofar as he hired former Alkire employees. In fact, he was not obligated to do so. No pertinent collective-bargaining agreement was in effect until May, when Mountaineer signed a contract with the Union, and the General Counsel does not contend that Respondents or any of them violated a contractual obligation by failing to follow seniority. As the alleged discriminatees did not enjoy the status of economic strikers after they were lawfully terminated, it follows that the allegations of the complaint must be dismissed as to one of them. Harvey Lattea did not sign the September grievance. He did not begin performing union work until September 1977. Straight testified, without contradiction, that he decided not to hire Lattea because of Lattea's poor driving and performance record. I credit Straight. The General Counsel's case with respect to Lattea rests solely on the contention that Lattea enjoyed the status of an economic striker, and therefore was entitled to be recalled to work ahead of any applicants who were not former Alkire employees. As this contention is without merit in the circumstances of this case, it follows that there was no discrimination with respect to Lattea.

As indicated, William Davis was a former committeeman. However, in September 1977, he was working as a mechanic; i.e., performing nonunion work. He was no longer on the committee and did not sign the grievance. Straight testified that he did not hire Davis because Davis never submitted a written application. Davis, in his testimony, admitted that he did not fill out an application. He testified that he declined to do so because the application form improperly called for financial statements, and the Union agreed. I do not credit this explanation. Union Representative Jordon testified that he advised the former Alkire employees to file applications with Mountaineer, and that he did not tell Davis that the form was illegal. Davis also testified that his son advised him not to sign the application because it called for financial statements. However, Davis' son applied himself for a job with Mountaineer, and was hired. The job application form contains an authorization for Mountaineer to make an investigation of the applicant's financial and credit record. However, a proviso permits the applicant to refuse to complete any portion of the form which the applicant believes to be unlawful. The form itself was based on a form used by Badger. The General Counsel does not contend that Davis was privileged to refuse to file an application because the form contained unlawful inquiries. Rather, the General Counsel's position is based on the contention, which I have rejected, that Davis did not have to file an application because he was already an employee of Mountaineer. I find that Davis declined to file an application because he did not wish to go to work for Mountaineer as a new employee. I also do not regard a conversation between Jordon and Straight in February, and a followup conversation in April, as constituting an application for jobs by Davis and other alleged discriminatees. Jordon testified that in February he spoke to Davis, Ogden Bragg, Larry and John Courtney, Larry Lantz, and three or four other former Alkire employees, who asked if they could be reemployed. Jordon then spoke to Straight. According to Jordon, he asserted that "the contract" had a succession clause, and asked if Bragg, Davis, and the Courtneys had jobs. Straight said they did not. They also discussed whether seniority was followed in a successorship situation. Jordon's testimony concerning the conversation was substantially uncontroverted. It is evident that Jordon was suggesting, without flatly asserting, that the former Alkire employees were entitled to be rehired, and that Straight disagreed with the suggestion that they were laid-off or striking employees of Upshur or Mountaineer who enjoyed rights of recall or reinstatement. As Jordon admittedly advised the former Alkire employees to file applications with Mountaineer, it is evident that Jordon did not press this position. I am also not persuaded that Straight used Davis' failure to file an application as a pretext for not hiring. No evidence was presented, other than hearsay, that Straight hired employees who did not submit applications. Straight wished to make his own decisions as to whom to hire and whom not to hire, and he could reasonably infer that any individual who did not file an application with Mountaineer was not interested in a job.[6] I find that there was no discrimination with respect to Davis.

Ogden Bragg took an application form from Straight but never returned it. Straight testified that he also would not have hired Bragg because of his disciplinary record. When they worked for Alkire, Straight gave Bragg a suspension because Bragg walked off a job in the middle of the day. Bragg was not presented as a witness, and Straight's testimony concerning the incident is uncontroverted. If Straight were discriminatorily motivated, then it is difficult to see why he would have refused to hire Bragg while hiring the other two committeemen who endorsed the September grievance.[7] I find that there was no discrimination with respect to Bragg.

John McNeely filed a job application with Mountaineer. David Straight testified, in sum, that he initially did not hire McNeely because he tended to be lazy, and there were better driver applicants available. However, by May Mountaineer needed more drivers, and by then McNeely was one of the better applicants available. McNeely was hired on May 15 as a nonunion driver, but on May 19 he was switched to union work. McNeely testified that Houdteshell and Straight told him that they needed more trucks to haul union coal, asked him if he wanted to do union work, said that they were paying $7 per hour, which was $1.87 below the UMW contract rate, and added that if there was any more trouble from the union men, they would be taken out of the Union and made nonunion. Houdteshell testified that he never discussed the Union with McNeely or said that he would get rid of the union people if they caused trouble. However, Straight testified that Houdtshell called a meeting of the drivers and asked them if they were willing to agree to a rate of $7 per hour. Straight testified that the drivers agreed to accept the $7 rate and that, when McNeely transferred to union work, he also agreed to accept the $7-per-hour rate. I credit McNeely to the extent that I find that, whatever words were used by Houdteshell and Straight, they indicated that they would not pay the UMW contract rate for union work, and that any driver who insisted on receiving the contract rate would be transferred to nonunion work. However, this is not the thrust of the complaint. The complaint does not allege that Respondents or any of them violated the Act by conditioning assignment of the employees to union work on a wage rate less than union scale. In fact, the evidence indicates that throughout the operations in the Buckhannon area the Union consistently tolerated payment of subscale wages for hauling union coal, while giving only lip service to the contract rate. Thus, in late May, after Mountaineer made clear that it would pay only $7 per hour to its union drivers, the Union agreed to permit Mountaineer to become a signatory to its contract, thereby permitting Mountaineer to haul coal for Badger. Rather, the thrust of the complaint is that Respondents refused to hire (or recall or reinstate) the former Alkire employees, or delayed doing so, because of their past activities in protesting Alkire's failure to pay the contract rate. I am not persuaded that the evidence so indicates with respect to McNeely. Straight and Houdteshell hired McNeely before they knew whether or not he would accept less than the contract rate. Indeed, they hired McNeely at a crucial time, when Badger was resuming full operations and the Union had not yet agreed to sign a contract with Mountaineer. If Mountaineer was concerned that McNeely would insist on the contract rate, and discriminatorily sought to head off that possibility, then it is more probable that McNeely would not have been hired at all.[8] However, as has been and will be discussed, Mountaineer hired a number of former employees who signed the September grievance. I find that Mountaineer did not discriminatorily refuse to hire McNeely.

David Straight testified that, among the September grievants, John Courtney wanted an immediate increase, while Larry Courtney leaned toward a temporary accommodation with Alkire. Both filed applications with Mountaineer. Both were hired, not immediately, but eventually. Straight testified that he did not hire John Courtney because he felt that he would not make a good employee, that he had a bad driving record and a poor attitude. In late May John Courtney had a chance encounter with Denzil Alkire. Courtney asked what the chances were of working for Mountaineer. Alkire said that they did not need any union drivers. Courtney asked about nonunion work, and Alkire said he would see what could be worked out. At Alkire's suggestion, Courtney went to Straight and Houdteshell. Straight was still unwilling to hire Courtney, but he was overruled by Houdteshell, who instructed him to hire Courtney. Houdteshell testified that he considered Courtney to be a very good driver. Courtney testified that while driving for Alkire he received only one traffic ticket (for overloading) and was never reprimanded for poor driving. However, Courtney was involved in an accident in September in which his truck was demolished. But for the developments in May, the evidence might suggest that Straight was advancing pretextual reasons for refusing to hire Courtney, and might warrant an inference that Straight was refusing to hire Courtney because of Courtney's previous insistence on the contract rate. However, if Straight were following a policy of refusing to hire grievants or adamant grievants, it is unlikely that he would have done so without the concurrence and approval of Houdteshell. Houdteshell's action indicates that Mountaineer did not have such a policy. Rather, the circumstances indicate that Straight and Houdteshell differed in their appraisal of Courtney's record. I find that the evidence fails to indicate that Mountaineer discriminated against John Courtney for reasons prohibited by the Act.

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[6] The cases cited by the General Counsel on this point in his brief are distinguishable. In *Macomb Block and Supply, Inc.*, 223 NLRB 1285, 1286 (1976), reversed 570 F.2d 1304 (6th Cir. 1978), the Board held, in sum, that an employer cannot refuse to hire prospective employees on the ground that they did not file formal applications, if the evidence indicates that the application requirement was part of a discriminatory scheme to deny them employment. This rule was applied in *Mason City Dressed Beef, Inc., and Packing House and Industrial Services, Inc.*, 231 NLRB 735, 748 (1977), enfd. in pertinent part 590 F.2d 688, 695–696 (8th Cir. 1978). The General Counsel's reliance on these cases begs the question. Absent evidence of an unlawful motivation, Mountaineer could lawfully require prospective employees to file individual job applications.

[7] Bragg strongly supported the grievance, while Donald Parks had some reservations. However, all three committeemen signed and endorsed the grievance.

[8] The General Counsel presents inconsistent arguments in this regard. On the one hand, the General Counsel contends that Mountaineer discriminated against some former Alkire employees by hiring them for nonunion work. On the other hand, the General Counsel argues that Mountaineer discriminated against William Davis, who was performing nonunion mechanic work for Alkire in December, by refusing to hire him for any job. This is a case of "damned if you do and damned if you don't." In order to accept the General Counsel's position, I would have to find that Mountaineer acted discriminatorily by failing to hire grievants to 7 of the 12 available union jobs (or 8, if Davis were included), although the alleged discriminatees comprised only a minority of Alkire's union employees, and an even smaller minority of Mountaineer's job applicants.

Straight testified that he did not initially hire Larry Courtney because Courtney applied for work as an equipment operator, and he needed only one employee to work exclusively in that category. Straight testified that Phillip Kelley and Donald Parks (both former Alkire employees, and the latter a committeeman) made similar applications, and that he hired Parks because he was the best qualified, and Kelley because he was also willing to work as a driver. Straight testified that Courtney later reapplied to work as a driver, and was hired in that category. A document introduced in evidence as a list of Mountaineer's employees does not contain Courtney's name, although it does indicate that Parks was the only employee who worked exclusively as an operator. The General Counsel argues in his brief that the Mountaineer application form does not contain an entry for job preference, and that an adverse inference should be drawn against Respondents because they failed to present Courtney's application in evidence. The General Counsel is attempting to shift the burden of proof. The General Counsel failed to produce Larry Courtney as a witness, and did not demand production of his application at the hearing. In light of the failure of the General Counsel to present Courtney as a witness, I credit Straight, and find that Mountaineer did not discriminate against Larry Courtney.

Larry Lantz, Robert Small, and Jim Detamore applied for work with Mountaineer, but were not hired. None was presented as a witness in this case. David Straight testified that he regarded Lantz as an average to below average driver. Straight testified that Lantz had a poor attitude, and that on one occasion when working for Alkire he refused to perform a minor repair on his truck, which he was able to perform, preferring to wait for a mechanic. According to Straight, Dennett Houdteshell felt that Lantz crossed railroad tracks at too fast a rate of speed. Straight testified Small also had a poor attitude, in that he verbally abused Badger supervisors. Straight further testified that he simply overlooked Detamore and that had he considered Detamore he probably would have hired him. Straight's explanation might be considered pretextual but for two significant facts. First, although Detamore signed the September grievance, he was not noticeably vocal about the matter. Rather, he was a quiet person who might easily be overlooked. Second, Straight had considerably more applications than positions to fill, and he was under no legal obligation to give preference to former Alkire drivers or to follow seniority or any other systematic method of hiring. Nevertheless, he informed all of the former Alkire employees that he was taking applications. Judged by objective standards, Straight may have been erroneous or even arbitrary in his selections, but it does not follow from such evidence that Mountaineer was systematically refusing to hire employees who signed the September grievance. Moreover, the evidence does not suggest such a pattern. Of the 13 employees who signed the September grievance, 1 (Kenny Lee) was no longer working for Alkire in December, 4 (John Helmick, Bruce Davis, George Jack, and Ogden Bragg) did not file applications, or otherwise indicated that they did not wish to work for Mountaineer, 5 (Don Parks, Don Oldaker, John Courtney, Larry Courtney, and John McNeely) were hired, and 3 (Robert Small, Jim Detamore, and Larry Lantz) were not hired. The General Counsel also tends to exaggerate the significance of the names which appeared on the grievance. After the grievance was filed, it was approved by all of the union-represented employees, and David Straight was aware of that fact. Nevertheless, union employees who did not sign the grievance but who subsequently approved it were hired by Mountaineer to perform both union and nonunion work. As indicated, I also do not regard as significant the fact that some grievants were not hired earlier than May. Prior to May, there was little union work available, whereas, by May, Badger had resumed full operations, and that time was a crucial one for determining the wage rate. Indeed, the evidence fails to indicate that, prior to May, Straight had any assurance that any person hired to do union work, whether or not formerly employed by Alkire, would not demand the contract rate.

In sum, I find that Mountaineer did not discriminatorily refuse to hire any of the former Alkire employees. Therefore, it is unnecessary to determine whether, by reason of his continuing involvement with the business, Alkire was a joint employer with Mountaineer during the period from February 8 to July 22.

CONCLUSIONS OF LAW

1. At various times material, Respondents were employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents have not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

O'Hare Knightsbridge d/b/a Sheraton O'Hare Hotel *and* International Union of Operating Engineers, Local 399, AFL-CIO. Case 13-CA-21470

February 3, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on August 27, 1981, by International Union of Operating Engineers, Local 399, AFL-CIO, herein called the Union, and duly served on O'Hare Knightsbridge d/b/a Sheraton O'Hare Hotel, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint on September 8, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 27, 1981, following a Board election in Case 13-RC-15594, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about August 25, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 17, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 28, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 1, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent attacks the validity of the election and certification and the validity of the Hearing Officer's Report on Objections on the ground that Respondent's exceptions to the Hearing Officer's Report on Objections should have been sustained and that the Board's adoption of the Hearing Officer's findings was improper. Specifically, Respondent contends that the Hearing Officer's crediting of the Union's organizer was erroneous; that even if such witness is credited, his admitted electioneering by the polling area violated the Board's rule against electioneering; and that Respondent's due process right to a fair hearing was violated by the Hearing Officer's limitation of Respondent's right to elicit relevant testimony from the Board agent. The General Counsel, on the other hand, argues that Respondent is merely attempting to relitigate those issues which were litigated in the underlying representation proceeding in Case 13-RC-15594, which may not be relitigated herein. We agree with the General Counsel.

Our review of the record herein reflects that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on December 5, 1980. The tally of ballots showed that of approximately 11 eligible voters 10 cast ballots, of which 9 were for, and 3 were against, the Union; 1 was challenged. Respondent filed objections to the conduct of the election.[2] After investigating the issues raised by the objections, the Acting Regional Director issued his Report on Objections in which he recommended that a hearing be held to resolve the credibility issues raised in the investigation of the objections. The hearing was held before Hearing Officer William V. Killoran, Jr., on January 19 and February 12, 1981.

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[1] Official notice is taken of the record in the representation proceeding, Case 13-RC-15594, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Respondent's objections asserted that the election was held in split sessions; a nonemployee representative engaged in electioneering with employees waiting to cast votes; electioneering took place within 40 to 60 feet of the polling place and all voters had to pass through an area where a union representative was stationed in order to gain access to the polling place; that under the rule in *Milchem, Inc.*, 170 NLRB 362 (1968), the actions of the union representative constitute objectionable conduct; and, by such conduct, the Union destroyed the laboratory conditions necessary for a fair election.

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During the hearing, Respondent asked for and received the Board's consent to permit Board Agent Ramon Martinez to testify pursuant to a subpena issued on the same date. On January 21, 1981, Respondent made a motion to admit documents and continue hearing until the disposition of the subpena Respondent served on Board Agent Ramon Martinez. On February 5, 1981, the General Counsel, by telegram, granted Respondent's request to permit Board Agent Martinez to testify solely with respect to what conversations, if any, he had with the parties to the election concerning the scope of the permissible electioneering. On February 9, 1981, the Hearing Officer issued his order reopening the hearing, receiving documents into evidence, and rescheduling the hearing. On March 18, 1981, the Hearing Officer issued his Report on Objections in which he recommended that Respondent's objections be overruled and that a certification of representative issue. Thereafter, Respondent filed exceptions to the Hearing Officer's Report on Objections, and the Union filed a response to Respondent's exceptions.

On July 27, 1981, the Board issued its Decision and Certification of Representative in which, after consideration of the Hearing Officer's report and Respondent's exceptions and brief, it adopted the Hearing Officer's findings and recommendations overruling Respondent's objections with respect to alleged electioneering and comments concerning electioneering by Board Agent Ramon Martinez. The Board also noted in footnote 1 of its Decision that the parties had agreed to which particular individuals would be eligible to vote through the use of a *Norris-Thermador Corp.* list.[3] Moreover, the Board indicated in footnote 2 that there was insufficient basis for disturbing the Hearing Officer's credibility resolutions in the case.

On August 11, 1981, the Union, by letter to Respondent's counsel, requested that it be advised as to whether or not Respondent was prepared to commence negotiations or wished to pursue its objections by refusing to bargain. By letter dated August 25, 1981, Respondent stated in pertinent part, ". . . I must inform you that we respectfully decline your offer to bargain inasmuch as we believe, for the reasons stated in our objections to certification, that the N.L.R.B. improperly certified Local 399. Accordingly, O'Hare Knightsbridge declines your offer to bargain until such time as the Board's Order is judicially enforced." Thereafter, on August 27, 1981, the Union filed the instant unfair labor practice charge.

We find no merit to Respondent's contentions inasmuch as it appears that Repondent is merely reiterating the issues previously raised and considered in the underlying representation case. We still find, and thereby reaffirm our previous determination, that Respondent's allegations, which deal primarily with credibility issues, constitute an insufficient basis for disturbing the Hearing Officer's credibility resolutions in this case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[5] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. THE BUSINESS OF RESPONDENT

Respondent, an Illinois partnership, is engaged in the hotel accommodation business and has maintained a facility located at 6810 Mannheim Road, Rosemont, Illinois. During the past fiscal or calendar year, a representative period, Respondent in the course and conduct of its operations had gross revenues in excess of $500,000 and, during the same period, it purchased and received at its facility goods and materials valued in excess of $5,000 directly from points located outside the State of Illinois.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

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[3] 119 NLRB 1301 (1958).

[4] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5] Moreover, as previously noted, Respondent's response to the Union's bargaining demand indicated that the Board improperly certified the Union and that Respondent declined to bargain until such time as the Board's Order is judicially enforced.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local 399, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All maintenance employees employed at the Employer's facility presently located at 6810 Mannheim Road, Rosemont, Illinois but excluding all other employees, including guards and supervisors as defined in the Act.

2. The certification

On December 5, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 13 designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 27, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about August 11, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 25, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 25, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. O'Hare Knightsbridge d/b/a Sheraton O'Hare Hotel is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 399, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All maintenance employees employed at the Employer's facility presently located at 6810 Mannheim Road, Rosemont, Illinois, but excluding all other employees, including guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 27, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective

bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 25, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, O'Hare Knightsbridge d/b/a Sheraton O'Hare Hotel, Rosemont, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 399, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All maintenance employees employed at the Employer's facility presently located at 6810 Mannheim Road, Rosemont, Illinois but excluding all other employees, including guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Rosemont, Illinois, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 399, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All maintenance employees employed at the Employer's facility presently located at 6810 Mannheim Road, Rosemont, Illinois but excluding all other employees, including guards and supervisors as defined in the Act.

O'HARE KNIGHTSBRIDGE D/B/A
SHERATON O'HARE HOTEL

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Riley-Beaird, Inc. *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO. Cases 15-CA-7582, 15-CA-7621-1, 15-CA-7621-2, 15-CA-7621-3, 15-CA-7697, 15-CA-7730, and 15-CA-7736

February 3, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 6, 1981, Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding. Thereafter, the Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[1] and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.

In agreement with the General Counsel, and in order to fully remedy the unfair labor practices committed herein, we shall order that the Respondent notify employees Arnold, Sanders, Stamper, Crowder, Grant, Broden, and Hall, in writing, that it has removed and expunged the unlawful written warnings, unexcused absences, adverse personnel actions, and references thereto from their personnel files. We further agree with the General Counsel that a broad cease-and-desist order is warranted in this case. This is not the first case involving unfair labor practices committed by the Respondent in connection with the Charging Party's organizational campaign[3] and the nature of the unfair labor practices committed herein demonstrates not only the Respondent's proclivity to violate the Act, but its general disregard for its employees' fundamental statutory rights.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Riley-Beaird, Inc., Shreveport, Louisiana, its officers, agents, successors, and assigns, take the action set forth in said recommended Order, as so modified:

1. Substitute the following for paragraph 1(l):

"(l) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to act together for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities."

2. Insert the following as paragraph 2(d), relettering subsequent paragraphs accordingly:

"(d) Notify employees Lynn A. Arnold, Willie D. Broden, Willie D. Crowder, J. R. Grant, Willie Hall, Jr., Cecil M. Sanders, and Thomas B. Stamper, in writing, that it has taken the action required by paragraph 2(c)."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice

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[1] The General Counsel's motion to correct the record, which was unopposed, is granted.

[2] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In regard to violations where the Administrative Law Judge rejected the Respondent's asserted justifications as pretextual, Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). In his view, *Wright Line* and its progeny concern identifying the cause of discharge where a genuine lawful and a genuine unlawful reason exist. Where the asserted lawful reason is found to be a pretext, only one genuine reason remains—the unlawful one. Thus, the *Wright Line* analysis is not pertinent to cases of pretext.

[3] See *Riley-Beaird, Inc.*, 253 NLRB 660 (1980).

[4] *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

259 NLRB No. 180

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

We will not unlawfully ask you about your activities or the activities of other employees on behalf of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization.

We will not unlawfully ask you about unfair labor practice charges you file against us with the National Labor Relations Board.

We will not create the impression that we have under surveillance your activities on behalf of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization, by telling you that a supervisor has been instructed to observe such activities.

We will not unlawfully threaten to file charges against you because you make and keep notes concerning your work and events at work.

We will not illegally threaten to discharge you because you make and keep notes concerning your work and events at work.

We will not unlawfully charge you with unexcused absences to penalize you for being absent from work in order to give testimony at a proceeding of the National Labor Relations Board.

We will not assign you to harder and less desirable work, subject you to stricter supervision, require you to follow plant rules more closely, restrict you in communicating with your fellow employees, or warn, suspend, or discharge you because you support International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization, or because you file charges or give testimony under the National Labor Relations Act.

We will not in any other manner interfere with, restrain, or coerce you in your exercise of the rights guaranteed you under Section 7 of the National Labor Relations Act.

We will remove from our records and destroy all copies of and references to certain warnings issued in 1980 to Lynn A. Arnold, Willie Broden, Willie D. Crowder, J. R. Grant, Willie Hall, Jr., Cecil M. Sanders, and Thomas B. Stamper; and we will notify each of them, in writing, that we have done so.

We will offer Lynn A. Arnold, Willie Hall, Jr., Cecil M. Sanders, and Thomas B. Stamper immediate and full reinstatement to their former positions of employment or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and we will make Lynn A. Arnold, Willie D. Crowder, and Willie Hall, Jr., whole, with interest, for any loss of pay they may have suffered as a result of their suspensions or discharge in 1980.

Riley-Beaird, Inc.

DECISION

Statement of the Case

Richard J. Linton, Administrative Law Judge: These consolidated cases were heard before me in Shreveport, Louisiana, during August 4-8 and 27-29, 1980,[1] pursuant to an initial complaint, dated March 14, two subsequent consolidated complaints, and various amendments thereto,[2] issued by General Counsel of the National Labor Relations Board through the Regional Director for Region 15. The consolidated complaints, as amended, are based on charges filed by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO[3] (the Union), against Riley-Beaird, Inc. (Respondent).

In the consolidated complaints, as amended, General Counsel alleges that Respondent violated Section 8(a)(1), (3), and (4) of the Act by, among other conduct, reprimanding and transferring certain employees; by suspending employees Lynn A. Arnold, Willie L. Crowder, and Willie Hall, Jr.; and by discharging Willie Hall, Jr.

By its answers, as amended, Respondent admits certain allegations, but denies that it has violated the Act in any manner.

Upon the entire record,[4] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by each of the parties, I make the following:

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[1] Unless otherwise indicated, all dates involved herein occurred in 1980.

[2] Aside from minor amendments made at, or shortly before, the hearing, the preferred practice is that subsequent cases and allegations be incorporated into a single consolidated complaint when the case submitted at the hearing is spread over numerous documents. The parties, and particularly the Administrative Law Judge, frequently are distracted by having to flip through the several complaints and amendments in order to locate relevant allegations.

[3] *Sua sponte,* I have corrected the name of the Union (separating "Ship" and "Builders" and spelling "and") so as to conform to the spelling appearing in the charges and in the Union's brief.

[4] The unopposed motion, dated October 24, 1980, of counsel for General Counsel to correct the transcript is hereby granted.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation headquartered in Shreveport, Louisiana, fabricates various heavy steel products, including pressure vessels, at its Shreveport, Louisiana, facility.[5] During the past 12 months, Respondent purchased and received, at Shreveport, Louisiana, goods and materials valued in excess of $50,000 directly from points located outside the State of Louisiana. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. UAW's 1977 campaign

Although the record discloses only sketchy information on the subject, it appears that in the summer of 1977 the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), conducted an organizing campaign among Respondent's employees. The extent and duration of the UAW's efforts are facts not available, but apparently the campaign did not proceed to a Board-conducted election. The principal relevance of this campaign relates to the case of dischargee Willie Hall, Jr.

In July and August 1977, UAW filed charges on behalf of Hall alleging that on June 6, 1977, Respondent transferred Hall from the midnight shift to the first shift and thereafter reprimanded him because of his activities on behalf of UAW. The Region dismissed the charges, and UAW's appeal to General Counsel was denied in October 1977 (G.C. Exh. 20). Respondent apparently returned Hall to the midnight shift on August 15, 1977.

In the instant case, the subject of the 1977 charges was mentioned in a significant meeting Hall attended with, and at the summons of, several of Respondent's officials. Such meeting is discussed below in the treatment of Hall's case.

2. Boilermakers' 1977–80 campaign

Al Washington, Jr., an International representative of the Union, testified that the Union began an organizational campaign among Respondent's employees in 1977. An election petition was filed in Case 15–RC–6501, apparently about late August 1979, and a Board-conducted election was held on October 4, 1979. As reflected by the tally of ballots served on the parties, out of a unit of approximately 896 employees, the Union fell some 16 votes short of securing a majority,[6] the Union filed timely objections alleging that Respondent's conduct improperly affected the election results. It also filed an unfair labor practice charge, Case 15–CA–7436, alleging parallel violations of Section 8(a)(1) of the Act by such conduct of Respondent. Complaint issued November 27, 1979, on certain allegations, and Cases 15–CA–7436 and 15–RC–6501 were consolidated for a hearing.

3. *Riley-Beaird, Inc.*, 253 NLRB 660 (1980)

The foregoing 8(a)(1) allegations and election objections came before Administrative Law Judge David L. Evans on February 4 and 5, 1980, in Shreveport, Louisiana. Administrative Law Judge Evans issued his Decision (G.C. Exh. 31) on August 13, 1980, and on December 10, 1980, the Board, finding an additional 8(a)(1) violation involving Supervisor M. O. Green, adopted Administrative Law Judge Evans' Decision. (235 NLRB 660 (1980)). I take administrative notice of such Decision, findings, and conclusions therein. In that Decision, Respondent is found to have violated Section 8(a)(1) of the Act by impliedly threatening plant closure and reduction of benefits if employees selected the Union as their representative. Additionally, Supervisor Green is found to have unlawfully solicited and remedied grievances regarding Cecil M. Sanders. The Board also granted the Union's request to withdraw its election objections in Case 15–RC–6501.

What makes the Decision of significant relevance is that of the seven alleged discriminatees herein, five[7] testified on behalf of General Counsel before Administrative Law Judge Evans. Therefore, the asserted incidents of discrimination against these five are alleged herein as violations of Section 8(a)(4) as well as Section 8(a)(3). It appears from the Decision that Vernon Huffaker is the only other employee who testified on behalf of General Counsel at the February hearing.

4. Contentions of the parties

General Counsel and the Union contend that Respondent, angered by the testimony against it by Arnold and the other employees at the February hearing before Administrative Law Judge Evans, retaliated against the alleged discriminatees herein by discharging Hall, and generally making life as miserable as possible for the others. This had a twofold purpose, they argue. First, the retaliation punished the ones (except Huffaker, who is not an alleged discriminatee) who testified, and secondly, it also serves as a constant and vivid warning to all other employees concerning what they can expect if they incur Respondent's enmity by assisting the government as well as supporting the Union.

Respondent denies any wrongdoing or unlawful purpose. At the hearing, it offered numerous and detailed exhibits, in addition to testimonial evidence, in support of its position that the transfers of Arnold and others were for economic reasons only, and that the discipline imposed on Arnold, Hall, and the other alleged discriminatees was consistent with past practice and justified by their work mistakes.

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[5] Respondent has been a wholly owned subsidiary of the Riley Company, based in Chicago, Illinois. More recently, Respondent has been owned by U. S. Filter, Inc., which has its home office in New York, New York.

[6] Of 862 valid ballots, 438 were against the Union, 424 were cast for the Union, and 1 was challenged.

[7] Lynn A. Arnold, Willie D. Crowder, Willie Hall, Jr., Cecil M. Sanders, and Thomas B. Stamper.

B. *Independent 8(a)(1) Allegations*

There are four allegations of independent 8(a)(1) violations. Two appear as paragraphs 15 and 16 in the second complaint (a consolidated complaint dated April 28, 1980) concerning an alleged interrogation and threat on March 31. Willie Hall, Jr., testified concerning that event.

Willie D. Broden testified in support of the remaining two allegations which appear in the July 1, 1980, "Amendments" to the third complaint (the consolidated complaint of June 25, 1980). The July 1 "Amendments" adds paragraph 11A, with subparagraphs 11A(a) alleging an impression of surveillance on May 10 and 11A(b) alleging an interrogation on such date.

C. *Allegations of 8(a)(3) and (4) Violations*

1. *Introduction*

In their briefs, General Counsel and the Union contend that shortly after the February hearing Respondent launched its campaign of retaliation against General Counsel's witnesses by reassignments and transfers to more onerous and less desirable jobs as well as by disciplining them for fabricated reasons and for mistakes of a kind previously tolerated.

Countering with its own evidence, Respondent asserts that the reassignments and transfers were for the purpose of reducing "x-ray rejects,"[8] and that the discipline, as previously noted, was consistent with past practice and otherwise justified.

William M. Bradshaw, Respondent's vice president of manufacturing, testified that in June 1979, following an expression of concern about quality and excessive cost by Company President Bill Adams, he began a drive to improve quality. As a result, production departments, or welding bays, adopted goals. The goal for X-ray rejects was an overall maximum of 3 percent. The same goal was reset in July 1980. Reduction of spoilage (caused by improper welds) was another goal. Both goals, of course, are designed to cut costs through improved quality and work proficiency. Bradshaw testified that Respondent began tightening up in these areas in June 1976. The Company's fiscal year ends on each June 30, and according to Bradshaw, the X-ray reject rate was 4.7 percent for the fiscal year ending June 30, 1979.

Bradshaw testified that progress toward achieving the goals was lagging. He therefore wrote a memo (Resp. Exh. 10), dated December 14, 1979, to Tank and Structural Superintendent E. C. Greene on the subject of weld rejects in bay 5, reading as follows:

> Look at the record for the last year on Bay 5 weld rejects. We are around 9% average in this Bay, all other Bays have made improvements in this area and are meeting their goals. Our plant average is good at the present time. If you need to move supervisors, welders, etc. do whatever is necessary to make improvement.
>
> You are charged with the responsibility to take whatever action is necessary. Keep me posted on your progress.

Greene testified that, on receipt of the memo, he called in Bay 5 General Foreman Rupert Sepulvado[9] and gave him 30 to 45 days to show an improvement regarding the reject percentage. Should no progress be made in the allotted time, Greene told Sepulvado that "[W]e are going to change personnel in that area, and supervision, if necessary. If we got to put a completely new crew of men in that department, then that is what we are going to do. But, we are going to get the X-rays down where they should be."

Greene further testified that at the end of January the reject rate was still around 8 to 9 percent (in Bay 5), so in the first week of February he and his general foreman began discussing moving employees from bay 5.[10] Greene initially asked several general foremen if they had any "good" individuals they would volunteer to send to bay 5 on a man-to-man swap by qualification (i.e., a first-class welder for a first-class welder). Naturally, as Greene testified, none wanted to give up qualified employees who were doing a "good job."

Receiving no volunteers, Greene testified that he stated he would have to take people. He told Sepulvado to select (apparently a certain number of employees) for transfer from bay 5, and Greene would obtain from other general foremen employees whom they had selected for transfer from their bays.[11] Thus, while the general foreman selected the transferees, Greene decided which selectee would be transferred to which bay. On cross-examination, he testified that the decision regarding the selections and transfers was finalized on Friday, February 8, and that the implementation began the following week.

2. Preview of conclusions

As appears below, I find and conclude that General Counsel has established a *prima facie* case of unlawful conduct, and that Respondent has failed to carry its *Wright Line*[12] burden of rebutting such *prima facie* case.

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[8] A term which refers to the quality control procedure in which welding mistakes discovered in the routine X-ray procedure are rejected and returned for repair and correction.

[9] Sepulvado testified that he has been general foreman over bays 5, 6, and 13 at least since January 1979.

[10] A general foreman often is in charge of more than one bay. Under the general foreman is a bay foreman and under the foreman are several leadmen. All are admitted statutory supervisors.

[11] Quite obviously, this procedure would result in bay 5 receiving welders who were considered as something less than the best by the selecting general foremen. While it is true that a first-class welder, for example, might be traded for another person possessing the same first-class welding certification, common experience would recognize that while all high school graduates get the same kind of diploma, some graduates are "A" students, some are "B," and some are "C." Common experience shows that some people are more proficient than others in the same classification. Greene admitted this when he testified that he asked his general foreman to volunteer "good" men to be swapped within the same classification.

[12] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

For example, in relation to consideration of General Counsel's contention that *timing* (i.e., the alleged discriminatory acts following almost immediately after the February hearing) serves here as an indicium of unlawful motivation, I have considered, among other evidence, Respondent's Exhibit 44. This 12-page exhibit[13] is a list of employees who were issued written warnings for the years 1976 through July 1980. A statistical analysis of the exhibit reveals the fact that the number of warnings for 1980 increased by an astonishing 86 percent over the previous 4-year average.[14] Thus:

	1976	*1977*	*1978*	*1979*	*1980*
Jan.	5	2	12	16	6
Feb.	5	2	8	16	19
Mar.	2	9	10	6	17
Apr.	18	6	17	7	17
May	21	11	10	7	29
Jun.	6	5	7	1	10
Jul.	12	12	2	4	15
Aug.	9	6	15	15	0
Sep.	6	6	5	5	0
Oct.	7	6	19	3	0
Nov.	7	5	7	16	0
Dec.	8	8	15	8	0
	106	78	127	104	113

Average for 4 years of 1976–79—103.75

Projected number for 1980 at 16.142 per month (113 plus 80.7 divided by 12)—193.71

Approximate 1980 increase over 4-year average—86 percent[15]

Furthermore, in this case, I find the demeanor of the witnesses to be an important factor. As appears below, based largely on the factor of demeanor, I credit General Counsel's witnesses over those of Respondent. At this point I shall note that some of Respondent's witnesses, particularly Greene and General Foreman Frank Booker, appeared quite hostile during their questioning by General Counsel. General Foreman Sepulvado was evasive at times. In contrast, the alleged discriminatees, despite the adverse, as I find, nature of the job conditions they have been subjected to, exhibited an appearance of a sincere effort to cooperate in the questioning by all parties.

3. The discrimination against Arnold, Sanders, and Stamper

a. *Sanders' unexcused absences*

When his supervisor, Harvey Reynolds, gave Cecil M. Sanders his paycheck the evening of January 31, Sanders told Reynolds that he had a subpena to appear in court on February 4. Reynolds respondend that this would be "okay." James W. Johnston, who was present during this conversation corroborated Sanders completely.

Sanders testified on February 4 and was still present at the hearing pursuant to Board subpena on February 5. He was seen at the hearing on February 5 by M. O. Greene, admitted supervisors/managers William Bradshaw, Hillman Deaton, M.O. Greene, and B. T. Walsworth. Sanders was paid 2 days' witness fees.

Upon returning to work on February 6, Sanders heard that his absences had been unexcused, and he questioned Reynolds about this. Reynolds told Sanders he did not remember his January 31 conversation with Sanders wherein Sanders notified him of his upcoming court appearance, although he did not deny that Sanders so informed him. Sanders then went to General Foreman Rupert Sepulvado the following day and told him that Johnston was present during the January 31 conversation with Reynolds. Sepulvado said he would check it out with Johnston. The following day Sanders asked Sepulvado if he had confirmed his story with Johnston, to which Sepulvado told him "No" and then walked away. Johnston testified that no supervisors had attempted to verify with him whether Sanders told Reynolds about his subpena.

Although testifying in an evasive and confusing fashion on cross-examination, General Foreman Sepulvado appears to have conceded that Foreman Reynolds told him one employee (presumably Sanders) would be testifying at the February hearing. Reynolds did not testify.

Respondent relies upon its Exhibit 45, which reflects that Sanders' absences on both February 4 and 5 were treated and cited as unexcused absences in violation of rule 34. Other names are listed of those who did not call in, and also were cited. However, I credit the testimony of Sanders and Johnston that Sanders did give notice to Foreman Reynolds. Finally, Sepulvado's clear disinterest in checking with Johnston evidences Respondent's unlawful motive in citing Sanders.[16] That Respondent did not cite the witnesses who did call in is not determinative. Thus, Personnel Manager Dillard conceded that if a supervisor excuses an employee, then he is excused. I find the citation to Sanders a violation of Section 8(a)(1), (3), and (4) of the Act, as alleged in paragraph 7 of the March 14 complaint.[17] I shall recommend that Respond-

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[13] Not treated by either General Counsel or the Union in their briefs.

[14] Figured by projecting the 7-month average of 16.14 throughout the remainder of 1980.

[15] I further note that only six warnings issued in January 1980, and that the first written warning in February did not issue until after the hearing before Administrative Law Judge Evans. Then the flood gates opened with 19 issuing in February (over three times the number of February 1979). An all-time monthly high (at least since January 1, 1976) of 29 issued in May—more than four times as many as were handed out in May 1979.

[16] In view of Sanders' description in the February hearing of his union activities, I find that Respondent was motivated here not only to retaliate for his testimony, but also because of such union activities.

[17] In any event, I find that citing an employee who is present at a Board proceeding pursuant to a Board subpena with an unexcused absence is inherently destructive of his Sec. 7 rights and thereby violative of Sec. 8(a)(1) and (4). Such a conclusion must be reached particularly where, as here, top officials of Respondent knew of Sanders' February 4 and 5 appearance in court, and where Respondent failed to show that if

Continued

ent expunge the record of unexcused absences from Sanders' personnel records.

b. *Sanders' February 6 job reassignment*

As noted previously, Cecil M. Sanders testified at the February hearing. He was present on both February 4 and 5. A first-class code welder at Respondent's plant for 12 years, Sanders testified that prior to the February hearing he had done automatic welding on the outside of heads (the large semi-coned shaped ends to railroad tank cars) for the past 2 or 3 years. Immediately upon Sanders' return to work on February 6 from the hearing, Leadman Paddie announced in a meeting of all bay 5 employees that Sanders was being moved from welding the outside of heads to the inside, and that employee Curly Cloud was being moved from welding the inside of heads to the outside.[18] Paddie told his bay crew that the reason for the change was that the X-ray rejects were too high and that such rejects were caused by bad welding. He did not explain how this move would bring down the reject percentage or otherwise improve the quality of work.[19]

Instead of Paddie testifying, General Foreman Sepulvado testified that he and the leadman in bay 5 (presumably Paddie) previously had discussed with Sanders the fact that he was experiencing bad welding in the nature of high-weld, undercurrents, and excessive pickups. Moreover, Sepulvado testified that Sanders was less experienced in running the outside machine, and that for these reasons Sanders was moved. Responding to the reasons why the announcement was made to the entire bay on Wednesday rather than at the Monday meeting, Sepulvado testified that it was to "let everybody in the bay know and be aware that we were going to have to move people around in order to get the X-ray percentage down. Either move people to different jobs in the bay or either a possibility of moving employees out of the bay." Contrary to the testimony of Sepulvado, Sanders testified that prior to his reassignment he had never been counseled, warned, disciplined, or in any way spoken to by any of his supervisors about his X-ray reject rate. Indeed, the last time he had been graded, several years previously, all of his marks were good to excellent.

According to the undisputed testimony of both Sanders and Arnold, Sanders' welding ability and reject rate was about equal to that of Cloud's. Of even more significance, Harlan Palmer, who welded the outside of heads on the shift opposite Sanders (that is, they rotated shifts every month) was not moved to welding the inside of heads, yet he had a high X-ray reject rate[20] and Palmer also, had many more "burn-throughs" than did Sanders.[21]

As earlier noted, Sepulvado testified in a reluctant and evasive fashion at various times during his testimony. I do not credit him. In contrast, Sanders and Arnold testified in a straightforward and believable fashion, and I credit their testimony. Accordingly, as alleged in paragraphs 9 and 11 of the first (March 14) complaint, I find that Respondent violated Section 8(a)(1), (3), and (4) of the Act by assigning Cecil M. Sanders on February 6 from welding the outside of heads in bay 5 to the more onerous and less desirable work of welding inside heads in bay 5.[22]

In making this finding, and in crediting Sanders and Arnold over Sepulvado, I have noted the timing of the assignment of Sanders immediately following his return to bay 5 from having testified at the February hearing; the fact that the announcement was made on Wednesday following the hearing rather than at the usual Monday bay meeting; the fact that the announcement was made to everyone rather than to the affected employee himself; and the fact that such assignment appears to have been the only effort to that point by General Foreman Sepulvado to lower the X-ray rejects rate in bay 5 even though the reject rate had been running between 5 and 9 percent for the last few years. I find that the assignment was done for the purpose of publicly punishing Sanders for his union activities and for testifying, and to serve as a warning to other employees that they should not incur the displeasure of Respondent.

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suffered a detriment as a result of his failure to renotify his immediate supervisor by calling in the morning of the hearing. See *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 338 U.S. 26 (1967).

[18] February 6 was a Wednesday. Ordinarily, meetings are held with bay employees at the start of the shift on Mondays. Furthermore, job reassignments of this nature are ordinarily not announced to the whole complement of bay employees but rather are announced privately to the affected employees.

[19] Paddie did not testify. Moreover, Plant Superintendent E. C. Greene, when called as a witness under Fed. R. Evid. 611(c), testified that either Supervisors Truman Cloud, R. L. Paddie, or Harold Stockton would have knowledge of Sanders' February 6 reassignment, yet none of these individuals was called by Respondent to testify.

[20] The employees were able to compare X-ray reject rates of the various employees of bay 5 as a result of a series of postings on the bulletin board showing the X-ray rejects of bay 5 employees. Additionally, part of Arnold's job was to repair the X-ray rejects, and thus he had the work before him and could tell which employees were receiving the most rejects.

[21] Sanders testified that about October 1979 Palmer had 11 burn-throughs in 1 head alone, and that Palmer did not receive a warning. Indeed, Palmer had the nickname among bay 5 employees of "Burn-through Palmer." Palmer did not testify at the February hearing. The record does not reflect whether Palmer was openly for or against the Union.

[22] Based on the description by Sanders and Arnold regarding the work of welding the inside and outside of heads, or crowns for railroad tank cars, I find that the work of welding on the inside was far more onerous. Welding on the inside, as contrasted to the outside, requires the welder to squat. He had to work in a cramped location, the work often is above his head, not nearly ventilated as the outside, and he chokes on smoke generated when oil mixes with heat from the welding. Moreover, Sanders credibly testified that employees generally work up from inside welding to outside welding. Thus, it is clear that everyone considered welding the inside to be less desirable than the outside. In addition to the physical discomfort an inside welder experiences, the job is also dangerous inasmuch as the welder's head can be caught between the welding machine and stool which could result in serious injury or even death. Sanders testified that one man had his head caught, and several others had their hats caught. Also, he testified that five men who welded the inside of heads had to have back operations. Of course, while Sanders' testimony on this latter point does not establish a medical connection, I do give weight to such testimony insofar as such fact bears on the perception of employees regarding the desirability of the work.

c. *The February 12 transfers of Arnold, Sanders, and Stamper*

(1) Lynn A. Arnold

Lynn A. Arnold testified that as of August 1980 he had been a first-class code welder with Respondent for nearly 14 years, and that this was the classification in which he was hired. Prior to the February hearing, Arnold spent most of his time hand welding on fittings, but sometimes he repaired X-ray rejects. Arnold explained that welding of fittings is more difficult than welding on some of the other work, such as railroad tank car heads, because the former requires laying down layer after layer of welding. The head referred to is the semicone section which goes on each end of a steel railroad car.

In repairing the X-ray rejects (work which had been rejected by quality control after defects were discovered in the routine X-ray process), Arnold could tell which employee had caused the rejects. For that matter, Arnold testified that all employees have rejects. At the time, shortly before the February hearing, the X-ray rejects were running 8 to 9 percent. It is undisputed that Arnold testified at the February hearing, and returned to work on Wednesday, February 6, 1980. Prior to the February hearing, Arnold worked in bay 5.

On February 12, Arnold was summoned to General Foreman Sepulvado's office. Sepulvado stated that X-ray rejects had been "real high" in bay 5 for the last "4 or 5 years," and that the only way Sepulvado knew of reducing the high X-ray reject rate was to move people around, and therefore Arnold was being transferred to bay 8.

Arnold asked why he was being transferred since he was not doing any of the welding where the bad rejects were coming from, that the rejects were coming from the welding on the heads. Arnold testified that very few X-rays or gamma rays were taken of the fittings he welded and consequently it is very seldom that he received a reject. Nevertheless, Sepulvado told Arnold that Arnold was "not thinking x-ray," so therefore Sepulvado had to transfer him from bay 5. Sepulvado said he had no complaints about the quality or quantity of Arnold's work, that both were good, but that Arnold was not thinking X-ray. Arnold testified that subsequent to his transfer to bay 8, he had occasion to observe that the posted X-ray rejects percentage for bay 5 were 39 percent on one job, 30 percent on another, and 18 percent on another—much higher than the previous 8–9 percent average.

Arnold testified without dispute that, prior to his transfer to bay 8, he had never been warned, disciplined, or even counseled by any supervisors about the quantity or quality of his welding, and, indeed, had never received any complaints about his welding. Moreover, he further credibly testified that he had never been counseled, warned, or disciplined regarding the matter of "thinking x-ray." Finally, Arnold testified that the one time he had been graded (some 3 years previously, by Leadman Raymond Paddie) concerning his quantity, quality of work, attitude, attendance record, and safety record, that Paddie had given him a "2" out of a possible "5" (with "1" being the highest). Paddie told him that he wanted to give him a "1," but that General Foreman Sepulvado did not believe anyone should receive a "1" because no one was perfect since there was always room for improvement.

Arnold also testified that Leadman Truman Cloud, as well as Paddie, had told him that he was a good welder. Indeed, only a few days before Arnold's transfer, Paddie utilized Arnold and employee Long to perform the difficult task of welding a 6-1/2-inch thick fitting to a head. Arnold asked Paddie why he always got such jobs (in reference to the job requiring a highly skilled welder), and Paddie told him that Arnold and James Long were the only two people he would trust to put on the job.

As is discussed below, Thomas B. Stamper was also transferred from bay 5 to bay 8 at the same time that Arnold was transferred. While Arnold went to the first shift, Stamper went to the second shift. At the hearing, Superintendent Greene reluctantly admitted that at the time of the transfers of Arnold and Stamper, bay 8 had a reputation of being a "hell hole." Arnold and Stamper were placed on the job of welding blade rings which Greene, again with reluctance, admitted carried the reputation of "hottest and worst" job in the plant. Greene testified that such reputation, while proper several years ago, was no longer justified because of various job improvements. Based on the demeanor and general believability of the witnesses, I credit the testimony of Arnold and Stamper, as discussed below, that the job of welding blade rings is in fact one of the worst jobs in the plant,[23] and I discredit Greene's testimony that as of February 1980 the job had been improved to the point of being one of the "best" welding jobs in the plant, and that of Booker that it is one of the "easiest" jobs. I also find that Arnold's work of welding fittings in bay 5, a job enjoying suitable ventilation and much less heat, was a far easier and more desirable job than that of welding blade rings in bay 8.

The blade rings are heavy metal discs, in the shape of rings or donuts (i.e., with a large opening in the center). Arnold testified that they are heavy and 6 to 8 feet across. Sketches furnished by Respondent disclosed that the rings appear to weigh several hundred pounds each. They are welded 3 to a set.

The reason welding the blade rings is considered by the employees as the worst job in the plant is that the blade rings have to be preheated to between 400 and 450 degrees, and this temperature has to be maintained while the employee welds. This is accomplished with the use of three preheaters which are spaced evenly around the blade ring, and stay on the entire time the welder is welding. Thus, as described by Marable, the welder sits only 5–6 feet from the preheaters during the welding process. Because blade rings are welded with carbon dioxide gas, the job cannot be ventilated, as fans or other bursts of air would blow the carbon dioxide gas away and cause pinholes in the weld.

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[23] Their testimony is confirmed by the testimony of current employees Nathan Parker, James W. Johnston, L. H. Williams, and Charlie Marable. Although Marable was recalling the work from an earlier time when the rings were not preheated, Arnold testified that the preheaters are not turned off during the welding process.

On examination by the Union's counsel, Uhlig, Arnold described welding on the rings as follows:

> A. When you are working on blade rings, you have to rig heaters on it, which is a pipe about so big and round, blaring a flame of fire out the side of the pipe. We have to keep three or four around that lade ring, keeping it 450 degrees hot before you start welding on it. Then, you get up on the stand, get a CO2 gun up there and you're humped right over the blade ring, sitting up there like this, over all the heat. The CO2 gun puts out tremendous heat and smoke. All that smoke is coming right back under your hood and the heat is hitting you on the chest. Your skin gets dried out and feel like it's just going to fall off you. Your clothes feel like they're going to flame up at any time.
>
> Q. Does this cause you to sweat?
>
> A. You sweat, but it dries as fast as you sweat.
>
> Q. Will an employee breathe that smoke in?
>
> A. You breathe that smoke in eight hours a day. When you go home, you feel like your chest is going to explode. I went home with my arms cherry red, my chest red from the heat, I even had clear blisters come on my feet from welding on them.

Stamper gave a similar description:

> Q. Mr. Stamper, if you know, you testified that when you worked in Bay 8 prior to 1980 on hot rings, it was routine to pull a man off after two or three days. If you know, what was the reason for pulling them off after two or three days?
>
> A. They usually pulled them off to give a man a break.
>
> Q. Why would he need a break?
>
> A. 450 degrees is hot enough to give anybody a break. You go so long on a hot ring and it just keeps draining out of you, day in, day out and about a week or two of it and it begins to tell on you. You feel drowsy all the time. Your chest hurts. You cough up that CO2 gas, and it's—you feel like you've got a cold all the time. Your sinuses are a mess. I have went to the bay at night and run a cold chill. That CO2 gas, it will eat you up.

Because of the extreme difficulty of the job of welding blade rings, the policy prior to the arrival of Arnold and Stamper in bay 8 was to rotate employees for 2-3 days at a time, or a week at most. As Parker credibly testified, this policy was instituted several years ago after the bay 8 employees complained about the job to Foreman Booker at a safety meeting. Parker testified that constant work on the blade rings was a safety problem because ". . . you coughed up blood. I have coughed up bloody looking stuff and I have felt tired and rundown all the time."

Notwithstanding Respondent's rotation policy,[24] once Arnold and Stamper came into bay 8, they did virtually all the welding on the blade rings, particularly on the verticle flanges (the major portion of the welding work on blade rings) that had to be done. When they were at work and the blade rings had to be welded, they were the ones to do it on their respective shifts. First-class welders Nathan Parker and R. L. Southern, for example, so testified. Thus, Arnold testified that he spent about 90 percent of his time in bay 8 welding blade rings. From February 12 to March 3, he spent all his worktime welding on blade rings. Parker confirmed that he observed Arnold had to weld on the rings for a 3- to 4-week period before receiving a respite. Then Arnold would have to resume welding on the hot rings—which had been waiting for him since Respondent assigned no one else but Arnold to the rings on the first shift.

(2) Thomas B. Stamper

For approximately 11 years prior to his testimony herein, Thomas B. Stamper has been classified at Respondent in the dual capacity of a first-class code welder and also a first-class automatic code welder. Stamper testified at the February hearing as a witness for General Counsel.

Prior to the February hearing, Stamper had worked in bay 5 for 3 to 4 years as an automatic welder on the inside of heads. He testified that about a week after his February 5 appearance before Administrative Law Judge Evans, Leadman Truman Cloud told him to report to General Foreman Sepulvado's office. Stamper testified as follows regarding the conversation in Sepulvado's office:

> (By Mr. Yudien) Q. Could you just tell what happened?
>
> A. Sepulvado said, "You're going to be transferred out." He said, "Our x-ray percentage has been high for three or four years and it is my job to get them down any way I can. And, so I am going to transfer you to Bay 8." And I asked him, I said, "Well, is my job, my x-rays up? You don't like the way I work, or something like that?" He said, "No, I didn't say that. As far as I'm concerned, *you do good work*. I can pretty well trust you, or anything like that." He said, "*I just feel like transferring you to Bay 8.*" So, then I turned around and told him, "Sepulvado, you know why I'm going to Bay 8." And Barton was in there too. And, I turned around to

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[24] I do not credit General Foreman Booker's testimony that the rotation policy was dropped some years ago when the work of welding on blade rings was raised from the floor to metal frame positions stationed a few feet above the floor. Nor do I credit Booker when he testified that he assigned Arnold and Stamper to the blade rings (on the first and second shifts, respectively), when Greene transferred them to bay 8 because a new shipment of rings had just arrived and he had no other employees to assign to the job. I credit R. L. Southern who testified that he was welding on the blade rings the day Arnold came to bay 8, and that Arnold replaced him on the rings that very morning. Except where corroborated by testimony of the employees I have credited, I do not believe Booker in any respect whatsoever. Moreover, as Parker, Johnston, Southern. and L. H. Williams are current employees of Respondent, they testified subject to Respondent's displeasure. I have weighed this factor, among others, in making my credibility determinations.

> [sic] Barton knows why *on account of the Union activity*. And, Sepulvado didn't open his mouth. He shrugged his shoulders like, didn't deny it yes or no. [Emphasis supplied.]
>
> Q. Did either Mr. Barton or Mr. Sepulvado deny that you were being transferred due to your Union activity?
>
> A. No, sir, they didn't say nay or yay.
>
> Q. Now, was your work that you were doing, the type of work that was being x-rayed?
>
> A. Yes, sir.
>
> Q. During the time that you had worked in Bay 5, had any supervisor complain[ed] to you or disciplined you for the quality or quantity of your welding?
>
> A. No, sir, in fact, Mr. Sepulvado, around November or December, he asked me to go on graveyard, he said, "If you don't mind." He said, "We don't have but one man [sic] need one man on graveyard to kind of take the slack off." He said, "You are trustworthy, for all I know, you always done good work. Would you mind going on graveyard by yourself and work?" I said, "No sir, I don't mind at all."
>
> Q. Had you ever been disciplined or warned or spoken to about your x-ray rejects?
>
> A. No, sir.

Sepulvado confirmed that Stamper did allege that the reason for the transfer was the former's union activities, but Sepulvado testified that such had "nothing to do with" the transfer. I do not credit Sepulvado.[25]

Although Stamper's bay 5 work of welding the insides of heads had been unpleasant, Stamper testified that his work of welding blade rings in bay 8 was even worse. As the work of welding blade rings already has been described above, it will not be repeated here.

Stamper testified that a handcode welder from bay 8 named Carpenter was sent to perform the automatic welding Stamper had been doing in bay 5. Carpenter told Stamper he had never operated an automatic welder.

(3) Cecil M. Sanders

No sooner was Sanders assigned to the job of welding the insides of heads than he was transferred to bay 10, where he was assigned to the still more difficult job of welding the inside seams on tanks.[26] Sanders testified that the inside of tanks is a hotter job than welding the inside of a head because a tank is about 50 feet long, and the welder may be all the way back in the tank, whereas a head is much shorter. As it is much darker inside the tanks, a welder has more difficulty seeing what he is doing. Additionally, when the welder is welding a closing seam, the tank is sealed from both ends, leaving no air ventilation at all, making it that much hotter, smokier, and darker. Sanders further testified that if a welder were to be injured while welding the inside closing seam in a tank car, no one would see him, and it might be 2-3 hours before he would be missed by anyone.

(4) Conclusion

Bay 5 General Foreman Sepulvado testified that he selected Arnold, Sanders, and Stamper for transfer because they were "just a starting point." "There is no particular reason they were picked."

Superintendent Greene testified that he made the decision to send Arnold and Stamper to bay 8 and Sanders to bay 10 (after Sepulvado had selected them for transfer from bay 5) because Arnold and Stamper had worked in bay 8 previously and because Sanders was an automatic submerged arc welder, and he needed to replace Sanders with another welder, man for man.[27]

In support of its argument that transfers are routine at the plant, Respondent submitted its exhibit 14. It is a list of some 153 employees who were transferred from one bay to another between January 2 and June 11, 1980.[28] Clearly, transfers are not uncommon at the plant. Although General Counsel does not question the concept of transfers generally, he does attack the selection of Arnold, Sanders, and Stamper.[29] Thus, Respondent's Exhibit 14 has no controlling significance in assessing the motivation for the selections at issue here. In fact, I would accord little weight to Exhibit 14 in view of the fact that it fails to show the classifications of the employees transferred. This must be coupled with the fact that several employees' names appear several times.[30] One can only speculate as to whether the frequent temporary transfers are of first-class welders sent to resolve some temporary problem; whether they are of mere helpers sent to where their services are needed; or some other explanation.

The list begins with a wholesale transfer of 14 employees on 1 day, January 2, 1980, to 3 different bays. It seems reasonable to conclude that bay 14 sustained a curtailed need for employees generally at the end of 1979.

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[25] In overruling General Counsel's objection to the leading nature of the question, I did suggest that an attempt be made to avoid leading. While leading will become necessary at some point to elicit a negative of an opponent's specific testimony, an Administrative Law Judge can attach greater weight to such negative if it comes after nonleading questions on the topic. At least once earlier in the hearing I had recommended such procedure for this very reason.

[26] Sanders testified that on February 13 Sepulvado transferred him for the purpose of reducing X-ray rejects because they had tried such transfers before with success. (However, no substantiating evidence was presented herein.) Sepulvado said he was not claiming that Sanders' welding was bad. Sanders testified that before his transfer the reject percentage had always ranged between 5 and 9 percent, and that after his transfer he observed postings in bay 5 in late February showing days for which the rates were 18 to 34 percent. Stamper also saw rates of 15 to 19 percent after his transfer, and he, like Sanders, confirmed that the pretransfer rate had ranged from 5 to 9 percent during the years that he had been in bay 5. Stamper had worked in bay 5 since 1976.

[27] Greene's statement implies that bay 10 had selected a person for transfer who had the same classification skill as Sanders.

[28] General Counsel and the Union do not discuss Resp. Exh. 14 in their briefs.

[29] The General Counsel also appears to attack the timing of Respondent's supposed need to reduce the X-ray rejects in bay 5. Thus, while the General Counsel does not take issue with the credibility of Respondent's evidence regarding the 3 percent goal, he does contend that the timing of the selection, and the selection process, reveals that the economic defense was a pretext seized on to punish the three for their protected activities.

[30] For example, R. J. Drummond on pp. 1 (twice if R. L. Drummond) and 2 (twice); R. D. Broome, pp 1 and 2 (three times); J. Brown, pp. 3; and J. R. McDearmont, pp. 4.

Yet these 14 employees are included in the list as if they had a material bearing on the transfers at issue. In short, I find the list, with its unexplained contents, to be of little assistance here.

Respondent also introduced its Exhibit 15, a list of the 12 unit employees in bay 5 on February 1. Of these 12, 4 (Arnold, Huffaker, Sanders, and Stamper) are shown as having testified at the February hearing. Of the 12, 5 (Arnold, Boston, Sanders, Stamper, and Toms) are shown to have been transferred—Boston and Toms on February 10 and Arnold, Sanders, and Stamper on February 13.[31]

Stamper testified that Boston was a fitter who assembled heads preparatory to the welding process. Thus, Boston's work, since it was not welding, had nothing to do with the X-ray reject percentage. Toms' job classification is not specified in the record. However, Sepulvado transferred Boston and Toms to bay 13 where they already had been working for some days, and no employees were transferred into bay 5 to replace them. Since Sepulvado testified that the transfer program was designed to reduce X-ray rejects by swapping people with like classifications in order to bring in people with an attitude geared toward that goal, it appears that the transfers of Boston and Toms were unassociated with the goal of reducing X-ray rejects. This leaves only Arnold, Sanders, and Stamper transferred from bay 5 for the ostensible goal of reducing the reject percentage. Stated differently, 100 percent of the transferees from bay 5 on the asserted reject reduction plan had testified in February. As earlier noted, General Counsel contends that they were transferred to more onerous and less desirable positions in order to punish them for their testimony, and to warn all other employees of the consequences which will follow similar conduct by them.[32]

Finally, Stamper's replacement at operating an automatic welding machine admitted to Stamper that he had never operated one of the machines. The X-ray reject percentages Arnold, Sanders, and Stamper thereafter observed in bay 5, from 15 to 39 percent,[33] indicate that the selection procedure was based on something other than economic considerations. That something other, I find, was the union activities of Arnold, Sanders, and Stamper, and their testimony at the February hearing.

Having found that the protected activities of Arnold, Sanders, and Stamper were a moving cause for their mid-February transfers, it must next be determined whether Respondent carried its *Wright Line*[34] burden of demonstrating that the transfers would have been effected regardless of such protected activities.

In light of the foregoing, and the entire record, it is clear, and I find, that the asserted economic program to reduce X-ray rejects was nothing more than a pretext seized upon to punish the three witnesses of General Counsel.[35] To be effective both as punishment of the three, and as a warning to all others, timing was critically important in order that all employees would appreciate the unmistakable message in such transfers. With a delayed action, the message would be lost on employees. The action had to be taken quickly, and it was. Accordingly, I find that Respondent failed to rebut General Counsel's *prima facie* case and, therefore, that Respondent violated Section 8(a)(1), (3), and (4) of the Act by transferring Arnold, Sanders, and Stamper[36] from their bay 5 jobs in mid-February 1980.[37]

d. *Closer supervision and stricter enforcement of work rules applied to Arnold, Sanders, and Stamper*[38]

General Foreman Frank Booker and Second Shift Foreman Manual Law notified Arnold and Stamper, upon their being transferred into bay 8, of bay 8's work rules. Thus, they were told that they had to be ready to work before the shift whistle blew; that they would work until the whistle sounded for break, and for lunch; that they would have 3 minutes before the final whistle to put up their tools and clean up around their area; that there would be no talking to other employees during working hours; and that they were not to talk to the employees on the opposite shift during the shift changes.

Both Arnold and Stamper credibly testified that the other bay 8 employees were not subjected to these same rules. Thus, Arnold testified that he observed other employees talking to each other during working time, washing up early, sitting by the shed outside bay 8 about 5 minutes before the whistle blew, and walking around wearing motorcycle helmets 5 minutes before quitting time. When these incidents occurred, the bay 8 supervisors were in the bay, sometimes within 10 feet of where the infraction was occurring. Similarly, Stamper testified that when the bay 8 supervisors saw other people talking during working time, they would turn away and act as though they did not see the employees talking. When Stamper was working the day shift, he saw employees Whiddon and Ramsey wash up early on a routine basis, and Supervisors Booker and Wise were only 4-5 feet away.[39] Arnold has seen employee Bass talking to nearly every other bay 8 employee during work, and sometimes Booker was as close as 4-5 feet from Bass who did not stop him from doing this.

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[31] The exhibit also shows that Leadman R. L. Paddie was transferred on February 18 and Welding Technician Ward in May.

[32] Vernon Huffaker, the other February witness, already was assigned to the job of gouging (repair work). It appears that a steady basis of gouging is considered undersirable by employees generally.

[33] Although B. T. Walsworth, Respondent's manager of quality control, testified that Resp. Exh. 13, a graph of reject percentages, shows that bay 5's X-ray reject rate began a steady decline from a January 1980 high of 8.14 to 5.85 percent by the end of July 1980, I note also that he testified he did not know why the rate decreased. I credit the testimony of Arnold, Sanders, and Stamper regarding the percentages they observed in bay 8 after their transfers. In any event, even if the reject percentage did decrease, it does not control resolution of the issue of alleged improper motivation to be decided here. Increased efficiency, as an incidental benefit, does not render lawful what is otherwise unlawful.

[34] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[35] Although Vice President Bradshaw's memo to Greene, regarding the reduction of rejects, bears the date of December 14, 1979, I find that such memo does not overcome the timing of the discrimination against Arnold, Sanders, and Stamper, and the public manner in which, for example, Sanders was reassigned on February 6. Moreover, the entire record supports the conclusion I reach here.

[36] While the three do not have a statutory right to such job assignments forever, neither may Respondent transfer them for unlawful reasons.

[37] With respect to the 8(a)(3) finding, I have considered the fact that in some instances General Counsel failed to show disparity. An example is Sanders' transfer to welding inside tanks in bay 10. Presumably, there were other employees who welded inside the tanks, yet there is no evidence that Respondent was punishing union supporters by assigning only (or mostly) employees openly active for the Union to the job of welding inside tanks. Nevertheless, in light of the testimony of the discriminatees at the February hearing, and the fact that Bradshaw, Greene, and other supervisors of Respondent admitted herein their knowledge of the union sympathies of Arnold, Sanders, and Stamper, and in light of the entire record, including the discrimination found against employee Willie Hall, Jr., I am persuaded that my 8(a)(3) conclusion is compelled. The basis for the 8(a)(4) conclusion, of course, is more obvious in view of the central fact of the February hearing.

[38] Par. 10(c) of the first (March 14) complaint.

In contrast to the leniency with which the other bay 8 employees have been treated, the rules have been strictly enforced against Arnold and Stamper. On various occasions, employees Bass and Howard stopped to talk to Arnold, and Booker made them leave. Arnold and Stamper both described an occasion where Stamper was following up[40] Arnold on second shift on blade rings, and he approached Arnold to find out how the job was running. No sooner had Stamper asked Arnold this then Supervisor Law came up and told Stamper to leave, because Booker was watching. Stamper tried to explain that he was just asking about the job, and Law responded, "Booker don't know what you're talk [sic] about."[41]

In order to assure strict enforcement of the rules as to Arnold and Stamper, they were both assigned to the bay 8 blade ring positioner on opposite shifts, which Arnold and Stamper estimated as ranging anywhere from 8-14 feet from the supervisors' office. This was described by Arnold as "pretty close to the closet" position in the bay, and Stamper confirmed that this was the closest welding position in the bay, while noting that there were a few fitters at the fitup table who were also pretty close to the office.

To obtain a better view of Arnold and Stamper,[42] about 1-1/2 weeks after they transferred into the bay, a second positioner was installed, which was even closer to the office, and both of them were reassigned to work at this new positioner.

Conclusion

General Counsel argues that the issue of closer supervision and stricter enforcement of the rules cannot be viewed in isolation, but rather must be viewed in the context of Respondent's campaign "to make life miserable for the plant's strongest and most vociferous union advocates." Certainly Respondent's actions in enforcing its rules in a disparate manner and keeping a closer watch on Arnold and Stamper would tend to inhibit them in their organizational activities. Moreover, it is clear, and I find, that such discriminatory actions by Respondent were taken in retaliation of their recent testimony in the February hearing as well as for their union organizing activities. By such conduct, Respondent violated Section 8(a)(1), (3), and (4) of the Act as alleged.

e. *February 25 warning to Stamper*

On February 25, employee Stamper received a written warning from General Foreman Booker for bad welding on a pad (G.C. Exh. 14). According to the testimony of Stamper, he welded with employee A. A. Williamson on the job for which he received the written warning. Stamper, who has been employed by Respondent as a first-class welder for about 11 years, observed both his and Williamson's welds, and he noted that Williamson's weld was no better or worse than his. Stamper's unrefuted testimony establishes that he had not been previously warned or disciplined about his welding, and that since he had been in bay 8, he had not been counseled about the quality of his welding by any bay 8 supervisors before receiving this warning. Williamson had been working in bay 8 longer than Stamper.

When Stamper received the warning from Booker, he asked Booker how he knew it was his work. Instead of answering, Booker remarked that it took most of the day to repair the mistakes. He said there were pinholes. Booker did not tell Stamper which "pad" he was supposed to have welded improperly (there are about 15 or 20 pads on an entire tank). Furthermore, Stamper testified that depending on the size of the pad it would take 20 or 30 minutes to a maximum of 2-3 hours.

When he was called under FRE 611(c) the first day of the hearing, Booker testified that he gave A. A. Williamson a verbal warning, which "is given to a man that doesn't understand or just come new to the bay."[43] Booker went on to say that he considers a man who has not been in the bay for several months to be new. Stamper, who had been in the bay for only 2 weeks, apparently would be considered new. Yet Stamper received a written warning.

Booker testified that he gave Stamper the written warning because of welding that Stamper had done which was so poor that it had to be gouged out and reworked. According to Booker, the welding was very poor as it contained overlaps, cold laps, pin holes, and had a general lack of fusion in the weld. He indicated that he gave Stamper the warning for unsatisfactory work. Booker also stated that there were three other employees who worked on the same job, J. E. Johnson, E. Johnson, and A. A. Williamson.

He identified Respondent's Exhibits 31 and 32 as written warnings which he had given to J. E. Johnson and E. Johnson for work on the same tank job. Neither testified at the February hearing. He testified that he did not give a warning to Williamson because Williamson's weld symbol was not on any of the bad work, whereas the symbol of Stamper and the two Johnsons were. Booker further testified that he did not show the poor work to Stamper because Stamper was working on second shift and the tank car had to be moved out of the bay prior to Stamper's return to work. Booker testified that neither Stamper's involvement in the February hearing nor Stamper's participation in union activities played any part in his decision to issue him the written warning.

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[39] Respondent finally issued Ray Whiddon and R. L. Southern warnings for washing up early in July (Resp. Exhs. 33 and 34, respectively).

[40] The record, at p. 139, ll. 20 and 23, incorrectly uses the phrase "fouling up." I hereby correct this to "following up."

[41] Law admits to having broken up a conversation between Stamper and Arnold, but testified it was because they were talking more than 3 minutes. It is clear from the testimony of Arnold and Stamper that this conversation could not have lasted longer than a few seconds before Law silenced them. Accordingly, I do not credit Law.

[42] Stamper's testimony stands unrefuted that the bay 8 supervisors could see him "very well" through the window in their office.

[43] However, when Booker was recalled by counsel for Respondent, about 3-1/2 weeks later, Booker changed his testimony, and stated that Williamson did not receive any warning, because his stencil was not on any of the bad welding. No documentary evidence was presented to support Booker's testimony one way or the other. As seen by Resp. Exh. 49, which is Arnold's employee record, Booker does make written notations of verbal warnings to employees.

Although the two Johnsons worked on the same tank and received warnings for faulty welds, there really is no connection between their work and Stamper's other than all worked on the same tank car. It is clear that Stamper's allegedly faulty weld was on a pad, whereas the warnings to the two Johnsons simply referred to "bad welding." Moreover, they apparently worked on the first shift (Resp. Exh. 31), whereas Stamper worked on the second. I note also Stamper's undisputed testimony that Booker *grinned* as he told Stamper he had a warning notice for him.

Under all the circumstances, I find the warning to Stamper to be a false and contrived event. I credit Stamper, and I completely disbelieve Booker. Thus, I find that Stamper did not make any faulty weld whatsoever, and that the warning is based on a total fabrication. Accordingly, I find that Respondent violated Section 8(a)(1), (3), and (4) of the Act as alleged in paragraph 8 of the first (March 14) complaint, and I shall order that Respondent expunge the warning from Stamper's personnel records.

f. *Arnold disciplined*

(1) Introduction

After testifying in the February hearing, and following his transfer from bay 5, Lynn A. Arnold received a verbal warning, two written warnings, and a 2-day suspension. General Counsel has alleged that such discipline is unlawful.

(2) March 6 verbal warning on quantity of work

Paragraph 7 of the second (April 28) complaint is a simple allegation that Respondent, through Foreman Manuel Law, verbally warned Arnold on March 6. Respondent denied the allegation in its answer. Contrary to such denial, at the hearing General Foreman Frank Booker testified that he instructed Foreman Manuel Law to verbally warn Arnold, and Law testified that he did as instructed. Indeed, Respondent introduced as its Exhibit 47 a copy of an employee daily record form bearing a notation by Law that he had "talked to" Arnold on March 6 for insufficient welding the previous night[44] on job order no. 166071 (a tank).

Booker testified that he had instructed Law to have the tank welded on the inside, cleaned, and ready for attaching the heads (the cup-shaped ends for the tank car) the following morning. On inspecting the vessel, they determined that there were 4–6 hours of work left. On learning the following morning that the tank had not been finished, Booker testified that he gave Law a "chewing out" because the tank was a "hot" (rush) and the job had not been completed. On learning that Arnold had worked on the tank, Booker told Law to tell Arnold he had not put out enough work on the job the previous night. Booker testified that he had the job completed that day in about 1-1/2 to 2 hours.

Law confirmed the 4-6-hour estimate and that Booker wanted the job completed that night. He also testified that from time to time, during the shift, he checked to see how Arnold was progressing. Law stated that at times he observed Arnold just sitting, but he did not determine whether Arnold was slacking on the job. He never told Arnold the work was not progressing fast enough. Indeed, he never told Arnold the job was to be completed that night or that it was a "hot" order.

Arnold testified that the night of March 5 Law had come into the tank and, after inspecting the work, told Arnold that the work was good and that he had done "a night's work." On reporting for work March 6, however, Arnold learned a different story. Thus, in the bay 8 office, in the presence of Charles LaBorde,[45] Law told Arnold he was going to have to start producing more work, that he had been watching him and Arnold was not producing enough.[46] Arnold reminded him of their conversation the previous evening, but Law denied so remarking to Arnold. He said Arnold would have to produce more and he would be watching Arnold more closely.[47]

Arnold asked LaBorde if he had any complaints about his work and LaBorde replied he had none.[48] Law then said that it was Booker who had told him to call Arnold in and warn him.

Arnold testified in detail concerning the work he had done the night of March 5.[49] Thus, he describes having to reset the roll (which apparently turns the tank) more than once, haul an airhose and the welding leads to the tank, weld both outside and inside fittings, and backgouge. The welding alone took some 6-1/2 hours, and the other preparatory work consumed the balance of the shift, except some cleanup time at the end.

One explanation for the different time estimates is that the parties differ on what Arnold had to do. For example, Law initially testified that the outside welding had been done on the day shift. On cross-examination, he conceded that Arnold did have to weld one outside fitting. Law also stated that Arnold did not have to pull over any welding leads since the day crew had left them there. Arnold testified that none of the fittings in place had been welded on the outside and inside of the tank.

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[44] It appears from the testimony of Law that Arnold had just that week been moved from the day shift to the second shift where Law was the foreman.

[45] LaBorde is a leadman.

[46] Arnold testified without contradiction that in his 14 years of employment with Respondent, he had never been so much as counseled regarding his work until this warning.

[47] At the hearing Law testified that the evening of March 5, although he knew Arnold had not done enough work, he did not say so. Instead, when Arnold asked him if he was satisfied, Law simply said "if you are." Law intended to discuss the matter with Booker, but Booker came to him first.

[48] LaBorde was not called as a witness by Respondent.

[49] He also testified that the tank was waiting for him the night of March 6 when he received his warning, and that it took him about 2 hours to finish the job that night.

Called in rebuttal by Respondent, Plant Superintendent Greene identified Respondent's Exhibit 47, the operation process sheet for order 166071 (ostensibly the tank in issue). According to Greene, there is no way in which Arnold could have welded all the fittings shown thereon in 8-9 hours. In reply, Arnold testified that he welded all the fittings there were to be welded at the time, and that Respondent's Exhibit 47 is not representative of the job as of March 5-6. For example, he testified that there was no manway "E" on the tank, yet such is shown on the exhibit. Whether a manway was added later, Arnold could not say. Respondent contends that Arnold has confused the job orders with the passage of time.

I attach no weight to Respondent's Exhibit 47 for several reasons. First, it is a blueprint dated December 20, 1979, and Greene conceded that it is just an estimate. Second, in view of Arnold's specific and detailed testimony, I have little confidence that the items shown in December are what faced Arnold in March. Additionally, Respondent Exhibit 47 reflects (under man-hours per unit) that bay 13 is to perform fitting, gouging, and welding. However, Greene testified that, while such work originally was scheduled for bay 13, it had been switched to bay 8, and the sheet (Resp. Exh. 47) "never changes once it is made up."[50]

In addition to all the above shortcomings of Respondent's Exhibit 47 as a reliable picture of the job to be done on March 5-6, I note that Greene conceded that Respondent's accounting department produces a computer printout showing the amount of actual work done for the job and which would reflect the work done by Arnold and, presumably, other employees. Respondent did not see fit to introduce such document,[51] and I can only conclude from such failure to introduce that the document would have been unfavorable to its contentions.

Arnold impressed me with his straightforward manner and his detailed testimony, and I credit him. In contrast, Greene and Booker, as noted earlier, exhibited an appearance of hostility during their testimony, and I do not credit Law. For example, I find it strange that Law, knowing the tank was "hot" (rush), made no mention of this to Arnold the night of March 5 when he, at times, supposedly observed Arnold sitting (and possibly preparing to work) and evidently knew after a while that Arnold would not finish the job.

In short, I find that the correct, accurate, and true version is that given by Arnold, and that Respondent's version of the job is a complete and total fabrication deliberately devised in order to build a disciplinary record on Arnold in order to punish him for his union activities and his testimony under the congressional statute. Accordingly, I find that Respondent violated Section 8(a)(1), (3), and (4) of the Act as alleged, and I shall order that Respondent notify Arnold that it revokes such March 6 warning.

(3) April 11 written warning on wasting gouging rods

Arnold testified that about 10:30 Friday morning, April 11, Leadman David G. Emerson called him into the office of General Foreman Frank Booker. In the office, Booker began by charging Arnold with slacking off in his work effort, and he stated that the previous day (Thursday, April 10) he had inspected Arnold's work area and allegedly found that Arnold had done very little work on the blade ring. Arnold disputed this.

Then Booker displayed a batch of gouging rods and stated he had picked them up under Arnold's work area the day before (Thursday). Arnold said they were not his rods, that he had not been at work on Thursday, April 10.[52] Booker said he was going to give Arnold a warning, not for his work but because of the gouging rods.[53] The warning notice (G.C. Exh. 9), dated April 10, reads in pertinent part:

> For violation of Rule No. 19—Insubordination—wasting company property in the form of gouging rods despite repeated instructions. Employee discarded jointable rods ranging from 4" to 11" in length. These rods should not be longer than 2".
>
> Photograph retained in Employee Relations Department.

The warning is signed by Emerson (who did not testify) and bears four sets of initials, one of which no doubt is Booker's.

Arnold testified convincingly that neither Booker nor Emerson had ever warned him previously on this matter, and he told Booker on April 11 that no one had ever so warned him. Booker made no response. The alleged prior warnings apparently are the basis of the "insubordination."

In testifying as a witness called by General Counsel under FRE 611(c), Superintendent Greene disclosed that another employee had worked at the same station as Arnold. Thus, it was important to learn just when the rods had been found, for they apparently could have been left by an unidentified employee who worked the evening shift on Wednesday, April 9.[54] In following up this line of inquiry when General Counsel called Booker under FRE 611(c), Booker testified as follows:

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[50] Additionally, I note that on Resp. Exh. 30, a blueprint diagram of the shop dated September 3, 1969, it was ascertained in *voir dire* that certain measurements in issue had been added the week of the hearing. Such fact should not have been left to *voir dire* by General Counsel, but should have been made known at the time of the offer. Thus, if one blueprint, Resp. Exh. 30, can be added to, I am compelled to conclude that Resp. Exh. 47 could likewise have been added too even though Greene testified there have been no additions to Resp. Exh. 47.

[51] Yet Respondent had introduced such computer printout in relation to the blade rings' order (Resp. Exh. 18).

[52] Respondent's employee daily record card (Resp. Exh. 47) shows code letters "S" over "E" for the date of April 10. While this could mean "sick" and "excused," there is no explanation in the record other than Booker's statement that it meant Arnold was sick that day. When the exhibit had earlier been marked as G.C. Exh. 7, Greene testified that the entry regarding Arnold working the first shift in April was supposed to be correct. A computer printout for the job, reflects that Arnold did not work on the project on April 10 (Resp. Exh. 18 p. 2). Respondent acknowledged that its records did reflect the April 10 absence.

[53] Booker subsequently stated to Emerson, in Arnold's presence, that he may have looked on Wednesday rather than Thursday. This was after Arnold reminded them he had not been at work on Thursday, and it smacks of a convenient change in memory to fit the need.

[54] When called by Respondent, Booker testified that Arnold was the last person to work at the station. Yet Greene testified an employee had worked at the same station. He was unclear as to whether he meant a different shift.

Q. When did you find those rods?

A. When did I find them?

Q. What time of day?

A. I don't remember, off hand.

Q. Was it—do you remember what shift you found it?

A. Yes, on the day shift I found it.

Q. When did you write up that warning?

A. I don't remember the date.

Q. Did you write the warning up on the same day you found it?

A. I don't know.

Q. Well, when, if a warning is dated a particular date, is that when you write up the warning, the day you date them?

A. Ask that question again, please?

Q. Do you write up the warning on the day that they dated?

A. I write up a warning and date it the day I find the rods. I don't know what day it might be written up.

Q. The warning was dated the day you found the rods?

A. I didn't say that.

Q. Could you explain what you did say?

A. I said, I write a warning on the day, I write the date in on the day I find the rods. But, I could write it the following day.

Q. Okay. So, If a warning has a particular date on it, that is the date you found the rods?

A. That is the date I wrote it.

Q. If a warning has a date on it, would that date reflect the date that you found the rods?

A. No, not particularly.

Q. If a warning has a date on it, would that date reflect the date the warning was written?

A. Pardon?[55]

Q. If a warning has a date on it, would that date reflect the date that warning was written?

A. Right.

Q. Did you write up the warning to Lynn Arnold on the same date that you found the rods?

Mr. Hester: Objection, asked and answered.

Judge Linton: Well, frankly, the witness seems to change his answer and it may be that he doesn't understand the question on this one. So, I'm going to overrule that objection.

By Mr. Yudien: (Resuming)

Q. You can answer the question.

A. Ask it again, please.

Q. Did you write up the warning to Lynn Arnold on the same date as when you discovered those rods?

A. I told you once, I didn't know.

Q. Might you have?

A. I might have.

In contrast to his inability to recall the time of day he found the rods, or whether he prepared the warning the same day he found the rods when asked by General Counsel, Booker testified with clear recollection when called by Respondent. Thus, he then testified that he found the rods in the early morning of April 10 and that he told Emerson to make out a warning slip for Arnold.

Finally, I credit Arnold's testimony that he burns his gouging rods down to some 2 inches; that he saves rods 2-1/2 inches or greater in length; that he has pointed out to Leadman LaBorde that whole gouging rods were lying scattered in the bay and LaBorde simply shrugged his shoulders.

As I credit Arnold's testimony that he had never previously been counseled or warned regarding gouging rods, and in light of his credited testimony that he does not discard rod stubs in excess of 2-1/2 inches, I find that Respondent's warning to Arnold falsely basing "insubordination" of fabricated prior warnings,[56] violates Section 8(a)(1), (3), and (4) of the Act, as alleged in paragraphs 8 and 17 of the second (April 28) complaint. I shall order that the warning be expunged from Arnold's personnel records and that Respondent notify Arnold it has done so.

(4) May 29 suspension and June 2 warning

It is undisputed that on Thursday, May 29, when Arnold reported for the second shift, he was called into Plant Superintendent Greene's office for a discussion concerning some welding he had done. Present in the office besides Superintendent Greene, were Personnel Manager George Dillard, Foreman Manuel Law, and Arnold. Greene testified that he called the meeting because it had been reported to him through Booker that Arnold had used the wrong kind of wire on welding a Westinghouse exhaust extension the night before. He further testified that Dillard was present, in lieu of Vice President Bradshaw or Employee Relations Manager Hillman Deaton, because one of them is present when the problem appears to be serious enough to involve the possibility of termination of the employee. Sometime that morning, Booker had called him and reported that as two of his welders were moving the exhaust extension, job number 159120, they observed the wrong wire on the welding machine and that he was afraid it had been welded with the wrong wire. Greene told Booker to obtain a sample of the weld and give it to the metallurgist for chemical analysis. Later that day, the metallurgist, or welding technician, confirmed that it had been welded with the wrong type of wire.

Booker confirmed the foregoing and testified that he personally went back and looked at the welding machine and observed that the spool of wire on the feeder was McKay 75 and that it should have been 91B3L wire. The chemical analysis proved that McKay 75 wire had been used.

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[55] Booker suffers from some hearing loss, and I consider the "Pardon" to be a reflection of that fact rather than anything else.

[56] It seems evident that Respondent was more concerned with preparing for litigation than in ascertaining the true facts. Thus, Respondent wrote on the warning "photograph retained in Employee Relations Department." The photograph was received in evidence as Resp. Exh. 35A. In short, I find that the gouging rods (Resp. Exhs. 35 and 35A) were not Arnold's.

At the afternoon meeting in Greene's office, Greene asked Arnold what type of wire he had used. Arnold stated that he had used 91B3L. Greene asked how he knew that and he said he had looked on the box which was labeled 91B3L. Greene told him that he had used McKay 75 wire. Arnold, according to Booker, asked how Greene knew that and Greene replied because a chemical analysis had been run.

Arnold testified at the hearing that the roll of wire inside the box also has a label on it and that he did not remember checking the label attached to the spool of wire, and that as the wires are the same color, there would be no way of telling the difference between the two without reading the labels. He further testified that he had no reason to believe that the sticker on the inside of the spool was going to be different from the one on the outside of the box. He testified that it was his usual procedure to check only the label on the outside of the box, and that he had never been instructed to do any differently.

Vice President Bradshaw testified that Respondent's vessels are all built under the standard set by the code of the American Society of Mechanical Engineers (ASME). Under the code, and in accordance with the code, Respondent established a quality control manual with guidelines relating to different procedures and processes. He testified that Respondent's quality control manager established certain guidelines for supervisors, weld technicians, and leadmen. Under these guidelines, such persons are to issue the welding rods and welding wire, make a record of it, and ascertain that everyone gets the right rods and wire. Although such persons can delegate authority, for example, to a top welder in a bay, with the approval of the quality control manager, there is no evidence in the record that the supervisory or quality control personnel delegated this responsibility and authority to Arnold or anyone else. Nevertheless, Greene testified that at the meeting he "reminded" Arnold that it was a welder's responsibility to secure the proper type of wire for each job, and that Arnold understood and knew that fact.

Both Arnold and Booker testified that a certain amount of heat was generated in the meeting when Booker admittedly interrupted Arnold at one point by saying, "wait a damn minute," in order that he, Booker, could express a point. Booker testified that the point he made at that time was that if the two welders had not pointed out the problem the job could have gone out of the bay and to the customer, put into use, and "could have exploded and killed several people and cost several million dollars." At this point in the conversation, Greene told Arnold to punch the clock, go home, and return Friday, that they had other things to consider. When Arnold asked what other things they had to consider, Greene told him that it was none of his business. Arnold responded that other employees had done similar things and no one had been sent home as far as he knows. Greene replied that employees had been sent home, and they also had told the supervisor that they had made a mistake but that Arnold did not know he had made a mistake. Booker stated that they had another test they wanted to run on the weld.

Greene further testified that the following day (Friday) Booker reported another problem regarding welding by Arnold. This time it was on a blade ring which allegedly was "literally full of pinholes and bad welding on both sides." Booker reported that Arnold and employee Jimmy R. Grant had welded on the blade ring.

Arnold testified that in leaving to go home he stopped to tell his rider that he had to leave and for the rider not to wait for him at the end of the shift. About half way to bay 13 where the rider worked, Bay Foreman Law caught Arnold by the shoulder and told him he would have to leave the plant. Arnold told him that he was going to tell his rider that he was leaving. Law told him that he could not do that and he had to "get out of the plant." Arnold asked if Law meant he could not tell his riders that he was leaving. Law responded, "E. C. Greene wants you out of the plant." Arnold said he had to go tell his riders, and he proceeded. Law followed him. Thereafter, Arnold called his brother-in-law who came and picked him up.

On Friday around 2 p.m., Arnold testified that Greene called him and told him not to report to work that they were not through with the investigation. Greene testified that he told Arnold that other problems had come up. When Arnold inquired as to the nature of those, Greene told him that there were some problems with blade rings and they were running more calculations on the exhaust extension.

Greene testified that it was the decision of him and Dillard that Arnold should be sent home, for they wanted to know how much rework would have to be done and there were more tests and calculations to run. The record does not reflect the nature of these other tests and calculations.

Greene testified on cross-examination that he did not permit Arnold to continue working because he had not admitted that he made a mistake. Earlier, Greene had testified that an employee may not get a warning if he admits his mistake. This was in relation to bad welding involving a bunch of pin holes, and where the welder admits he made a mistake and wants to do something about it.

Booker testified that Arnold was sent home because there was a lot of rework involved in the exhaust extension, requiring gouging out the weld and rewelding, and Greene wanted to check further and see how far and how deep it had to be gouged.

Greene testified that Booker reported to him that extensive pin holes and other problems had been discovered in a blade ring.

Foreman J. C. Wise testified that quality control had found the poor work on the blade ring and brought it to his attention through a rework order of form 13-A. Wise testified that on inspecting the welding on the blade he found that there were two weld symbols on the blade ring, one being for Grant and the other being for Arnold. Wise approached Grant who initially denied that he had done the welding. Wise testified that the welding had been done a week earlier. Later, after Grant had had the opportunity to inspect the work, he told Wise that in fact he had done the poor welding and explained that he simply had done a bad job.

On the afternoon of Monday, June 2, Arnold was called to a meeting in Greene's office. Employee Relations Manager Deaton was present. At the meeting, Greene gave him a warning slip (G.C. Exh. 7) for violating rule no. 41, "Unsatisfactory work on jobs 159120 - exh. ext. & job 159122-01." The warning was signed by J. F. Booker and initialed by Greene. Booker testified that initially he had written a separate warning for the exhaust extension, but then tore it up and put both jobs on the same warning notice.

At the time Greene handed Arnold the warning slip, he told Arnold that the committee had met and decided to bring Arnold back to work. He then handed Arnold the warning and said that they had found some more welding Arnold had done that was bad and that they had photographs of it. He said that the welding was rotten all the way through, had pin holes in it, the weld was broken, undercut, and had to be deseamed and welded. Arnold asked him how he knew that he had welded on it, and Greene replied because Arnold's weld symbol was on it. Arnold stated that more than one welder worked on it and how did Greene know that Arnold did all of the bad welding. Greene stated that another employee was given a warning for the same job.

When Deaton inquired whether Arnold had welded on the blade ring, Arnold told him he did not know because he had welded on 10 or 15 and did not recall at that time. Greene stated that they could argue all day and not get anything settled, and he told Arnold to go back to work.

Arnold testified that Jimmy Grant also welded on the blade ring. He further testified that the day the work was done, the weld had been capped out on one side and the supervisor (Foreman Law) told him the weld was finished and told him to turn it over. Arnold testified that he assumed the supervisor had seen the pin holes and that they would be repaired in the back at what is called the "pickup" area where some repairs are made. Arnold turned the blade ring over and started welding another bevel. Arnold testified that on the side that had the pin holes, he had welded only in the very bottom of the bevel before, and that the pin holes were not in his welds but on the surface. While he stated that his weld symbols ("LA") were on the blade rings, it would not necessarily indicate the part of the welding he had actually done. Arnold testified that he did not repair the pin holes because his supervisor told him the weld was finished and to turn it over, and that in bay 8 "when the supervisor tell you to do something, that is what you do."

Although Arnold testified that it was not unusual for the men assigned to pickup to do these pin holes, the inspector who found the pin holes, Roy Ross, testified that these pin holes were the worst he had seen in the recent past and should have been repaired by the welder, and that if he, as inspector, sees the poor welding first, it will not go to the pickup welding process but will be rejected by him.

Grant testified that he has been a first-class welder only since March 14. This was the first time he had welded on a blade ring and the day before he welded on it he asked Foreman Wise to show him how because he had not previously performed such welding. He testified that he stenciled his weld symbols by the portion of the work on Friday, May 23, just as the whistle blew ending the first shift, and he did not have time to check for pin holes. When he returned to work the following Monday, the blade ring was gone and he was again unable to check for pin holes.

Grant admitted that when first questioned by supervisors about the bad welding he denied doing it because he was not sure which side he welded, but when he later had a chance to inspect the job himself he realized he had done the faulty welding. He then went to Supervisor Wise and admitted to him that he had made the pin holes. Later that day, he received a warning slip for his "unsatisfactory work" on welding the blade rings (G.C. Exh. 16, dated 5-30-80).

It should be noted that on May 20 Arnold assisted in distributing a handbill at the plant gate on behalf of the Union. The handbill was a copy of a letter dated March 10 addressed jointly to Respondent's president, William E. Adams, and to the Regional Director for Region 15 of the Board from International Representative Al Washington, Jr., on the Union's letterhead. (G.C. Exh. 12). Some 48 employees signed their names as the "Boilermakers in-plant organizing committee." Arnold's name is the first on the list, and Grant's signature is on the second page toward the end. Booker, who signed Grant's warning slip, admitted that at the time he issued the warning to Grant he was aware of the handbilling at the gate and of Grant's signature on the list. Presumably he was also aware of Arnold's signature.

Grant testified that a few minutes after Booker and Wise had asked him about the welding on the blade ring, he went back by himself and inspected the blade ring and ascertained that he had caused the pin holes. He thereafter called Wise over to his work station and said that he had gone back and inspected the job and that he had done the pin holes. Wise replied, "I know. Me and Mr. Booker had figured that already." Wise did not deny this in his testimony.

A little later, Wise came by and called Grant aside and gave him the warning slip and told him that Booker had told Wise to give it to Grant. Grant testified that Lynn Arnold had welded on the other side of the blade ring.

Grant explained that it was not unusual for one welding blade rings for the first time to get pin holes in the work, and that when using a CO2 gun a whiff of wind can cause a pin hole. Indeed, the day before he began work on the blade ring he asked Wise to show him how to weld on it since he had never welded on it before.

With respect to the wrong wire used by Arnold, there is no doubt that such involved a serious mistake. However, I find that the mistake was that of supervision in accordance with Respondent's own quality control guide and not that of Arnold. There is no evidence that Respondent felt the mistake was serious enough to warn the supervisors, leadmen, and quality control personnel involved, nor is there any evidence that welders had been advised that, contrary to the quality control manual guidelines, they are expected to match the wire to the label on the box. While a disinterested observer may not see anything wrong with requiring a welder to make certain that the wire is the same as that on the box label, it must be remembered that the welders work with these materials day in and day out. Moreover, Arnold testified that he followed his usual procedure—a procedure which had never caused a problem previously. In view of all the circumstances, I conclude that Respondent saw the event as a convenient pretext to continue to build its case against Arnold, and that in the absence of his union activities and testimony in February it would not have issued the warning to him.

With respect to the bad welding on the blade ring, the evidence reveals Respondent's animus against Arnold (for which Grant suffered). Thus, even though on Friday, May 30, Grant had admitted that he did the bad welding which had caused the pin holes, Respondent nevertheless delivered the predated warning to Arnold the following Monday. Grant, I find, was warned only to justify the warning given to Arnold.

I shall order that these warnings to Arnold and Grant be expunged.

g. *July 22 written warning to Sanders*

By hearing amendment (G.C. Exh. 2) to the first (March 14) complaint, General Counsel added paragraph 8A alleging that Respondent violated Section 8(a)(1), (3), and (4) of the Act by warning Sanders on July 22 both in writing and verbally (orally).

Sanders testified that on Friday, July 18, while he was working in bay 10, Supervisor "Red" Mitchell of bay 13 came and asked if he would work overtime the following evening in bay 13. Sanders replied that he would. The following evening, under the instructions and supervision of Leadman Porterfield, Sanders welded a closing seam on a tank (welding a head to the tank).

A brief description here can not disclose the work problems Porterfield and Sanders, along with a fitter and the welder's helper, experienced that evening. Porterfield had to switch Sanders from job to job at different times. These were several interruptions. Finally, on the closing seam for which Sanders received his warning, a comedy of errors, none caused by Sanders, occurred.[57] Thus, after Sanders had welded about half the seam his weld ground, which was welded to the outside of the tank by the welder on the previous shift, broke off, and his machine stopped. The helper climbed up a ladder to the manway and hollered in to Sanders that the ground had broken. After someone rewelded the ground, Sanders welded about 3 more feet when Porterfield climbed up to the manway entry and informed Sanders that the flux belt on the outside of the tank was broken. Sanders stopped welding again, and waited inside the tank about a half hour while it was being fixed. On being signaled, by their beating on the tank, that it was ready, Sanders then welded about another foot, and had to stop again when Porterfield climbed back up the tank to the manway opening and told him that the helper forgot to put flux on the belt, which had set the belt on fire and burned a hole in the belt. After this was repaired, Sanders was finally able to finish the job. Sanders testified that such starts and stops are easily visible in the weld. Although the foregoing nightmare of events was exasperating and disconcerting, Sanders testified that the biggest problem was the fact that there was a misalignment of 1/4 inch by virtue of a head which was too large. In the terminology of Quality Control Manager Walsworth, there was an offset. Walsworth testified that there is an offset on every railcar tank and every head because the head has a 1/8-inch (2/16-inch) to 3/16-inch greater thickness than the tank shell it is joined to. Thus, Walsworth testified that even on a perfect joinder there is an offset (an extension of one metal plate above the other). In addition to the offset, there may be some misalignment. Walsworth testified that the combination a fitter does is acceptable so long as it is within the specified tolerance. The tolerance for bay 13 is not defined in the record.[58]

The fitter told Sanders that he had mismeasured the head and was having a lot of trouble with it (the offset/misalignment) and might have to cut if off and put on another head.[59] Sanders' testified that supervisory Leadman Porterfield was well aware of the misalignment problem.

Quality control personnel, in X-raying the closing seam, found defective welds in each of the 26 pictures taken of the circumference of the closing seam, and for these defects Greene issued Sanders a warning (G.C. Exh. 13) on Tuesday, July 22, in the presence of General Foreman Sepulvado and Foreman G. W. McKaskle.[60] Although the warning itself specified 25 pictures as disclosing defects, Walsworth testified that the correct number was 26 out of 26. Greene explained that it takes 26 photos, 18 inches in length, to photograph the circumference of a closing seam on a tank, and that there is some overlap in each picture.

When giving Sanders the warning, Greene testified that he told Sanders he had to "go on record" with him regarding the defects because of their severity and the extensive rework involved. Greene testified that on the preceding order, with 50 tanks, the average defect was only one per closing seam, with a high of five defects.

Sanders testified that Greene asked him what had happened on the job, and Sanders explained all the details (summarized above). He also explained that the large misalignment had caused the weld to roll, and that Sanders had to increase the voltage to compensate for the roll in order to spread the weld a little wider. In short, Sanders told Greene that a 20-minute job had been extended to 2 hours because of all the problems.

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[57] Sanders testified that he was working on the inside of a 50–60-foot-long tank, at one end and some 25 feet from the manway exit. It was dark, smokey from the welding, and so hot inside the tank that a yellow crayon in his pocket melted. At one point someone, apparently an insensitive "practical joker," beat on the tank with a hammer—with predictable effect upon Sanders who was inside what then became a large steel drum.

[58] Sanders testified that the fitter told him they did not fit a head on a tank in bay 13 where the difference was more than one-fourth inch. He further testified that in bay 10, where he had been since about February 12, quality control rejects any difference greater than one-eighth inch.

[59] Indeed, Sanders stated that in fact some others were cut and redone.

[60] Porterfield was conspicuously absent. McKaskle did not testify. Thus, Sanders' testimony is undisputed that when he was helping to distribute the May 20 handbill (G.C. Exh. 12) he handed one to McKaskle.

After checking with Sepulvado, Greene said that the tanks in Bay 13 were different from the ones in bay 10, and that the ground is the responsibility of the welder. Sanders testified that the latter is true if the one doing the welding attached the ground.

To Sanders' knowledge (and no evidence to the contrary was presented), neither the helper who failed to put flux on the flux belt, nor the fitter who improperly aligned the head and tank, nor the welder who improperly tacked the ground to the outside of the tank received warnings for their mistakes.

The meeting ended with Greene telling Sepulvado to give Sanders the warning. After receiving the warning, Sanders left.[61]

Clearly, Respondent is entitled to decide what work is acceptable and what must be rejected, and it may discipline employees for defective work so long as such discipline has not been motivated by statutorily protected conduct. Even then, Respondent may do so if it proves that it would have issued the warning in the absence of such protected activity. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

It is significant that only Sanders[62] was warned for the events involving the closing seam. Of even more significance is the fact that Leadman Porterfield (who apparently, so far as the record shows, received no reprimand himself) was with the job, and the welder's unidentified helper, every step of the way. Porterfield knew the problems.

In short, I find and conclude that Respondent seized upon the defective welding as an excuse and pretext to add one more warning to Sanders' record, and that it would not have issued the warning absent Sanders' protected activities.[63] Accordingly, I find that the July 22 warning violated Section 8(a)(1), (3), and (4) of the Act,[64] and that Respondent should be ordered to rescind same and notify Sanders personally that it has been expunged from his personnel records.

4. Crowder's March 12 written warning and suspension

Willie D. Crowder, who also testified in the February hearing as one of General Counsel's witnesses, has been employed by Respondent for over 12 years. He has been classified as a first-class hand code welder and also as an automatic machine welder for about 11 years.

On March 12, Crowder received a written warning (G.C. Exh. 17) for "Failure to follow instructions" in violation of rule 19. More specifically, the warning issued allegedly because the grounding nut was loose on Crowder's welding cable. When Crowder declined to accept the warning notice, he was suspended.

Vice President Bradshaw testified that Respondent had an ongoing program, for quality control and safety reasons, to ensure that the welding machines were properly grounded. He testified that if a grounding were not properly tightened, the grounding lead could heat up and cause substandard welding or possibly a severe shock. He initiated the construction of a new type of welding ground as part of this program. Photographs of the welding grounds are in evidence as Respondent's Exhibits 19 and 20. He further testified that since about early June 1979 Respondent has had numerous meetings and other communications with supervisors and employees in which they have been instructed regarding the importance of keeping the grounds tight.

Bay 11 Foreman Delmo Cason testified that he left his office around 1 p.m., follwing the lunch period with the intention of going to the back of the bay. Crowder's welding position was directly in front of Cason as the latter left his office. Cason observed that the tank Crowder was working on was rolling (a normal procedure on some of the jobs) and he observed that the ground was "flopping around." Therefore, Cason testified that he walked over to make sure and found that the ground was "very loose." He then reported the matter to Claude Veatch, general foreman of bays 11 and 12, and the two returned to Crowder's work station and again inspected the ground. Veatch agreed that it was loose, and called Crowder down and had him tighten the ground with a crescent wrench. Confirming the testimony Bradshaw had given, Cason testified that he was concerned about Crowder's loose ground because of the instructions to keep them tight and because the matter had gotten to the point where he was, "concerned about my job." Indeed, he testified in the Monday meeting with the bay employees that he had told them what was expected concerning tightening of the grounds, and that they should check the grounds every morning before they went to work, tighten them with a crescent wrench, and to recheck them three or four times a day. He further testified, "And I told them also that was the last time we was going to tell them about the grounds. The management of the company was through talking about grounds. We would have to do something about it."

Crowder testified that after taking his lunchbreak on March 12 he noticed, as he was about to resume work, that the grounding nut was loose on the tank. He therefore tightened the nut by twisting the cable in a clockwise fashion and also by tapping the nut with a wedge to make certain that he got it "snug and secure." He then ascended the tank and began welding wrap pads. About 20 minutes before 1 p.m., he observed that Cason came straight to the end of the tank where Crowder was working, grabbed the grounding cables and "jerked" them side to side several times until they were so loose they would swing freely. At the time, Crowder was welding a pass around the pads with the welding machine. About 20 to 30 minutes later Cason returned with Veatch and shook the cables again while showing them to Veatch. They both looked up at Crowder and then walked away. Moments later Crowder finished welding the pass, took a crescent wrench down the ladder and tightened the ground and returned to his job. Some 30 to 40 minutes later Cason summoned Crowder to the office to see Veatch.

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[61] Just before the end of the meeting, Greene accused Sanders of having a "real bad" welding record in bay 10. Sanders responded that was the first he had heard of it.

[62] Who had acceded to a request for help in bay 13, and who consented to Porterfield's personal request to stay and weld rather than leave after all the confusion and after someone hammered on the tank with Sanders inside.

[63] Greene's closing remark to Sanders, that the latter had bad welding in bay 10 (a new allegation to Sanders) has all the characteristics of a cat licking his lips, while taunting the trapped mouse, in anticipation of having the mouse as its dinner course very soon.

[64] As alleged in par. 8A of the August 4 hearing amendment (G.C. Exh. 2) to the first (March 14) complaint.

In the office, Veatch said that the employees had been reminded to keep the ground cables tight and then handed Crowder a warning slip. Crowder made no effort to reach for it and said that no one had told him he would get a warning because the ground nut was not tight. Veatch stated that Crowder had to do what he was told, and again handed the slip toward Crowder who again made no effort to accept it. At that point Veatch said that, "Well, you can accept it or refuse it." Crowder asked what will happen if he refused it and Veatch replied that he would write "a letter" about it. Crowder told him to go ahead and write the letter. Veatch responded, "Don't worry. Don't worry Crowder, I'll do my job." Crowder replied for him to go ahead and do his job, saying, "Thank you, I appreciate it." Crowder then returned to his work station and resumed welding.

In his own testimony, Cason admitted that he shook Crowder's ground cables, but denied that he loosened Crowder's ground. He further testified, on cross-examination, that, "We were concerned with grounding at the time. I was checking anything that was suspicious of having a loose ground." However, he stated that he was not particularly going to check Crowder's ground but just happened to see that it was loose. Nevertheless, he testified that he did not check any other grounds in the bay that day, although he had done so on Monday of that week.

Veatch denied that he told Crowder he did not have to accept the warning even though a report would be written about the matter. He assertedly told Crowder that while he could not make him take the warning slip, if he refused to do so he would have no other choice but to write a report on the situation which would be made a permanent record in his personnel file. When Crowder still refused, Veatch told him to return to work. After Crowder returned to work, Veatch contacted Superintendent Greene, outlined the events, and recommended that he be permitted to send Crowder home for refusing to take the warning notice. Greene said not to do so but to call Crowder back into his office again and if he still refused to take the warning then send him home.

It is undisputed that Cason was sent to summon Crowder again to the office. Veatch testified that in the second meeting he told Crowder that they needed him to take the warning slip to acknowledge the fact "that you have made a mistake, and that you knew that you shouldn't have done it and take the warning slip and let it be a lesson to you and a reminder not to continue that." Crowder reiterated his position that he was not taking the warning slip, and that Veatch could do whatever he wanted with it. Veatch then testified that he told Crowder to punch out and go home and that they would be in touch with him later. He testified that Crowder was sent home in order to maintain a measure of discipline. Following such testimony, Veatch was specifically asked if he had told Crowder in the second meeting to take the second warning so as to acknowledge that he had made a mistake. Veatch answered in the affirmative and stated that Crowder admitted that his ground was loose and that he had gotten his crescent wrench, descended from the tank, and tightened it. Veatch testified that he had given written warnings to other employees for failing to ground their machines properly, and he identified Respondent's Exhibits 22 and 23 as warnings he had given to Memphis Evans and Leon Bell for having their grounds loose. The warnings are dated August 13 and April 21, respectively, *after* the event in issue here.

Concerning the second meeting, Crowder testified that it was very short and that neither he nor Veatch took time to sit. Veatch stated, "Crowder, it seems to me you got a bad attitude." Crowder asked him how he could arrive at that conclusion since they had talked only once. Veatch told him, "Well, anyway, you punch out and go to the house and don't you come back until I call you." Crowder testified that he then left, put up his tools, and went home. In neither meeting, Crowder testified, were voices raised, and both parties spoke in a regular, low tone of voice.

Crowder testified that when he went to pick up his paycheck 2 days later, on Friday, March 14, Cason told him that he had been trying to call him, and that Employee Relations Manager Hillman Deaton wanted to talk with him. Crowder then went to Deaton's office where Deaton asked him for his version of what had happened. Crowder testified that he told Deaton everything in its entirety, including how Cason had swung the grounding cable and how "they got the warning slip plotted up on me." Deaton stated that the warning slip was not an admission of guilt, but simply something to show that he had been warned. Deaton advised him to take the warning slip, unless he thought it was absolutely against his will in which case he would not have to. He repeated acceptance of the warning did not mean a whole lot, and did not constitute an admission of guilt. He told Crowder to report to work on Monday morning and that he, Deaton, would set up a meeting in Superintendent Greene's office to have everyone present and work the matter out. Crowder expressed the thought that he did not know whether that would do any good because it would be their word against his. Deaton said, "Well, no, it's their word against ours." Crowder said he knew why they were "messing" with him, that it was because he had testified in the hearing on February 4 against the Company. Deaton replied, "No, it shouldn't be that way. It shouldn't have anything to do with it."

Deaton testified that when the warning slip with Crowder's paycheck came to him he attempted to investigate the matter. The following day, Thursday, March 13, he telephoned Crowder's home four times without success, and was not able to speak with Crowder until he came in Friday to pick up his paycheck. He explained to Crowder that the warning was not an admission of guilt, and that Crowder had the employee grievance procedure as a recourse. Crowder then readily accepted the warning and said he wanted to proceed with his recourse.

Deaton testified that at the meeting the following Monday, March 17, attended by Vice President Bradshaw, Superintendent Greene, Veatch, Crowder, and himself, Crowder expressed his position that the warning should not have issued. However, Deaton testified that "the letter of warning stood." He further testified that in the process of the discussion, Crowder indicated that he wanted to be transferred from bay 11. After the meeting, Respondent's officials discussed the matter and decided to transfer him to bay 13. Under cross-examination by General Counsel, Deaton conceded that there is no specific requirement that an employee accept a warning. However, he said, "It is a routine matter in view of the grievance procedure." He said that Respondent has not had any experience with employees refusing to accept a warning.

Deaton testified that employees had been informed of the grievance procedure, that it is a matter of company policy in writing and that he did not know whether it had been posted.

Crowder testified that at the Monday meeting, March 17, Cason was not present. Deaton started the meeting by telling the others that Crowder was there to tell his side of the story. Crowder testified that he told them everything in its entirety including the fact Veatch told him he could accept or refuse the warning, and that if he refused "a letter" would be written up on the matter. After Crowder recited all the events, Deaton turned to Veatch and asked if that was the way it had happened. Veatch replied in the affirmative. Crowder was asked if he had anything else to say, and he told them how he had performed in bay 11. Thus, he told how he had been transferred to the bay in January prior to the February hearing, and that in order to help Respondent succeed in a welding project Vice President Bradshaw had conceived, he, Crowder, had carried flux and wire by hand and on his shoulder in order to expedite the job while other welders waited for assistance. "Then, I get a warning slip for some pennyante reason like grounds not being tight. And I told Mr. Greene, I told them all in the meeting, I said, 'You could have checked all over the job that day and you would have found countless grounds loose with nuts not tight.'" At that point Greene interrupted and said, "No, we can't say that. I know for a fact that Cason checked every ground in Bay 11, and yours was the only one that he found loose." Greene also added that Crowder was guilty of insubordination when he refused to accept the warning slip Veatch had handed him. Bradshaw said that it was very important to have the grounds tight. At that point Crowder requested that he be transferred from bay 11. They told him that the matter would be considered later, and Crowder returned to work. Later that morning he learned that his transfer request had been granted.

When asked that if he were concerned about his job as he had testified, and after having found one ground loose, why did he not then check other grounds to make double certain, Cason testified that he had checked on other grounds on days before and after this and he really did not have time to do more checking that day since it was approaching 1 or 2 p.m., the shift changes at 3:30 p.m. and supervisors come in around 2:45 p.m. Cason testified that the lunch period ended at 12 noon and that he had done paperwork in his office after that for some 45 minutes to an hour. He testified that while there was still time to check grounds if he had done that specifically, he would have had to stop his other supervisory activities.

Fitter's helper Paul Jamison, called by General Counsel, worked in bay 11. On the day Crowder received his warning for a loose ground, Jamison, who was working on the next tank from Crowder, observed Cason jerk on Crowder's grounding cables. Later that dey, Cason told fitter Randy White, whom Jamison was helping, to make sure he tightened up his ground because he had just given another man a warning for it. Jamison testified that when Cason came by he did not check Jamison's ground and if he had done so he would have found that it was loose and probably would have been moved with a flick of the wrist. Jamison testified that the ground nut is supposed to be tight enough so that it will not wiggle. Although Jamison testified that he had been in the process of moving his equipment and had not had the opportunity to tighten the ground, he further explained that Cason would not have known that. After Cason left, White handed Jamison the crescent wrench and he tightened the ground and tacked it down.

Charles L. Meshell, who has been a first-class welder for 4 years, recalled the day that Crowder was sent home from work in bay 11 because of a loose ground. On that day, before Crowder was sent home, no supervisor had spoken to Meshell about his ground cable. Afterwards, Leadman Herschel Finley came and told him to make sure his ground was welded to the tank. Meshell checked the ground and discovered that it was so loose that the nut could be turned with his fingers. At no time, before or after the conversation, did Finley check Meshell's ground. Later that same afternoon, Cason came by and told him the same thing. Cason did *not* check the ground in any way.

Meshell testified that in the recent weeks before the hearing, some employees were tacking their grounds to the tank and some were not and that supervisors knew this. Moreover, when Meshell entered bay 11, Foreman Britain told him that the ground cable should not be just thrown inside the tank, that they should be welded to the tank.[65]

On consideration of the foregoing, and the entire record, I find that Cason, contrary to his denial, deliberately jerked and pulled on Crowder's ground cable until he had loosened it, and all for the purpose of creating a basis to issue him a warning. Crowder testified in a convincing fashion, as did Jamison and Meshell, and I credit them. In contrast, I was not favorably impressed by the fashion in which Respondent's witnesses testified.

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[65] In its brief, Respondent argues that with respect to cables thrown into tanks, it no doubt involved tanks which were stationary and would not roll; that it is possible to get a proper ground when the tank is stationary by throwing the ground into the tank, and that Crowder was welding on a tank which rolls.

I also note from Cason's own testimony that he was so concerned about the grounding problem as to be worried about his own job security, yet after he allegedly found Crowder's ground loose, he did not take the time to check any others.[66] Moreover, even if Cason did not jerk the ground until it was loose, he personally engaged in disparity of treatment later that day involving employees White and Jamison, as did Leadman Finley regarding Meshell's ground. Under either interpretation of the facts, Respondent proceeded unlawfully against Crowder in issuing a warning to him.

With respect to Crowder's 2-day suspension, I again credit his testimony. Accordingly, I find that Veatch told him he could accept the warning or not,[67] and, in the second meeting, admittedly told Crowder that by accepting the warning he would be admitting his error. Crowder, believing himself in the right, can hardly be faulted for declining to admit what he considered a falsehood. Deaton, Greene, and Veatch admitted there is no rule requiring employees to accept warnings, yet Crowder was suspended for not accepting the warning. I credit Crowder that Deaton told him, in their meeting of Friday, March 14, that Deaton said he would not advise Crowder to come to work until after the March 17 meeting if Crowder persisted in refusing to accept the warning. I do not credit Deaton's denial.

In view of the foregoing, and the entire record, I find that the March 12 warning was violative of Section 8(a)(1), (3), and (4) of the Act.

As the March 12 warning was tainted, I find that Crowder's refusal to accept it was protected. Therefore, by suspending Crowder for engaging in a protected refusal, Respondent violated Section 8(a)(1), (3), and (4) of the Act. I do not accept Respondent's argument stated in fn. 6 at p. 62 of its brief that Crowder should not receive backpay for the full 2 days he was not at home when Deaton called.[68] Veatch did not instruct Crowder to remain by the telephone or tell him that he would be paid during his suspension. Indeed, Crowder testified that he possibly could have waited a week, or a month or more before being called and he could not stay at home just waiting.

Respondent, I find, should be ordered to expunge the warning, so inform Crowder, and pay him backpay for his suspension of 2 days.

5. Grant's written warnings of April 14 and May 30

a. *April 14*

Jimmy R. Grant testified that he began working for Respondent on September 14, 1977, that nearly all of his time has been in bay 8, and that he has been classified by Respondent as a first-class welder since March 14.

International Representative Al Washington, Jr., testified, without contradiction, that about April 5 he mailed a certified letter addressed jointly to William E. Adams, president of Respondent, and to Region 15 of the Board, on union stationery and signed by him. Some 48 employees signed their names to the letter,[69] with their names extending onto a second page above the appellation "Boilermakers In-Plant Organizing Committee." The letter reads:

> As you are aware, many of your employees have authorized the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers to represent them for the purpose of collective bargaining and other mutual aid and protection.
>
> Therefore, this union has formed an in-plant organizing committee. The following named employees of Riley-Beaird, Inc. have authorized us to inform you that they constitute the organizing committee in the Riley-Beaird Plant.
>
> As additional employees join this committee, their names will be supplied to you in the near future. They will be engaging in only peaceful and protected activity. We request that you and all officers and agents of Riley-Beaird respect their rights protected by Section 7 of the National Labor Relations Act.

Washington's testimony is undisputed that he picked up the signed return receipt at the post office on April 7. The copy in evidence (G.C. Exh. 12) also reflects the National Labor Relations Board's Region 15's date stamp of (Monday) April 7.[70] Grant testified that his name appears on page 2, fifth name down, right hand side (J. R. Grant).[71]

One week later, Foreman J. C. Wise summoned Grant to the office of General Foreman Frank Booker of bay 8. In the presence of Booker, Wise sat down and signed his name to a pink warning slip and said, "You know what this is for don't you?" When Grant inquired for what, Wise said, "I told you all over and over about washing up early." Grant, on not being given any opportunity to discuss the matter, took the warning (G.C. Exh. 15)[72] and left the office.

At the hearing, Grant explained that on the previous Friday, April 11, at or about 3:25 p.m. he went to the restroom. On leaving the restroom, he washed his hands and with a paper towel dried his face. At that time the horn blew ending the shift. Also with him washing in a similar fashion was Johnny Ray Booker. As Grant was washing his face, he looked and saw Night Supervisor Manuel Law about 50 to 75 feet away pointing in his direction. Employee Booker was standing some 3 feet from

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[66] As the warnings to Evans and Bell issued in April and August *after* Crowder's warning and after the charge was filed on Crowder's warning (G.C. Exh. 1(h); Case 15-CA-7621-2), I find their persuasive character to be small indeed.

[67] As General Foreman Booker told Arnold regarding his warning of April 11.

[68] Respondent's argument borders on being frivolous.

[69] Although the letter is dated March 10, Washington explained the passage of time before mailing on the basis the signatures were being secured.

[70] Presumably this copy was furnished by General Counsel.

[71] Grant testified that the Union handbilled at Respondent's plant gate with copies of the letter about mid-March. In this Grant was in error as the evidence clearly shows that such handbilling did not occur until around May 20.

[72] Dated (Friday) April 11, the written warning, asserting violations of rules 19 and 22, states, "Refusing to follow instructions. Washing up early."

Grant. At the time, Law was speaking with General Foreman Booker while pointing in the direction of Grant. At that time the horn blew and Grant went home.

Grant also testified that Foreman Wise joined Law and Booker during the pointing demonstration. They also had clear visibility of Johnny Ray Booker who also works in bay 8. Grant testified that Johnny Ray Booker often washes up early anywhere from 3:10 to 3:25 p.m. everyday, and that General Foreman Booker had been in the vicinity when he has been doing so. Also, Grant has observed that Foreman Wise would see Johnny Ray Booker washing up early. To Grant's knowledge, Johnny Ray Booker never received any warnings for washing up early.

In addition to Johnny Ray Booker who washes up early practically daily, with obvious supervisory knowledge, Grant testified that employees Ray Whiddon, Ramsey (last name not identified), and R. L. Southern have been permitted by Supervisors Wise, Emerson, and Booker to pack up early in order to leave. Grant testified that all three of them received warnings, about 2 weeks prior to the hearing, but that they had been repeating their conduct since then without any further warning so far as Grant was aware.

On cross-examination, Grant testified that when he went into the restroom Johnny Ray Booker already was there washing his hands, and when Grant came out of the restroom to wash his own hands, Johnny Ray Booker was standing at the water fountain which is right next to the wash basin.

When asked how he knew that Whiddon, Ramsey, and Southern had washed up early, Grant testified that he began observing after he had received his own warning notice in order to ascertain whether any others were getting warnings. Between mid-April and some 2 to 3 weeks before his testimony, Grant observed Johnny Ray Booker washing up between 3:10 and 3:25 p.m. everyday. Not until 2 to 3 weeks before the hearing did the three, Whiddon, Ramsey, and Booker receive a warning.

Grant testified that he has never washed up early nor packed up early, and that Ramsey, Southern, and Johnny Ray Booker are the only ones he has seen pack up early or wash up early and that they do it most of the time. On redirect, Grant named Ray Whiddon, Ramsey, and R. L. Southern as washing up early consistently before they received a warning, and that they continue to wash up early.

Grant testified that he was making a distinction between washing his hands after leaving the restroom and washing up early. He further testified that he did not use the restroom everyday at 3:20 p.m. or so, whereas Ray Whiddon, Ramsey, and Southern were doing so everyday at that time. Grant testified that General Foreman Booker told employees at the safety meeting not to wash up early or use the restroom at the same time everyday, and Grant testified that this was the very first afternoon he had gone to the restroom at that time. General Foreman Booker was speaking and referring to the end of the shift and just before lunchtime.

In his testimony, Foreman Law confirmed that on April 11 General Foreman Booker, Foreman Wise, and he were walking down the bay considering the work to be done on the second shift. Law noticed Grant washing up and, ribbing Supervisor Booker because he is always talking about men washing up, Law pointed to Grant and said, "Look, you got a man washing up early." At that time Grant looked at them but finished washing. Law denied that anyone was washing at the same time as Grant and specifically denied that J. R. Booker was washing at the same time. On cross-examination, Law conceded that employees are permitted to wash up after leaving the restroom, but not their arms and face as Grant was doing.

Foreman J. C. Wise corroborated the version of Law and testified that when he issued the warning slip to Grant the following Monday morning for washing up early on Friday, April 11, Grant told him that he knew he was going to get a warning. Grant said he had dropped his wife off at work at Western Electric and made the comment to her that he knew he was going to get a warning because he got caught washing up early.[73]

Wise also testified that no one else was washing up at the same time as Grant, and specifically J. R. Booker was not. Wise explained that when he said that Grant was washing up, he meant that Grant was washing his hands, arms, face, and had soap up to his elbows. Wise said that he made the recommendation for the warning and that General Foreman Frank Booker made the decision that one should issue. Wise testified that at the time he gave the warning slip to Grant he had no knowledge that Grant was involved in any union activity.

On cross-examination, Wise conceded that he thought J. R. Booker was standing by the water fountain near the washup station. On further cross-examination, he admitted that he did see J. R. Booker there, getting a drink of water at the same time that the supervisors observed Grant washing-up. Wise admitted that J. R. Booker did not receive a warning for being at the water fountain. He stated that nothing was said to Grant on April 11 because as soon as the whistle blew Grant left.

General Foreman Frank Booker testified that when he observed Grant at the washbasin he appeared to be "taking a bath." Booker identified Respondent's Exhibits 33 and 34 as written warnings given to employees Ray Whiddon and R. L. Southern for washing up early before lunch. Both warnings are dated July 9 and refer to violations of rule no. 19 "Washing up early before noon." They are signed by J. F. Booker, Supervisor. General Foreman Booker testified that he was responsible for issuing the warnings to Whiddon and Southern. When asked why he issued the warnings to them, he testified that he "repeatedly" told them no washing up before break, noon, or before quitting time. He denied seeing any other employee washing up early since the warning had been issued to Grant. He further denied knowledge that Grant was engaged in any activity for the Union at the time the warning was issued to him.[74]

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[73] During his own cross-examination, Grant testified that he normally takes his wife to work, and he denied that he engaged in any conversation with Wise when the latter gave him the warning for washing up early.

[74] As with Grant, Booker also was confused about the date General Counsel's Exhibit 12 was distributed as a handbill, for Booker testified

Continued

Booker testified that he does not care who gets a drink of water when he needs one, and that there certainly is a difference between getting a drink of water at the water fountain and washing up early. He further testified that he would not issue a warning to someone obtaining a drink of water at the water fountain shortly before the end of the shift or before lunch. Booker testified that he never saw Wooden or Ramsey washing up early. On cross-examination he also testified that he has never stopped anyone from washing their hands after going to the restroom.

Conclusion

General Counsel alleges in paragraph 10 of the third (June 25) complaint that Respondent violated Section 8(a)(1) and (3) of the Act by issuing the April 11 warning to Grant. I conclude that General Counsel has established a *prima facie* case, and that Respondent has not shown that it would have issued the warning notwithstanding Grant's union activities. I find that Grant made a believable witness, and I credit him. I find that Respondent had knowledge of Grant's union activities by virtue of the fact that Respondent received the Union's letter on April 7, 4 days before Grant was observed washing up after leaving the restroom, and I consider this timing to be of particular significance.

While I credit Wise's uncontradicted testimony that Grant made the statement that he told his wife that he knew he was going to get a warning, I find that such remark is subject to two equally plausible explanations. One would be that which Respondent attributes to it, that is, that Wise knew he was guilty of a violation of company rules. The second and equally plausible explanation is that Grant knew he was going to be discriminated against because he had signed his name to the letter which had been sent by the Union a few days earlier.

No evidence was presented by Respondent that it had ever issued a warning for washing up early prior to the one issued Grant. Although an argument can be made that this allegation, in isolation, might be dismissable, it is clear that I must consider the entire case.

Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by issuing the April 11 warning to Grant, and I shall order it to expunge the warning and notify Grant that it has done so.

b. *May 30*

Grant's May 30 written warning (G.C. Exh. 16) is for "unsatisfactory work" in violation of rule 41. The warning, dated May 30, 1980, is signed by General Foreman J. F. Booker. The factual circumstances (pin holes in a blade ring) already have been set forth above in section III,C,3(f)(4) dealing with a similar warning to Arnold (and his suspension).

Wise admitted that Grant has been a good welder for him, and I credit Grant's testimony that he reexamined the blade rings and then called Wise over to his work station and admitted to him that he had caused the pin holes.[75] Later that afternoon Wise served the warning notice on him.

Booker admitted that at the time of the warning he was aware of Grant's union activities because he had seen Grant's name on the Union's letter, copies of which had been distributed at the plant gate, but that such fact made no difference. He further testified that Grant was experienced in using a CO2 welding gun, and that he, Booker, has issued warnings to several other employees for poor workmanship.[76]

General Counsel argues that even though Grant admitted doing faulty welding, his warning nevertheless should be found violative of Section 8(a)(3) and (1) of the Act on the basis that the welding was only a pretext seized on to mask the real motive—to punish Grant for signing and assisting in distributing the letter handbill a week earlier.[77] General Counsel also points to the fact that Wise admitted Grant had just begun welding on blade rings during the week in which he received the warning, that he was just learning the job, and that welding blade rings is different from welding other products. Respondent did not depart from normal procedure, as General Counsel argues, when the blade ring was not allowed to be repaired in the "pick up" section because Quality Control Inspector Ross, called as a witness by General Counsel, testified that it is his job to reject work as bad as that and return it to the welder.

Finally, General Counsel refers to the fact that Greene testified that a welder who admits he has caused "a bunch of pin holes" and wants to do something about it would not receive a warning.[78]

The argument also could be made that Respondent issued the warning to Grant, notwithstanding the policy described by Greene, in order to add support to the warning issued Arnold.

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that it was passed out at the gate on March 10, the date shown on the letter. Later in the day it was handbilled, he found copies of it lying on his desk where people had brought them in and left them on his desk. He denied having a copy on his desk the day the written warning was issued to Grant for washing up early. I note that April 11 was 4 days after Respondent received G. C. Exh. 12.

[75] I credit Grant's version that he, on his own, went to the back of the bay and rechecked the blade ring, and I do not accept Wise's testimony suggesting that he and Grant went together.

[76] Booker's testimony regarding previous warnings for poor workmanship (which Greene also identifies as rule 41) is supported by Resp. Exh. 44. That exhibit reflects that from 1976 through 1979, bay 8 issued written warnings for violating rule 41 as follows: 1976—4; 1977—0; 1978—2; and 1979—7.

[77] Contrary to this statement in General Counsel's brief, on redirect examination Grant testified that, although he observed the handbilling, he did not personally assist. Whether he watched from a distance, or stood next to those making the distribution, is not established in the record.

[78] While Greene's answer is not entirely definitive, he seems to be saying that Respondent would not issue a formal warning (written or verbal) to an employee who not only admits his mistake but also displays a good attitude (i.e., eager to do a good job). Grant fits that criteria. While he did not ask for help then (he had earlier asked Wise to show him how to weld blade rings), he admitted his mistake and Wise, in his own testimony, apparently considered Grant a willing worker as well as a good one. Accordingly, in issuing the warning to Grant (only his second, and both are in controversy in this case), Respondent departed from its own policy as described by Superintendent Greene.

Conclusion

Under all the circumstances, including, among others, the animus shown by the findings and conclusions reported at 253 NLRB 660 (1980), and the departure from Greene's policy, I am constrained to find that Respondent indeed was substantially motivated to issue the May 30 warning to Grant because of the fact he signed the Union's letter-handbill which, as Arnold testified, was distributed about May 20.

Under *Wright Line, supra*, Respondent was required to demonstrate that it would have issued the warning notwithstanding Grant's protected activities. Here again, I am persuaded that Respondent would not have done so absent Grant's name appearing on the Union's letter-handbill. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) of the Act by issuing the May 30 warning to Grant,[79] and that it should be ordered to expunge such warning and inform him personally (i.e., in addition to the notice to be posted) that it has done so.

6. Discrimination against Broden

a. *Warning of April 23*

Willie Broden, a class "A" mechanic since December 19, 1979, has worked for Respondent over 28 years (since March 1952). He reports to Mechanical-Maintenance Supervisor W. T. Palmer. Broden prefers to work the night shift (3:30 p.m. to midnight),[80] and for most of his employment prior to June 16 he did so. However, in mid-May, as Broden was preparing to leave on vacation, Palmer informed him he (Broden) was being assigned to the day shift (7 a.m. to 3:30 p.m.) effective upon his June 16 return from vacation.

The times Broden worked days in the past, the longest stretch being 3 to 4 months, occurred when he was not needed on the night shift because of a shortage of work there.

On Monday, April 28, Broden received a written warning from Supervisor Palmer.[81] Dated April 25, the warning (G.C. Exh. 21) is for "Improper Assembly of Aronson Turning Rools, causing heavy damage to unit." Palmer testified that he asked Broden to reassemble a set of power rolls which had been leaking oil. A seal had just arrived, and the power rolls already had been disassembled to replace the seal before Broden was assigned the task of reassembly. Although Broden previously had never reassembled this particular type of equipment, Palmer testified that Broden said he could do the job. Palmer stated that in reassembling the equipment, Broden failed to preset the gearbox bearings correctly, and this damaged the worm and worm gear so badly they had to be replaced.[82]

According to Palmer, the worm and worm gear were ordered immediately after this happened at an approximate cost of $1,500 to $1,600,[83] and they were thereafter installed by the maintenance people. When asked who, specifically, Palmer replied that Leadman Preston LaBorde "may have put it in." On cross-examination by union counsel, Palmer stated he could not swear that the new parts had in fact been installed, and then conceded that the rollers "could be" operating with the old worm gear. A moment later he stated, "I didn't say the leaderman put [it] in, I said he had the job done." Palmer further answered that he was not sure who did the actual work.[84]

Broden testified that on April 28, Palmer told him he had reassembled the rolls incorrectly, and that any class A mechanic should have known to preload the bearings. He then gave Broden the warning, and told him that the rolls were disassembled in the maintenance building and for him to reassemble them. Before Broden left, Palmer showed him the blueprint for the rolls. It was the first time Broden had even seen the blueprint for that kind of roll. He testified that bearings on the other rolls preload differently. The following night Palmer told Broden that he had checked the rolls. Palmer, apparently, was satisfied with the manner in which Broden had reassembled them. Broden was never thereafter told that the rolls were not working.

Broden testified that on April 21 he observed that the worm (or ring) gear was worn, but that he did not mention it to Palmer because the wear did not appear that significant. However, on receiving the warning and being told about excessive damage, Broden did point out to Palmer that the gear had been worn. Palmer's response, if any, is not described in the record. Broden further testified that in reassembling the rolls on April 28 after the warning, he noticed that the worm gear shaft was bent a little. He showed this to Palmer who apparently agreed that it was bent some. Nevertheless, Broden testified that he used these same parts, including the shaft, in reassembling the rolls the night of April 28. On cross-examination, Palmer testified that the rolls were put back into service performing the same work as before.[85]

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[79] Such violation is established in any event by virtue of my finding that a motivating factor in Respondent's decision to issue the warning to Grant was the desire to add artificial support to Arnold's warning. That is, in order to avoid revoking Arnold's warning, it also warned Grant since both worked on the blade ring. Respondent's reasoning is logically defective, for Grant's admission absolved Arnold. That Respondent persisted in the warning to Arnold surely reflects the intensity of its animus against one of the handful of employees recognized by all as one of the strongest and most visible of the Union's supporters.

[80] Broden testified that he informed Palmer of his preference a long time ago and once, specifically, in 1977.

[81] Palmer testified that he consulted with Vice President Bradshaw before he issued the warning.

[82] Broden testified that the rolls sounded all right after he reassembled them on April 21, but that they began making a "popping" noise on April 24.

[83] Respondent did not offer or produce at the hearing the requisition form or invoice described by Palmer.

[84] Broden earlier had testified that after receiving the warning he again reassembled the rollers, and that he used the old parts. Called during the Union's August 1 case, Broden testified that the Friday before his testimony he had observed the new parts in the maintenance department in a box marked "Bay 12 rolls." On cross-examination, Broden conceded that although the new worm gear looked the same as the old one, he could not say it was the same one that had been ordered. On the other hand, I note that, although Broden and Palmer testified on August 7, the hearing was not closed until August 27. Yet Respondent offered no specific evidence to rebut Broden's testimony of seeing the new parts in a box. Accordingly, I find that as of August 1 the new parts had not been installed in the rollers and that such rollers were still operating with the old parts.

[85] Palmer initially said "limited" service, but on further questioning by union counsel it is clear that the service was not "limited."

It should be noted that the instant warning was Broden's *first* written warning in his 28 years of employment with Respondent. Moreover, although Palmer at one point testified he was sure that he had given Broden some verbal warnings during the more than 20 years he had supervised him, and that the last one would have been within the last 5 years, he had to concede that not one verbal warning was reflected in any of the personnel records of Broden which Respondent had brought to the hearing. The records extended back through 1972, and Palmer stated that he believed they were all the records he had.

Palmer testified that recently, he thought since the warning to Broden, he has issued warnings to employees Frank Rivers and B. J. Jones for similar carelessness in disassembling a machine. No copies of the warnings were offered in evidence, and the incidents for which Rivers and Jones were warned are not further described. (On the other hand, General Counsel offered no evidence that Broden had made mistakes in the past without being warned or that non-union employees had made similar errors with impunity.)

Although Broden testified that during the first part of 1980, prior to his warning, he attended several union meetings, there is no evidence Respondent was aware of Broden's sympathies—until Respondent received Union Representative Washington's letter on April 7. The letter contains Broden's signature on the second page as one of the Union's members of the in-plant organizing committee.

Broden testified without contradiction that, when he assisted in distributing the letter as a handbill at the plant gate on May 20, he spoke to Supervisors Tom Britain and Harvey Reynolds, and they observed him. He further testified that about late April or early May, some 2 or 3 weeks before the May 20 handbilling,[86] Night Superintendent G. W. McKaskle came to Broden in the electric shop and asked him how the Union was going.[87] Broden answered that he did not know, and further testified:

> And he went on to tell me then that Mr. Palmer told him to watch me around there and see if I was going around amongst the men talking any union talk to them.[88]
>
> At that time I ran my hands in my shirt pocket, pulled out some church tickets that I was trying to sell to help raise money to pay for the church that we are building.
>
> He said, "Willie, you see that?"
>
> I said, "Yes, sir."
>
> He said, "People don't know what's going on."

In his own testimony, Palmer did not mention the foregoing conversation.

Conclusion

General Counsel established that on April 7 Respondent became aware of Broden's membership in the Union's in-plant organizing committee; that barely 3 weeks later Broden received the first warning (written or verbal) in his 28-year career at Respondent's plant; and that although the warning was for "heavy damage to unit," no such damage was ever shown to Broden or the existence thereof demonstrated at the hearing.[89] Where the reason given is false, as I find, it is appropriate, in light of the timing and other circumstances of the entire record,[90] to infer, as I do, that Respondent actually was motivated to issue the warning because of Broden's announced membership in the Union's in-plant organizing committee. *General Thermo, Inc.*, 250 NLRB 1260 (1980).

I further find that Respondent's *Wright Line* evidence falls short of persuading that it would have issued the warning notwithstanding Broden's union activities. In view of the falsity of the "heavy damage" reason, and Broden's unblemished record of 28 years, I find that the evidence is insufficient to establish that Respondent would have issued the warning in any event.

Accordingly, I find that Respondent, as alleged,[91] violated Section 8(a)(1) and (3) of the Act by issuing Broden the April 25 warning, and that it must be ordered to expunge such warning from his records and notify him personally that it has done so.

b. *Broden transferred June 16*

As earlier noted, effective June 16, Broden was transferred from the evening shift to the first, or day, shift.[92] Palmer testified that he transferred Broden to the day shift to pick up the slack created on routine preventative maintenance when several of the first-shift mechanics were required to spend much of their time on various new construction projects at the plant.

General Counsel argues that the transfer was made for the unlawful purpose of moving Broden from the evening shift, where he was not supervised, to the day shift where Respondent's supervisors could keep a close watch on Broden concerning his union activities.

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[86] Broden testified that Union Representative Washington, Lynn Arnold, C. M. Sanders, and Willie Hall were among those handbilling.

[87] Par. 11A(b) of the July 1 "Amendments To Consolidated Complaint" alleges the interrogation as violative of Sec. 8(a)(1) of the Act. I so find.

[88] Par. 11A(a) of the July 1 "Amendments" alleges that such conduct created the impression of surveillance of union activities in violation of Sec. 8(a)(1) of the Act. I so find.

[89] This is not to say that Respondent did not in fact order a replacement for the worm and worm gear. I do not credit Palmer, and I do not accept his testimony, that the parts would not have been ordered had it not been for Broden's mistake. I note that the worm gear already was worn and that the new parts had not been installed even as late as August 1 while the rolls had been operating on the old parts. In short, the "heavy damage" is a trumped up phrase, falsely describing what obviously amounted to very little damage, and so worded to provide an ostensibly legitimate basis for building a case against long-term employee Broden because he had aligned himself with the Union.

[90] I also note Respondent's general animus and the fact that its focus on Broden's union activities was important enough for McKaskle to interrogate him a few short days after the warning and unwittingly disclose Respondent's plans to surveil Broden's union activities.

[91] Par. 9 of the third (June 25) complaint.

[92] Pars. 9A, 13, and 15 of the July 23 "Second Amendments to Consolidated Complaint" allege the transfer to be in violation of Sec. 8(a)(3) and (1) of the Act.

Palmer testified that the transfer was "considered to be temporary," and that within the last 2 to 4 years he has moved Broden to the day shift to help out in a similar situation.

Although the record gives rise to a strong suspicion that Broden's transfer was unlawfully motivated, I find that the evidence falls short of establishing it to be so. While I do not credit Palmer except where he is independently corroborated by credited witnesses, I note that Broden previously has worked on days. Moreover, there is no evidence that the transfer is really permanent or indefinite notwithstanding Palmer's testimony that the transfer, while not explicitly temporary, is "considered to be temporary." Accordingly, I shall recommend this portion of the case be dismissed.

7. Discrimination against Willie Hall, Jr.

a. *Introduction*

(1) Hall's employment record

Fired on April 3, 1980, for poor quality of work, Willie Hall, Jr., had been one of the most prominent supporters of the Union at Respondent's plant. As in the familiar nursery rhyme, everywhere the Union was, Hall would surely be. Within 2 months after testifying against Respondent at the February hearing,[93] Hall was fired.

Hired by Respondent in August 1972, Hall had been classified as a first-class welder for 5 years. Despite his journeyman classification, Hall's employment record bears many pock marks. Indeed, in its brief (Resp. Br. p. 59), Respondent states that, "Without question, Hall was the worst welder in the plant, and he had received no less than three written warnings prior to 1980 for poor welding." The prior warnings introduced in evidence are:

1. April 2, 1973—Bay 8—Violated rule 41: Unsatisfactory work. "Poor welding on horizontal seam job #190456, resulting in rework. I have discussed your poor work performance with you previously."[94]
2. June 18, 1975—Bay 8—Violated rule 41: Unsatisfactory work. "The weld you put on this unit (121014–01) the appearance is very bad, you being a 1st class welder. Will have to improve or further disciplinary action will be taken."
3. April 21, 1977—Bay 8—Violated rule 19: "Refusing to follow instructions."
4. June 30, 1977—Bay 11—Violated rule 19: "You had weld rods in your hip pocket instead of your rod pouch."
5. [95]July 14, 1977—Bay 11—Violated rule 19, 31, & 41: [No description.]
6. March 2, 1978—Bay 8—Violated rule 6: Bad Workmanship. "Bad welding, Hall you have been putting in bad welds for several days, you have been talked to about this type of work. You have to improve in order to stay a welder at this plant."

Hall's work performance from March 1978 to March 1980 apparently was acceptable or better,[96] for he did not receive his seventh warning (G.C. Exh. 18), an action in issue here,[97] until March 11, 1980:

7. March 11, 1980—Bay 11—Violated rule 41: "Unsatisfactory Welding on U fitg. s/o 161598-03 TK-15."

The March 11 warning and other final events in Hall's employment are treated below.

(2) Complaint allegations

All allegations concerning Hall are in the second (April 28, 1980) complaint. They consist of (a) reassigning Hall on February 6 to more onerous and less desirable work; (b) issuing Hall a written warning on March 11; (c) verbally warning Hall on March 15; (d) suspending Hall on March 31 for 3 working days; and (e) discharging Hall on April 3.

(3) Hall's arthritis

For nearly 7 months prior to his February 4 testimony, Hall had been welding pads in bay 11. It is undisputed that welding pads is less physically demanding than welding fittings.[98] Pads are simply reinforcing metal plates usually welded to the outside of a railroad tank car,[99] but fittings cover openings in the tank shell. Thus, fitting welds must withstand pressure, whereas some pad welds are not subjected to pressure. (It appears that some pads are subjected to pressure.)

Hall testified that he suffers from arthritis, and that the foremen in bay 8 and 11[100] were aware of that fact.[101]

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[93] Administrative Law Judge Evans, affirmed by the Board, found in sec. II, A, of his Decision in *Riley-Beaird, Inc.*, 253 NLRB 660 (1980), that Supervisor Tom Britain unlawfully interrogated Hall in September 1979. However, in ALJD, sec. II,D,1 and 3, Administrative Law Judge Evans did not credit Hall wherein he testified that certain high officials of Respondent displayed photographs of strike violence.

[94] There follows on the form this preprinted statement: "You are hereby notified that repetition of this offense, or others, will subject you to further disciplinary action. It is hoped immediate improvement will make further action unnecessary." On this warning to Hall, the foregoing statement is *underlined*.

[95] Warning no. 5 was the subject of an unfair labor practice charge filed July 20, 1977, on Hall's behalf by the UAW in Case 15–CA–6540. The Regional Director's dismissal was affirmed by the General Counsel on October 18, 1977, on the basis: "Under all the circumstances, including the fact that the welding job in question performed by Hall did fall apart at the seams thereby causing extensive damage, and that the warning was issued only after the Company viewed Hall's personnel file, the burden of establishing that Hall was warned for other lawful reasons could not be sustained." (G.C. Exhs. 20(c) and (d)). A contemporaneous charge in Case 15–CA–6571–2, alleging a transfer of Hall on June 6, 1977, in violation of Sec. 8(a)(1) and (3), was dismissed by the Regional Director with the UAW's appeal therefrom being denied by the General Counsel on October 19, 1977 (G.C. Exhs. 20(a) and (b)).

[96] As we shall see, Supervisor Britain told Hall in early 1980 that his welding was excellent.

[97] Par. 10 of the second (April 28, 1980) complaint.

[98] In addition to the testimony of Hall and other witnesses who so testified, Supervisor Claude Veatch also confirmed this fact.

[99] Some pads are small, and some are as long as a 60-foot railroad tank car.

[100] For bay 11, Hall specifically named Tom Britain, Delmo Cason, and Claude Veatch.

[101] Veatch denied such knowledge. I credit Hall.

Indeed, in June 1979, while he was assigned to bay 8, Hall was hospitalized for 8 days because of his arthritis, and in September 1979, after having transferred to bay 11, Hall spent 14 days in the hospital. He testified without contradiction that his safety record at the company reflects these facts.

In addition, Hall testified that he receives gold shots for treatment of his arthritis. In December 1979, Foreman Cason wanted to transfer Hall to the day shift. Hall testified that he explained to General Foreman Veatch and Cason that he preferred the evening shift so he could receive his gold shot treatments from his doctor. Veatch asked Hall to work days just for December, and told Hall he could return to the second shift in January 1980. Hall agreed, and returned to the second shift as promised.

(4) Contentions of the parties

As earlier noted, Respondent contends that Hall was the "worst welder in the plant." It asks on brief, "What was the Respondent to do? Continue to allow Hall to perform substandard welding without even making an attempt to improve?"

General Counsel has alleged that the actions imposed on Hall by Respondent violated Section 8(a)(1), (3), and (4) of the Act. General Counsel argues that, to the extent Hall did perform unsatisfactorily on any jobs following his testimony at the February 4-5 hearing, it was because Respondent, knowing about Hall's arthritic condition, deliberately transferred him from welding pads to the more onerous job of welding fittings. Respondent, General Counsel argues, knew that Hall would be unable to properly weld the fittings because of his arthritis, and that Hall would thereby provide the basis for his own discharge. Such intentional assignment, General Counsel argues, was in retaliation for Hall's protected activities, and the discipline and discharge which predictably flowed from such onerous assignment were unlawful.

b. *Hall's February 6 reassignment from pads to fittings*

As noted above in subsection (3), dealing with Hall's arthritis, Hall had been welding pads in bay 11 for nearly 7 months prior to his February 4 testimony. Hall testified that when he returned to work on February 6 on completion of the hearing before Administrative Law Judge Evans, he was reassigned to bay 11, from welding pads to welding fittings. Nearly 3 weeks later, on February 25, Foreman Cason told Hall he would weld pads that night. Hall then asked him why he had been taken off pads and assigned to fittings when he returned from testifying at the hearing. Cason replied, "Because I wanted to take you off the pads." Hall then asked if his welding was bad, and Cason responded no, that he would have been the first person to tell Hall if such were the case.[102]

While I find that Cason's February 25 expression to Hall regarding the move from pads to fittings is more instructive (the abruptness supports an inference of animus) than his testimonial reason, it is to be noted that at the hearing Cason testified that he made the decision to move Hall from welding pads to welding fittings because Respondent was planning to increase its production of tank cars and there was a need for extra welders.[103] In order to obtain the additional production, Cason has to train new employees (trainees) to do the work. Cason testified that the normal practice is to refrain from assigning trainees to weld fittings because fittings are pressure-type work, whereas pads are not. Cason placed P. E. Chaney on the pad station with the trainees and assigned Hall to a fitting position because Hall had welded fittings previously. Cason specifically testified that no one replaced Hall on pad weldings, and that Charles Meshell did not replace Hall.[104] He further testified that welding on fittings was not a more difficult job, but that Respondent attempted to use only first-, second-, or third-class welders rather than trainees because fittings are pressure-type work. I do not credit Cason. His demeanor was not nearly as impressive as that of Hall and Meshell.

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[102] Indeed, Hall around late June 1979 was asked to go from his then assigned bay 8 to help out a few nights in bay 11. After Hall had welded fittings there for about a week, Supervisor Tom Britain complimented Hall on his "excellent" work, asked him to transfer to bay 11, and at the end of the first week, asked Hall to switch to welding pads because Britain needed a first-class welder on pads who did "not mind working." After Hall had spent only 1 night on pads, Britain was so pleased with Hall's "excellent" welding that he assigned Hall to pads. Britain did not testify.

[103] General Foreman Claude Veatch testified unpersuasively that he had no personal knowledge of why Hall was transferred from pads to fittings. Cason was bay foreman on the day shift, and Britain the second-shift foreman.

[104] I credit the testimony of Hall and Meshell that they swapped jobs. Since July 1979, Meshell had been welding fittings in bay 11. Employed by Respondent since 1972, and a first-class welder for 4 years, Meshell testified that he welded pads for 2 days in July 1979, but that Second Shift Foreman Britain removed him because of bad welding. Now, on February 6, an excellent pad welder, (Hall) was replaced by Meshell whom Britain had labeled as bad on pads.

Respondent contends that the record discloses that Hall and Meshell worked different shifts and that therefore Meshell could not have replaced Hall. In its brief, Respondent urges me to reverse my ruling excluding a pretrial affidavit (Resp. Exh. 48) of Hall. In the excluded affidavit, Hall stated that Meshell was "put on the 11-7 shift in Bay 11" on February 6, and P. E. Chaney was brought from the first shift and took Hall's place welding pads on the second shift. (Resp. Exh. 48, p. 2, rejected exhibit file.) Respondent offered the exhibit as impeachment after Hall had testified and left the hearing. I rejected the exhibit (offered during the rebuttal stage, and not during Hall's cross-examination), at the objections of the General Counsel and the Charging Party, on the basis that the offer came too late since Hall was not present to be given an opportunity to explain the statement. In its brief, Respondent argues that "no rule of evidence" requires an opportunity be given to explain a discrepancy between testimony and a prior recorded statement since both "stand on their own merits." Even if Hall were a full-party opponent, so that an admission normally would be received under FRE 801(d)(2), I would have had the same difficulty here from the standpoint of fundamental fairness and due process. While I consider that the two grounds just mentioned are sufficient to support my ruling, I note that FRE 613(b) states that a prior inconsistent statement of a nonparty witness is not admissible (for impeachment) "unless the witness is afforded an opportunity to explein or deny the same and the opposite party is afforded an opportunity to interrogate him thereon . . . ."

Respondent also observes that its Exh. 27, Meshell's daily record card, reflects that Meshell worked on the first shift the entire month of February. Even if that were so, it would not seem to be controlling. There is no contention that Meshell was not switched to pads on February 6. Whether he did so on the second shift or the first shift does not seem of controlling significance. The same amount of pad work was done, first shift or second, and Hall was switched to fittings. Moreover, Superintendent Greene specifically testified that the daily record card is less reliable than the computer printout, which in turn is based on the timecards punched by the employee. Accordingly, I do not accept Resp. Exh. 27 over the testimony of Hall and Meshell.

Although it is true that Hall had welded fittings previously, the abruptness and timing of the reassignment, coming immediately after Hall returned from the February hearing was made, I find, for the purpose of intimidating Hall, and serving as a warning to others—that union activities displease Respondent, and testifying against Respondent will not go unpunished. Thus, I find that Respondent, as alleged, violated Section 8(a)(1), (3), and (4) by transferring Hall from welding pads to welding fittings on and after February 6, 1980. Furthermore, I find that the purpose of assigning Hall to the physically more onerous job of welding fittings was twofold. First, to punish him physically, and second, to transfer him to a job where there would be a greater possibility that he would make mistakes which could provide a basis for his discharge.

While Respondent is not required to permanently assign Hall to welding pads, it is not entitled to reassign him for unlawful reasons. The remedy must be for Respondent to restore the *status quo ante*, i.e., return Hall to welding pads, if such job is in existence.

c. *March 11 written warning*

After he was assigned to welding fittings, Hall received a written warning, dated March 11, for "Unsatisfactory welding on U fitg. s/o 161598-03 TK-15." The work allegedly was performed by Hall on the evening of March 10.

Soon after Hall arrived at work the afternoon of March 11, Foreman Tom Britain came and informed him that he was wanted in the supervisor's office. On arriving in the office, and being seated, Hall observed that Foreman Delmo Cason was writing on a form. Completing his writing, Cason gave it to Hall and told him it was a warning slip for unsatisfactory welding.

Hall asked that if he was doing unsatisfactory welding on fittings, why Respondent did not put him back on pads where he had been performing satisfactorily, "because you know I suffer with arthritis and it is uncomfortable for me to weld on the fittings." Before Cason could respond, General Foreman Claude Veatch came into the office and asked Hall what his problem was. Hall replied that he was speaking to Cason. At that point, Cason told Hall, "Call me Mr. Cason."

Hall asked why he should have to say "Mr. Cason," and the latter stated, "Because I am the boss out here." Hall replied that he tendered respect to those who gave him respect, that the only titles in the plant were "leadermen, supervisors, general foreman and foremen," and that the "bosses" left when people stopped "sharecropping."

At or about that point Hall stated that he had not been shown his allegedly bad welding and he asked to see it. Veatch said that Cason and Britain did not have time to show the welding to him, and that: "Once we said you did something, that's what you did." When Hall then asked about disparity in warnings being issued, Britain replied:

> A bad welding is depending on how we look at it. Don't worry about the next man, no matter how bad it is, just worry about yourself.

Hall then returned to work.

Shortly thereafter, as Britain passed Hall at his work station, Hall again asked to see his bad welding. Britain replied that he did not have time to show Hall, and he thereupon walked away from Hall. Moments later employee Memphis Evans came over and asked Hall about the warning slip he had received. Britain returned, told Evans to return to his own work station, and then told Hall. "Hall, as long as you're in this bay, I don't want to catch you talking to no employees."[105]

Hall testified that in the past Respondent had showed employees their bad welding.[106] Indeed, when Hall was warned in 1977 for bad welding, he was shown the welding he had done which the Company claimed was substandard.

With respect to the allegedly poor welding, Veatch testified that Cason had discovered the poor welding and called Veatch over to examine it.[107] Agreeing with Cason, Veatch called Superintendent Greene to inspect the job since it appeared that a warning should be issued and a warning required Greene's approval. Greene also agreed that the welding was very poor. Veatch testified that the weld had to be gouged out and rewelded, and that such work was performed on the day shift before Hall arrived on the second shift. Veatch explained that the tank, number 15, had to be moved on through the assembly line to keep from holding up other work on the line.

Hall testified that he had not done any work on tank 15. He testified that he knew he had not because of notes he had been keeping on his work. He explained that after he testified at the February hearing, the "lawyers" suggested that he keep notes on his activities "because you never can tell what's going to happen after you testified against a person." Hall testified that he began making his notes when he returned to work on February 6, and that he made them for all of his work from his return through March.[108] He further testified that his notes[109] reflected that he had worked on tank 4 of job number 161610 on March 10 (G.C. Exh. 19, p. 10). He did not realize until later, after receiving the warning (which he put in his pocket without inspecting when Cason gave it to him), that he had not in fact worked on tank 15.

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[105] Welder L. H. Williams testified that about 2 weeks after the February hearing he was told by Foreman Britain not to talk with Hall during working time, yet Britain never applied the same restriction to his conversing with other employees even though they would do so during working time in the presence of Britain.

[106] This fact is corroborated by Meshell who testified that when he was verbally warned in July by Britain for bad welding, he was shown the welding on his request.

[107] Pin holes and poor appearance in a nozzle weld. Veatch testified that Hall's welding symbol was on the work. However, no photograph was offered in evidence of the weld as was done with Resp. Exh. 29 pertaining to a weld allegedly done by Arnold. Indeed, Greene testified that a photograph was made of some other work by Hall, yet that photograph was not offered in evidence either.

[108] Hall's last day at work was on March 31, and his termination followed on April 3.

[109] The notes are contained in G.C. Exh. 19, a small notebook with an orange cover. More will be said later regarding the book's authenticity.

As will be seen below, I find that Hall's notes (G.C. Exh. 19) are genuine, and that he carefully recorded in specific detail the job orders and tank numbers he worked on after returning to work on February 6. Respondent offered no documentary or other substantiating evidence in support of the testimony of its witnesses that Hall in fact worked on tank 15. As I find that Hall testified with a far more impressive demeanor than Respondent's witnesses, I credit Hall, and I therefore find that Respondent violated Section 8(a)(1), (3), and (4) of the Act, as alleged, by issuing the March 11 warning to Hall.

d. *March 15 verbal warning*

The record is somewhat confusing regarding the allegation of a mid-March verbal warning.[110] While it appears that supervisory personnel, including Superintendent Greene, concluded that Hall had done some bad welding on another tank, and so told Hall, there is no documentary evidence that a verbal warning issued. Veatch testified that no warning was given because Hall denied making the weld in question and Respondent could not demonstrate for certain that he had been the welder. In its brief, page 28, Respondent stated, "Hall was not given any type of warning because Hall denied that he had done the welding and there was no conclusive proof that he had in fact done it."[111]

To avoid extending this already lengthy decision, I shall forgo further discussion of the matter,[112] and I shall dismiss the allegation, paragraph 11 of the second (April 28, 1980) complaint.

e. *Suspending and discharging Hall*

(1) March 31 conference room meeting and suspension

Hall's suspension and discharge were triggered by the same event. Therefore, the two allegedly discriminatory actions[113] are combined for treatment.

On March 14, the Union filed its charge in Case 15-CA-7621 (one of the instant cases) alleging that Respondent had violated Section 8(a)(1), (3), and (4) of the Act by issuing the March 11 written warning to Hall. The return receipt, in evidence as G.C. Exh. 1(d), reflects that Respondent received the charge on March 17. A few days later, Respondent accused Hall of faulty welding, suspended Hall and then discharged him.

It is undisputed that on March 31 Hall was summoned to a meeting of a disciplinary committee in the conference room adjacent to the office of Hillman Deaton, manager of employee relations. The six[114] present at the meeting were:

William Bradshaw—Vice President of Manufacturing
Hillman Deaton—Manager of Employee Relations
George Dillard—Personnel Manager
Claude Veatch—General Foreman, Bay 11
Rupert Sepulvado—General Foreman, Bays 5, 6 and 13
Willie Hall, Jr.—Welder

All of the six-named persons testified concerning the meeting, and there is a sharp, and critical, conflict between the version given by Hall and the essentially singular version given by the five management representatives.[115]

Deaton also identified a reject report (Resp. Exh. 37) which describes the defective work allegedly done by Hall on tank 22. Dated March 25, the reject report (on quality control form 206) reflects that rail car tank 22, out of project number 161595-03, was rejected for faulty welding performed in bay 11.[116] The defective welding is described as:

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[110] Different dates are referred to in the record, and there are references to different tanks (14 and 22).

[111] Hall testified that the matter even progressed to a meeting in the office of Hillman Deaton, manager of employee relations. In the presence of Superintendent Greene and General Foreman Veatch, Deaton told Hall he would have to accept Hall's word that he had not done the welding in question since Foreman Britain did not know (was unable to demonstrate) that Hall had done it.

[112] It should be noted that in conjunction with this second mid-March event, Greene testified, without contradiction, that he told Hall he had a welding problem, and suggested that Hall transfer to the day shift in order that he could receive some retraining, either on the job or at welding school. Hall declined, saying that he had no problem with his welding and that he preferred the second shift. Greene acquiesced, but asked Hall to seek assistance from the second-shift welding technician and supervisors if he saw that he had a welding problem. Greene concluded with the admonition, "But we can no longer tolerate this type of work, and if it continues, the company is going to have to take further disciplinary action." At the hearing, Hall testified that when he accepted the offer of welding assistance in 1977 he even received a warning during such assistance, and, figuring Respondent would do the same to him this time, he declined.

[113] Hall's March 31 suspension is the subject of par. 12 of the second (April 28) complaint, and his April 3 discharge is alleged in complaint par. 13.

[114] Only Bradshaw named a seventh, Superintendent E. C. Greene. During his own testimony, Greene testified that he was on vacation the week of the meeting.

[115] In its brief, Respondent suggests what amounts to a numbers test. Thus, it argues that I must accept Respondent's version or conclude that the five conspired to commit perjury. I reject this argument. While the number of witnesses supporting one version of a factual conflict is one factor to be considered, it is not the controlling one in credibility resolutions. Were it so, an administrative law judge's responsibility would end, in this instance, after outlining the dispute and, on noting that the division of witnesses is 5 to 1, accepting as true the version of the five. Such is not the law.

[116] Hall's notebook (G.C. Exh. 19) reflects that he welded fittings on two tanks numbered 22. The first occasion was on March 14 on project number 161595-03 (the same project number noted on Resp. Exh. 37), and again on March 25 (the very date of Resp. Exh. 37) respecting project number 161610. It appears very likely that tank 22 of March 14 (project 161595-03) was the subject of the almost issued verbal warning concerning a nozzle discussed in the prior subsection of this Decision. Veatch's testimony would seem to so indicate, although he places the date later. Greene places the date about mid-March, but at one point he

Continued

> The weep hole on the repad on the U nozzle leaked when the coils were on hydro. Request repair procedure. The vessel has not been hydro tested.

The report further reflects that after the leak in the repad was repaired, that area passed the hydrostatic (water pressure) test.

Hall's account of the conference room conversation describes the confrontation in such graphic detail that it justifies repetition[117] here:

> And, the conversation started off, Hillman Deaton spoken to me, he said, "Hall, the last meeting that you and I had together, I thought we resolved everything and worked out everything together, but I find out later that you filed unfair labor practice charges against us."[118] And, he said, "What makes you think you are right in doing this?"
>
> I spoken and said, "Deaton, it's not that I think I'm right. I am doing what the law says that I have a right to do when I feel a person is harassing me."
>
> And, at that time, George Dillard spoken up. He said, "Hall, in 1977 you filed unfair labor practice charges against us and you went all the way to Washington, D.C. with it and you lost. Now, what makes you think you will win this charge?"
>
> I spoken and I said, "Dillard," I said, "what happened in 1977 doesn't mean it's going to happen in 1980." I said, "This is a new ball game."
>
> And, at that time, George Dillard spoken up, he said, "Hall, it is you who are harassing the foremen in the bay out there, by taking this little notebook of yours and going out there and writing down everything you do. We should be filing charges against you."[119]
>
> I said, "Well, George Dillard, if you think you should file charges against me, then do that."
>
> Q. Then what happened?
>
> A. And then, William Bradshaw, he spoken up. He said, "Hall, they also have unsatisfactory work that you did out there in the bay." I think he said Bay 10 or 14, I'm not sure.
>
> So, I asked him, I said, "Bradshaw, would you draw me a picture or a diagram and show me what was the bad welding I did out there?"
>
> So, he got a pencil and a piece of paper and he drew a diagram of the pad I was supposed to have welded.
>
> And, so, I smiled and looked at it and said, "This seems funny to me."
>
> He said, "What's so funny about it, that you don't understand?"
>
> I said, "You all taken me off of pads February 6th, 1980. You say this was welded in March. How could I have welded this?"
>
> And, at that time, Claude Veatch spoken up, he came over there and looked at the picture and said, "No, this is the wrong picture, a wrong diagram."[120] So, at that time, I spoken up and said, "Well, it seems as though you all can't get your story together here."

Hall testified that at one point Bradshaw told him he had done $20,000 to $30,000 worth of bad welds on a tank, and Hall replied that he could not have done that much welding, good or bad, in a whole week.

At that point Dillard advised Hall that he could leave and, after an exchange of a few more words, Hall left the conference room. After about 5 to 7 minutes the others also emerged. Deaton then called Hall into the former's office and told him that the committee had voted to send Hall home. Not knowing Sepulvado, Hall asked for the correct spelling of the foreman's name. Deaton said he did not know, and Hall, pulling out his notebook, said that he would spell it as best he could. Deaton then stated: "Hall, this is what I'm talking about. This is what is going to cost you your job." Hall asked what Deaton was referring to, and the latter replied: "That little book. You get rid of that book and the rest of it,[121] and everything could be more easy for you."

Hall said he had paid 35 cents for the book and intended to keep it since other welders and fitters have books they make notes in. Deaton then asked Hall why he persisted in his belief that the Union would succeed in coming in the plant in light of its past failures, and Hall replied, in effect, that this time the situation was different. After further conversation, Hall asked whether he was fired and Deaton told him no. As Hall prepared to leave, Deaton asked, "Hall, will you get rid of that little book?" Hall replied in the negative, and went home.

Turning now to the version of Respondent's five witnesses, I note that their essentially singular report is devoted mainly to denials that Deaton and Dillard referred to any 1977 or 1980 unfair labor practice charges, and denials that Deaton linked Hall's problem to the notebook he had.

Respecting the 1977 charges, the version of the management witnesses is that the only reference to them

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refers to tank 14. Hall identifies the March 14 tank 22 as the subject of his near verbal warning. As Hall further explained, the digits 03 are part of the job or project number on March 14 tank 22. The digits 22 following job number 161610 on March 25 designate the tank number and are not part of the job number as one might conclude. Hall explained that he did not always include the last two digits following the dash on the job number, and that such two digits in his notebook refer to the tank number.

[117] The quoted testimony is from Hall's direct examination. When asked on cross-examination to repeat his story, Hall did so in a remarkable display of memory recall. I conclude that the March 31 event remained very vivid in Hall's mind.

[118] An obvious reference to the March 14 charge relating to the written warning issued to Hall on March 11.

[119] Although Dillard's remarks are not the subject of a complaint allegation, they constitute threats in violation of Sec. 8(a)(1) of the Act, if actually made. I credit Hall, and I find an additional 8(a)(1) violation based on this fully litigated matter. *Salem Transportation, Co., Inc.*, 252 NLRB 1103 (1980).

[120] During cross-examination by the Union, Veatch conceded that Bradshaw diagramed a big wrap pad rather than the fitting reinforcement pad which allegedly leaked because of improper welding by Hall.

[121] Hall stated that he asked Deaton if the "rest of it" referred to the charges he (the Union on his behalf) had filed, but that Deaton made no comment.

came when Bradshaw asked Hall if he kept notes of all his work, and Hall replied that he had been told to do so after the 1977 charges.[122]

Bradshaw testified that he sat next to Hall at the conference and that Deaton opened the meeting by saying they were there to review Hall's bad welding work on tanks 15,[123] 14,[124] and 22.[125] Bradshaw testified[126] that he asked Hall whether he had welded on tank car 22, and that Hall pulled a little black or navy blue[127] book from his shirt pocket[128] and said he had to look at his book. Hall then confirmed that he had indeed worked on tank 22 and gave an unspecified date.[129] Bradshaw then asked Hall if he kept records of everything he did, and Hall replied, "Yes, sir, since I had some unfair labor practices turned down on me and they advised me to keep records and that is what I'm doing."

Bradshaw further testified that after Hall was dismissed from the meeting, the committee decided to send him home (suspend him) "until we could further investigate the whole aspect of all his welding." He further testified that as the committee left the conference room, Hall, waiting in an adjacent area, asked Bradshaw, not Deaton, who Sepulvado was and how to spell his name. According to Bradshaw, he spelled the name slowly for Hall who had out his notebook.[130]

Despite Bradshaw's reference to further investigation, no evidence of such was presented at the instant hearing. In fact, there is only limited evidence regarding the welding allegedly performed by Hall on tank 22. Such evidence came from Sepulvado and Veatch.

Sepulvado, general foreman over bays 5, 6, and 13, testified that tank 22 had been built in bay 11 and then sent to bay 13 where his people welded external coils to the tank. Thereafter, tank 22 was "sold to inspection" by bay 13, and hydro tested in bay 14[131] where it reportedly leaked.[132] Tank 22 was returned to bay 13 where Sepulvado's crew cut off the coils and discovered that the leak was coming from the reinforcement pad for the unloading nozzle which is welded to the tank. The leak was repaired, the coils reattached, and welded again. On cross-examination, Sepulvado testified that the welding inspector identified Hall's welding symbol.[133]

Veatch testified that Hall, concerning the near verbal warning in mid-March regarding tank 22 (job number unspecified), stated that he had welded all the fittings on the tank except the bottom unloading nozzle then under question. Indeed, Veatch said all the other fittings bore Hall's welding symbol. Accordingly, Veatch explained that when the second failure developed, a leak during a hydrostatic test of certain coils, it was known that the work had been performed by Hall. However, Veatch conceded that he was unable to say himself exactly what item on tank 22 leaked since the repair was not handled in his bay.

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[122] Of course, this does not coincide with the notebook dates which begin with February 6, 1980. Hall testified that it was during the February 1980 hearing that the "lawyers" suggested he keep notes, and he began doing so on February 6.

[123] Apparently the subject of the March 11 written warning.

[124] When called as a 611(c) witness the first day of the hearing, Superintendent Greene at one point stated that Hall had done bad welding on a tank 14. There is no other evidence in the record clarifying this reference. Greene went on to describe his talk with Hall in which he offered him welding assistance and retraining. However, the record shows that such offer pertained to Hall's allegedly faulty welding in mid-March on tank 22—for which no warning issued because it could not be demonstrated that Hall was responsible for the weld in question.

[125] It is unfortunate that the parties failed to develop a clear record regarding tank(s), 22. As already observed, Hall's notes reflect two different tank 22's on different dates in March. At the hearing, Respondent denied that Hall received a verbal warning for the mid-March welding on a tank 22 (job or project number not specified), and then on March 25, repair was requested on a tank 22 with the same job number corresponding to Hall's notes for the date of March 14.

[126] Although the meeting was on March 31, Bradshaw said he could not recall the date, and that it seemed like "four or five weeks ago." Bradshaw testified on August 7—over 4 months after the meeting.

[127] All five of Respondent's witnesses so identified the color, and further stated that the book opened from right to left. The notebook Hall identified (G.C. Exh. 19) is orange and opens from bottom to top. All five denied that G.C. Exh. 19 was the book Hall referred to. There is no dispute that the pages were loose. Bradshaw said the pages Hall had were dirty from shop sweat and frayed. Dillard said some of the pages had grease on them. On rebuttal, Hall credibly explained that there was no occasion for the pages to be greasy since he wears gloves to weld and pulled the gloves off to write. Moreover, I note that the orange cover to G.C. Exh. 19 has what appears to be a welding burn on the front, and that the pages are either sweat or water stained. Contrary to Respondent's suggestion on brief, the notebook does not have the appearance of being purchased a few days before the hearing. I find it to be the notebook Hall used.

[128] Hall testified that he was not certain whether he pulled the book from his pocket in the conference room meeting, although he was sure he did when he met later only with Deaton. It seems logical that Hall would have referred to his notes in the conference room and I find that he did remove the book from his pocket there to inspect his notes.

[129] Contrary to Veatch's testimony that Hall's weld symbol was on all (except one) of the fittings on tank 22, Hall testified that on tank 22 he welded only two fittings, the manway and the fitting next to the manway. Sepulvado identified the point of leak as the reinforcement pad of the *unloading* nozzle. As Veatch identified the unloading nozzle as being on the bottom of the tank, and Hall implied that the manway is on top of the tank, it seems evident that Hall did not weld the item which leaked (if there was a leak). Finally, in view of Veatch's testimony that the unloading nozzle leak, for which Hall almost received a verbal warning in mid-March, was repaired by replacement, and Sepulvado described the item which lead to Hall's suspension and discharge as the reinforcement pad for the unloading noozle, there is every possibility that, if there in fact was a leak, it was caused by whoever "cut the bottom out, replace[d] it." In short, there is every indication that Respondent seeks to blame a leak in the replaced bottom on Hall, when he in fact had nothing to do with the replaced part and Respondent knew very well he had nothing to do with it.

[130] The spelling which appears in G.C. Exh. 19 appears to be "Sepvead." Thus, this misspelling is more consistent with Hall's version than with Bradshaw's. Even if G.C. Exh. 19 is not the notebook Hall displayed on March 31, as Bradshaw and the others testified, it would seem that in any recopying by Hall into G.C. Exh. 19, the correct spelling of Sepulvado would appear if Bradshaw spoke slowly. I credit Hall concerning this matter.

[131] Hall testified that the work done in bay 11 is inspected and tested by air pressure in conjunction with soap and water, and if there is a leak it is repaired before the tank leaves bay 11. This raises some question regarding Respondent's later evidence that Hall's work was discovered in another bay to be the cause of a leak.

[132] The General Counsel's hearsay objection was overruled. Thus, this testimony is evidence only of the reported course of action and not proof that there in fact was a leak.

[133] It is undisputed that the welders have symbols they stamp into the work to identify it. Hall testified that his weld symbol had always been QN until sometime in March (before the March 31 meeting), but that he did not recall the new symbol since he had used it only a short time. Sepulvado did not identify the weld symbol the inspector found; the inspector did not testify; and the record does not disclose what symbol, if any, was found.

According to Deaton, the March 31 meeting was very short. He opened it by referring to tank 22[134] and told Hall that there was a problem with his welding performance. Hall replied that the only problem was that he was being harassed. Deaton said welding code specifications had to be met. Bradshaw then asked Hall if he had worked on tank 22, and Hall removed a small notebook from his pocket, thumbed through the pages, and said yes. At that point there was some discussion concerning whether it was pad or fitting work (an apparent reference to Bradshaw's diagram). Bradshaw asked Hall if he made notes about everything on the job and Hall responded, "No, but since I filed those unfair labor practices in 1977 and they were not successful, I have been told to write down job developments as they occur." Deaton testified that was about the extent of the meeting. He denied the various hearing assertions of Hall regarding Deaton's and Dillard's references to charges and to the notebook.

Deaton further testified that just after the committee left, and while he and Hall were in Deaton's office, he advised Hall that the committee had decided to suspend him during an investigation in which his case would be further reviewed. Deaton denied that there was any reference to Sepulvado, the Union, or Hall's notebook while they were in his office. He testified that his next conversation with Hall was to advise him that he had been terminated.

Dillard testified that he said nothing at the meeting. His testimony is consistent with that of the other four management representatives.

(2) April 3 discharge of Hall

Deaton testified that he could not recall the exact date the decision was made to terminate Hall, but that it was made in the 3-day period between March 31 and April 3. Dillard recalled that the discharge decision was made the day after the March 31 suspension.

Deaton testified that when Hall telephoned him on April 3 he told Hall that the committee had met and had "rendered a termination." He denied that there was any reference to Hall's notebook in this very brief conversation. Bradshaw testified that he happened to be in Deaton's office when the telephone rang. While he could not hear what the caller said, he could hear Deaton's statements. According to Bradshaw, Deaton said, "Willie, I was just fixing to call you. You have been terminated." Deaton told the caller to come get his check at anytime, and that ended the *3-to-4-second* conversation. Bradshaw denied in his testimony that Deaton said, "We voted Wednesday to terminate you." Of course, Deaton's own version comes very close to that which Bradshaw denied.

Hall testified that when he telephoned Deaton the latter said he was glad Hall had called, because he was about to call him. Deaton then said, "Well, they had a conference concerning you. They voted to terminate you." According to Hall, Deaton said that he could give up his notebook or quit. Hall said he would not give up the book and that Deaton would not get it short of a court order. Deaton then told Hall he was terminated and they then discussed the procedure for Hall to pick up his check.

One final point to be considered is Hall's testimony that when he and Deaton were conversing in Deaton's office at the time of Hall's March 31 suspension, Deaton allegedly told Hall he was with Hall 100 percent.[135] Hall told Deaton that Deaton would lie if necessary in order to save his job and feed his family, that such was just human nature. On cross-examination, Hall modified the reference to human nature to say that it depends on the individual.

(3) Attorney-client privilege

Before concluding the issues regarding Hall, it should be observed that Sepulvado admitted on cross-examination by counsel for the General Counsel that before testifying he had reviewed a list of questions with Respondent's attorney, William E. Hester III. Although Sepulvado had a copy of the list with him, he did not refer to it during his testimony. When counsel for the General Counsel moved for production, attorney Hester objected on the basis of attorney-client privilege. Counsel for the General Counsel argued that the objection should be overruled because (1) the privilege had been waived when the questions were asked; (2) the document was producible under the Jencks Act; and (3) privilege, if such, was outweighed by the interest in developing a probative record. The Union took no position. After some colloquy regarding this matter, I declined to order production under Federal Rule of Evidence 612(2) (order to produce is discretionary where notes reviewed *before* testifying), and I sustained the objection. In order to preserve the notes for examination on review, or remand, they were placed in an envelope, marked as General Counsel Exhibit 32, and the envelope sealed and marked, in part, "Sealed Exhibit."

Only counsel for the General Counsel addresses the matter in his brief where he additionally argues that the notes are not protected by the attorney-client privilege since only a communication from the client, not the reverse, is privileged. In the alternative, counsel for the General Counsel argues that in assessing credibility I should consider the fact that Sepulvado's testimony was based on a two-page list of questions he studied prior to testifying.

In adhering to my ruling, I observe that the "Report of House Committee on the Judiciary" on Fed. R. Evid. 612 states, "The Committee intends that nothing in the Rule be construed as barring the assertion of a *privilege* with respect to writings used by a witness to refresh his memory." (Emphasis supplied.) The attorney-client privilege is encompassed within Fed. R. Evid. 501. Finally, I take note of the Supreme Court's recent decision in *Upjohn Company et al.* v. *United States (IRS)*, 49 L.W. 4093 (January 13, 1981), wherein the Court essentially declared that corporations enjoy the same attorney-client privilege as an individual.[136] No different result would obtain even if the notes are considered only the "work product" of attorney Hester. I do not consider that the notes detract from Sepulvado's credibility any more than I deem as detracting from Hall's credibility the fact he had two pretrial affidavits which he presumably reviewed before testifying.

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[134] Unlike Bradshaw, Deaton did not list tanks 15 and 14.

[135] Supposedly this related to a remark by Deaton that his job would be easier if the plant were unionized.

f. *Conclusions regarding Hall's case*

Respecting the notebook question, I credit Hall's testimony that General Counsel's Exhibit 19 is the notebook he had in his possession at the March 31 conference room meeting. Hall testified in a straightforward and detailed manner and, with one exception hereafter noted, I credit his testimony completely. In contrast, Bradshaw, as noted above at various points, could not recall relevant facts. Indeed, it seems that Bradshaw has a tendency to testify in a positive way about erroneous facts. An example is the fact that Veatch admitted that Bradshaw's March 31 diagram depicted a wrap pad rather than the item allegedly welded improperly by Hall. The witnesses other than Bradshaw devoted most of their testimony about the March 31 meeting to simple denials of some of Hall's assertions rather than giving a detailed description of what was said there.

Although the entries in Hall's notebook specify job numbers and tanks he worked on, Respondent did not offer any company documents demonstrating that Hall did *not* work on the tanks reflected by the notebook entries.[137] Respondent had ample opportunity to produce rebuttal records inasmuch as there was a hearing recess between August 8 and 27 when resumed with the majority of Respondent's case. Hall had testified on August 6, the third day of the hearing.

Turning now to the March 31 meeting, I credit Hall's specific and detailed account over the rather flat descriptions offered by Respondent's witnesses. Moreover, I note that Hall testified forcefully and convincingly. Even when Hall was asked on cross-examination to repeat his story, he did so in an unhesitating manner and in an almost identical detail.[138] In short, Hall's version has the ring of truth.

The one point concerning which I do not credit Hall is his testimony regarding Deaton's supposed April 3 offer that Hall give up his notebook in exchange for returning to work. Unlike the rest of Hall's testimony, this particular point just does not "fit." Thus, it appears that before the discharge decision Deaton often assumed a kind of mediator role, or that of a grievance referee, and could conceivably make the remarks Hall attributes to him. In contrast, it is illogical that Deaton, *after* the decision to terminate had been made, would have offered Hall a chance to return to work. Particularly, this is so where, as I find, Respondent was seeking any pretext to rid itself of Hall.

On the other hand, I accept Hall's testimony that in the March 31 conference room meeting Deaton and Dillard did refer to the notebook as described by Hall, and that Deaton, later in his office, told Hall that the notebook was going to cost him his job.[139]

Respecting the basis for the March 11 warning, I find that Hall did not perform any welding on tank 15, and that Respondent attributed any defective welding on the tank to Hall as a pretext to build a current record against him because of his union activities and his February testimony.[140]

I further find and conclude that Respondent sought to attribute bad welding on tank 22 to Hall for the same unlawful reasons, and that it thereby violated Section 8(a)(3) and (4) by suspending Hall on March 31 and discharging him on April 3.

Considering now Respondent's *Wright Line*[141] burden, I find that although the General Counsel has shown that unlawful considerations were motivating factors in Hall's reassignment, warning, suspension, and discharge, Respondent has failed to demonstrate affirmatively that it would have reassigned (to fittings), warned, suspended, and discharged Hall notwithstanding his protected conduct. Some of Respondent's failure in this regard is the rather confusing evidence regarding tank 22. Evidentiary references to the tank were usually not connected to a job number, and Respondent offered unsatisfactory evidence that Hall in fact welded the item which leaked.[142] Indeed, there is only hearsay evidence that there was a leak in fact, and that was admitted over the General Counsel's objection merely to show a course of action (and why Respondent took the action it did). Sepulvado's testimony that his bay employees repaired the area which leaked is not competent evidence of a leak in fact since only the inspector conducting the hydrostatic test could observe a leak. Sepulvado's crew simply repaired the area a leak was presumed to flow from.

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[136] Thus, it is immaterial that Sepulvado is a line supervisor and not member of a managerial "control group." As an agent with relevant knowledge, communications with Sepulvado are protected by the attorney-client privilege.

[137] Resp. Exh. 18, relating to Arnold's case, is a computer printout of work performed on a specified project, and Superintendent Greene testified that there are computer printouts which are made by the accounting department for all jobs. Moreover, Resp. Exh. 47, also introduced regarding Arnold's case, describes the project number and the number of tanks. Hence, I conclude that there were records available which Respondent could have offered had it chosen to do so, and I draw an adverse inference from its failure to do so.

[138] Moreover, Hall's version not only is internally consistent, it is consistent with independent facts: the 1977 and 1980 unfair labor practice charges and the fact that he did keep a notebook as Respondent well knew in advance of the meeting.

[139] This remark simply reflected that the notebook symbolized Hall's protected union and testimonial activities. Moreover, as Hall's testimony reflects, Deaton would pretend to be a kind of confidant to Hall whenever they were alone in Deaton's office. This, then, explains why Deaton would tell Hall that the notebook would cost him his job.

[140] Hall's last pre-February warning came in March 1978. His pre-February record has several poor performance warnings, including one which underlines some pointed language about further discipline. Nevertheless, one must ask why Respondent retained Hall in the years 1973 to March 1978 if it considered him a poor welder. One must also wonder why Hall, whose performance was warning free between 1978 and March 11, 1980, all of a sudden could do nothing right.

[141] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[142] The welding inspector who, according to Veatch, identified Hall's weld symbol was not called to testify. Moreover, Veatch's testimony is of questionable accuracy since Hall testified that his weld symbol was changed in March. Although Respondent was quick to offer photographs of other work in question in this case, none was offered of the item in instant dispute—even though Greene conceded that some were made of tank 22 in mid-March. In short, Respondent's evidence is far too skimpy and garbled.

Accordingly, as I find that Respondent has not carried its *Wright Line* burden, I shall order that it expunge the March 11 warning from Hall's employment record, revoke the March 31 suspension and April 3 discharge, reinstate Hall to welding pads (if such job is in existence), and make him whole.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by unlawfully interrogating employees about their protected activities, by giving them the impression of unlawful surveillance, and by illegally threatening them because of their protected activities.

4. Respondent has violated Section 8(a)(3), (4), and (1) of the Act by assigning employees to more onerous and less desirable work, subjecting them to stricter supervision, requiring them to adhere more closely to plant rules, restricting their communications with their fellow employees, citing them with unexcused absences, and by warning, transferring, and discharging employees.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not issue Willie Hall, Jr., a verbal warning on or about March 15, 1980, and therefore did not violate Section 8(a)(3) and (1) as alleged.

7. Respondent did not violate Section 8(a)(3) and (1) of the Act by transferring Willie D. Broden from the second shift to the first shift on or about June 16, 1980.

THE REMEDY

In view of the foregoing, I shall recommend that Respondent be ordered to cease and desist from its illegal conduct, and to (1) expunge the unexcused absences charged to Cecil M. Sanders for February 4 and 5, 1980, and inform him it has done so; (2) expunge the warnings issued to Lynn A. Arnold, Willie D. Broden, Willie D. Crowder, J. R. Grant, Willie Hall, Jr., Cecil M. Sanders, and Thomas B. Stamper and notify them personally that it has done so; (3) retransfer Arnold, Sanders, and Stamper to their former positions in bay 5, which they enjoyed prior to their discriminatory reassignments and transfers in February 1980 or, if such jobs no longer exist, to substantially equivalent jobs; (4) reinstate Hall to his second-shift position of welding pads in bay 11 which he occupied prior to his February-April discriminatory reassignment, suspension, and discharge, or, if such job no longer exists, to a substantially equivalent position; and (5) make whole, with interest, Arnold, Crowder, and Hall for any loss of earnings they may have suffered by reason of the discriminatory suspensions and discharge taken against them. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[143]

The Respondent, Riley-Beaird, Inc., Shreveport, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union activities and that of other employees.

(b) Unlawfully interrogating employees concerning charges they have filed with the Board.

(c) Creating the impression of surveillance of employees' union activities by telling them that a supervisor has been instructed to observe their union activities.

(d) Unlawfully threatening employees with filing of charges against them because they make and keep notes concerning their work and events at work.

(e) Illegally threatening employees with discharge because they make and keep notes concerning their work and events at work.

(f) Unlawfully charging employees with unexcused absences to penalize them for being absent from work in order to give testimony at a Board proceeding.

(g) Assigning employees to more onerous and less desirable work, subjecting them to stricter supervision, requiring them to adhere more closely to plant rules, and restricting them in communicating with their fellow employees because they support the Union, or any other labor organization,[144] or because they have filed charges or given testimony under the Act.

(h) Unlawfully issuing warning to employees.

(i) Unlawfully reassigning and transferring employees.

(j) Illegally suspending and discharging employees.

(k) Discouraging employees from membership in International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organizations, or discouraging employees from filing charges or giving testimony under the Act, by unlawfully reassigning, warning, suspending, or discharging any of its employees, or discriminating against them in any other manner with respect to their hire or tenure of employment in violation of Section 8(a)(3) and (4) of the Act.

(l) In any like or related manner interferring with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to act together for the purpose of collective bargaining or of other mutual aid or protection, or to refrain from any or all such activities.

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[143] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[144] The phrase "or any other labor organization" is appropriately included. *Elk Brand Manufacturing Company*, 253 NLRB 1038 (1981).

2. Take the following affirmative action which will effectuate the purposes of the Act:

(a) Offer Lynn A. Arnold, Willie Hall, Jr., Cecil M. Sanders, and Thomas B. Stamper immediate and full reinstatement to their former positions of employment or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make whole Lynn A. Arnold, Willie D. Crowder, and Willie Hall, Jr., for any loss of pay they may have suffered by reason of Respondent's discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Remove from its records and destroy all copies of, and references to, the warnings issued as shown below:

Lynn A. Arnold	March 6, 1980 April 11, 1980 May 29, 1980
Willie D. Broden	April 25, 1980
Willie D. Crowder	March 12, 1980
J. R. Grant	April 11, 1980 May 30, 1980
Willie Hall, Jr.	March 11, 1980
Cecil M. Sanders	February 4 and 5, 1980, unexcused absences July 22, 1980
Thomas B. Stamper	February 25, 1980

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Shreveport, Louisiana, plant signed and dated copies of the attached notice marked "Appendix."[148] Copies of said notice, on forms provided by the Regional Director for Region 15, and after being duly signed and dated by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaints be dismissed insofar as they allege violations not specifically found herein.

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[148] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Cambridge Contracting, Inc. and Cambridge Chemical Corp. *and* Fred Ens, Jr., Paul P. Pruss & Son, Inc., and Fred Ens, Sr.

Cambridge Contracting, Inc. *and* Fred Ens, Sr. Cases 22-CA-9254, 22-CA-10198, and 22-CA-10354

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 29, 1981, Administrative Law Judge Joel P. Biblowitz issued the attached Decision in this proceeding. Thereafter, Charging Party Fred Ens, Sr., filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the informal settlement agreement entered into between the parties on January 24, 1980, and vacated and set aside by the Regional Director for Region 22 of the National Labor Relations Board on November 26, 1980, be, and it hereby is, reinstated.

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[1] Charging Party Ens, Sr., has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was heard before me in Newark, New Jersey, on May 26 and 27, 1981. An order consolidating cases, first amended complaint issued on November 26, 1980, based on charges filed as follows: Case 22-CA-9254 was filed on May 29, 1979, and amended on July 5, 1979; Case 22-CA-10198 was filed on August 5, 1980, and amended on October 9, 1980; Case 22-CA-10354 was filed on October 20, 1980. The complaint alleges that Cambridge Chemical Corp., herein called Respondent Chemical, and Cambridge Contracting, Inc., herein called Respondent Contracting, and at times collectively referred to as Respondent Cambridge, discharged Fred Ens, Jr., on or about May 3, 1979, because he joined or assisted Local 394, Laborers International Union of North America, AFL-CIO, herein called Local 394, and engaged in other concerted actions, and discharged Fred Ens, Sr., on May 18, 1979, because of the unfair labor practice charge filed by Ens Jr. regarding his discharge.[1] The complaint also alleges that Paul P. Pruss & Son, Inc., herein called Respondent Pruss, discharged or laid off Ens Sr., Ens Jr., and Golie Ricks on May 9, 1980, at the request of Respondent Cambridge, because they joined or assisted Local 394, engaged in other concerted actions, and because they filed or otherwise participated in a Board proceeding under the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent Contracting and Respondent Chemical, New Jersey corporations with their principal office and place of business at 11 West 21 Street, Linden, New Jersey, are affiliated business enterprises with common owners, directors, personnel, facilities, and a common labor policy. Admittedly, Respondent Contracting and Respondent Chemical constitute a single integrated business enterprise and a single employer within the meaning of the Act. Respondent Cambridge is engaged in the business of providing and performing tank cleaning, heavy equipment cleaning, light construction services, and related services. In the course of its business operations during the 12-month period preceding November 1980, Respondent Cambridge caused to be purchased and delivered to its Linden office cleaning equipment and materials, and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported to said Linden office in interstate commerce directly from outside the State of New Jersey.

Respondent Pruss, a Pennsylvania corporation with its principal office in Elizabeth, New Jersey, is engaged in the business of providing and performing tank cleaning services and related services. During the calendar year 1979 Respondent Pruss provided and performed tank cleaning services valued in excess of $50,000 for enterprises including, *inter alia*, Exxon Company, U.S.A., located within the State of New Jersey, which enterprises, including Exxon Company, U.S.A., are directly engaged in interstate commerce. It is admitted, and I find, that Respondent Cambridge and Respondent Pruss are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[1] An allegation in the complaint that Respondent Cambridge granted an unlawful wage increase was withdrawn at the hearing.

259 NLRB No. 184

II. THE LABOR ORGANIZATION INVOLVED

Respondents admit, and I find, that Local 394 is a labor organization within the meaning of Section 2(5) of the Act.

III. BACKGROUND

On May 3, 1979, Respondent Cambridge discharged Ens Jr. allegedly because of his activities on behalf of Local 394 or his other concerted activities; on May 4, 1979, Ens Jr. filed an unfair labor practice charge with the Board regarding his discharge. On May 18, 1979, Respondent Cambridge discharged Ens Sr. allegedly because of his participation in, and in reprisal for, the unfair labor practice charge filed by Ens Jr. On or about January 24, 1980, prior to the unfair labor practice hearing in the matter, Ens Jr. and Respondent Cambridge entered into an informal settlement agreement (approved by the Regional Director) providing for, *inter alia*, certain moneys to be paid to Ens Sr. and Ens Jr. and a notice providing, *inter alia*:

> WE WILL NOT discharge or otherwise discriminate against our employees because of their membership in, activities on behalf of, and support for, Local 394, Laborers' International Union of North America, AFL-CIO, or any other labor organization.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

Prior to the execution of this informal settlement agreement, Ens Jr., Ens Sr., and Ricks had obtained employment with Respondent Pruss. On May 9, 1980, Respondent Pruss discharged Ens Sr. and Ricks and laid off Ens Jr. The complaint alleges that Respondent Pruss discharged or laid off Ens Jr., Ens Sr., and Ricks because it was requested to do so by Respondent Cambridge for the same alleged reasons that Respondent Cambridge discharged Ens Jr. and Ens Sr.—their concerted activities and their filing of charges and participating in Board proceedings under the Act. On November 26, 1980, the Regional Director withdrew approval of, and vacated and set aside, the informal settlement agreement dated January 24, 1980, and incorporated the original allegations of the May 1979 discharges in the consolidated amended complaint issued on November 26, 1980. The moneys paid by Respondent Cambridge to Ens Jr. and Ens Sr. pursuant to the informal settlement agreement were not returned to Respondent Cambridge.

The attorney for Respondent Cambridge (who at the instant hearing represented all the Respondents) filed an undated brief and notice of motion requesting "that the Order withdrawing approval of the settlement agreement should be vacated, as a matter of law or, in the alternative, a severance of that proceeding should be granted from the unfair labor practice charges separately issued as against Pruss and Cambridge arising out of the discharge by Pruss of employees Ens Sr., Ens Jr., and Golie Ricks and an initial hearing held before a different Administrative Law Judge." On May 18, 1981, John M. Dyer, Associate Chief Administrative Law Judge, issued an order where he stated:

> IT IS HEREBY ORDERED that the Motion be denied. One question to be decided is whether the terms of the settlement agreement were violated by the actions alleged in complaint paragraphs 20 and 21. If the Judge decides that such actions violated the terms of the settlement agreement as alleged in complaint 22, he thereby finds that the settlement agreement was properly set aside. If the Judge finds that the actions did not violate the terms of the settlement agreement, then it will be ordered reinstated. Respondent is not prejudiced by so proceeding since this is the threshold question. For this reason and the reasons expressed in Counsel for the General Counsel's Opposition Memorandum, Respondent's Motion and Alternative Motion must be denied.

On the basis of this order, after the discussion of all the facts herein (including the discharge by Respondent Cambridge of Ens Sr. and Ens Jr.), the first subject under my analysis and conclusion will be whether Respondent Cambridge violated the terms of the earlier settlement agreement entered into on January 24, 1980, with Ens Sr. and Ens Jr.

IV. THE FACTS

Ens Sr. began his employ with Respondent Contracting in or about 1970; at the time he was terminated, on May 18, 1979,[2] his title was supervisor, contracting. Ens Jr. began working for Respondent Contracting part-time in 1974 and 1976; he was hired by Respondent Contracting as a full-time employee in January 1977 and was employed as a working foreman. While the parties agree that Ens Jr. was not a supervisor within the meaning of Section 2(11) of the Act during the period in question, Respondents allege that Ens Sr. was a supervisor within the meaning of Section 2(11) of the Act during his employment with Respondent Cambridge; the General Counsel appears to urge that Ens Sr. was not a supervisor within the meaning of the Act during that period.

Ens Sr. was paid an hourly rate of $5.20; Ens Jr. was earning $4 an hour while many of the laborers employed by Respondent Cambridge earned from $3.65 to $4.50 an hour. Respondent Cambridge's operation involved performing chemical cleaning and maintenance work at the Exxon Refinery in Linden, New Jersey. Ens Sr, met on a daily basis with an Exxon coordinator, who informed him of the next day's assignments. Ens Sr. then decided on the required number of men and trucks needed for the job. (Most of the laborers on these jobs were temporary help from an employment service.) He has not hired or fired employees. He testified that he has not recommended that employees be discharged; on one occasion he informed Paul Oriel, vice president and general manager and an admitted agent of Respondent Cambridge, that he had caught an employee sleeping in the truck on three occasions; the employee was not discharged. When the Exxon coordinator informs him that he wants the Cambridge employees to continue working past the usual 4:30 quitting time, he (Ens Sr.) would ask the entire crew to remain on the job. If some of these employees refused this request, Ens Sr. would sometimes ask some of the other employees to work the overtime hours; Oriel also chose employees to work overtime. When asked how he decided whom to ask, Ens Sr. testified: "No particular way." He also testified that some employees are better at certain tasks than other employees and that he would take that into consideration in choosing employees to work overtime: "some guys are afraid of heights. You can't put them on a tower." Ens Sr.'s supervision is only over the employees of Respondent Contracting; if he could not locate enough employees to work overtime at any particular time, he would notify Oriel who would request employees of Respondent Chemical[3] to work overtime. Oriel testified that Ens Sr. could, and has, recommended that certain employees be discharged, but on the few occasions that he has so recommended it was not followed because the employees were long-term employees at the time; he could not remember any occasion where Respondent Cambridge followed Ens Sr.'s recommendation to discharge an employee, but his recommendations were given careful consideration. Respondent Contracting has 9 or 10 employees; Oriel and Frank Riley, president of Respondent Cambridge, appear to be the only agents of Respondent Cambridge on the corporate hierarchy above Ens Sr. at the time.

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[2] Unless otherwise indicated, all dates mentioned herein are for the year 1979.

I would find on the basis of the above that Ens Sr. was not a supervisor within the meaning of Section 2(11) of the Act at the time in question. It is clear that he could not hire or fire employees and that he never effectively recommended the discharge of any employee; although his recommendations were given "careful consideration" there was no evidence that they were ever followed. His decision on the number of employees to be employed each day was strictly dictated by the stated demands of the Exxon coordinator. Additionally, it appears to me that the only activity engaged in by Ens Sr. that could be considered out of the ordinary, was, on occasion, selecting employees to work overtime, but even that required little, if any, independent judgment; rather, these decisions appear to be rather pedestrian and predictable in nature. These findings, together with the fact his salary is not appreciably higher than many of the other employees, together with the fact that Oriel and Riley are also available to supervise the 9 to 10 employees of Respondent Contracting, convince me that he was not a supervisor within the meaning of the Act.

On April 30, at or about 7:30 a.m., prior to beginning work, about seven or eight of Respondent Contracting's employees were discussing the need for raises. Ricks said that they should agree on an amount of a raise that they desire and approach Riley with it and everybody agreed at that time that it was a good idea. During the employees' 10:30 a.m. break at the Exxon refinery they continued discussing the possibility of approaching Riley with certain demands and one of the employees of Respondent Contracting, Joe Miller, informed Ens Jr. that they had no power to approach Riley with any demands. Ens Jr. decided that Miller was correct and he told the other employees that maybe they should contact a union. All the other employees agreed except Miller who argued that he was better off without a union because he needed the overtime hours he worked in order to survive; Ens Jr. and another employee informed Miller that if a union obtained good increases for them he would not have to work so much overtime. At lunchtime that day the employees got together again and Ens Jr. decided to "test" the employees' resolve regarding a union. In this regard he took a blank piece of paper and signed it; he handed it to Ricks, who also signed it. When he gave it to the other employees: "I just said here, sign this piece of paper, please," although, again, the paper contained nothing but signatures.[4] All the employees present signed the paper except Miller; Ens Jr. told Miller, "everybody else signed this piece of paper, Joe. Why don't you put your name on it?" Miller refused. When Miller asked what the paper was for, Ens Jr. said it was nothing, just a piece of paper with a list of names. Miller again refused and Ens Jr. threw away the paper. Later that day, Ens Jr. learned that Mike Sherrick, one of the employees who signed his blank piece of paper, was fired at lunchtime.[5] During the afternoon break Miller approached Ens Jr. and told him that he did not know how it happened, but Oriel found out about the list. Ens Jr. said that there was only one way he could have found out, and that was through Miller, but Miller denied it.

Ens Sr. testified that at lunchtime that day he observed Miller sitting in front of one of Respondent Cambridge's buildings speaking with Oriel. He overheard Miller telling Oriel that he was not able to live on 40 hours pay, but he did not hear anything that Oriel said.

On May 3, during lunchtime, the employees again discussed contacting a union or speaking to Riley about getting more money. It was decided that they would meet that evening at a local bar and that, prior to that meeting, Ens Jr. and Ricks would attempt to contact a union. That same day Ens Jr. and Ricks picked Local 394's telephone number from the phone book. While they were at the Exxon refinery they went together to a public telephone where Ricks called the Local 394 office. A woman answered the phone and Ricks informed her who he was and where he worked, and that they were having problems on the job; she told him that his first step should be to get in touch with the Labor Board. She also informed Ricks that he should call back the following Monday.

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[3] Respondent Contracting performed general cleanup work at the refinery, while Respondent Chemical performed specific jobs using chemicals to clean tanks and towers.

[4] Ens Jr. testified: "Well, if you were one of the regular employees of Cambridge at the time, and was—how could I say it—had worked with myself for a year or two at the time and knew there was talk of union going around, and therefore knew that there was nothing to fear by signing this piece of paper."

[5] The circumstances surrounding his discharge will not be discussed herein. Although he was paid $1,000 pursuant to the settlement of the prior matter on January 24, 1980, he is not named in the consolidated amended complaint. It should also be noted that in other parts of the record there is testimony that Sherrick was discharged on May 3; this seems more reasonable as Ens Jr. testified that Sherrick was present at a meeting on May 3 with the other employees.

On that same day at or about 3 p.m., Ens Sr. returned to Respondent Cambridge's Linden facility to work on the daily timesheets, which are submitted by Respondent Cambridge to Exxon for reimbursement for work performed. Riley said to him, "The shit hit the fan over at the refinery, didn't it Freddy?" and Ens Sr. asked him what he was talking about. Riley then said that he did not know who was causing all the trouble: "It's that guy who comes out here." Ens Sr. thought he was referring to an individual named Matty Dudeck, but Riley said that it was not Dudeck, he was referring to an Exxon supervisor named Ronny Grue. Riley then said, "I have to let your son go tonight." When Ens Sr. asked why, Riley said, "we got a call from purchasing that him and Sherrick are dealing in dope." Ens Sr. protested and said that if it involved dope why did Exxon's purchasing department report on it rather than the more appropriate department, security. Riley then said, "well, we'll say it's his driving record, but in a month or so when this blows over, he can come back and work." Riley gave him Ens Jr.'s last checks; Riley never called Ens Jr. to inform him of his discharge.

When Ens Sr. went home that evening he informed his son that Riley said that he was fired for dealing in dope, but Riley would go along with calling it a discharge for a poor driving record. (That afternoon, when Ens Jr. finished work, he could not find his timecard to punch out). Ens Jr. told his father that the allegation was untrue, and he denied at the hearing that he had ever sold or used a controlled dangerous substance.

On May 4, Ens Jr. filed an 8(a)(1) charge with the Board against Respondent Contracting alleging that Respondent Contracting restrained and coerced its employees in the exercise of their Section 7 rights. This charge does not specifically allege that Ens Jr., the Charging Party, was discharged in violation of the Act.

Between May 6 and May 13, Ens Sr. went to speak with Riley, and before the discussion began, Oriel walked in. Ens Sr. told them that he had heard rumors that he and Ricks were the next ones to be discharged; Oriel said that it was not true. Ens Sr. then said that he had spoken to his son and he still was unsure whether to bring a lawsuit against them or Exxon. Riley then informed him that they had received notice of the unfair labor practice charge that Ens Jr. had filed. According to Ens Sr.'s testimony, Riley then said, "Who said anything about dope?" and Ens Sr. said, "You did." Riley asked Oriel if he (Riley) had said anything about dope and Oriel said that he had not. Ens Sr. protested and left.

Oriel testified that Ens Jr. was discharged for the following reasons: " . . namely because he would not work overtime for me. He had a poor driving record. He was caught in the refinery speeding many times by Frank Riley.[6] And he refused to listen to me, only to his father, and that and stories that were going around the shop at the time. As he was supplier for any type of drugs that you would want." Oriel testified that, within a week prior to Ens Jr.'s discharge, he was informed by Miller that he had purchased drugs from Ens Jr. Miller testified that he has purchased marijuana from Ens Jr. The closest he could estimate the time of this purchase was "within a year" of Ens Jr.'s discharge. He also testified that he reported this to Oriel, but he did not testify as to when he did so.

Oriel testified that Riley made the decision to discharge Oriel. Oriel also testified that he would not have recommended discharging Ens Jr. until he heard of the drug dealing, and at that time he recommended to Riley that he be discharged. He also admitted that he heard of the drug allegations regarding Ens Jr. a month prior to his discharge. Regarding one of Respondent Cambridge's other reasons for discharging Ens Jr.—his alleged refusal to work overtime—Oriel testified that he "almost always" refused to work overtime for him, while he did work overtime for his father.[7]

On May 18 Ens Sr. reported for work as usual. At or about 3:30, while he was preparing the daily reports, Oriel said to him, "it's layoff time." Ens Sr. said "layoff time?" and Oriel said "yes." Ens Sr. asked, "What reason are you giving for firing me?" Oriel said, "You are not doing your job." Ens Sr. asked him what he meant and Oriel repeated that he was not doing his job. Ens Sr. told Oriel that he would probably have another Labor Board case on his hands, and left. He testified that he had never been warned about his work performance prior to that.

Oriel testified that a number of reasons contributed to Ens Sr.'s discharge. One reason was:

> Fred Ens Sr. had a pickup truck he was allowed to take home every evening and weekends. In that pickup truck, he would carry, besides the gas in the truck itself, three or four or five gallon cans, which he used during the day to fill pumps or trucks that ran out of gas. Now, it seemed that every weekend he would fill up those cans and bring them back Monday morning empty. On top of that, on Sunday I came to work and he was filling up the cans on a Sunday morning with keys to the gas pump that he shouldn't have had, and to the office that he shouldn't have had, to unlock the electrical part of the gas pumps to start them up.

Oriel testified that this event occurred 2 or 3 months prior to the discharge of Ens Sr. and, after the event, he changed the keys on the gas pump and the office. He testified that the reason they did not discharge him at that time was that in about January there was an explosion at the Exxon refinery which tripled his work force. Although he had convinced Riley, by then, that Ens Sr. should be discharged, they could not do so until they could locate a replacement for him. In or about February, Oriel asked a retired Exxon coordinator to take the job, but he refused. They therefore waited until the explosion cleanup was completed in mid-May and, at that time, discharged Ens Sr. and replaced him with Miller, at first on a temporary basis but, according to Oriel's testimony, 6 months later Miller was given the job permanently because he had performed the job well. Oriel was asked why he waited so long before replacing Ens Sr. with Miller when he knew in February that the retired Exxon coordinator would not take the job. He answered that he did not feel that Miller could handle the job earlier, with all the extra work caused by the explosion; however, by May that cleanup work had been completed. At that point in his testimony (in answer to a question from me, after direct and cross-examination) Oriel testified that for 3 months prior to Ens Sr.'s discharge they had complaints about their work under Ens Sr.'s supervision; they did not discharge him earlier because of the heavy workload.

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[6] Riley did not testify.

[7] On cross-examination, Oriel testified that after he told Ens Sr. to inform Ens Jr. that he was fired, Ens Sr. told him that Ens Jr. was going to the Labor Board. I would find that Ens Sr. informed Oriel of this in a later conversation, not on May 3. For one thing, Ens Sr. never testified to this. Additionally, I find it unlikely that a person who has been given a double shock of hearing that his son has been fired, and for dealing in dope, would immediately answer that his son was going to the Labor Board.

Oriel also testified that, in early May, Ricks came into his office and said that, although he did not want to cause trouble, he wanted Oriel to know that Ens Jr. had made a statement in front of all the employees (during the country's gas shortage) that his family had no problem with gas because his father could take as much as he wanted out of there. Ricks testified that, on the day Ens Sr. was discharged, he (Ricks) called Ens Sr., who said that he was told that one of the reasons he was fired was because Ricks had told Riley that during the gas shortage Ens Jr. had made the statements that they did not have to worry about gas because his father got it from Respondent Cambridge. After Ens Jr. told Ricks this, Ricks went to Oriel's office where Miller was present, and told Oriel that he (Ricks) had not made the statement in question, that it was Miller who said it. According to Ricks' testimony, Miller made no denial and Oriel said that Riley was not going to let anybody run his business. Miller testified that he never heard Ens Jr. make the alleged statement about Ens Sr. taking gas from Respondent Cambridge nor did he inform anyone that Ens Jr. had made such a remark.

Oriel testified that the other reason Ens Sr. was discharged was because he persisted in doing his paperwork (the daily timesheets that are transmitted to Exxon for billing purposes) in the afternoon, when he should have performed the work in the morning. He testified that "quite a few times" he told Ens Sr. that he should not leave the job to do his paperwork; that he was paid a half hour overtime, daily, so that it would not interfere with his presence at the jobsite, and yet he continued to report back to Respondent Cambridge's office at 3 or 3:30 to perform his paperwork. Ens Sr. testified that he was supposed to do the paperwork anytime he had the chance and Oriel never complained to him that he should be at the jobsite with the other employees rather than doing the timesheets in Respondent Cambridge's office at 3:30

Ricks testified that on May 18, at or about 5:30 p.m., as he was walking toward the train station, Oriel stopped his car and gave him a ride to the station: "And in the course of my riding with him to the station he said there is not going to be no union at Cambridge."

Ricks left the employ of Respondent Cambridge in December. He was served with a subpena from General Counsel at the hearing in Case 22-CA-9254 on January 24, 1980; he appeared on that day at the Labor Board, as did Riley and his wife, Oriel, and Miller. Ricks did not speak to any of these people, and never testified as the case was settled prior to hearing by the payment of a total of $3,500 to Ens Sr., Ens Jr., and Sherrick and the posting of the Board notice, *supra*, which was complied with by Respondent Cambridge.

Ens Sr. was hired at Respondent Pruss on July 14 (there is no contention by Respondent Pruss that he was a supervisor within the meaning of the Act during his employment there); Ens Jr. was hired by Respondent Pruss on December 7;[8] Ricks, on December 31.

The next event of importance herein was a meeting between Oriel, Riley, and Victor Cappetta, manager of the chemical cleaning division of Respondent Pruss, and an admitted agent of Respondent Pruss; this meeting took place in Cappetta's office and he placed the time of the meeting as mid-April 1980. Also present at the time was Respondent Pruss' garage man. Cappetta testified that when Riley and Oriel walked into his office they were furious. Riley said that there was damage done to his equipment the previous night and "this nonsense has got to stop." Cappetta said that he knew nothing about it, and Riley said, "This has got to stop, otherwise I'll take my own actions." (He did not specify what these "actions" would be, nor did Cappetta ask him what actions he would take; Cappetta testified: "I didn't bother to ask him. Because at that time he was fit to be tied.") Cappetta asked Riley about 10 times who did the damage, but Riley would not tell him.

The only other witness to this conversation to testify, Oriel, testified that Riley told Cappetta (whom he had known for years) that there was some damage done to his equipment[9] and he was pretty sure he knew who did it. He wanted it known that he wanted it stopped and wanted no more. Cappetta asked Riley nine times whom he was referring to, but Riley refused to tell him. Oriel testified that he and Riley felt that Ens Jr. had done the damage to the truck because Miller told them that Ens Jr. had threatened to damage their equipment. (Miller did not testify regarding this subject.) Oriel testified that they spoke to Cappetta "to let them know we knew who did it and ask it to be stopped." Although Riley did not name Ens Jr., "I assumed that they knew the circumstances . . . of which Fred Ens, Jr. used to work for us." He also testified that they went to Cappetta to get a warning to Ens Jr. without him being singled out. They did not name Ens Jr. to Cappetta because of the prior Labor Board matter with him.

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[8] The brief of Respondents states: "Ens Jr. started with Pruss on December 7, 1979, *after* the settlement aforesaid." That is not correct; Ens Jr. obtained his employment with Respondent Pruss 6 weeks prior to the settlement agreement.

[9] Oriel testified that one of Respondent Cambridge's vehicles had an oil drain hose cut in half while parked at the Exxon refinery the prior evening or that morning. Oriel saw it and testified that there was no doubt in his mind that it had been cut. Ens Sr. testified that, after this, he spoke with a mechanic of Respondent Cambridge who told him "somebody broke an oil line and it could have broke itself."

Ens Sr. testified that, about 2 days after this conversation, Cappetta told him that Riley and Oriel came to see him and told him that guys were tampering with his trucks. Cappetta asked who it was and Riley said, "You know who the guys are." Cappetta said that if he knew who they were he would not ask him and Riley said, "Who's the three guys that brought me up on charges to the Labor Board." Ens Sr.'s testimony continues: "Then he went on to say—Vic Cappetta—that Frank Riley told him, I got ten million dollars and I'll go in that Refinery and cut the price[10] so bad that nobody will be making money on big jobs."[11] Both Cappetta and Oriel specifically deny that Riley mentioned the $10 million figure; although neither specifically denied Riley's alleged statement of "The three guys that brought me up on charges to the Labor Board," I believe their numerous denials that Riley mentioned any names can reasonably be construed as a denial of this alleged statement.

Shortly thereafter, Cappetta informed Paul Pruss, Jr., herein called Pruss, vice president of Respondent Pruss, of his conversation with Riley and Oriel. About a week later (the next occasion that he was in the area) Pruss met with his employees at the Exxon refinery 1 day during lunch and informed them that he had heard a complaint about another contractor's equipment, he did not approve of any shenanigans, and he did not want any problems with any of the contractor's including Riley. No names were mentioned.

On May 9, 1980, Respondent Pruss discharged or laid off Ens Jr., Ens Sr., and Ricks. Ens Jr. was employed by Respondent Pruss as an operator driver at their Bayway, New Jersey, location—driving a truck and operating some of its chemical cleaning equipment. When he arrived for work on May 9, 1980, he found a note left for him at Respondent Pruss' clothes trailer at the Exxon refinery. The note stated: "Fred Ens, Jr. Please leave your PCS card and Badge with Tommy. Paul is reforming the acid company seperate [sic]. So you are laid off temp. and Golie." It was signed "Ron."[12] Nothing was said to him about it and nobody was there for him to question. He had lost his PCS (prescription card), but he did leave his badge in the office and left. Fell testified that Ens Jr. was laid off for lack of work, as was Ricks and they were chosen because they had the least seniority. Ens Jr. was recalled to work by Respondent Pruss in August 1980; admittedly, when he returned to work for Respondent Pruss there was one employee—Flo Ruiz—working for them who had not been employed there when Ens Jr. was laid off. Ens Jr. filed a grievance with the union representing Respondent Pruss' employees. It was determined that an employee had been hired for a 2-day period in May 1980 and therefore Respondent paid Ens Jr. 2 days' backpay. His case for backpay for the entire period of his layoff (due to the presence of Ruiz and others) is still pending. Fell testified that there were occasions during Ens Jr.'s layoff when Respondent Pruss employed others: "We get jobs at the last minute from Exxon. We can't afford to call in and get people from outside which are already laid off. He may not be home. So we call the Bayonne refinery [another operation of respondent Pruss] and they have extra men, which they might be slow, they alternately send them over to us for a couple of days. We send them back again.

Ricks testified that on May 9, 1980, Fell handed him a layoff slip and said that he was going on vacation for 2 weeks and when he returned Ricks and Ens Jr. would be transferred to Respondent Pruss' Elizabeth terminal to work with Ens Sr. He was never recalled. Fell testified that Ricks was originally laid off for lack of work, although he was dissatisfied with Ricks because of his poor attendance record; he testified that from January through May 9, 1980, Ricks only appeared for work on or about 60 days, although he could have worked every day during that period but he was often out sick. Ricks testified that he could not remember whether he worked more or less than half the workdays during this period. After Ricks' layoff Respondent Pruss and the union representing its employees discussed the matter; Fell told the union that because of Ricks' poor attendance record he wanted to discharge him, rather than lay him off. The union determined that because of his poor attendance record he had not completed his probationary period and his layoff was converted to a discharge. No grievance or arbitration was filed regarding this layoff/discharge.

Ens Sr. was discharged by Respondent Pruss on May 9, 1980. Ens Sr. testified that, a day or two before Cappetta allegedly informed him of his conversation with Riley and Oriel, he was told by Fell to call Pruss, at the Philadelphia office. Pruss told him that he had a complaint from Ronnie Grue (who is in charge of chemical cleaning for Exxon in the area) that Ens Sr. did not use an inhibitor[13] on a certain job. Ens Sr. told him that he was wrong and that one of the employees who did the cleaning job with him was present and he could tell Pruss that they did use the inhibitor and Grue was a witness to it. Shortly thereafter, Ens Sr. met Grue and asked him about his complaint to Respondent Pruss that he (Ens Sr.) had not used an inhibitor in the acid; Grue told him that he never made such a complaint. About 2 days later while Ens Sr. was in Respondent Pruss' trailer with Cappetta, Grue walked in. He told Cappetta and Ens Sr. that he never made a complaint to Pruss and that he was present when Ens Sr. and his crew put the inhibitor in the acid.

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[10] As stated, *supra*, both Respondent Cambridge and Respondent Pruss are engaged in the same type of business and both perform work at the Exxon refinery. They were described as "friendly competitors." Ens Sr. testified that at one time Respondent Cambridge had almost all of the Exxon work, but that Respondent Pruss was "cutting in on them."

[11] Counsel for Respondent objected to the entirety of Ens Sr.'s testimony regarding the Riley, Oriel, and Cappetta conversation as hearsay. I overruled the objection on the ground that the statement was an admission and not hearsay under Fed. R. Evid. 801(d)(2). Although it is not entirely clear in the record, my ruling was meant to apply only to Respondent Pruss, the only one of Respondents for which Cappetta is an agent. It appears to me that there is no way that Respondent Cambridge can be bound by Cappetta's alleged statements to Ens Sr. and even the General Counsel appears to agree, when he stated: "Do his statements bind Cambridge? Probably not."

[12] Although there is no allegation in the consolidated amended complaint that "Ron" (Ron Fell) is a supervisor for Respondent Pruss, Respondent Pruss admits the allegation of the consolidated amended complaint that Ens Jr. was laid off on or about May 9, 1980. "Tommy," the name in the note, was his foreman that day.

[13] An inhibitor is a chemical that is put into the acid (hydrochloric acid or phosphoric acid) that is used to clean tanks, exchangers, pipes, and lines at the refinery. The inhibitor stops the acid's reactions after the cleaning job has been completed.

Ens Sr. testified further that about 2 weeks later he saw Pruss outside Respondent Pruss' trailer in Bayway and the first thing that was said was Pruss said to him, "You're a liar." Pruss then spoke about people damaging his equipment and how expensive it was to repair the equipment. They then walked into the trailer and Pruss again called Ens Sr. a liar. Ens Sr. told him that the next time he called him a liar without a reason he would hit him. Pruss then said that he could not think straight because he was taking his medicine and that he was not going to lose everything that he and his father had worked for. Ens Sr. said he did not know what he was talking about and that was the extent of that conversation.

About 2 weeks later (May 9, 1980) Pruss called Ens Sr. to his office at the end of the day. Cappetta was present also. Pruss took some papers from his briefcase and handed them to Cappetta who looked them over and returned them to Pruss. Pruss said to Ens Sr. that he lied on his employment application; Ens Sr. asked how he lied and Pruss said, "I had a check run on you and you served time."[14] Ens Sr. said, "You think that's something to be proud of? I go around bragging about that? Why didn't you ask me about it and I would have told you." Pruss told him that he was going to have to let him go and gave him his paycheck and a check for a week's vacation. Ens Sr. asked if there were any chance of his returning to Respondent Pruss and Pruss said that he could not think straight. Ens Sr. walked out of the office with Cappetta, who told him, "Give him a day or two to calm down." He never returned to the employ of Respondent Pruss.

On June 26, Ens Sr. filled out an application for employment for Respondent Pruss.[15] One of the questions asked is: "Have you ever been convicted of a crime, excluding misdemeanors and summary offenses?" He answered "no." On direct examination (prior to the introduction of his employment application) Ens Sr. was asked how he answered this question and he testified: "I actually don't know if I filled it out." On cross-examination, Ens Sr. repeated that he did not know whether he answered that question; when asked why he did not state on the application that he had been convicted of a crime, he testified: "Because when I asked Vic Cappetta should I fill that all out, he said all they want is name, social security number and deductions." When he was asked whether the application asked for a lot more than that, Ens Sr. testified that he did not know what else he filled out; "It was one of those deals where I met the fellow [Cappetta] on the outside of the gate. When I asked him, you want me to fill out all this stuff, and he said you are hired."

Cappetta testified that he did not personally know Ens Sr. prior to his employment at Respondent Pruss, but he had seen him at the Exxon refinery while he was employed at Respondent Cambridge, and he did not know that Ens Sr. had a prison record at the time he was hired by Respondent Pruss. He learned of it about a month prior to Ens. Sr.'s discharge from Pruss who told him: ". . . he had a record. He had been in prison . . . we all know it now. For this reason, we can't tolerate this kind of character." Cappetta also testified that he gave Ens Sr. the employment application to fill out and expected him to "fill it out thoroughly"; he testified that he did not tell Ens Sr. simply to fill out his name, address, and social security number on the application. After he gave Ens Sr. the employment application he left and did not see it again; it went to Respondent Pruss' office in Philadelphia.

Fell testified that while Ens Sr. was employed by Respondent Cambridge he saw him at the refinery and, occasionally, spoke to him, just as he spoke to the other employees of Respondent Cambridge, but he did not learn that Ens Sr. had a prison record until Pruss informed him of it about 2 weeks or a month prior to his discharge. Pruss told him that he had done the check because they were losing a lot of tools. According to Fell's testimony, Ens Sr. was not discharged at that time because they were in the middle of a job and they needed him until the job was completed. Fell also testified that during the period of the employment of Ens Sr. and Ens Jr. many tools started disappearing. Although they did not speak to them about the missing tools, Respondent Pruss "just assumed" that they were responsible for the loss of these tools; he discussed this loss with Pruss and that was another reason for the discharge of Ens Sr.

Pruss testified that in about February or March 1980 Cappetta and Fell informed him that some of their equipment was missing. About a month later he received an "anonymous tip" that one of his employees "may have an unsavory background." In regard to this "tip" he testified to the following: ". . . [it] sort of like got around through the grapevine back to me. . . . I don't even remember [whom he heard it from]. I was bullshitting with a couple of guys in the smoke shanty, that kind of thing. . . . Like I said, I heard scuttlebutt. They said something to the effect that did you know that Fred Ens was in jail, or something like that, and I said no, what are you talking about? And they said well, you'd better check it out. That was the extent of the conversation. That's when I called the investigator. . . In other words, this party came to me and said hey, I heard the man had a record. But I don't want to be accused."

After the conversation, Pruss examined Ens Sr.'s employment application and saw that he did not list any conviction; he then employed a private investigator to check into Ens Sr.'s background (this was about a month prior to Ens Sr.'s discharge). As to way he employed the investigator, Pruss testified:

> Well, a combination of things. Equipment started to disappear from some of our locations. We couldn't point a finger on anybody, but it just didn't add up. The thing wasn't making sense that all of a

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[14] Ens Sr. went to prison for receiving stolen property, larceny, and bookmaking. This occurred in 1973 while he was employed by Respondent Cambridge. After being in prison for about 6 months he was eligible for the work release program and returned to Respondent Cambridge's employ at that time.

[15] The application states, *inter alia*: "I hereby certify that the facts set forth in the above employment application are true and complete to the best of my knowledge. I understand that if employed, falsified statements on this application shall be considered sufficient cause for dismissal."

> sudden after so many years the equipment is starting to walk off the job the way it did.
>
> So when this subject was brought up about Ens Sr. I called this private investigator and asked his opinion. He said better check it out. I said okay, go ahead, and that's what I did. You know, I retained him to investigate.

Sometime thereafter, Pruss received a certified statement from the clerk of Union County, dated April 29, 1980, certifying to Ens Sr.'s convictions. He testified that he waited until May 9, 1980, to discharge him because he was in the middle of a job, for which he needed him, and waited until the job was completed. Pruss also testified this was not the first occasion when equipment and tools were missing; "I mean occasionally guys will lose a tool. But you don't start losing hundreds of dollars worth of equipment in a matter of weeks, and it just walks off the job." He then testified: "The equipment problems was going on for a period of months, because both Ronnie Fell and Vic Cappetta complained to me about it. . . . And then it sort of came to a head when this stuff was brought to my attention that Mr. Ens had an unsavory background. And I might add that since these people are no longer with me, I'm not losing the hundreds of dollars worth of tools anymore, either."

On rebuttal, Ens Sr. testified that while employed by Respondent Pruss he used his own tools, and at the beginning of his employment there, Fell informed him that tools were being left on the job are stolen, and named two employees whom he thought were taking the tools—George Heinkel was the name he remembered.

V. ANALYSIS AND CONCLUSION

Where there are credibility issues to be resolved (which is not too often herein) I would credit Respondent's witnesses over Ens Sr., Ens Jr., and Ricks. Respondents' witnesses, and most especially Oriel and Miller, appeared to me at the hearing to be testifying in a frank and truthful manner. Although Ens Sr. and Ricks did not appear obviously untruthful in their testimony, there were aspects of their testimony that indicated to me that they were not being entirely truthful. Ens Sr. initially testified that he did not know if he answered the question on Respondent Pruss' employment application regarding convictions for a crime. It appears to me that an individual applying for a job who had recently been in prison would look hard and long at that question; the attitude of society being what it is, he must have been fearful that if he answered yes he would not get the job, while, at the same time knowing that if he answered no, and his background were discovered, he could be summarily discharged. It is certainly not the type of question that Ens Sr. would forget. For that reason I would find that Ens Sr.'s testimony lacked some credibility.

My reason for finding Ricks' testimony somewhat less than credible is not as obvious as my reason stated *supra* regarding Ens Sr. Ricks began working for Respondent Pruss on December 31 and worked there until May 9, 1980. Respondent Pruss' witnesses testified to Ricks' extremely poor attendance record during his employment there, testifying that of the 90 to 95 workdays during this period Ricks only appeared for work on or about 60 days, although he could, and should, have worked every day. Ricks' testimony that he could not remember how many days he worked or whether he worked more or less than half of the available workdays during this period does not ring true to me. It would appear to me that an employee beginning employment with a new employer would be more cognizant of his attendance record, at least for the first few months, and especially if he were absent from work as often as Ricks was. Additionally, Ricks appeared to me to be somewhat evasive at times in his testimony. Lastly, because I found Miller to be a frank and truthful witness, I would credit his testimony that he purchased marijuana from Ens Jr. and, where necessary, I would credit his testimony over that of Ens Jr.

The first issue to be decided (pursuant to the order of Associate Chief Administrative Law Judge Dyer) is whether Respondent Cambridge violated the terms of the informal settlement agreement entered into on January 24, 1980. In that agreement Respondent Cambridge agreed, *inter alia*, that it would not discharge or otherwise discriminate against its employees because of their membership in Local 394 or any other labor organization and it would not, in any like or related manner, interfere with, restrain, or coerce its employees in the exercise of rights guaranteed in Section 7 of the Act.

Settlement agreements will not be set aside absent a breach of their provisions or the commission of subsequent unfair labor practices. *Mohasco Industries, Inc. (Laurens Park Mill)*, 172 NLRB 2079 (1968); *Sundstrand Castings Company and Sundstrand Corporation*, 209 NLRB 414 (1974). The basis of the General Counsel's allegation that the settlement agreement should be set aside is the April 1980 conversation between Riley, Oriel, and Cappetta; this is the only basis for the General Counsel's allegation since there is no allegation that Respondent Cambridge engaged in any other unfair labor practices subsequent to January 24, 1980.

I have found, *supra*, that Ens Sr.'s testimony regarding his conversation with Cappetta about his April 1980 conversation with Riley and Oriel is hearsay as to Respondent Cambridge and is binding only upon Respondent Pruss as an admission under Federal Rules of Evidence 801(d)(2). It would therefore be of no assistance in overturning the settlement agreement and so Ens Sr.'s version of this conversation will be temporarily put aside. Cappetta's and Oriel's version of this conversation is that Riley told Cappetta that damage had been done to his equipment and it had to stop. Cappetta asked Riley 9 or 10 times who did it, but Riley refused to tell him. The only difference between their testimony regarding this conversation is that Cappetta testified that Riley said that he would take some unspecified action if the damage did not stop (Oriel never testified to this) and Oriel testified that Riley told Cappetta "he was pretty sure he knew who did it."

The logical question that arises is why did Riley and Oriel speak to Cappetta at all if they refused to divulge the name of the person who they felt did the damage. The General Counsel would allege that, even absent the naming of the alleged culprits, the purpose of the visit was in the nature of a signal to Respondent Pruss to take some action against Ens Jr., or Ens Jr. as well as Ens Sr. and Ricks. Just as I found Oriel to be a credible witness I find his explanation for the visit not unreasonable; one of their trucks had been damaged and they assumed (from what Miller told them) that the damage was done by Ens Jr.; they were afraid to single him out because they had been "stung" by the Labor Board settlement 3 months earlier, but they wanted the word sent out to all of Respondent Pruss' employees at the Exxon Bayway terminal (including Ens Jr.) that they did not want it to happen again. According to Oriel, it seemed like the safe way to accomplish their purpose.

On the basis of the above, I would find insufficient evidence to establish that Respondent Cambridge violated the terms of the January 24, 1980, settlement agreement. Their visit with Cappetta had a legitimate purpose and there is no probative evidence that it was accomplished in any unlawful manner. The January 24, 1980, settlement agreement will therefore be reinstated.

The remaining issue to be considered is whether the discharge of Ens Sr. on May 9, 1980, violated Section 8(a)(1) and (4) of the Act and whether the discharge of Ricks on May 9, 1980, and the layoff of Ens Jr. from May 9, 1980, through August 1980 violates Section 8(a)(1), (3), and (4) of the Act. The consolidated amended complaint alleges that Respondent Pruss discharged or laid off Ens Sr., Ens Jr., and Ricks because they joined or assisted Local 394 or engaged in other protected concerted activities, and because they filed charges or participated in a Board proceeding under the Act; it is also alleged in the consolidated amended complaint that Respondent Pruss took this action because Respondent Cambridge requested it to do so.

I have found, *supra*, that Respondent Cambridge did not violate the January 24, 1980, settlement agreement by the visit of Riley and Oriel to Cappetta's office in April. I would likewise find that there is insufficient evidence to establish the allegations in the consolidated amended complaint that Respondent Pruss discharged or laid off Ens Sr., Ens Jr., and Ricks because Respondent Cambridge requested it to do so. As stated *supra*, Riley and Oriel had a valid reason for speaking to Cappetta (the damage to their truck) and they accomplished this task in a careful, lawful manner. Clearly, they never specifically asked that the employees be discharged or laid off and the evidence is insufficient to establish that this conversation was meant to serve as a signal to Respondent Pruss to take action against these employees.

The only allegation remaining, therefore, is that Respondent Pruss discharged or laid off Ens Sr., Ens Jr., and Ricks because of their activities on behalf of Local 394, other protected concerted activities, or their participation in the filing of, or participation in, a Board proceeding. This allegation must also fall. Without the assistance of the General Counsel's allegation that Respondent Cambridge instigated the discharge and layoff of Ens Sr., Ens Jr., and Ricks by Respondent Pruss, there is not a scintilla of evidence that these terminations were unlawful. Ens Jr., in his employment application with Respondent Pruss, stated that he had been discharged from his employment at Respondent Cambridge because of his union activity and he was hired nonetheless; additionally, Respondent Pruss' employees are represented by a union. As regards the allegation that they were terminated in violation of Section 8(a)(4) of the Act, the Board proceedings, at that time, involved only Respondent Cambridge and had no effect upon Respondent Pruss. Without finding that Respondent Pruss acted on May 9, 1980, against Ens Sr., Ens Jr. and Ricks as a favor to Respondent Cambridge or in fear of what Respondent Cambridge would do if they did not so act (which I have not found, *supra.*) there is no evidence that Respondent discharged Ens Sr. and Ricks, and laid off Ens Jr. in violation of Section 8(a)(1), (3), and (4) of the Act, and these allegations against Respondent Pruss will therefore be dismissed.

That is not to say that the discharges and layoff of Ens Sr., Ricks, and Ens Jr. are beyond suspicion. All occurred on the same day, about a month after the visit by Riley and Oriel. Respondent Pruss exlains this as being caused by a work slowdown and the fact that these individuals were the least senior employees. I am also skeptical regarding Ricks' discharge; it was originally a layoff, but when the layoff was grieved the union determined that he had not worked enough days to complete his probationary period, and the layoff was converted to a discharge; this appears to be contrary to the practice followed by unions I have observed. However, the General Counsel, in order to have his contentions sustained, must show more than establishing that Respondent's case is suspicious. Under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), he must establish "a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." The General Counsel has not sustained that burden herein.

CONCLUSIONS OF LAW

1. Respondent Cambridge Contracting, Inc. and Respondent Cambridge Chemical Corp., a single integrated business enterprise, is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Paul P. Pruss & Son, Inc., is an employer within the meaning of Section of 2(6) and (7) of the Act.

3. Local 394, Laborers' International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent Cambridge has not engaged in conduct in violation of the informal settlement agreement entered into on January 24, 1980.

5. Respondent Cambridge has not engaged in any conduct in violation of the Act as alleged herein.

6. Respondent Pruss has not engaged in any conduct in violation of the Act as alleged herein.

ORDER[16]

It hereby is ordered that the consolidated amended complaint be, and it hereby is, dismissed in its entirety.

It is further ordered that the informal settlement agreement entered into between the parties on January 24, 1980, and vacated and set aside by the Regional Director for Region 22 of the National Labor Relations Board on November 26, 1980, is hereby reinstated.

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[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order.

Mobile Home Estates, Inc. *and* **International Union, Allied Industrial Workers, AFL-CIO, and its Local 712.** Case 8-CA-10691

February 4, 1982

DECISION AND ORDER

MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 16, 1981, Administrative Law Judge John M. Dyer issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and briefs in support thereof and in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

1. The General Counsel excepts to the Administrative Law Judge's failure to find that Respondent additionally violated Section 8(a)(1) of the Act when, on November 13, 1976, Respondent's president, Newman, interrogated employee Phyllis Hicks regarding her willingness to cross the picket line in the event of a strike, and in the same conversation told Hicks that if they did not have the Union he could afford to pay some of them better wages. We find merit in this exception.

The Administrative Law Judge correctly stated that the standard to be applied in determining the lawfulness of Newman's conduct is that applied in *Mosher Steel Company*, 220 NLRB 336 (1975). Thus, questions about employee strike intentions which are not accompanied by threats, promises, or other coercive conduct are not *per se* unlawful, but must be judged in light of all of the relevant circumstances. We find that Newman's questioning of Hicks, occurring in the context of his statement that if they did not have the Union he could afford to pay some employees better wages, exceeded the bounds set forth in *Mosher Steel*, and that Respondent, by Newman's conduct, violated Section 8(a)(1) of the Act. We shall amend the Administrative Law Judge's Conclusions of Law and recommended Order accordingly.

2. We also find merit in the General Counsel's exception to the Administrative Law Judge's failure to find that Respondent violated Section 8(a)(3) and (1) of the Act when, following the strike, it denied reinstatement to probationary employees Dale Thomas and John Carpenter.

It is well established that an economic striker who has not been permanently replaced is entitled to reinstatement upon making an unconditional offer to return to work, absent a showing by the employer that its refusal to offer reinstatement was based on legitimate and substantial business justifications.[3] Further, the denial of reinstatement to an economic striker, absent legitimate business reasons, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed.[4] We find that Respondent has not met its burden here. Thus, there is no evidence that

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[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. Administrative Law Judge Ivar H. Peterson conducted the hearing in the instant case in May 1977. Following the issuance of his Decision, the Board remanded the case for additional findings. Before issuing a Supplemental Decision, however, Administrative Law Judge Peterson retired. After obtaining statements of position from the parties, the Board issued an order remanding the case for a hearing *de novo* by a new administrative law judge. Subsequently, however, the Board approved a stipulation entered into by the parties that the case be decided by a new administrative law judge based on his own review of the original record and his own findings of fact and credibility resolutions independent from the Decision previously issued by Administrative Law Judge Peterson. Thereafter, Administrative Law Judge John M. Dyer was assigned to issue a decision. It is the Board's established policy to attach great weight to an administrative law judge's credibility findings insofar as they are based on demeanor. However, in contested cases the Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of the evidence, and the Board is not bound by the administrative law judge's findings of fact, but bases its findings upon a *de novo* review of the entire record. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Administrative Law Judge Dyer's credibility findings are based on factors other than demeanor, and in consonance with the Board's policy set forth in *Standard Dry Wall Products, Inc., supra*, we have independently examined the record in this case. We find that there is no basis on the record in this proceeding for reversing his credibility determinations or his findings of fact based thereon.

[2] Employee Hicks testified to a conversation on November 15 or 16, 1976, with Director of Marketing Miller, in which the latter allegedly asked her whether she intended to cross the picket line in the event of a strike. Miller denied having any conversation with Hicks. The Administrative Law Judge, assuming *arguendo*, without deciding, the truthfulness of Hicks' testimony, found that no violation had been established. We find it unnecessary to reach this issue since the finding of such an additional violation would be cumulative and would not materially affect our Order.

We adopt the Administrative Law Judge's conclusion that Miller did not threaten employee Mihuc in violation of Sec. 8(a)(1) of the Act by stating that Respondent was going to close the plant during the winter and that Miller and Respondent's president, Newman, were going to go to Florida. In so doing, however, we disavow the Administrative Law Judge's finding that Miller's words were not meant seriously. Rather, we find, in agreement with the Administrative Law Judge, that in the context in which it was made the statement did not constitute a threat.

In view of the Administrative Law Judge's conclusion, which we adopt, that employee Holibaugh was not discharged in violation of Sec. 8(a)(3) of the Act, we find it unnecessary to pass on the Administrative Law Judge's statement that, even had the discharge been unlawful, the strike would not have been an unfair labor practice strike.

[3] *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[4] *The Laidlaw Corporation, supra*, and cases cited therein at 1369.

either Thomas or Carpenter was ever warned or otherwise advised prior to the strike that his work was unsatisfactory. Indeed, the only evidence regarding Respondent's decision not to offer them reinstatement is Supervisor Lascelles' self-serving testimony that *after the strike* he asked Thomas' and Carpenter's foremen about their work and was told that it had been poor. It is therefore clear that Respondent has not demonstrated that Thomas and Carpenter in any event would have been discharged prior to the unconditional offer to return,[5] or that its refusal to offer them reinstatement was otherwise justified by substantial and legitimate business reasons. Accordingly, we find that, by its conduct, Respondent violated Section 8(a)(3) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

Insert the following as new Conclusions of Law 7(d) and 8 and renumber the subsequent paragraph accordingly:

"(d) Coercively interrogating employee Phyllis Hicks regarding her willingness to cross the picket line in the event of a strike.

"8. By discriminatorily failing and refusing to reinstate economic strikers John Carpenter and Dale Thomas upon their unconditional offer to return to work, Respondent has violated Section 8(a)(3) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Mobile Home Estates, Inc., Bryan, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as new paragraphs 1(f) and (g) and reletter the subsequent paragraph accordingly:

"(f) Coercively interrogating employees regarding their willingness to cross a picket line in the event of a strike and informing employees that, if they did not have the Union, Respondent could afford to pay some of them better wages.

"(g) Discriminatorily refusing to reinstate, upon their unconditional offer to return to work, employees who participate in an economic strike."

2. Insert the following as a new paragraph 2(c) and reletter the subsequent paragraphs accordingly:[6]

"(c) Offer John Carpenter and Dale Thomas immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings suffered by reason of the discrimination against them, with interest, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). (See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)"

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that restrains or coerces employees with respect to these rights.

WE WILL NOT refuse to recognize, meet, or bargain with International Union, Allied Industrial Workers, AFL-CIO, and its Local 712, as the exclusive bargaining representative of our employees in the following unit:

> All production and maintenance employees at Respondent's Bryan, Ohio, place of business, but excluding plant clerical employees, office clerical employees, road service em-

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[5] *Markle Manufacturing Company*, 239 NLRB 1142, 1149 (1979).

[6] Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

ployees, truck drivers, and guards and supervisors as defined in the Act.

WE WILL NOT tell employees that their Union is no good and costs them money and they should resign from it and form their own union.

WE WILL NOT urge employees not to engage in a strike and not to support their Union.

WE WILL NOT coercively interrogate employees regarding their willingness to cross a picket line in the event of a strike.

WE WILL NOT discriminatorily fail or refuse to reinstate, upon their unconditional offer to return to work, employees who participated in an economic strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described above, and, if any understanding is reached, embody such understanding in a signed agreement.

WE WILL provide the Union with the information it requested in its December 10, 1976, letter and with any similar information it may request.

WE WILL offer our employees John Carpenter and Dale Thomas immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights and privileges, and WE WILL make each of them whole for any loss of earnings they may have suffered by reason of our discrimination against them, with interest.

MOBILE HOME ESTATES, INC.

DECISION

STATEMENT OF THE CASE

JOHN M. DYER, Administrative Law Judge: Following the issuance of an Order by the National Labor Relations Board, herein referred to as the Board, remanding this case to the Administrative Law Judge who originally heard the proceeding and his becoming unavailable, the parties hereto, Mobile Home Estates, Inc., herein referred to as the Company or Respondent, International Union, Allied Industrial Workers, AFL-CIO and its Local 712, herein referred to as the International and the Local and collectively as the Union, and the counsel for the General Counsel, herein referred to as the General Counsel, expressed their desires on how to proceed to the Board, and it issued an Order remanding the proceeding to the Regional Director for a hearing *de novo*. Following the issuance of a notice of hearing by the Acting Regional Director on July 2, 1980, the parties stipulated that this case could be referred to an administrative law judge for issuance of an original and independent decision based on that administrative law judge's own analysis, review, findings, and conclusions in this matter, and not adopting or relying on the findings and conclusions in the Decision of the prior administrative law judge. Following an agreed motion and stipulation, to the Board, it issued an order on September 18, 1980, granting the motion, approving the parties' stipulation, and ordering the chief administrative law judge to designate an administrative law judge for the purpose of issuing and serving upon the parties a written decision on the record containing findings of fact, specific resolutions on the credibility of the testimony of witnesses, conclusions of law, and recommendations. The Chief Administrative Law Judge appointed me and I, with the agreement of the parties, set a date for receipt of their briefs in this matter. Briefs received from Respondent and the General Counsel have been studied and considered, together with the record and exhibits.

The complaint, as amended, sets forth the jurisdiction and commerce allegations and the status of the Union, all of which are admitted. Respondent admitted the supervisory status of Company President James Newman, Director of Marketing Steve Miller, Plant Manager Clarence Brannun, and Plant Superintendent Lascelles. Respondent admitted that it had recognized the International as the bargaining representative of a production and maintenance unit at Respondent's Bryan, Ohio, place of business in March 1972 and signed a 3-year contract with the Union which was in effect from November 13, 1973, through November 14, 1976. Respondent denied that the Union represented a majority of its unit employees until the date of its answer, but admitted that the Union had requested negotiation and collective bargaining with it up through December 10, 1976.[1] It admitted that certain employees struck Respondent from November 20 until December 1 and that the Union notified Respondent the strike was terminated as of December 1, and made an unconditional offer to return to work on behalf of the employees engaged in the strike. Respondent admitted it terminated Harry Holibaugh on November 18 and had not reinstated him, and that the Union on December 10 had requested of it the names and addresses of all bargaining unit employees and it had not honored that request.

Complaint paragraphs 12 through 37, as amended, contain allegations that Respondent violated Section 8(a)(1) of the Act by various interrogations, refusals to consider the Union's wage demands and threats to close the plant, conducting direct negotiations with employees, suggesting the formation of a separate union, and seeking resignations from the Union. Many of these paragraphs are nearly identical in language with the exception of a date. Unfortunately, the General Counsel's brief does not designate which testimony he contends supports the individual paragraph allegations, and I have made assumptions that certain testimony was meant to substantiate certain items in the complaint.

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[1] Unless otherwise specified, all dates herein refer to the fall and winter of 1976 and the first few months of 1977.

The complaint also alleges that Respondent violated Section 8(a)(5) by unilaterally instituting pay raises and increasing the existing piece rate and bonus without notifying and bargaining with the Union, and that Respondent engaged in a course of bad-faith bargaining. It is further alleged that the strike was an unfair labor practice strike and that Respondent did not reinstate 12 named individuals at the conclusion of the strike and laid off or terminated some of them because they had engaged in a protected strike, in violation of Section 8(3) and (1) of the Act. A separate refusal to bargain is alleged in regard to Respondent's refusal to provide the information requested by the Union in its letter of December 10.

Respondent denies that it violated the Act in any manner. Specifically, it states it had good reason to believe that the Union no longer enjoyed the majority support of the unit employees following the conclusion of the strike and at that time it determined not to further recognize or bargain with the Union. It denies that the strike was an unfair labor practice strike but urges that its inception was economic and that it had reached an impasse with the Union in regard to pay matters and that, when it granted certain raises which it had offered to the Union during negotiations, it was completely within its rights.

In essence, Respondent admits that, when the strike became imminent, it sought information from employees as to whether they would cross the picket line and work since it had decided to stay open during the strike and needed information to determine whether that course of action was feasible. Respondent also admits that, when asked by the employees what wage rates it would pay during the strike, it informed the employees that it would pay the rates it had offered to the Union.

Respondent offered various defenses regarding the 12 employees who were not immediately reinstated. According to it, some of those people quit prior to the strike and some were probationary employees who were not brought back since it determined they would not make good employees. Others were brought back shortly after the strike and some were recalled later, primarily because they were not needed since Respondent's business was down. Although Respondent hired five or six employees before it brought back some of those alleged as discriminatees, it stated that those hired were needed for particular jobs which those strikers were unable to perform. Respondent stated it terminated Holibaugh because he slowed down on the job and refused to perform; it denied that his union activity influenced its decision. Respondent offered various explanations for other allegations and denied it had performed certain actions.

In determining credibility where there are conflicts between witnesses, I have credited Belknap only in areas where he is corroborated by other individuals or testified to an event similar to other credited testimony. Some of Belknap's testimony went considerably further than other General Counsel witnesses and appeared to me to be embellishments on fact or his conclusions rather than direct reporting of events. In deciding to credit Belknap only partially, I noted his denial of a prior felony conviction and am not convinced by his explanation of that testimony. Belknap's rebuttal denial that Lascelles was a supervisor and "in fact I never seen Ron Lascelles or ever heard of him until I went back to work," meaning following the strike, is incomprehensible when compared to his previous testimony that Lascelles was one of the foremen of the Company and that he had heard Lascelles ask Holibaugh to perform certain work. It appears that Belknap completely disregarded his prior testimony in trying to make a point during his rebuttal testimony. Taking all of these matters together, I have concluded that Belknap's testimony is not reliable unless in the circumstances cited above.

I have not credited Holibaugh completely since there were times during his testimony when he seemed to be evasive, and I believe the testimony preponderates against him in regard to his statements about overtime, both for himself and others, and whether he urged slowdowns.

Some of the General Counsel's witnesses who worked during the strike appeared to favor Respondent's version of events and appeared more friendly to Respondent than the Union or the General Counsel. Where they testified to what President Newman or other supervisors said which might be considered violative of Section 8(a)(1), I have credited that testimony. A number of witnesses did not recall events and where opposing witnesses were able to cite what took place and give details, the opposing witnesses have been credited.

In applying Board law to the facts which I hereafter find, I have concluded that Respondent did not engage in a course of conduct, refusal to bargain, which was alleged as violative of Section 8(a)(5) of the Act. I did find that Respondent did not have sufficient reason to decide that the Union no longer represented a majority of its employees and that Respondent violated Section 8(a)(5) of the Act in refusing to recognize the Union as the representative of its unit employees and negotiate with the Union following the strike, and further violated Section 8(a)(5) in refusing to give the information the Union requested in its December 10 letter. I have also determined that Respondent, through President Newman, violated Section 8(a)(1) of the Act when he told certain employees, who had said they would work during the strike, that they could form their own union. It was also found that Director of Marketing Miller violated Section 8(a)(1) of the Act in his conversation with employee Mihuc.

I have found that the strike was an economic strike and that the parties were at impasse over wage rates and that Respondent's paying the rates and amounts which were the same or less than what it had offered to the Union during negotiations was proper and that it did not violate the Act by telling employees who stated they intended to work during the strike that it was going to pay such amounts. Since Respondent had decided it wished to run the Company during the strike and the strike appeared imminent after the last bargaining session, inquiries made of employees as to whether they intended to work during the strike were proper under Board law. Where questions were asked by employees in regard to the possibility of being fined by the Union, I do not find that the answer given by Newman that the employees could resign from the Union to forestall such action violated the Act, nor do I find that Respondent initiated or sponsored the document begun by employee Piper for resignations from the Union.

On the basis of the evidence, I have concluded that Holibaugh was not discharged in violation of the Act. Respondent's explanations for its recall or nonrecall of the 12 named individuals, one of whom the General Counsel agreed to exclude and drop from the complaint, I find have not been rebutted by the General Counsel and I have determined that Respondent did not violate that allegation of the complaint.

Insofar as the record shows, all parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally at the hearing held in this case.

On the entire record in this case, including the exhibits and testimony, and noting the contradictions in the testimony, and on the credibility resolutions I have made, I make the following:

FINDINGS OF FACT

I. COMMERCE FINDINGS AND UNION STATUS

Respondent is an Ohio corporation with its plant and office in Bryan, Ohio, where it engaged in the manufacture and nonretail sale of mobile homes. During the 1976–77 period Respondent annually purchased and received, directly from points outside Ohio, goods and materials valued in excess of $50,000.

Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits, and I find, that International Union, Allied Industrial Workers, AFL–CIO, and its Local 712, are labor organizations within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background and Undisputed Facts*

Most of the allegations in the complaint concerned Company President James Newman who, together with his wife and daughters, owned and controlled the Company. Newman testified that he was the principal designer of the mobile homes his Company built and, to a large extent, designed and built the building used by the corporation. The original complaint alleged that Steve Miller occupied the position of "supervisor" and was an agent of Respondent acting in its behalf and a supervisor within the meaning of the Act. Respondent's answer to the complaint admitted the allegation of the complaint, except it denied that Miller occupied that position. Miller's position, according to Respondent, is that of director of marketing. In regard to the 8(a)(1) complaint allegation about Miller, Respondent took the position that Miller was not a supervisor of the employees in the unit, but that his capacity was head of sales and directing salesmen, and denied that he had been made a supervisor for a day over the employees in the production and maintenance (P and M) unit. From the admissions and from the testimony, it is clear that Miller is a supervisor in the sales department as director of marketing, and whether he had direct supervision or not over the P and M unit employees for a short time is immaterial since he is still a supervisor acting in Respondent's behalf and speaks for the Company in his capacity. Therefore, Respondent is responsible for the remarks I found he made.

The sales department inspected finished trailers to determine that they met Company product standards before accepting them for delivery to customers. Miller and other salesmen would examine mobile homes and mark a "squawk sheet" identifying needed repairs or work. If minor matters were involved, such as puttying over nail holes or removing excess putty, etc., the salesmen or Miller might effect the repair.

Under Newman were Plant Manager Clarence Brannun and Plant Superintendent Ron Lascelles. Respondent in its 10 or 11 departments had senior employees who were designated as group leaders and were paid 10 percent more than regular employees for their work. The parties appear to have agreed that they were not supervisors. According to Respondent, its operation was cut up into a number of subdivisions and there might or might not be a group leader in each of these subdivisions.

Respondent built both single and double-wide homes which would start their journey through the plant at the first station where the frame was placed, followed at other stations by the floor, then the walls and various work done at the stations until the product was ready to be rolled out of the plant at the last station and placed in the yard. Sometimes final finishing touches or repairs were needed after the product left the plant, while it was in the yard.

Respondent did not produce products for inventory but built only for a confirmed order which it tried to fill in 3 weeks.

During the fall of 1976, Respondent had 40 P and M unit employees according to the available exhibits, and they were producing around three single homes a day. Newman said he sought to produce a floor, that is one single-wide product or half of a double-wide home, with the expenditure of 120 man-hours or less.

During the fall Respondent received an order for six double-wide units, which were to be fancier and better finished than its regular products and consequently took more time to complete. But since 12 floors would be only a small percentage of Respondent's production of 3 floors a day over a 2-or 3-month period, this order would not explain the slowdown in production Respondent testified it experienced.

The plant is partially open and apparently it is rather difficult to work in some parts of the plant during cold weather. Respondent stated that usually the winter season brings a slump in orders and for the two winters prior to the 1976–77 period it had closed its plant completely except for a few personnel.

Respondent stated that its orders were low in the winter of 1976–77 and it did not need to replace all of its employees and return to its prestrike complement for that reason; additionally, it sent some employees to prepare and show its product at an annual mobile home show in Louisville, Kentucky, and these employees were gone for several weeks.

The 3-year contract between Respondent and the Union, among other things, contained a checkoff authorization clause and a provision that the employees in the unit were to become members of the Union after 30 days' employment. The contract also provided for a 45 working day probationary period for all employees and contained a clause that either party had to give the other 5 days' notice if it wished to terminate the contract.

Respondent claimed that initially it did not deduct dues since authorization cards were not provided for a period of more than a year after the contract commenced. Eventually dues authorization cards were provided and the employees signed them and dues and initiation fees were thereafter deducted from employees and forwarded on a monthly basis to the Union.

The employees belonged to an amalgamated local union whose offices were somewhere other than in Bryan, Ohio. During the summer of 1976, there was a renewed interest in the Union and regular monthly meetings of Respondent's employees began to be held. The members sought their own local union, petitioned for it, and it was granted by the International. An election was held in August and officers, a bargaining committee, and stewards were elected. William Hamilton was elected president, Harry Holibaugh, vice president, Phyllis Hicks was elected secretary and became the treasurer after the strike commenced following Denny Sanders' resignation from the Union. Employees Piper, Eddy, Paxton, Sheets, and McCloud were trustees.

Respondent and the Union entered into negotiations for the renewal of the contract in October and met on five seperate occasions, the last date being Friday, November 12.

Among the objects which the Union sought were a minimum wage scale of $5 per hour and the elimination or some modification of compulsory overtime. The Company had proposed a wage scale less than what the Union sought and suggested a new pot bonus system which would pay employees, after deducting labor and other costs, 7-1/2 percent of the inventory price of the finished product. It was agreed by Union Representative Campbell during his testimony that the 7-1/2 percent pot bonus figure would be in excess of 10 percent of the employees' wage rates.

At the November 12 negotiation meeting, the parties went through various proposals. Some agreements were made but the main sticking point was wages. After receiving a different proposal from the Company and the Union's rejecting it, the parties left the meeting room. They met outside on the street, conferred further, went back inside and met again, secured agreement on a few other items, and Respondent revised its wage rates to a base in the first year of the contract of $3.65 per hour, with $3.85 for employees with 6 months' seniority, and $4.10 an hour for employees employed longer than a year. Raises for the second and third year appear to average somewhere around 7 to 8 percent. The union negotiating committee again rejected Respondent's offer as insufficient but said it would take it to a meeting of the employees, although recommending against it, and that the meeting would be held on Sunday, November 14.

There were 32 employees at the union meeting on Sunday, November 14, and they rejected Respondent's final contract proposal by 31 to 1. A vote was then taken on whether to strike and the result was 28 for striking, 2 against, and 2 void.

A notice reciting the rejection of the Company's offer and terminating the contract signed by Roy Campbell was delivered to Newman at home by Holibaugh, Belknap, and Eddy who told Newman, when he asked, that the action meant the employees would strike as of midnight November 19-20.

Holibaugh was terminated on Thursday, November 18. A picket line was established at the Company's premises shortly after midnight on Saturday, November 20. It appears that some 13 people who were on dues authorization prior to the strike signed a document resigning from the Union, and most of them worked during the strike. The number of employees who picketed dwindled during the strike and some of the employees who stayed out and did not work did not picket.

The picketing employees held a meeting in the evening of December 1 and decided to terminate the strike. Union Representative Campbell informed his superior of the vote, and his superior said he would notify the Company by letter. Some of the picketing employees returned to work the following day. A letter from the Union, dated December 1, making an unconditional offer on behalf of all striking employees to return to work, was received by the Company between December 2 and December 3. According to the complaint and amended complaints, the 12 people listed in paragraph 39 were not returned to work then and some were never asked to return to work.

On December 10, Union Representative Campbell sent a letter to President Newman requesting a list of all employees with their dates of hire, addresses, rates of pay, and the department in which they were working. The letter also requested the continuation of dues deductions and stated that the Union was prepared to resume contract negotiations on December 21, 22, or 23. Newman's return letter, dated December 14, stated that according to the contract and Respondent's attorney the Company could not deduct dues from the employees but enclosed a list showing the amounts deducted from employees for November. Campbell responded on December 17, saying Newman had not answered his request for further negotiations and for the information sought in his previous letter. On the same date Respondent's counsel wrote Campbell, saying that because of previous commitments he would be unable to meet on the negotiation dates proposed by the Union and suggested that the Union call him after the first of the year to make arrangements for a negotiation date. He stated that the checkoff authorizations expired with the termination of the contract and Respondent would not deduct dues from any of its employees' wages.

There were no further negotiation meetings between the parties, with neither of the parties seeking to get in touch with the other and the Union filing the initial charge in this case on December 27.

B. *Events Prior to the Strike*

1. Phyllis Hicks was one of the most senior employees at Respondent and built cabinets for installation in trailers. In August 1976, she was elected recording secretary and was a member of the negotiation committee, participating in the five negotiation sessions. During the strike she became the treasurer when the Union replaced members and officers who had resigned from the Union. She testified that after either the second or third negotiation session in late October, while she was in the cabinet shop, Newman said he had offered a fair contract. She said she did not think it was fair because the wages were not much different from those in the prior contract. Newman said he could not afford to pay $5 an hour (base salary) but would have to close his doors because he would go bankrupt. Hicks was asked to name the members of the negotiation committee, she did so, and then was asked if they were present during this conversation, and the transcript shows she said yes. This answer would certainly nullify the allegation.

Hicks testified that on Saturday, November 13, while in the cabinet shop, Newman asked if she would cross the picket line if there was a strike. She said she would but would not bring her car across the picket line and Newman responded that either he or one of the supervisors could bring her through the picket line. She testified Newman said if they did not have the Union he could afford to pay some of them better wages.

She had another conversation with Newman later on the same day in uptown Edgerton, Ohio, in which she again told Newman she would cross the picket line. He said the Company had offered a just and fair contract and they would bring her across the picket line. She stated that Newman said she would have to withdraw from the Union so she would not be fined.

On the following Monday, she saw Newman near the cabinet shop and told him she would not cross the picket line. He told her he would bring her across the picket line, but she repeated she would not cross it.

Newman testified he decided to try to keep the plant open for work in the event the employees struck and he attempted to determine whether enough employees would cross a picket line to make his decision feasible. He agreed that he and Phyllis Hicks talked on and off about the strike for a couple of weeks prior to it and that she told him she wanted to work and he told her he would help her come across the picket line. Newman also stated that some of the employees told him they were afraid to work during the strike because they had been told they could be fined $500 by the Union if they did so. He said he asked his counsel about it and was told that employees could not be fined if they were not members of the Union and he in turn gave this information to a number of the employees. Newman admitted he spoke to Phyllis Hicks about the negotiations and the amount of pay the Union was demanding and stated that what he said to her was the same thing he had said to the entire union negotiating team during negotiations, and Hicks said that was true. Newman said that on Monday Hicks reversed herself and said she was not going to work during the strike; she said she had received some threatening telephone calls and was worried. Although stating at one point that she did not tell Newman on Monday, November 15, about being concerned because of threatening telephone calls, Hicks later said she might have discussed the subject with Newman and acknowledged that she did receive a telephone call and was afraid for her daughter.

The above testimony appears to relate to complaint paragraphs 12 and 13. Complaint paragraph 12 alleges that Newman interrogated an employee regarding the employee's intention to cross the picket line on or about November 13.

It was apparent following the union committee's rejection of Respondent's contract offer on November 12 that the parties were headed for a strike. In these circumstances and considering both Newman's question to Hicks and his later questions to other employees in the following week as to whether they would work during the strike, it appears that *Mosher Steel Company*, 220 NLRB 336 (1975), controls the situation rather than *W. A. Sheaffer Pen Company Division of Textron, Inc.*, 199 NLRB 242 (1972). The Board has held that inquiries of employees as to their strike intentions are not *per se* unlawful where the record shows there is a reasonable basis for fearing a strike and respondent seeks information on which to determine whether it can keep its business open during the strike. One *caveat* is whether such inquiries are coupled with threats or promises. I find that the discussions between Newman and Hicks did not contain threats or promises and that these were questions asked by Newman to determine whether to attempt to keep his business open. I would therefore dismiss complaint allegation 12, finding that it is not substantiated.

Complaint allegation 13 alleges that Newman threatened an employee with plant closure rather than "reasonably considering the Union's wage demands, in order to discourage employees from engaging in a protected strike." Hicks' testimony was that Newman said he could not pay $5 an hour and would have to close his plant doors because he would go bankrupt.

Prior to this time, Respondent and the Union had engaged in five negotiation sessions and Respondent had made three different wage proposals, altering its proposal a second time during the last negotiation session. It is clear that Respondent did consider the Union's wage proposal, made several counterproposals, and rejected the Union's proposal on the ground it could not afford it.

There is nothing in Hicks' testimony that would show Respondent did not reasonably consider the Union's wage demands, and the General Counsel has not demonstrated by any other evidence that Respondent did not "reasonably consider" the Union's position. The lines on pay were drawn sharply with the Union proposing and not backing away or compromising on its $5 position.

The fact that Respondent did not accept the Union's position but argued that having a basic rate that high would bankrupt it is not any proof that Respondent did not consider the Union's position in a reasonable manner.

The testimony falls far short of supporting complaint paragraph 13, and I find, accordingly, that this allegation must be dismissed.

Complaint paragraph 15 alleges that Newman on or about November 13 unlawfully suggested that an employee resign from the Union "in order to avoid engaging in a protected strike and further, to avoid being fined by the Union for failure to engage in an authorized strike." The testimony of Hicks was that Newman said she would have to withdraw from the Union so that she would not be fined after she told him that she would cross the picket line. Newman asserted in his testimony that his response to employees concerning fines was based on their questions to him concerning the issue. It is clear that Newman did not say anything to Hicks about resigning from the Union "in order to avoid engaging in a protected strike." The Board has found violations where an employer urged employees to resign from the union in an effort to undermine union strength or undercut employee support of a strike. This was not the case here. The employee, known by the Company to be a union member and officer, had said she would cross the picket line and physically not support the strike, and the information was given to her on the basis of current rumors that union members who crossed the picket line would be fined $500.

In these circumstances, I would not find that Newman violated Section 8(a)(1) of the Act since the threat of fines was being bruited around and this information was given to an employee union member who said she would cross the picket line. There is no testimony that she did not ask Newman about the fines. Accordingly, complaint paragraph 15 is dismissed.

2. Hicks testified that on either November 15 or 16, while in the cabinet shop, Steve Miller asked if she was going to cross the picket line if there was a strike and she told him that she would not cross the picket line.

The General Counsel's brief states that employee Darlene Dangler corroborated that Miller approached Hicks. However, Dangler's testimony is only that she saw Hicks and Miller talking.

Miller denied that he had any conversation with anyone in the cabinet shop and specifically said that he had no conversation with Hicks.

Assuming, without deciding, that Hicks' testimony is correct, I would find it insufficient to support the complaint allegation. There are no accompanying remarks which would threaten or promise anything to Hicks. The issue is whether this, by itself, is unlawful interrogation.

Miller, as the director of marketing and head of sales, had a direct interest in whether trailers were going to be manufactured and produced through an impending strike. Although Miller did not have Newman's responsibility in making the decision whether to operate during the strike, he was a supervisor who could report his findings to Newman. There appears to be no coercion extant or intended in this conversation, and I find that the testimony does not support the complaint paragraph and that paragraph 17 must be dismissed.

3. Jan Piper, who had worked for the Company some 4-1/2 years and was the person with the most seniority, testified that between November 13 and 15 President Newman asked if he would work during the strike and he replied that he probably would.

Assuming that this testimony is meant to support complaint paragraph 16, I find that it does not substantiate it and that complaint paragraph must be dismissed.

As stated above, after negotiations had terminated and possibly after the employees had voted to strike, there was no question but that a strike was imminent, and Respondent, seeking to determine whether it would have enough employees to run the plant during the strike, asked some of its employees if they would work during the strike. This questioning in this manner and for this purpose was proper and not coercive interrogation. See *Mosher Steel, supra*. Therefore, complaint paragraph 16 must be dismissed.

4. Kenneth Brown testified that after the strike vote had been taken he asked if Newman was going to keep the plant open and Newman said, "Yes, who is going to work?" Brown said he talked to Newman about going to the Edgerton plant (Mini Mansions, a sister corporation) if Newman was not going to keep the Bryan plant open. Dennis Sanders testified that during the week of November 14 Newman asked if he was going to strike, and he said it looked like it and asked Newman if he could work if Newman was going to stay open. Newman said he was going to stay open and Sanders could work if he wanted to.

Presuming that the testimony of Brown and Sanders is meant to support complaint paragraph 19, I find and conclude that these remarks and questions by Newman were proper under these circumstances and I accordingly will dismiss complaint paragraph 19.

5. It is not known what evidence the General Counsel would assert substantiates complaint paragraph 20 which alleges that Newman interrogated an employee during the first 3 weeks of November regarding the employee's opinion as to whether employees would engage in a strike. If the General Counsel was relying on the testimony of Phyllis Hicks or Kenneth Brown, and knowing of no other testimony which might be relevant, I do not feel that such testimony supports this complaint paragraph and I accordingly would dismiss paragraph 20.

6. The General Counsel has not suggested what testimony substantiates complaint paragraph 23. The only testimony which seems to come somewhere near the allegation that Newman interrogated an employee concerning the employee's knowledge of other employees' intentions of engaging in a strike would be Brown's testimony that, after he asked if Newman was going to keep the plant open, Newman said, "Who is going to work?" If this testimony is meant to substantiate complaint paragraph 23, I find that it fails to do so. The context of the conversation would not permit such a strained interpretation. There being no other testimony which I can find which would substantiate this complaint paragraph, I dismiss complaint paragraph 23.

7. Complaint paragraph 18 alleges that Newman threatened employees during the week of November 14

that Respondent would close its plant rather than reasonably consider the Union's wage demand for the purpose of discouraging employees from engaging in a protected strike.

Nile Eddy, who had been with the Company a number of years, was a member and trustee of the Union and on the bargaining committee. He attended three or four negotiation sessions, resigned from the Union prior to the strike, and worked during the strike. At the time of the hearing in this case he was an assistant supervisor and was called by the General Counsel as an adverse witness.

Eddy said he, along with others, rejected the Company's contract proposal and voted to strike and was one of the three who went to Newman's house to give him the message that the Union had rejected the Company's offer and voted to strike. During the week prior to the strike Eddy talked to Newman about the bargaining positions, stating that he thought what the Union asked for was fair and asked why Newman did not want to pay the the $5 base rate. Newman said a lot of people in the factory were not doing their jobs and that he could not pay people who were lazy and stood around doing nothing. Eddy asked why they could not get rid of those people. Newman replied that if they could get rid of the people that did not want to work he could afford to pay a halfway decent wage. During this conversation Newman asked if they were going to strike, and Eddy replied that they were not putting barrels out there for nothing. Eddy said that, though he did not remember it precisely, it is possible Newman said if the employees went out on strike he would probably have to close the plant.

Employee Anthony Paxton, who had been with the Company over 2 years at the time of the strike, said he told Newman while they were conversing in the plumbing department that he would strike for more benefits but not for more money. Newman said he could not pay $5 an hour, that he would close the plant down before he would pay that much because people were not doing their jobs and he would lose money. Paxton said he agreed with Newman that he would lose money at that rate.

There is no testimony or evidence that Respondent would not or did not reasonably consider the Union's wage demand, as noted *supra*. The statements in the context shown above do not amount to a coercive threat to close the plant but rather appear to be statements of what Newman felt might become necessary if the employees did not work during the strike or if Respondent had to pay a wage rate which it thought would drive it into bankruptcy. Again, presuming that Eddy's and Paxton's testimony is meant to substantiate complaint paragraph 18, I find and conclude they do not do so and I dismiss paragraph 18.

8. Employee Ernest Williams, who was a group leader, stated that on Thursday, November 18, Newman asked if he was going to work on Monday. He told Newman there was a strike vote and there would be a strike and he would be on the picket line.

Complaint paragraph 22 alleges that Newman interrogated an employee on or about November 19 regarding the employee's intention to engage in or refrain from engaging in a strike. Assuming that Williams' testimony is meant to substantiate complaint paragraph 22, and/or complaint paragraph 24 which is phrased precisely the same, I find that the testimony does not substantiate either paragraph and that they should be dismissed on the basis that questioning an employee as to his intention to engage or not engage in a strike where the strike is imminent and respondent is attempting to keep its plant open during the strike is not coercive or violative of the Act as per *Mosher Steel, supra*, and I dismiss complaint paragraphs 22 and 24.

9. Gary Woodall testified that on November 18 Newman asked what he thought about the whole matter pertaining to the strike and he replied that he did not care and walked away. He said that Newman asked him this question two or three times that day.

Employee Robert Belknap testified he was asked by Newman in one part of their November 18 talk what he felt about the Union and he responded that it was good for both the Company and the employees. Newman said he meant concerning what they were negotiating for. Belknap replied that they were being fair in what they asked for, and Newman replied that they were not, that $5 an hour was not fair because it would break him and that a lot of the employees would slack off and not work if they were getting $5 an hour. Belknap said he replied, "You're the boss and you could weed out those people that won't work and get rid of them and get employees that will work." He said Newman asked what he thought about working under a gentleman's agreement and going nonunion if they went out on strike. He said he replied no, that he had taken an oath when he joined the Union and he felt obligated to the people he represented who had voted him in office. He said Newman said he would make it worth his while if he would stay and he replied no, he could not do it. Newman supposedly then said Belknap was not being fair, and he replied that he could not withdraw "like you want me to." The conversation turned to an injunction the Company was going to get, and Newman was asked whether he had shown Nile Eddy some canceled orders and he responded yes, because he could not fulfill the contracts. Belknap said he asked why Newman did not tell that to the entire committee. Newman supposedly responded he was glad that was brought up, that he could make it worthwhile if they withdrew from the Union, stayed in the shop, and worked instead of going out on strike. He said he told Newman he could not do that and Newman said they were not going to hurt him, he would have a new crew coming into the plant. He also stated that Newman said there would be a piece of paper coming around the shop for people who would stay and work to sign and, if he changed his mind, the paper would be floating around.

Complaint paragraph 21 alleges that Newman unlawfully interrogated an employee regarding the employee's attitude towards the Union and the employee's position on the Union's bargaining demands. If Woodall's testimony is meant to substantiate this allegation, I find that it does not do so.

As stated *supra*, in view of Belknap's overall testimony and the attack on his credibility, I have determined not to credit Belknap in areas which are not corroborated by other employees or where there is no credible similar testimony. It appears that Belknap embellished his testimony since he retreated from it somewhat during cross-examination.

Newman testified that about 2 days prior to the strike he talked with Belknap concerning whether Belknap would work during the strike; Belknap said he would not and hoped there would not be any hard feelings. Belknap told him that one of the reasons was that the people had elected him and he felt an obligation since he was on the bargaining committee and was afraid of violence. Newman told Belknap there were no hard feelings. Belknap said Newman would not have the trouble if he paid $5 an hour. Newman replied he could not afford to. Newman denied saying anything about Belknap's membership in the Union or withdrawing or resigning from the Union. He also denied that he had a conversation with Belknap about working under a gentleman's agreement. He said he had mentioned those words when he had talked to a group of employees in the sidewall department earlier that week. He stated that at that time Sanders, Paxton, and six or eight other employees had asked if they could work during the strike and he told them that he was going to have the plant open and anybody who wanted to could come in and work. They wanted to know whether they would be under a contract and he replied no, but they could have a gentleman's agreement between them. Newman denied stating anyting to Belknap about a paper going around, saying he did not know anything about any paper until Piper showed him a paper in the lunchroom the day prior to the strike.

As between Belknap and Newman, I credit Newman's version of the events. It appears from the transcript that Newman had a good grasp of the facts and was able to detail what occurred, when, and who was present. Belknap's testimony seemed to be hazy in comparison.

Insofar as complaint paragraph 21 is concerned, I credit Newman's version of the conversation and find that Newman was asked by Belknap what he was going to do during the strike, and he replied that he was going to get some new people if they went out on strike, and that they had a conversation concerning whether Belknap would work during the strike. Accordingly, I dismiss complaint paragraph 21 as not being substantiated by the testimony of either Belknap or Woodall, or of Holibaugh *infra* , and I do not find any other credible testimony which would tend to support this paragraph.

In regard to complaint paragraph 36, which I assume is meant to be substantiated by Belknap, I find that Belknap's testimony does not substantiate it and that it must be dismissed.

Paragraph 36 alleges that Newman engaged in direct negotiations with employees and sought assistance of the employees in undermining the Union and dissipating its majority status "by coercively suggesting to them that they resign from the Union, draft and circulate a petition among employees for the purpose of soliciting resignation from the Union, form their own separate Union and enter into a separate 'gentleman's' agreement with Respondent governing the employees' terms and conditions of employment."

Belknap was the only witness of all of the General Counsel's witnesses to suggest that Newman said there would be a paper going around the shop for people to sign who would stay in and work. I credit Newman's denial of having any such conversation with Belknap. Newman readily admitted using the term "gentleman's agreement" but stated that it did not occur in any single conversation with Belknap but was mentioned to a group of employees that he talked to in the sidewall department when they had asked if they could work during the strike and wanted to know if they would be under a contract. There is nothing to suggest in his answer that a "gentleman's agreement" meant that they were going to have a separate contract. Newman discussed with employees that he would pay them the amounts which he had offered to the Union during the negotiations. Since there is no reliable testimony to tell us what a "gentleman's agreement" would consist of, I can only assume that the language meant that he would agree to pay them the amounts which he stated and not otherwise alter their terms and conditions of employment, and to that extent that was an agreement between them but not a contract.

There is nothing in Belknap's testimony concerning Newman's suggesting employees resign from the Union as such, other than the statement about a paper going around. Further, there is nothing which would demonstrate that Newman suggested a paper be drafted and circulated to such purpose, and there is no testimony by Belknap that Newman suggested that the employees form their own separate union. Accordingly, on the basis of my credibility determinations and the lack of support for the allegation in complaint paragraph 36, it must be dismissed.

Complaint paragraph 27 alleges that Newman engaged in direct negotiations with an employee "by coercively informing the employee of Respondent's opinion of the Union's wage demands." Assuming that this allegation is meant to be substantiated by Belknap's testimony, I find that the testimony does not substantiate the allegation and I am not completely clear that this allegation sets forth a violation of the Act, in that it is not clear what is meant by "coercively informing." In any event, I find that complaint paragraph 27 is not substantiated by any credible evidence and must be dismissed.

Complaint paragraph 28 alleges that on or about November 18 Newman engaged in direct negotiations with an employee and promised a benefit by informing the employee Respondent would enter into a separate gentleman's agreement with him if he refrained from engaging in a protected strike.

Assuming that this complaint allegation is meant to be substantiated by Belknap's testimony, I note again that I do not credit Belknap completely and do credit Newman's version of the conversation he had with Belknap. Noting again the reference to a gentleman's agreement, I find that this complaint paragraph has not been substantiated by any credible testimony and it must be dismissed.

10. Charles Albertson, who had been with the Company approximately 4 months at the time of the strike, was a welder and a member of the Union. He testified he had a conversation with Newman on the day before the strike in the frame shed in which Newman said he was not going to meet the Union's demands and was planning on taking a trip to Florida and closing the place down in December anyway. According to Albertson, Newman also said that while the employees were out on strike they would not be drawing any unemployment and they could starve as far as he was concerned.

Newman testified that on November 17, which was his birthday, he was in the frame shop with Steve Miller, Albertson, and others, and someone said to Miller that they ought to go to Florida. Newman said the plant would be locked up for the winter anyway and he thought he would go down there and buy a condominium and, turning to Albertson, joked, "Why don't you come down and wash my car and mow my yard?"

With the historical background that the plant had been closed during the two previous winters and, here, a strike was imminent which might possibly close the plant depending on how many people came in to work, and these remarks being made in fun according to both Newman and Miller, I find that there is no violation of the Act as alleged in complaint paragraph 26 because I do not find that these were threats of Respondent's economic reprisals if the employees struck. I further find that there is no substantiation for the allegation that Respondent would not reasonably consider the Union's wage demands as explained *supra*.

Assuming again that complaint paragraph 26 is meant to be substantiated by the testimony of Albertson, I find that it does not do so and accordingly I will dismiss complaint paragraph 26.

11. Complaint paragraph 14 asserts that on or about November 18 or 19 Respondent assisted employees in the preparation of "a petition" setting forth union members' intentions to resign from the Union and allowed the petition to be circulated among its employees throughout its facility.

Jan Piper testified that he had a meeting with Newman and employees Sanders and Paxton in the office on either November 18 or 19. He testified that they went to the office to tell Newman they wanted to work during the strike because they needed the money. Newman said he was not allowed to negotiate with them. Piper, without attribution, said there was some talk about resigning from the Union and forming their own union and working under a gentleman's agreement where they would look out for each other, but he was not sure that Newman said anything about resigning from the Union. Newman did say something about a gentleman's agreement but Piper could not define it. Piper said Newman might have talked about a 10-percent increase in piecework but was not sure. During the conversation Newman said he would not pay $5 an hour and did not care if they stayed out all winter.

In regard to a "petition" or document, Piper said that he and others in the plant were talking about the possibility of a $500 fine for working during the strike and that this conversation had been going on before they went in to see Newman; he said this might have been brought up during the conversation with Newman.

It seems reasonable from what Newman testified to at various points that, if asked concerning this, Newman would have replied that they could not be fined if they were not members of the Union.

Following the meeting with Newman, Piper went several offices away to Newman's secretary, Mrs. Ellis, and asked her to type something for him. She agreed, and he dictated the folowing: "The following people do not wish to be represented by Roy Campbell or Local 712, Allied Industrial Workers of America." The document contains a typewritten date which appears to be November 18, 1976, and a handwritten 9 over the 8. On the document itself, which is Respondent's Exhibit 2, there are 13 purported signatures. It does not appear that any other employees were with Piper when Ellis typed this paper and an envelope addressed to Union Representative Campbell. Piper said that Ellis had typed other things for him and other employees on occasion. The postage on the envelope appears to be from a postage meter, and Piper testified that he asked someone in the office to put the postage on the envelope. Ellis testified that the postage meter is not in her office and that she was not asked to place the postage on the envelope. She stated that, if she had been asked, she would have charged Piper 13 cents for the postage.

Piper said he took the paper into the plant and gave it to some employees in his department who passed it around and eventually returned it to him, and he mailed it. He agreed that he may have flashed the document in front of Newman but he did not think that Newman looked at it closely, that Newman did not ask to see it but that he showed it when he told Newman that 12 or 13 people would work during the strike.

Newman testified that Piper told him he wanted to work during the strike and that a number of others talked to him about resigning from the Union, including Paxton and Sanders. In regard to the document, he stated that Jan Piper showed it to him the day before the strike in the lunchroom and that he told Piper he did not want it. He testified that he had received advice from his counsel that he should not get involved with anything like that if it went on. He said a copy of it was put in his mailbox on either Thursday or Friday prior to the strike, that it appeared about the same time a group came into his office and told him that they were going to work during the strike and that there were others who would work also.

Newman testified that approximately 2 weeks prior to the strike he was asked by Sanders and others about working during the strike; he told them his attorney had said that if the employees were not members of the Union they could not be fined. Asked if he said anything to a person about not circulating a document when it was shown to him, he said that he did not know that it had been done or when. Newman admitted that on occasions prior to the strike he told some employees that he felt the Union's proposals were unreasonable. He said that a lot of employees had in their minds that they were going to get $5 an hour and that this was unreasonable to him; when he was asked by any of the employees about the negotiations and the amount of pay, he would respond that the Union's demand for that amount was unreasonable.

While the complaint refers to a "petition," it is clear that there was no petition such as to sponsor a decertification or another union that was circulated insofar as this transcript shows. What the General Counsel refers to as a "petition" is actually a statement of resignation from the Union which contains 13 purported signatures.

Complaint paragraph 14 alleges that Respondent unlawfully assisted employees in the preparation of this document, that they knew of it and allowed it to be circulated among its employees in its plant during worktime. To support this allegation, it appears that the General Counsel assumes that Respondent had and enforced in its plant a no-solicitation rule. The transcript and exhibits do not demonstrate that Respondent had or enforced such a rule or that the circulation of a document during worktime was prohibited by Respondent.

Insofar as the testimony demonstrates, there was no participation by any members of management in the preparation or circulation of the document. The only management knowledge demonstrated by the testimony is that it was shown by Piper to Newman at lunchtime. There is no testimony that any supervisor knew or approved of the circulation of the document. Piper testified that originally he had the document prepared and gave it to others to circulate and that, after others had signed it, it came back to him. Thus, there is no evidence as to how many signatures were on it at the time it was shown to Newman. It is just as feasible that the document was completely signed by noontime when Newman saw it, as it is feasible that it was unsigned or partly signed. There is no way of charging Newman with foreknowledge of the circulation of the petition and no way to demonstrate that he knew the petition was circulated in the plant during worktime.

The General Counsel has proved that a secretary for Respondent typed the two-line document on company paper and addressed an envelope with the Union's address. It has not been proven who authorized the expenditure of 13 cents for postage for the envelope.

At best, we have ministerial clerical assistance from Respondent and nothing else proven in regard to the preparation and circulation of this document. On the status of the evidence, the allegations of complaint paragraph 14 have not been substantiated, and I conclude that it must be dismissed.

12. Harry Holibaugh was a member of the negotiating committee both as the vice president and, after President Williams resigned, as the president of the Local. He testified that on November 18, the day he was discharged, while at work Newman asked what it would take to end the strike and he replied it would take what they asked for, $5 an hour. He said Newman replied he could not afford that and at that rate of pay some of the people would not have an incentive and would just goof off. Holibaugh responded that Newman would be surprised how well they would work if he paid them a decent wage. Newman asked again if it would take $5, and he replied yes and the conversation ended.

Holibaugh, after first denying it, admitted on cross-examination that this conversation was practically the same as they had during various negotiation sessions. He agreed that Newman said, if he paid $5 an hour as a minimum rate, there would be no way he could motivate the employees to work.

Newman testified that he had several conversations with Holibaugh concerning the status of the negotiations in the week prior to the strike. He asked Holibaugh if they would ever get things settled and Holibaugh said yes, if they got $5 an hour. He told Holibaugh he could not afford that and testified that this was the same thing they had been saying to one another during the negotiations. Holibaugh stated that maybe they could get some of the men who did not want to work out of the plant but indicated the committee had to have $5 an hour to keep from striking.

It is not known if Holibaugh's testimony is meant to substantiate complaint paragraph 21 which alleges that on November 18 Newman interrogated an employee regarding his attitude towards the Union and his position on its bargaining demands. It is assumed that Holibaugh's testimony is meant to substantiate complaint paragraph 33 which alleges that on November 18 Newman engaged in direct negotiations with an employee in the absence of the negotiating committee by seeking the employee's assistance in settling the strike. Complaint paragraph 34 alleges that during October and November Newman discussed piece rate and vacation pay proposals with an individual and thereby engaged in unlawful individual bargaining. It is not known whether Holibaugh's testimony is thought by the General Counsel to substantiate complaint paragraph 34.

Considering complaint paragraphs 21 and 33 together, the evidence shows that on November 18, less than 48 hours before the strike was due to start, Newman was asking the president of the Union if the strike could be avoided and how. This question was not addressed to Holibaugh as an individual employee, but rather as the principal in-plant spokesman for the Union. If Holibaugh's answer had indicated a change in position, it is likely further negotiations would have ensued. However, his answer demonstrated that the Union was holding fast to the wage demands and was not prepared to compromise it at that juncture. Newman did not indicate his position would change and any prospects for a compromise faded. This conversation was not an effort to circumvent or subvert the Union but rather a question directed by Newman to the Union as to whether some movement could be made at this last minute to avert the strike. Whether the remark was made in a joking or a serious manner is immaterial. I do not find that complaint paragraphs 21 or 33 are substantiated by the evidence. I know of no other testimony which would substantiate the allegations of complaint paragraph 33 and accordingly I dismiss it. Complaint paragraph 21 was considered *supra.*

If Holibaugh's testimony is meant to substantiate complaint allegation 34, I find that it does not do so for the reasons stated above. Further, there is no testimony that discussions between Newman and Holibaugh took place at any time other than the week immediately prior to the strike.

The next question is whether the testimony of Nile Eddy or Dennis Sanders substantiates paragraph 34. Eddy testified that he told Newman he thought the amount of money the Union asked for was fair. Eddy said he went to Newman's office to talk to him about the status of negotiations and wanted to know why Newman would not agree to the Union's demand. Newman said he could not afford a base rate of $5 when some of the employees would not work. There is nothing in Eddy's testimony about vacation pay. Eddy's testimony will be considered further in regard to complaint paragraph 31 *infra*.

Sanders testified that during the week prior to the strike he and employees Kenny Brown, Leroy Stantz, Tom Farley, and a few others were discussing what the base rate would be if they worked during the strike. Newman walked by and Sanders asked Newman what the base rate would be if they worked during the strike. Newman said it would be $4.10 for the ones who were there a year, $3.65 for the ones under 6 months, and $3.85 for those between 6 months and a year. They also discussed that instead of the 7-1/2 percent pot bonus on the invoice price they would get a 10-percent wage bonus, which while a higher percentage would be less money than the Company's proposed pot bonus. There is no testimony that anything was said about vacation pay. Sanders' testimony will be considered further regarding complaint paragraph 35.

I do not find that any of these conversations substantiate the allegations of complaint paragraph 34 since the question concerning rates to be paid during the strike was a legitimate question and was asked by the employees of Newman, and Newman responded as both Eddy and Sanders testified. With the subsequent finding that an impasse concerning wages existed prior to the inception of this economic strike and Respondent was free to effectuate the amounts it had offered the Union, it is clear that this was not individual bargaining but an announcement of Respondent's plan. The alteration of the pot bonus was not unlawful, as will be discussed *infra*.

I do not find that either of these conversations violated Section 8(a)(1) of the Act and accordingly I will dismiss complaint allegation 34.

Sanders' testimony is assumed to relate to the allegation in complaint paragraph 30 which alleges Newman unlawfully engaged in direct negotiations with employees by offering them Respondent's last wage proposal if they refrained from striking. The testimony does not substantiate this allegation since, as I will find *infra*, the parties were at an impasse over wages and Respondent, in attempting to work during the strike, could tell its employees what wages it would offer to employees who agreed to work during the strike. Therefore, I will dismiss complaint paragraph 30.

13. Complaint paragraph 32 is very similar to paragraph 30 in alleging that on November 19 Newman negotiated directly with employees by offering them the last wage proposal he had offered the Union in negotiations.

Assuming that Paxton's testimony is meant to substantiate this allegation, I find that it does not and that the paragraph must be dismissed.

Paxton, with fellow employees Beatty and Stantz, was in the plumbing shop on November 19, and they asked Newman if the pay rate during the strike would be the same or different from the rate of the old contract. Newman told them the rate for employees with a year's seniority would be $4.10 plus a 10-percent incentive.

This testimony is similar to that of Sanders in regard to complaint paragraph 30 above and for the same reasons as expressed for its dismissal, I will dismiss complaint paragraph 32.

14. Pat Gentry testified that around November 17 while in the lunchroom, he had a conversatibn with Plant Superintendent Brannun and Director of Marketing Miller. Brannun wanted employees to stay and work overtime, he threatened to fire them if they did not do so, and they were arguing back and forth. The question of the strike was brought up and, according to Gentry, Miller said he would pack up and go to Florida.

Complaint paragraph 25 states that Miller threatened employees on or about November 17 by coercively stating Respondent's intention to close the plant and go to Florida in order to discourage employees from engaging in a strike.

Assuming that Gentry's testimony is meant to substantiate complaint paragraph 25, it does not do so since no threat was made and, according to the transcript, nothing was said about closing the plant. Miller's saying that he would pack up and go to Florida appears nothing more than a statement of what he would do if the plant was struck.

I conclude and find that complaint paragraph 25 is not substantiated by evidence and I will dismiss it.

15. Gwen Mihuc began her employment with Respondent in October 1976. She testified that, while working in the final finish department on November 19, Foreman Lascelles told her that Steve Miller would be acting supervisor that day. She testified that later Miller said the Union was not any good, that the employees should quit it and start their own union because it was costing them money. She testified he said they were going to close the plant down and he and Newman were going to Florida and buy a condominium. Further, she stated Miller said there would be all new people working there in March and none of the people presently working would be there and Respondent had enough people to build trailers without them.

During cross-examination Mihuc said she knew Miller, thought he was the head salesman, and had seen him inspecting trailers and doing some minor repair work. She stated Miller was perfectly serious in his conversation with her and that Miller started the conversation.

Lascelles denied telling Mihuc or anyone else that Miller was to be their foreman for a day. Lascelles stated that on November 19 some of the employees had come to work and then punched out early and he was shorthanded since Respondent was attempting to get as many trailers completed prior to the strike as it could. He asked Miller to stay in the finish department to make sure that things got done right and he told those in final finish to do what Miller wanted to get the coaches properly prepared so they could get them out; but he stated he did not tell the employees that Miller was their acting supervisor.

It would appear, from what Lascelles admitted he told the employees, that some of them may have assumed Miller was their acting supervisor for that day. Whether he was or not, there is no question but that Miller is a supervisor, as Respondent admitted, although he may not have had direct supervision over unit employees. Nevertheless, he is an agent for and speaks for the Company.

Miller recalled a discussion he had at or about that time with employee Vicki Kreischer when Gwen Mihuc and several others were present. Kreischer said there were a lot of rumors going around concerning what might happen and she wanted to work but was afraid to do so, she was going to stay home when the strike started. As to whether anything was said about Florida, Miller said he and Newman had a standing joke about going to Florida and getting a condominium for the wintertime. He said they all laughed about it, including Mihuc. Miller said Mihuc left shortly after that, saying she had a headache and there was a lot of pressure on her.

Respondent, in examining its witnesses accused of violations of Section 8(a)(1), in any number of instances drew direct denials of such testimony from them, in addition to their versions of the conversation. There is no denial from Miller of the direct statements Mihuc attributed to him concerning the Union being no good and that employees should quit it and form their own union because it was costing them money. Accordingly, I find that Mihuc's testimony is undenied and I have no reason not to credit her.

Accordingly, I conclude and find that the allegations of complaint paragraph 29, in regard to unlawfully encouraging an employee to refrain from engaging in a protected strike and from supporting or giving assistance to the Union for the purpose of undermining the Union and dissipating its majority status, and complaint paragraph 37, alleging an attempt to undermine the Union by telling an employee to resign from the Union to form a separate union since it was no good and cost money, are substantiated by Mihuc's testimony. The testimony dealing with the statement about going to Florida and closing the plant during the strike do not come within the ambit of a direct threat according to the bulk of the testimony regarding this statement. Accordingly, I do not find that such a threat was made but, rather, that the words were not meant seriously.

16. Complaint paragraph 31 alleges that Newman on two occasions engaged in direct negotiations with and coerced an employee, informing him that Respondent would pay the requested wage rate, despite the fact that it had been unwilling to pay the rate, if the employee would assist Respondent in undermining the Union and dissipating its majority status.

Presumably this allegation is meant to be substantiated by the testimony of Nile Eddy. As stated above, Eddy went to Newman's office and asked why Respondent could not pay the amount the Union was requesting. Newman replied that a number of people in the plant were not doing their jobs and were lazy and he could not afford to pay people like that if they were going to stand around and do nothing. Eddy testified he said, "Why can't we get rid of those people?" He said Newman replied that, if they could get rid of the people that did not want to work, he could afford to pay a half-way decent wage. Eddy said he told Newman that Newman could weed out and get rid of the people that did not want to work and then Newman could afford the pay raise. Questioned closer by the General Counsel concerning this statement, Eddy said that Newman said, "Well, if we weeded out the bad guys, maybe I would pay the money, if we got the guys that didn't want to work."

The testimony does not substantiate the allegations of the complaint. Apparently, the General Counsel felt that "bad guys" referred to union members, but it is clear that the reference was to employees that Newman felt were not working. Eddy, at that time, was still a union member and a member of the negotiating team. The complaint allegation appears to assert that Newman was attempting to enlist Eddy's aid to somehow help him get rid of union employees and, if successful in dislodging the Union, Newman would pay a $5 base rate. Eddy's testimony will not substantiate such a tortuous reading. The testimony appears to be a discussion between Eddy, a person interested in getting the Union's position across to Respondent that the employees wanted $5, and a response by Newman that he could not afford a base rate of $5 to employees who were not interested in working. The thrust of the conversation is not that Eddy would somehow get rid of the people or the Union, but that Newman should get rid of inefficient or lazy employees. Complaint paragraph 31 is dismissed since I conclude and find that it is not substantiated by any testimony.

17. Complaint paragraph 35(c) alleges that on November 18 Newman engaged in surveillance of union activities at an employee's home in Edgerton, Ohio. Phyllis Hicks testified that an impromptu union meeting of 10 or less employees was held at her home that evening following Holibaugh's discharge. During the time the employees were at her home, she saw a red and white Lincoln Continental driving past her house; she testified that the only person she knows who owns such a vehicle is Newman. However, she could not see or identify the driver of the car nor the license plates of the vehicle. Later, as she was preparing for bed following the union meeting, she saw the car drive past her house again.

Newman testified that he was nowhere near Hicks' house that evening, that he had not known of any union meeting, and that he was home the entire evening because his family gave him a surprise birthday party. Newman said he had a friend who lives in the same community as Hicks, but denied that he had visited the friend that evening.

This allegation must be dismissed since, even crediting Hicks, there is no identification of person or vehicle but only of a red and white Continental. There is not even proof that there are no similar cars in the area.

Accordingly, I dismiss complaint paragraph 35(c).

18. Complaint paragraph 35(b) alleges that Newman attempted to seek assistance of employees in undermining the Union and dissipating the Union's majority status by telling them to resign from the Union.

Employee Paxton testified he asked Newman about union fines, saying he had heard that the Union would fine members $500 if they worked during the strike. Newman replied that the Union could not fine members who resigned from the Union and then worked during the strike.

Belknap testified that Newman told him to withdraw from the Union, but I do not credit this testimony since it is the only testimony attributing such a statement to Newman and, on the credibility resolutions regarding Belknap, I would not credit such testimony. Further, Newman denied doing so.

Newman admitted telling employees who asked him that they could escape from being fined by the Union if they resigned from the Union before working during a strike. He attributed this knowledge to his attorney's advice.

The testimony demonstrates that employees sought assistance from Newman in regard to the subject of fines and he answered their queries by telling them the Union could not fine them if they resigned from the Union prior to working during a strike.

I do not find these statements to be coercive, but merely a response to employees who were concerned about a fine if they did work. While the employer may have been happy to give advice which encompassed resignations from the Union, his answers, based on his counsel's advice, to questions by employees how they could work during the strike without being fined by the Union, are not violative of Section 8(a)(1) of the Act, and accordingly I dismiss complaint paragraph 35(b).

19. Complaint paragraph 35(a) alleges that Newman attempted to undermine and dissipate the Union's majority by suggesting to the employees that a separate union be formed.

Sanders testified that during their conversation Newman said the employees could form their own union. Similarly, Paxton testified that, in his conversation on November 19, Newman said the employees could start their own union and have their representative in the plant.

Newman testified that during the week prior to the strike a number of people talked to him about union membership and fines, saying that they were afraid to work during the strike because Holibaugh was telling them they would be fined $500. He told them, according to his counsel, they could not be fined if they were not members of the Union and that a number of employees spoke to him about resigning from the Union. While denying any conversation with Belknap about withdrawing or resigning from the Union, Newman did not directly deny this testimony of Sanders and Paxton. Newman was asked to deny quite a number of statements attributed to him and he did so on a number of other occasions.

In this instance, I credit the testimony of Sanders and Paxton, who appeared to be, if not completely neutral witnesses, at least favoring the Company to some degree. They were employees of long standing with the Company who had resigned from the Union to work during the strike. Their testimony appears to go against the Company in this instance, and I credit it; I conclude and find that Newman suggested, at least to Sanders and Paxton, that the employees could start their own union in the plant after they had resigned from Respondent and that such statements violated Section 8(a)(1) of the Act.

In view of my finding *infra* that Respondent violated the Act by not continuing to recognize the Union, it is clear that Respondent was not free to do so and certainly was not free to encourage employees to start their own union, since Respondent had a duty to recognize the Charging Party and continue to negotiate and deal with it.

C. *Background of Holibaugh's Termination*

Holibaugh started with the Company on May 12, 1976. He stated that his job was to unload trucks and supply parts to the various departments as needed, and that he had been told by the person who had the job before him and showed him what to do that was all the job required. He stated that prior to the commencement of negotiations he would unload trucks, empty wastebaskets, and put out materials, and that he had volunteered to clean the lunchroom but he very seldom moved trailers.

Holibaugh became a union member and participated in the August 25 election of officers; he was chosen vice president and a member of the negotiating team. When the president of the Union resigned in mid-October, Holibaugh became president of the Local.

Holibaugh testified that, after he became a union officer, he was told that his duties also included cleaning the lunchroom and the men's room, cleaning up the yard and moving trailers, and cleaning wastebaskets in the sales department twice a day. The thrust of Holibaugh's testimony was that these duties were added to his ordinary duties following his becoming a union officer and concurrent with a change in attitude towards him by Supervisor Lascelles. He said that prior to that time Lascelles was friendly, but afterwards Lascelles' attitude became extremely hard towards him, particularly after he filed grievances against Lascelles. The first grievance he filed was for failure by Respondent to pay him holiday pay (apparently for Labor Day). His grievance alleged that he had worked the 8 hours before the holiday and 8 hours the following workday, but Holibaugh admitted he was late the day following the holiday and felt the withholding of holiday pay was erroneous. He agreed that, when this grievance was presented, Lascelles told him to put it in, that he might win it.

Holibaugh testified that, he prepared two grievances on the evening of October 20 and presented them to Lascelles the following morning. One of the grievances alleged that the Company was in violation of the contract by not posting job vacancies. The second grievance was a strong attack on Lascelles which alleged that Lascelles engaged in "total and unnecessary harassment to employees, *continuous badgering* to work faster and harder, threatening to fire employees it caught out of department witch [sic] is depriving employees of bathroom rites [sic], threatening employees to work over 8 hours or they will be fired. '*Fits of anger*' unbecoming of a plant manager that suggest physical violence to employees."

Holibaugh testified that Lascelles read the grievance and replied that he was going to give Holibaugh a warning. Holibaugh stated that one good turn deserved another, and Lascelles gave him a warning for not staying and unloading a truck. Holibaugh said he explained to Lascelles that he had washed and punched out, and was in his car getting ready to leave when the truck came in and nobody asked him to stay. Lascelles said that he should have come back, punched in, and unloaded the truck.

Holibaugh acknowledged receiving another warning for not staying and unloading a truck, saying he had told Lascelles the day before that he could not work overtime because he had to pick up his wife.

Respondent adduced testimony from employee Piper that he had held the job Holibaugh performed, prior to the time that the individual who trained Holibaugh was employed, and such person remained on the job a very short time. Piper testified that the normal duties of the job included working the towmotor, stocking the plant, unloading trucks, keeping the yard picked up, moving trailers, emptying wastebaskets, and cleaning bathrooms and the lunchroom.

Holibaugh admitted that, when he received a raise in July, Lascelles said he expected a lot more from him and that he would be moving trailers off the end of the line. He said he told Lascelles he did not have enough time to do everything and Lascelles responded that he was sure Holibaugh would find the time.

When pressed on cross-examination as to when his relationship with Lascelles started to deteriorate, Holibaugh said that negotiations started around October 7 and by October 21, when he got that warning, the relationship had certainly changed. Asked if he recalled receiving warnings prior to that time, Holibaugh said he did not recall receiving a written warning from Lascelles on August 27 for missing too much work but acknowledged his signature when shown the warning slip. Asked if he remembered another warning for missing too much work dated September 8, he said he did not recall receiving such from Lascelles. When shown the document, Holibaugh noted that there was no signature or union approval on it and said he did not recollect seeing it. He was asked if he had refused to sign any written warnings and replied that he had; he acknowledged that there would be no signature with a refusal, but he did not recall whether he refused to sign the document.

Holibaugh said he probably disagreed with all the warnings Lascelles gave and added that no excuse was good enough for Lascelles. When questioned as to whether he missed work during those periods, he replied that he had no idea. He was asked concerning other dates on which he allegedly missed work or was late; he did not recollect any but said that there were a few mornings when he was late, and he did not remember when they were.

In regard to working overtime to unload trucks, Holibaugh acknowledged that some trucks came from Indiana and, because of the time difference, did not arrive until late. He stated that sometimes he stayed overtime and sometimes he did not, that it depended on the plans he had, but said he never stated he refused to stay. Holibaugh said that if he had an important appointment or had to pick up his wife he would tell that to Lascelles, but added again that no excuse was ever good enough for Lascelles. Asked if he refused to stay on October 20, he said he did not refuse, but his testimony is unclear as to the reason he did not stay to unload a late truck on that date. The October 21 warning slip states that "the employee refused to work over and stated that he will not work any time past 4 p.m. There are times when overtime is required." There is a purported signature of Niles Eddy and a written statement "but do not go along with it." Another warning slip dated October 29 signed by Lascelles has as its complaint: "Left when he knew truck was here to be unloaded. This must be stopped." There is a notation that Holibaugh refused to sign it.

There is agreement that during the negotiations the Union was attempting to secure the elimination of or restrictions on mandatory overtime. Holibaugh stated that after he became union president he proposed to the Company both inside and outside of negotiations that overtime should not be worked to get trailers completed. He admitted discussing this with other employees, stating that it was his opinion that a person did not have to stay and work 14 or 15 hours a day and have no life of his own. Asked if he had ever had to work 15 hours a day, he sidestepped the question by saying he would not do so. Asked if in the week before the strike he discussed not working any overtime with the employees, Holibaugh said a number of employees, including Schooley, Blankenship, and others, asked if they had to work overtime and he said they could use their own discretion. Asked if he had told Lascelles that the employees did not have to work overtime, he first said he might have done so; he then said he suggested it to Lascelles but Lascelles said that they had to work overtime when it was needed. He said there was one occasion when he told a group of employees in the lunchroom they could use their own discretion, and the employees decided not to work overtime.

Holibaugh was questioned about his second warning for not staying overtime to unload a truck (October 29) and was asked if he had not demanded of Lascelles that he be given a 3-day layoff, as this was his third warning in a 90-day period. He said he did not do so in those terms but he did ask whether Lascelles was going to suspend him for 3 days like he did everybody else on a third warning. He did not recall whether Lascelles said the warning was for corrective purposes rather than for punishment.

This acknowledgment by Holibaugh of one of the two overtime warnings as a third warning in a 90-day period is a contradiction of Holibaugh's testimony that he did not recall the previous warnings for missing too much work in September and August. For this warning to have been his third, one of those prior warnings would have had to be included in the 90-day period.

Asked whether he complained to anybody else that he had not received a 3-day suspension, he answered that he did not recall. He denied saying that he would take the plant out if Respondent gave him a 3-day suspension. When questioned as to whether he complained to Plant Superintendent Brannun that Lascelles had not given him a 3-day suspension, he denied that, but did not deny talking to Lascelles about the suspension and stated that he might have done so.

Holibaugh was also asked about the Respondent's incentive pay system and replied that there was no incentive pay, there was only partiality and discrimination.

Ron Lascelles testified that the job for which Holibaugh was hired included receiving material, putting it away, keeping the yard in orderly fashion, supplying materials to the lines, emptying wastebaskets, cleaning the lunchroom and other rooms, and removing coaches from the line. Lascelles testified that Piper had held that job, and, for a period of some 4 to 6 weeks, a short-time employee held it between Piper's and Holibaugh's tenure. Lascelles testified that he talked to Holibaugh about Holibaugh's attendance problems, emphasizing that it was a small company and they did not have a lot of cross-training and everybody was needed to show up on time.

Lascelles also said he had discussions with Holibaugh concerning the need for employees to work overtime until the trailers were done and moved out of the plant. He told Holibaugh that materials come in from all over the country and there was no way for the truckdrivers to schedule themselves to be there precisely during worktime; sometimes it was required that a person stay late to do the unloading. Holibaugh said he did not want to work overtime and that 1 or 2 weeks before the strike, Holibaugh said he was not going to work overtime any more, that his wife worked elsewhere, they had only one car, and he had to pick her up. Lascelles told Holibaugh that did not fit with the Company's rules and there were occasions when overtime had to be worked. Holibaugh replied that Lascelles could not require him to work overtime.

In regard to October 21, Lascelles said he prepared the warning slip and gave it to Holibaugh before Holibaugh gave him the two grievances. When he gave Holibaugh the October 29 warning concerning not working overtime, Holibaugh said this was his third warning; he asked if Lascelles was going to give him a 3-day suspension and added that, if Lascelles did, he would take the shop out with him. Lascelles said no, that it was a warning, not a discipline, and he wanted to make sure Holibaugh understood what the Company wanted from him, that they did not want to chase him off or cause problems, and therefore he was not giving him a suspension. Lascelles testified that Holibaugh argued he was supposed to receive a suspension and, after saying several times that he was not going to suspend him, Holibaugh said he would see about it and went to Brannun. Lascelles followed, and Holibaugh told Brannun that he had received three written warnings and was supposed to have 3 days off, that Lascelles had given him the third warning and did not suspend him and he wanted Brannun to override Lascelles. Brannun refused to do so.

Lascelles testified that Holibaugh's work got progressively worse and that, when he would talk to Holibaugh about improving, Holibaugh would look at him and smile and say he was doing his best and that he interpreted this behavior as an attempt to needle him. Lascelles noted that during the week prior to the strike production slowed down, material was not being delivered to the areas, and he saw Holibaugh around the shop talking to people, not doing his work.

D. *Holibaugh's Termination on November 18*

Holibaugh acknowledged that on November 18 he was late to work but said others were late as well; he was the only one who received a warning. He did not testify as to whether the others had the same history of problems he had with lateness and absenteeism. He stated that during that day he was ordered over the loudspeaker system to go move trailers off the line so he got the tractor, went to the end of the line, and spotted them in the yard. Thereafter he went back to his towmotor and found that Newman was using it loading cabinets. Newman asked where he had been, and he replied that Newman ought to ask Lascelles, that he had been moving trailers off the line. Lascelles was present and said that Newman should have seen Holibaugh driving, that he did not think Holibaugh could drive any slower. Holibaugh asked if they wanted him to tear the trailers up, and Newman told him that they were not going to take any more—off of him. Holibaugh asked, "Why don't you go ahead and do it?" Newman said he was acting in a smart-aleck manner. Holibaugh said, "Why don't you go ahead and fire me, that's what you're up to anyhow." Lascelles said that they were not going to take any more—off of him, and Holibaugh replied that he did his job. Newman commented that, if he did his job, why was it that several departments needed one-by-four's and one-by two's. Holibaugh replied it was because they were not in stock.

Holibaugh said that following this, around noontime, Brannun said he was not supposed to be talking about union activities all over the plant. Holibaugh asked if they thought he was a robot, that if somebody talked to him he would reply.

Around 3:40 p.m. while Holibaugh was moving a trailer off the end of the line, Lascelles got on the tractor with him. After he had positioned it in the yard, Lascelles said he thought Holibaugh was harassing him, that Holibaugh had a smart attitude and he thought Holibaugh had just better go home. Holibaugh asked if that meant he was fired, and Lascelles said it did. He punched out and left. Holibaugh complained that he was being paged for jobs all over the plant that day and felt he was being harassed.

Newman testified that on November 18, not finding Holibaugh around, he used the forklift to move some cabinets which were needed. When Holibaugh got back, he told Lascelles and Holibaugh that it was Lascelles' obligation to get Holibaugh straightened out. He told Holibaugh that they had taken all they were going to take, and Holibaugh smiled in reply.

Lascelles said that one-by-four's are the main item they use and while occasionally they might be out of some particular length of one-by-four's, the Company would never be out of them entirely.

Lascelles testified that Holibaugh perceptibly slowed down on the job. On November 18, he paged Holibaugh over the intercom to come to move two coaches. After waiting for some time, he walked to the final finishing department, found Holibaugh and asked him to get his tractor and go to the end of the line and move two coaches. He returned to the end of the line and after waiting for a while, again went back to the final finishing department and told Holibaugh he was waiting for him to move. Holibaugh said he was coming. Lascelles walked back to the end of the line and arrived before Holibaugh showed up driving the tractor. He said he helped Holibaugh back up and hook up to the trailer and watched him move it into the yard. He testified that Holibaugh was moving as slow as it is possible to move and that it took forever for Holibaugh to move the trailer out and park it. When Holibaugh came back, he decided to talk with him about it and again helped him hook up. Lascelles rode on the back of the tractor and asked Holibaugh why the job was not getting done and why he was so slow. He said Holibaugh spoke about the strike and said that Lascelles had better watch out when the strike started because the big boys from the flooring department were going to bust some heads. He asked Holibaugh if that was a threat, and Holibaugh responded by asking, "Did I threaten you?" and saying no, it was not a threat. He told Holibaugh he wanted him to get the work done so the line could move, and Holibaugh replied that he was not going to "bust his fanny" and smiled at him. He told Holibaugh that he might as well go home because he had to get the job done and had to have someone who was going to do it. Holibaugh smiled, said thank you, and left.

In regard to the statement about the boys from flooring, Holibaugh said he did tell Lascelles they had some pretty big boys in the flooring department and, when Lascelles asked what he meant by that, he replied he was just making conversation.

While Holibaugh denied that he had ever refused to work overtime, it appears from his statements that, although he might not have used those words, such was the clear import of what he said.

Respondent also accused Holibaugh of asking employees to slow down in their work during the week before the strike. Holibaugh denied making such statements. Employee Paxton stated that, 1 to 3 days before the strike, Holibaugh told him not to build up the plumbing material ahead of time but to use up what they had built up so that when the strike started the Company would have to build it, and to slow down his work. Paxton also testified that he overheard a conversation between Holibaugh and Lascelles about 3 days prior to the strike in which Holibaugh said it was not his job to unload a trailer and he was not going to do it. Holibaugh denied making that statement.

E. *Conclusions as to Holibaugh's Termination*

If we consider Holibaugh's testimony and that of a few of the General Counsel's witnesses, it would appear that a *prima facie* case is made out for Holibaugh in that he asserts he began to be harassed by Lascelles at the time he became a union officer and that the harassment continued and increased. His testimonial description of the discharge and the events leading up to it would show that he was being continually harassed throughout that day by Lascelles, that he was trying to do his job and was terminated by Respondent without just cause to punish him for his union leadership. There is testimony that following his discharge some seven to eight employees gathered at Phyllis Hicks' house and talked about going out on strike early to protest Holibaugh's discharge but were dissuaded from doing so by Union Representative Campbell.

Overbalancing this picture is that which evolves from Respondent's testimony, some admissions from Holibaugh, and the warnings. The evidence is clear that Holibaugh had some problems with attendance and lateness and had been warned concerning them; from Holibaugh's admission, it appears that those warnings preceded the asserted change in attitude towards him by Lascelles.

Holibaugh admitted that he saw a truck come in as he was preparing to leave on the evening of October 20 and that, despite knowing he was the person charged with unloading the truck and what Respondent's policy was towards overtime, he did not respond to that policy but left the premises. This occurred shortly after he became union president and, according to his own testimony, attempted to negotiate with Respondent some restrictions on mandatory overtime, in essence acknowledging that overtime was mandatory for employees. The reasons Holibaugh gave for not working overtime amounted to a refusal to do so despite Respondent's necessity to unload trucks that came to its premises.

I credit Lascelles where there is a conflict between Holibaugh and Lascelles, finding that Holibaugh had a heavy bias against the Company and Lascelles, as demonstrated by Holibaugh's testimony, and that there were some contradictions in his testimony. The details of conversation are glossed over to an extent by Holibaugh whereas Lascelles' testimony is more precise and seems to indicate a finer retention of what occurred.

Basically, Respondent agrees that Holibaugh's name was called a large number of times over the intercom on the day he was discharged but it was not because Respondent was harassing Holibaugh, but rather because Holibaugh was not doing the jobs he was supposed to do, and it was necessary to call him a number of times to try to get him to do those jobs. Lascelles' testimony regarding Holibaugh's delays in responding to his instruction to come to the end of the line and move trailers appears to emphasize that point.

If Respondent sought to punish Holibaugh for his union officership and activities, it could have done so by suspending him on October 29 when it had the opportunity and Holibaugh appeared to be insisting on it. In fact, looking at the number of written warnings Holibaugh had received within a 90-day period, the warning of October 21 was the third warning within a 90-day period and the warning of October 29 was the fourth. Presumably, under such circumstances, Respondent could have suspended Holibaugh on October 21 and possibly have terminated him on October 29. However, as Lascelles explained, he wanted Holibaugh to acknowledge the Company's policy on overtime and to observe it and gave him the warning for that purpose and not to punish him or attempt to get rid of him.

If Respondent wanted to rid itself of Holibaugh on the basis that he was refusing to work overtime and in effect seeking to dictate to Respondent what his hours of employment would be, it apparently could have done so and the Board, on the basis of *F. W. Woolworth Company*, 204 NLRB 396 (1973), would have found that to be good cause. But Respondent sought to have Holibaugh accede to its wishes concerning overtime and did not suspend or discharge him then.

I credit Lascelles that Holibaugh's activities during the final week, where he appeared to be engaged in and to encourage others to engage in a slowdown of work, added to his refusals to work overtime, created a situation where Holibaugh was not amenable to what was demanded of him in his job, and I find that the discharge was for good cause and that it overbalances any *prima facie* case of discrimination. Accordingly, I will dismiss complaint paragraph 38.

F. *The Unfair Labor Practice Strike Allegation*

There is agreement, noted above, that the employees engaged in a strike from November 20 until December 1. Complaint paragraph 10(b) alleges that this strike was caused and prolonged by Respondent's unfair labor practices, and the General Counsel asserts that the discharge of Holibaugh was one of the reasons for the strike and, urging that Holibaugh's discharge violated Section 8(a)(1) and (3), claims that the strike was an unfair labor practice strike giving participants therein rights to reinstatement, which are more particularly alleged in complaint paragraph 39.

Counsel's position is undercut by my finding that Holibaugh was not discharged in violation of the Act. Even if I had found that Respondent had violated the Act in terminating Holibaugh, I would still not find that the strike was an unfair labor practice strike.

There is no dispute that on Sunday, November 14, the employees by an overwhelming vote agreed to strike after refusing to accept Respondent's contract offer. It is clear from the testimony that during most of the following week the employees sought to convince Newman that Respondent should pay the $5 per hour amount which the Union was seeking in these negotiations, and Newman responded that he could not do so. It is clear from the testimony that an impasse had developed concerning rates of pay.

During the week prior to the strike, a second meeting was held at an employee's house and another strike vote taken; again the results were overwhelming in favor of striking. On Thursday, November 18, Eddy, who had become convinced that the employees should not strike, sought another strike vote in the lunchroom, and it is clear that the strike again was supported by a great majority of those present. All of these events occurred prior to the Holibaugh termination.

As noted above, on the evening of November 18 an impromptu meeting was held at Phyllis Hicks' house with eight or nine employees present where sentiment was expressed about going out on strike prior to the strike date because of Holibaugh's termination. Union Representative Campbell told the employees that they must wait until the strike date according to the terms of the contract.

On November 19, a number of employees stayed off from work or came into work and left early, claiming that they were sick, but the purpose of such actions was not demonstrated.

No mention was made of an unfair labor practice origin of the strike on the picket signs and no claim was made to Respondent prior to, during, or after the strike that the strike had been caused at least in part by Holibaugh's termination or any other unfair labor practices, until this case.

The strike lasted from November 20 until December 1, and there is nothing in this record to indicate that the strike was prolonged in any manner by anything that Respondent did or did not do, and such prolongation is only a presumption by the General Counsel with nothing to substantiate it. The 8(a)(1) violations found above were not considered by the strike participants, and I conclude that it was an economic strike.

Accordingly, I find that the strike was not an unfair labor practice strike and that employees who struck are not entitled to reinstatement on that basis as alleged in complaint paragraph 39. I dismiss complaint paragraph 10(b) and that part of complaint paragraph 39 which asserts reinstatement rights based on an unfair labor practice strike. See *Romo Paper Products Corp.*, 208 NLRB 644 (1974).

G. *The Pay Raise Allegation*

Complaint paragraphs 40 and 41 assert that Respondent violated Section 8(a)(5) and (1) of the Act by not notifying and bargaining with the Union in regard to the pay raise and bonus rate it paid employees on or after November 22.

Having previously found that the parties were at an impasse concerning pay rates prior to the strike and that Respondent was therefore free to pay employees who worked during and after the strike rates it had offered to the Union, together with Union Representative Campbell's testimony that the bonus rate alleged as violative in complaint paragraph 41 was less than the amount the Company had proposed in its contract offer, it follows that these two allegations are without foundation and, accordingly, I dismiss them.

H. *The General Refusal-To-Bargain Allegation and Respondent's Refusal To Further Recognize the Union*

Complaint paragraph 45 alleges that all of Respondent's conduct, as set forth in the complaint from paragraph 12 on demonstrated course of conduct, bad-faith bargaining by Respondent with the objective of the avoidance of meaningful negotiations with the Union and avoidance of a contract with the Union, the discouragement of employees from engaging in union or protected activities for the purposes of collective bargaining.

With the exception of complaint paragraphs 29, 35(a), and 37 wherein I have found violations, and with the further exception of complaint paragraph 44 where I do find a violation, the remaining unfair labor practice allegations of this complaint have been dismissed.

The General Counsel has not demonstrated any egregious unfair labor practices concurrent with the negotiations which ceased on November 12 which would substantiate the course of conduct, bad-faith bargaining allegations in complaint paragraph 45. Nor has the General Counsel produced any evidence concerning Respondent's conduct during the negotiations, such as reneging on agreements, surface bargaining, etc., which would support his allegations. In short, there is nothing through the time of the strike which would show other than that Respondent engaged in good-faith bargaining with the intention of reaching an agreement.

Therefore, I cannot find that Respondent engaged in course of conduct, bad-faith bargaining. It appears that any violation of Respondent in its duty to bargain with the Union occurred following the strike, and not during the negotiations prior to the strike.

I do find that Respondent had a duty to recognize and bargain with the Union during and after the strike and that the reasons advanced by President Newman in his testimony, and by Respondent in its brief, for terminating its negotiations with the Union and refusing to recognize it as its employees' bargaining agent on and after December 1, 1976, were insufficient and that, by such termination and refusal to recognize, Respondent violated Section 8(a)(5) and (1) of the Act.

President Newman testified that he got a letter from the Union around December 10 and, at that time, did not believe he had an obligation to continue to bargain with the Union. He based his decision on the following: (1) The Union went out on strike and terminated its contract and they did not have a contract at the time of the hearing; and (2) the strike started out with a few people (meaning pickets) which did not represent 50 percent of the work force and dwindled every day during the strike. He said "Those people came back to work before the strike was over." Asked who did, he named Norma Crow and said several others did. He also testified that a further reason was that he had received a list of employees who had resigned from the Union. The list to which he referred is the lists of 13 employees on the document prepared by employee Piper. The General Counsel urged that two of these people later joined and supported the strike. These are all the reasons given by Newman as to why he felt he had no obligation to bargain further with the Union.

Respondent's brief lists 13 reasons which Respondent asserts warranted it in refusing to bargain further with the Union. Those reasons are as follows:

> 1. The Union was *voluntarily* recognized in February 1972.
> 2. It did not achieve a collective-bargaining agreement with Respondent until November 1973.
> 3. The collective-bargaining agreement contained a union shop clause providing for mandatory union membership and a dues checkoff provision but no authorizations for dues checkoff were provided to Respondent until June 1975.
> 4. There was insufficient interest by the employees in the Union to support the establishment of their own local union until the summer of 1976.
> 5. Less than a majority of the employees, on the average, attended the union meetings in 1976 during which the local union was established.
> 6. Union officers had to be appointed, rather than elected, because of such lack of interest.
> 7. Four of the seven local union officers resigned from the Union during negotiations or before the strike.
> 8. Thirteen employees, including three of these four officers, executed a written union resignation and gave MHE's president a copy.
> 9. Thirteen or fourteen bargaining union members worked during the strike.
> 10. The strike lasted only 7 workdays and only 10 to 12 employees attended the union meeting terminating the strike.
> 11. The Company had no meetings with and made no concessions to the Union during the strike to warrant its termination.
> 12. Only 14 of more than 40 employees had more than 6 months of service with the Company in November 1976, and almost all of them worked during the strike.
> 13. Respondent's work force historically experiences high turnover and fluctuates widely in number.

The first six reasons advanced by Respondent have to do with the manner in which the Union was first recognized and what occurred on various dates between 1973 and the summer of 1976; although providing some background, they really have nothing to do with the majority status of the Union in 1976. It is true that under the contract provisions employees were to obtain union membership on or after 30 days' employment and to maintain it; that dues deductions were authorized by the employees and the amounts were paid by Respondent to the Union. However, granting that, these first six reasons are not relevant to the question before us.

It appears from the testimony that the president of the Local resigned from the Union during negotiations and apparently left the Company to go into business for himself. There is no allegation that he continued with the Company and his name does not appear on the Company's records. Other officers or members of the negotiating committee resigned from the Union prior to the strike.

On the document prepared by Piper there are 13 signatures. One or two of the employees indicated that they later withdrew these resignations and did not work during the strike, and there may have been several other people who were members of the Union who went in and worked during part of the strike. There is no dispute, as paragraph 10 in Respondent's brief, quoted above, alleges, that the strike lasted only 7 workdays and that the meeting held to terminate the strike was attended by 10 to 12 members.

Paragraph 11 of Respondent's brief, as set forth above, states that the Company held no meetings with and made no concessions to, the Union during the strike to warrant its termination, which only means that the Union did not win the strike but voted to terminate it for the members' own reasons, not because of any concessions made by Respondent. This does no more than tell us that the impasse which started the strike was still extant at the close of the strike.

Respondent's paragraph 12, as set forth above, alleges that of the 40 employees who were union members and had dues deductions during the month of November only 14 of that number had more than 6 months' seniority with Respondent. It appears to be a fact that most of that group worked during the strike, with the notable exception of Phyllis Hicks.

Respondent's last reason is, *supra*, that its work force historically experiences high turnover and fluctuates widely in number.

All of these reasons, taken singularly or considered together, do not overturn the fact that, in the formal strike vote taken prior to the strike by the Union, the members voted to strike by 28-to-2, with 2 voids or abstentions. The margin was nearly the same in the two other votes which took place on November 17 and 18, with more than a majority of the employees then employed voting to strike.

Even if we were to grant that the 13 resignations were all authentic and continued in force, despite testimony to the contrary on two of them, it would still be mathematically clear that the Union represented a majority of the employees at the time of the strike. There is no evidence which credibly demonstrates a shift of employee sentiment to opposing the Union during or after the strike. The employees who did not resign from the Union must, under the present evidence, be presumed to have continued to support the Union during and after the strike.

In *Cantor Bros., Inc.*, 203 NLRB 774 (1973), Administrative Law Judge Taplitz noted some of the cases which seemed to be controlling in that case and in the present instance. He cited *Coca-Cola Bottling Works, Inc.*, 186 NLRB 1050 (1970), as standing for the proposition that an employer could not rely on the refusal of some employees to go on strike or the return of striking employees to work as a basis for company withdrawal of recognition from the union, since the Board would not presume that failure to support a strike or returning to work during a strike indicated a lack of support for the union. There are any number of reasons why employees would work during a strike even though they supported a union or abandoned the strike while it was still going on.

Here, Respondent seems to equate the number of pickets with the number of employees who support the strike. This is not a reasonable test. The number of pickets merely shows that those pickets are actively engaged in demonstrating their support for the Union. Others may support the Union but not actively demonstrate their support.

The Board has held in *Pennco, Inc.*, 250 NLRB 716 (1980), that strike replacements and new employees are not automatically counted as antiunion. Basically, the Board considers that replacements may support the union in the same proportion that employees did prior to the strike. The Board has stated that there is a heavy burden of proof on an employer since it will not presume the replacements do not support a strike. It stated that to do so would be to overburden the right to strike because, if that were the guide, then an employer could refuse to recognize the union any time there was a strike and replacements. See *Cavalier Division of Seeburg Corporation and Cavalier Corporation*, 192 NLRB 290 (1971).

Respondent may have presumed that, with the corps of senior employees it retained, most of whom did sign the document resigning from the Union, that it felt the less senior employees had no particular interest in the Company, and that it could refrain from negotiating with the Union based to some degree on the number of replacements and the new employees it would be bringing into the Company as it expanded.

However, if this was its hope, it is unavailing as a defense in this instance because under Board precepts Respondent has produced no credible evidence to demonstrate other than that the Union continued to represent a majority of Respondent's employees. On this basis, it is clear that Respondent violated Section 8(a)(5) and (1) of the Act when it refused on and after December 10, 1976, to recognize or negotiate with the Union as the collective-bargaining representative of the employees in Respondent's P and M unit, and I so conclude and find. The Union's request for further negotiations contained in its December 10 letter to Respondent was ignored and in essence was refused; the answer of Respondent's counsel on December 17 was nothing more than a palliative smokescreen.

I. *Requests for Information*

Respondent admits that it received the December 10 letter from the Union which, among other things, requested that Respondent furnish it with a list of all employees which would include their names, addresses, dates of hire, rates of pay, and the department in which they were working. Respondent admits that it failed and refused to provide the Union with such information and says the information was not relevant and necessary to enable the Union to perform its responsibilities as a bargaining representative because the Union no longer represented the employees. However, as noted above, I have found that Respondent's refusal to recognize and negotiate with the Union on the basis of its belief that the Union no longer represented a majority of the employees was ill-founded and, under Board law, was improper and violative of the Act. Since the Union did represent the unit of employees and this information was proper and necessary to its functioning as a collective-bargaining representative, particularly following the strike in this matter, I conclude and find that Respondent's refusal to furnish this information to the Union, as alleged in complaint paragraph 44, was an independent violation of Section 8(a)(5) and (1) of the Act.

J. *The Alleged Refusal Properly To Reinstate 12 Employees*

Parnell Smith, one of the 12 named in complaint paragraph 39, apparently did not cooperate in the investigation in this matter, and the General Counsel on the record stated that Smith had failed to appear and agreed to dismiss him from the case. It would appear therefore that based on the transcript Smith should not be considered in this matter.

The remaining question is whether the *Laidlaw* rights of these 11 individuals were violated in any manner by Respondent's course of offering reinstatement to some and not others.

It is clear from the record that a number of employees who were active in the Union and in picketing, such as Phyllis Hicks, were reinstated immediately after the Union voted to discontinue the strike. This vote took place in the evening of December 1, and Union Representative Campbell requested the Union's director to inform Respondent of the cessation of the strike. In a letter to the Company dated December 1, the Union on behalf of all the striking employees made an unconditional application and offer to return to work and requested immediate reinstatement.

During the strike Respondent had employed employees from a sister corporation, had advertised for other employees, and had hired some people. Roger Simpson was hired during the strike on November 30 as a yardman, presumably to replace Holibaugh.

Respondent stated that it did not hire or recall many people between December and February since it had a few orders; it also had a trailer show in Kentucky and used a number of the people to prepare and set up its trailers for that show. Additionally, because of the strike, Respondent had refused some orders and cut down on some materials and stated it did not have enough orders for a full crew during those winter months. As mentioned, *supra*, Respondent builds it product solely on order and does not produce for its own inventory.

Respondent admitted it hired some people in the interim and gave its reasons why it hired them and why it did not recall some of the employees who had struck and had not yet been returned to work.

Respondent hired Greg Cantler on January 14, 1977, to work in partition II. It stated that Cantler had worked for the Company previously, was experienced, had left, gone to Florida, and returned, and there was no one else available on the list of people who had gone on strike who could do the job he filled.

Lascelles testified he hired Brenda Walter on January 14, 1977, to work in the metal department because there was no one else to fill the job; he made reference to manual dexterity needed for the job. Asked why he had not brought back either Woodall or Gentry who had worked on roofs, Lascelles testified that was a different type of job and they would not have been able to perform it.

Gary Simpson and Charles Sergent were hired on January 26, 1977, in partition I. Lascelles stated that there were no other people among those who had struck who were able to do the job.

Rita Blazekovitch was hired on February 3, 1977, in the trim department, and again Lascelles stated she was hired because no one else was available who could do that job.

Tom Raub was hired on February 15, 1977, and had worked for the Company previously. He had left several months before the strike and was hired by Respondent as a yardman and swingman since he was a versatile employee who could do a number of different jobs. These were all the persons who were hired before Respondent called back to work some of those listed in paragraph 39.

Asked whether some of the strikers could have been trained for some of these jobs, Lascelles said it would have taken as much training to retrain them from their previous work as it would be to put on new employees, that some of them would not have been as dexterous as the persons he hired and some of those he hired had previous experience with the Company. Most of the 11 had been with the Company only a short time prior to the strike.

Respondent further stated that whether a person had been on the picket line or did not work during the strike had nothing to do with its decision on whether to return that person to work. In regard to the 11 employees, we have the following testimony:

1. Charles Albertson was brought in by the Company during December and worked a half day. Albertson stated that prior to that time he had called the Company and was told he was in a layoff status and that Respondent had sufficient employees at that time. He said that following the half day in December he never heard anything from the Company so he got another job. In March 1977, he was called by the Company to return to work but did not respond since he had another job.

Albertson admitted that he had returned to Terry Industries in Edgerton in January 1977, had worked there for 2 years, and was laid off there when he went to work for Respondent in August 1976. He said he was making more money there than he had ever made at Respondent.

2. Lascelles testified that he called Robert Belknap to come back to work and Belknap said he would do so but did not show up.

On rebuttal, Belknap testified that he did not have any such conversation with Lascelles about returning to work and said that Lascelles was not a supervisor. This testimony of Belknap is incomprehensible, considering Belknap's prior testimony as to the supervisory status of Lascelles and as contrasted against the fact that Lascelles was a foreman who was recalling other employees. In any event, Newman called Belknap around February 6, asking him to return to work, and Belknap said he finally reported back to work around February 14.

3. Don Blankenship stated that he picketed and that following the strike he and employee Schooley talked to one of the secretaries in the office and were given layoff slips. Blankenship said he tried Respondent again in February and March and was told he was still on layoff; he was finally recalled on April 4, 1977.

Lascelles testified that he did not need Blankenship immediately after the strike but attempted to call him several times later and was not able to get him.

4. Schooley testified he called the Company and was told that he was out of a job; he implied that this was at the end of the strike and he did not corroborate Blankenship's testimony. He said he received an offer in Febru-

ary or March and talked to Foreman Lascelles; he did not like what Lascelles had to say and did not go back to work.

Lascelles stated that he was unable to reach Schooley the first few times he called but finally got him and asked him to come to the plant. He told Schooley that he needed him to work but wanted better attendance from Schooley than he had before. Schooley said he was healthy and would be in to work every day and would report the next morning. Schooley never showed up, and Lascelles said he never heard from him again.

5. John Carpenter was a probationary employee when the strike started. He lived some 20 to 25 miles from Bryan, Ohio. He did picket duty about three times but did not know when the strike ended; he did not learn that it had ended until some 2 to 3 weeks later. He said that, about a month after the strike ended, he went to the plant and was told there were no openings.

Lascelles testified that he discussed probationary employee Carpenter with Brannun, and they decided they should not bring Carpenter back to finish out his probationary period since Carpenter had poor attendance and was a sloppy worker and they did not believe he should be kept as an employee.

6. Dale Thomas was a probationary employee who did not testify in this case since apparently he was unavailable out of state. Lascelles testified that Thomas had worked in the ceiling-sidewall area and, when someone was needed in that department, he checked with the people in that department, since he was not familiar with Thomas, and asked them about Thomas' work. He testified that all the people in the department, including the leadman, said they did not want Thomas back, so he did not make any offer to Thomas to return to work but terminated him as a probationer.

7. Pat Gentry stated that early in the strike he called regarding a job and was told that the metal work was being done by the people that had been brought over from the sister company, Mini Mansions. He did not receive a call to return to work until February 16 when he was called by Lascelles, and he reported back on February 17.

8. William Kochenour was a probationary employee who stated that he began with Respondent on October 5. He said he signed the document prepared by Piper since he understood he could keep on working if he resigned from the Union but then did not work during the strike. He said he returned to work about 2 days after the strike was over, worked 2 days, and took a day off work to take his wife to the doctor. He said he called in and was told that he had been fired.

During cross-examination Kochenour stated that he did not know that the contract provided for a 45-working-day probationary period before a person acquired seniority; he had assumed he was over the probationary period when he joined the Union. He agreed that he went back to work around December 3 and, when asked whether he punched in 9 minutes late Thursday, said he did not punch in at all, that his card was not there and he did not recall punching out. Then he testified that he did not work that day. Later he testified that maybe he did punch in that day but he did not recall being 9 minutes late. Asked if he had taken his wife to the doctor on Thursday or Friday, he said he might have punched in 23 minutes late on another day. When asked if his record was that, after being recalled following the strike, he was late the first 2 days and missed the third day, he said that could have been the record but he did not recall it. He also admitted that he had been absent four times in his employment prior to the strike.

Lascelles stated that he had recalled Kochenour to work as a probationary employee because he hoped he would become a good worker. However, Kochenour was late twice and missed a third day and Respondent terminated his probationary employment at that time.

9. Mike Marvin testified that he was not on active picket duty during the strike and, during the strike, began to look for other employment. He said that after the strike he sought to go back to Respondent because he had not yet found a job. He said Respondent had an ad in the paper so he went to the plant and saw one of the secretaries and asked if he needed to fill out an application and she said his application was still current. Marvin said he saw another ad in the paper in April 1977, made an application then, and talked to Lascelles. Lascelles asked if he was working and he said he was, and Lascelles told him that he did not need part-time help and Marvin said he was looking for full-time employment. Lascelles said he did not think Marvin could handle it and they would not need him.

During cross-examination Marvin attempted to evade the question of whether on November 29 he had a discussion with anyone in the Company about quitting as an employee at Respondent. He answered the question by saying he quit active picket duty to go look for work. Asked again whether he spoke to the secretary, Mrs. Ellis, concerning quitting as an employee, he stated he called in and told her that he was not on picket duty any more and was looking for employment and needed to go to work. Asked if he told Ellis he was making an application at another Company and wanted Respondent's records to show him as a "quit," he evaded the question and stated that at that time he had not made an application to the other company. He testified that he was planning to make an application but that nobody knew it and, to his knowledge, he did not tell her of his plan. He denied asking Ellis to tell the other company he had quit at Respondent but stated that he started work at the other company in the first part of December and was still there, working on the third shift.

Ellis testified that Marvin asked her about getting a slip to show that he had quit so that he could get a job with the Arrow Corporation. Lascelles testified that he gave Marvin a quit slip when Marvin crossed the picket line into the plant and asked him for one.

In regard to credibility determinations here, I credit Ellis and Lascelles that Marvin asked both Ellis and Lascelles for a quit slip and procured one from Lascelles. There would be no reason for Marvin to make a call or come to the plant merely to tell someone at the plant that he was not on active picket duty and was seeking a job somewhere else. His April request of Lascelles for a job evidently was taken by Lascelles as an application for a second full-time job, with Lascelles answering that he did not think Marvin could handle a second full-time job and they would not hire him.

10. Lascelles testified that on November 19, the day prior to the strike, he wanted some partitions built because the work was behind, and he spoke to Jeff Schilt and one other person who said they were going home. He asked them to stay and finish building the partition they were working on; Schilt said he would not do so, that he was going to quit because he could not afford to go on strike, he had to get another job and therefore was quitting. According to Lascelles, Schilt resigned at that time and left.

Schilt testified that he did not walk the picket line but stayed home during the strike and did not work. He said he did not receive any message from Respondent about returning to work and denied having any conversation with Lascelles about quitting. He lived about 24 miles from Respondent's plant and said he had not learned that the strike was over when he started work at General Tire on February 9, 1977.

I credit Lascelles that Schilt told him he was quitting. I do not see how Schilt could have had any interest in a job at Respondent or in returning to work there, living a mere 24 miles away and not making any effort to determine if the strike had ended before starting work for General Tire almost 2-1/2 months after the strike ended at Respondent. Schilt's actions were those of a person with no interest in Respondent, and I credit Lascelles that he quit.

11. Gary Woodall testified that he called Lascelles in March 1977 regarding a job and was told to come in. Lascelles offered him a job working in the ceiling department although Woodall had worked in the metal department prior to that time. Lascelles felt that Woodall could do the job. Woodall agreed to do it and went to work in the ceiling department in March.

On the basis of the transcript testimony and my credibility determinations, I have determined that employees Marvin and Schilt quit their jobs before the strike ended and that Respondent need not offer them any employment.

Probationer Kochenour was reinstated shortlv after the strike ended but was thereafter fired for apparent good cause, and I find that Respondent need make no further offer of employment to Kochenour.

Employees Woodall, Belknap, Gentry, and Blankenship were recalled from February on, in 1977. Respondent testified that it had no openings that they could fill prior to that time, and there is no countervailing evidence. I therefore find that Respondent owes no further or prior duty to these employees, and there is no proof that it should have recalled these individuals prior to the time it did.

Schooley was recalled and did not come in after agreeing to do so. I do not find that there is any evidence that he should have heen recalled earlier and find that Respondent owes him no offer of reinstatement at this point since he refused its offer.

Albertson worked for half a day in December but then got a job where he had been previously employed; he was laid off but did not respond to any offer from Respondent. It is apparent that he had a job at the other company early in December and did not intend to return to Respondent, so Respondent owes him no further offer of reinstatement.

Probationers Carpenter and Thomas were not offered jobs since they were considered indequate, poor employees. There is no testimony to demonstrate that their union membership or activitv had anything to do with Respondent's not offering to reinstate them. It would be a futile gesture to say Respondent must make them an offer but would then be free to terminate them as inadequate employees. Accordingly I find that Respondent, under these circumstances, is not obligated to offer them reinstatement.

Accordingly, I dismiss complaint paragraph 39.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above in section II which have been found to constitute unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, occurring in connection with Respondent's operations as set forth in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I recommend that it be ordered to cease and desist therefrom and, upon request, bargain collectively in good faith with the Union as the exclusive representative of all employees in the unit set forth below in the Conclusions of Law and in the event that an understanding is reached, embody such understanding in a signed agreement. Respondent shall be ordered to comply with the Union's request for information concerning the employees in the unit.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All production and maintenance employees at Respondent's Bryan, Ohio place of business, but excluding plant clerical employees, office clerical employees, road service employees, truck drivers, and guards and supervisors as defined in the Act.

4. The Union is the exclusive representative of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By withdrawing recognition from the Union and by refusing to meet and bargain with the Union on and after December 10, 1976, and by refusing to provide the Union with requested information regarding unit employees, their names, addresses, jobs, rates of pay, etc., Respondent violated Section 8(a)(5) of the Act.

6. By the foregoing conduct Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

7. Respondent further violated Section 8(a)(1) of the Act by:

(a) Telling employees that after withdrawing from the Union, they should form their own union.

(b) Telling employees that their union was no good and costs them money and they should resign from it and form their own union.

(c) Urging employees not to engage in a strike and not to support their Union.

8. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Respondent, Mobile Home Estates, Inc., Bryan, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize, meet, and bargain with International Union, Allied Industrial Workers, AFL-CIO, and its Local 712, as the exclusive representative of its employees in the following unit:

> All production and maintenance employees at Respondent's Bryan, Ohio place of business, but excluding plant clerical employees, office clerical employees, road service employees, truck drivers, and guards and supervisors as defined in the Act.

(b) Refusing to provide the Union with requested information concerning unit employees.

(c) Telling employees that, after withdrawing from the Union, they should form their own union.

(d) Telling employees that their union is no good and costs them money and they should resign from it and form their own union.

(e) Urging employees not to engage in a strike and not to support their Union.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, bargain collectively with said Union as the exclusive representative of its employees in that bargaining unit and, in the event that an understanding is reached, embody such understanding in a signed agreement.

(b) Provide the Union with the information it requested in its December 10, 1976, letter and with any similar information it may request.

(c) Post at its Bryan, Ohio, plant copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Peabody Coal Company *and* International Union, United Mine Workers of America. Case 14–CA–14724

February 4, 1982

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On September 25, 1981, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Peabody Coal Company, Stonefort, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights."

2. Substitute "Stonefort, Illinois," for "St. Louis, Missouri," in paragraph 2(b).

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

259 NLRB No. 183

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT threaten employees with loss of seniority and/or loss of employment if the Union were selected as their bargaining representative, nor interrogate employees about their union sympathies, about their signing of union cards, or as to how they voted in a Board election.

WE WILL NOT solicit employees to withdraw their support for the Union, nor offer the use of our typewriters in preparing letters requesting that negotiations cease.

WE WILL NOT promise employees more favorable consideration on company jobs if they wrote letters stating that they no longer wished to be represented or if they requested that negotiations cease, nor tell employees that we would only give employees what we wanted in negotiations thereby implying that negotiations would be futile.

WE WILL NOT refuse to bargain in good faith with International Union, United Mine Workers of America as the duly certified collective-bargaining representative of the warehouse employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL, upon request, bargain with International Union, United Mine Workers of

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. II,A,6, the Administrative Law Judge attributed to employee witness Danny Gibbs the testimony about a threat by Supervisor Ronald Menzie. The record shows that employee Phyllis Adler, not Gibbs, testified about the threat. This inadvertent error does not alter our finding of a violation.

America as the duly designated representative of the employees in the appropriate unit.

PEABODY COAL COMAPNY

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case was heard before me in St. Louis, Missouri, on May 13, 1981. The complaint alleged various violations of Section 8(a)(1) of the Act both before and after a representation election which was held on January 9, 1981. The complaint also alleged that Respondent violated Section 8(a)(5) of the Act in refusing to bargain with a certified union. Although the Union has requested bargaining, Respondent continues to refuse on technical grounds although its request to the Board for review of the Union's certification was denied. (Resp. Exh 2.)

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Peabody Coal Company is a corporation duly authorized to do business under the laws of the States of Missouri and Illinois. Respondent has maintained its principal office and place of business in St. Louis, Missouri, and also maintains other facilities in numerous States, including the mine facility located at Rural Route 1 in the city of Stonefort in the State of Illinois, hereafter referred to as the Will Scarlet Mine. The Will Scarlet Mine is the only facility involved in this proceeding. It is alleged and admitted that during the year ending December 31, 1980, Respondent, in the course and conduct of its business operations, mined at its Will Scarlet surface mine located at Stonefort, Illinois, coal valued in excess of $50,000 of which coal valued in excess of $50,000 was shipped from said facility directly to points located outside the State of Illinois.

On the basis of the above admitted facts, I find that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

It is further alleged and admitted that the Charging Party, International Union, United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act and I so find.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The 8(a)(1) Allegations*

The numerous 8(a)(1) allegations are treated in chronological order and in the order in which they appear in the amended complaint.

1. It is alleged that Respondent's mine superintendent, Menzie, on or about December 12, 1980, urged an employee to vote against the Union by promising that wages and benefits would increase without the employees' selecting union representation. There is no testimonial support for this allegation even in the employee's account of his December 12 conversation with Menzie. According to Gibbs, an employee, Menzie said, "I'd like to give you my personal opinion about the election coming up. It looks like you would be better off to go ahead and vote the Union down at this time then wait and see what the outcome of Consolidated Coal Company would be." By this, Menzie was referring to a company where a union had recently won the election and where a contract had not yet been negotiated. Menzie cannot conceivably be seen as promising anything in this remark. Therefore, I recommend that this allegation be dismissed.

2. The complaint further alleges that Superintendent Menzie, on or about December 12, 1980, threatened an employee with loss of employment should the employee select the Union as his collective-bargaining representative. Danny Gibbs credibly testified that, in his December 12 conversation with Menzie, Menzie said "there's a possibility that Pit 16 might shut down and those men over there could bump you if you get in the Union because you have no seniority." Thus, if there were layoffs or reduction in force, others would have more seniority because, as a new member of the Union, Gibbs would have little or no seniority. As a result, Gibbs would be placed on a layoff panel and, due to the number on that list, his chances for employment were minimal. Menzie testified that in discussing seniority with employees, he pointed out to them that their seniority depended on what was negotiated by the Union and the Company. He strongly suggested that their seniority date would be their first day of union membership and that hence they would not get credit for any years of prior employment. Menzie's statement was an implicit threat to the employee that he would lose his job should the Union be selected since his remarks linked, in the guise of a prediction, a union victory and loss of employment. See *Hinky Dinky Super Markets, Inc.*, 247 NLRB 1176, 1178 (1980). I credit Gibbs' version and do not credit Menzie in this respect. Accordingly, I find that this threat was violative of Section 8(a)(1) of the Act.

3. It is further alleged that, on December 21, 1980, Mine Superintendent Menzie interrogated employee Richardson concerning his signing of a union card and his support for the Union and also threatened Richardson with loss of seniority and loss of employment if the Union won. Menzie admits having asked Richardson if he had signed a union card. He also admits having told Richardson that, if the Union won, negotiations about seniority would result in his placement at or near the bottom of the seniority list and, in a work force reduction, he would be laid off. Menzie subsequently claimed to have merely suggested that a union victory could lead to a layoff, but I credit his earlier account and the account of employee Richardson, who also testified that Menzie asked him, in that same conversation, why he favored the Union. Accordingly, I find several 8(a)(1) violations in Menzie's December 21 conversation with Richardson. See *Central Freight Lines, Inc.*, 255 NLRB 509 (1981).

4. The complaint alleged that on or about January 7, 1981, Menzie threatened an employee with loss of employment should the employee select the Union as her bargaining representative. Lori Wahls, a warehouse clerk and employee of Peabody, testified that on or about January 7, 1981, she had a conversation with Menzie in the warehouse. She testified that Menzie told her that if the Union won the election there would be a layoff and that she probably would never work for Peabody again. Menzie's version was different in that he had simply advised employees that if the Union won the election, when the employees became union members, depending on how their seniority was negotiated, they would probably be at the bottom of the seniority list and that, in any reduction in force, they would be the first laid off. Wahls appeared sincere and credible and I credit her version. Accordingly, I find that the comments attributed to Menzie in January constituted a threat to Lori Wahls that she would be laid off if the Union won the election. I find such a threat to be violative of Section 8(a)(1) of the Act.

5. It is alleged that on January 9, 1981, the date of the election, Mine Superintendent Menzie interrogated an employee as to how the employee voted in the election. Menzie himself admits asking employee Emmons whether he voted for "me" or "them." Accordingly, I find that this interrogation constitutes a violation of Section 8(a)(1) of the Act.

6. It is alleged that on January 23, 1981, Menzie threatened an employee with loss of employment. Except for the date, the allegation appeared the same as previously discussed in paragraph 4, *supra*. Preliminarily, I note that, since the allegation was a threat of loss of employment should the employees select the Union and since the union election was held on January 9, it appears that the allegation is at best misworded.

Concerning this allegation, Alder testified that on or about that date Menzie approached her at the warehouse window where she was working and stated he was "surprised in us people wanting to go union, that he had been good to us." According to Gibbs, Menzie also said that he would lay "all of us" off eliminating some of the paperwork or having it done by people from the mines. Alder's testimony does not establish any threat. I credit Gibbs that Menzie said he could lay "all of us" off and use people from the mines. Despite a slight variance from the allegation, I find Menzie's comment to Gibbs, even though it occurred after the election, constituted a threat violative of Section 8(a)(1) of the Act.

7. It is further alleged that on or about February 15, 1981, Menzie threatened employees with loss of seniority because they had selected a union; that Menzie threatened employees with loss of employment because the employees had selected the Union; and that Respondent had created the impression of surveillance of employees' union activities by identifying which employees Respondent believed had voted for and against the Union; and, lastly, that Respondent stated that an employee, believed to have voted against the Union, would be transferred to preserve that employee's job in the event of layoffs.

Danny Gibbs testified that on or about February 15, 1981, Menzie said to him: "You've lost your jobs to the union now." According to Gibbs, Menzie further said, "In the next week or so I'm going to be hiring 11 more men and 3 more the following week for union jobs and that will put you further down the line in your seniority." Menzie further stated that he thought six employees would vote against the Union. When questioned about his conversation, Menzie remembered discussing the hiring of new employees with Gibbs, and telling Gibbs about a 30-day period during which employees could get out of the Union. Menzie further stated that, in regard to seniority, there was no seniority list with respect to the warehouse unit and that the Union has seniority over these jobs. I credit Gibbs' testimony and find that it supports the allegation of a threat of loss of seniority and employment because of selection of the Union. However, I find no evidence to support the latter two allegations involving surveillance and transfer of an employee. Menzie's statement that he thought six employees would vote against the Union does not in my view establish that there was an impression of surveillance. There had been six votes in favor of the Union and one vote against the Union. Since Menzie presumably knew employees' views fairly well, it is not surprising that he would have a view as to how the employees voted and his articulation of that view, without more, does not give the impression of surveillance. Further, I find no testimonial support for the allegation that on or about February 15 Respondent stated through Menzie that an employee would be transferred in order to preserve his job in the event of layoffs. Therefore, as to the specific allegations around February 15, 1981, I find that Menzie did threaten Gibbs with loss of seniority and loss of employment because employees selected the Union as their bargaining representative in violation of Section 8(a)(1) of the Act. With respect to remaining allegations, I find no evidentiary support and recommend their dismissal.

8. The complaint alleges that on or about February 23, 1981, Menzie did the following: solicited employees to withdraw their support for the Union by encouraging them to prepare notarized letters requesting that negotiations cease; offered to allow employees to use Respondent's typewriters to prepare such notarized letters; promised that Respondent would give more favorable consideration in awarding jobs to those employees who signed the letter requesting negotiations cease as compared to employees supporting the Union; and implied that union representation was futile by stating that Respondent would only give the employees what Respondent wished.

Phyllis Adler testified, in regard to the first two allegations, that Menzie had told her, as well as Gibbs, that the Union did not really want the warehouse employees as members, but that actually the Union wanted the warehouse jobs to be union jobs. Menzie further told Adler and Gibbs that they could prepare an affidavit, saying they did not want to join the Union, on the supply room typewriter. Adler credibly testified that she had never asked Menzie or anyone else about how to get out of the Union. Gibbs testified, regarding the same conversation with Menzie, that Menzie had called him and Adler into Menzie's office and had told them that some employees had asked him how to get out of the Union. Menzie told Adler and Gibbs that they could write a letter, using a company typewriter, stating that negotiations should cease. They would have to get five people to sign this letter and they would have to get it notarized. Menzie also told them that they would have to do all those things on their own. Gibbs credibly testified that he had never asked Menzie how to get out of the Union. I credit his testimony in this regard over Menzie's testimony that Gibbs had asked him how to get out of the Union. I credit Gibbs' and Adler's testimony in regard to the conversation with Menzie although Adler remembered the date of the conversation as February 27, whereas Gibbs remembered it as February 23. I do not credit Menzie's testimony that Gibbs asked on his own initiative if he could use the company typewriter to type the affidavit requesting that negotiations cease.

Accordingly, I find that Menzie's conversation with Gibbs and Adler violated Section 8(a)(1) of the Act in that Menzie solicited Gibbs and Adler to withdraw their support of the Union and offered a company typewriter to type an affidavit to that effect.

As to the third and fourth allegations above, Gibbs testified that Menzie had also said during that above conversation that if five people did not sign a letter to stop negotiations with the Union, it would be impossible to get a company (nonbargaining unit) job. According to Gibbs, Menzie then went on to identify George Brouillete (the employee previously identified by Menzie as having cast the one "no" vote for the Union) as the only person who, at that time, could get a company job if he asked for one. Menzie then said that, after five people signed a letter requesting that negotiations cease, so-called company jobs would become available to them. Finally, Gibbs remembered Menzie saying that Peabody was not negotiating at that time but when it did start negotiating it would not give the employees what they wanted, that instead the employees would have to take what Peabody gave them.

I find that Respondent promised favorable consideration for jobs for those who signed a letter requesting that negotiations cease and thereby violated Section 8(a)(1) of the Act. It is not clear whether the comment on bargaining indicated simply his opinion that the Company would take a hard bargaining stance or was, alternatively, implying that negotiations would be futile.

In view of the context in which this occurred, especially his urging employees to disavow the Union, I find the bargaining comment violative of Section 8(a)(1).

9. It is alleged that sometime during the latter part of February 1981 Mine Superintendent Menzie solicited employees to withdraw support for the Union by encouraging the employees to prepare letters informing the Union they no longer wished it to be their collective-bargaining representative. Pertinent to this allegation, employee Richardson testified that Menzie told him and his fellow employees Robinson and Brouillete that Menzie had been approached by three employees who wanted to know how they could get out of the Union. Menzie told Richardson and the others that they could either write a letter individually or they could write a letter collectively saying that they no longer wanted the Union to represent them. Richardson credibly testified that he had never asked Menzie or anyone else how to get out of the Union. Menzie's testimony did not contradict Richardson in regard to this conversation in any significant respect. Therefore, I find Menzie's conduct in soliciting employees Richardson, Robinson, and Brouillete to write a letter saying they no longer wished to be represented by the United Mine Workers to be a violation of Section 8(a)(1) of the Act.

10. It is alleged that sometime during the latter part of February 1981 Mine Superintendent Menzie solicited an employee to withdraw support for the Union by encouraging the employee to prepare and sign a letter informing the Union that he desired to withdraw from the Union.

Regarding this allegation, employee Don Emmons credibly testified that, in late February 1981, Menzie told him that if he wanted to get out of the Union he could write and sign a letter which said he no longer wanted to be in the Union. Although Menzie testified that he gave Emmons this information because Emmons had previously asked him how to get out of the Union, Emmons credibly denied that he had ever asked Menzie about getting out of the Union. Therefore, I find that in this instance, the information Menzie proffered was tantamount to a solicitation that the employee write and sign a letter saying that the employee wished to withdraw from the Union. Accordingly, I find this conduct to be a violation of Section 8(a)(1) of the Act.

11. It is further alleged that on or about March 2, 1981, Menzie solicited an employee to withdraw support from the Union by encouraging the employee to prepare a notarized letter requesting the Union to cease negotiations. It is also alleged that he offered to allow the employee to use Respondent's typewriter to prepare such a notarized letter. Regarding these allegations, Lori Wahls testified that on March 2, while she was working in the warehouse clerk's office, Menzie approached her and mentioned that three or four employees had asked him about getting out of the Union and he advised her that she could type an affidavit to that effect. Menzie pointed in the direction of the warehouse typewriter and told Wahls that she could use it to type the affidavit. Wahls further credibly testified that she had never asked Menzie for any procedure about getting out of the Union. In this respect, Menzie did testify that only two persons, Danny Gibbs and Don Emmons, had asked him about getting out of the Union. Menzie admitted that none of the other employees had solicited his advice about getting out of the Union. Danny Gibbs specifically denied that he had ever inquired about the manner of getting out of the Union. I credit Gibbs in this respect. Even assuming that one or more employees did ask Menzie what they should do in order to get out of the Union, I find that he gratuitously volunteered information to others concerning a procedure for getting out of the Union. I credit Wahls' testimony about the March 2 conversation and find that by soliciting her to execute an affidavit withdrawing support from the Union and by of-

fering her the use of a company typewriter, that Respondent in both respects violated Section 8(a)(1) of the Act.

B. *The 8(a)(5) Allegations*

It is undisputed that on January 9, 1981, a majority of the employees in the warehouse unit selected the United Mine Workers as their collective- bargaining representative and that on January 19 the Regional Director certified the United Mine Workers as the exclusive collective-bargaining representative of the employees in said unit. It is undisputed that on or about January 29, 1981, the Charging Party by mailgram requested Respondent to recognize and bargain with it as the exclusive representative of Respondent's employees, namely, the warehouse clerk's unit. (See G.C. Exh. 7.) It is further undisputed that by letter on or about February 6, 1981, Respondent denied the request for recognition and bargaining. (See G.C. Exh. 8.) Thus, with respect to the 8(a)(5) allegations, it is admitted that Respondent has refused the certified Union's request for recognition and bargaining. Respondent's counsel alleged that the existing National Bituminous Coal Agreement, introduced here as Respondent's Exhibit 2, is a bar to negotiations and/or certification of the warehouse clerk's unit. Respondent's counsel conceded that he wished to appeal the Board's decision denying review in the representation case and that, therefore, a refusal to bargain was necessary in order to test the appropriateness of the certification, under these circumstances.

In view of the Board's denial of review by mailgram (introduced here as G.C. Exh. 5), I have no alternative but to hold that the certification is appropriate, and that Respondent's refusal to bargain is unwarranted. Accordingly, I find that Respondent's refusal to recognize and bargain with the certified Union is a refusal to bargain within the meaning of Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Peabody Coal Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party, International Union, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, through its Mine Superintendent Ron Menzie, violated Section 8(a)(1) of the Act by: threatening employees, on or about December 12, 1980, and January 7, 1981, with loss of seniority and employment should they select the Union as their collective-bargaining representative; interrogating an employee regarding his signing of a union card and his union support; threatening an employee with loss of seniority and loss of employment if the Union won; interrogating an employee as to how the employee voted in the election; threatening an employee, on February 15, 1981, with loss of seniority and loss of employment because employees selected the Union as their bargaining representative; soliciting employees to withdraw their support for the Union by encouraging them to prepare notarized letters requesting that negotiations cease; offering to allow employees to use Respondent's typewriters to prepare such notarized letters; promising that Respondent would give more favorable consideration, in awarding jobs, to employees who signed the letter requesting that negotiations cease; implying that union representation was futile by stating that Respondent would only give the employees what Respondent wished; soliciting employees to write a letter saying they no longer wished to be represented by the United Mine Workers; soliciting an employee to withdraw support for the United Mine Workers by encouraging the employee to prepare and sign a letter informing the Union that the employee desired to withdraw from the Union. The above enumerated conduct on December 12, 1980, January 7, February 15 and 23, and March 2, 1981, all constitute separate violations of Section 8(a)(1) of the Act.

4. Respondent's refusal on or about February 6, 1981, to recognize or bargain with the duly certified Union, herein the United Mine Workers, constitutes a refusal to bargain and is a violation of Section 8(a)(5) of the Act.

5. The above enumerated unfair labor practices affect commerce within the meaning of the Act. Except for the unfair labor practices found herein, the remainder of the unfair labor practice allegations are dismissed.

THE REMEDY

The recommended Order will require Respondent to cease and desist from the unfair labor practices found. Respondent shall also be required to bargain with the United Mine Workers for 1 full year from the date bargaining between the two parties initially begins.

ORDER[1]

The Respondent, Peabody Coal Company, Stonefort, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of seniority and/or loss of employment if the Union were selected as bargaining representative; interrogating employees about their union sympathies, or their signing of union cards, or as to how they voted in a Board election.

(b) Soliciting employees to withdraw their support for the Union and offering the use of Respondent's typewriters in preparing letters requesting negotiations cease.

(c) Promising employees more favorable consideration on company jobs if employees wrote letters stating they no longer wished to be represented or if they requested negotiations cease; telling employees that Respondent would only give employees what Respondent wanted in negotiations, thereby implying negotiations would be futile.

(d) Refusing to bargain in good faith with the United Mine Workers, the duly certified collective-bargaining representative of the warehouse employees.

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[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action in order to effectuate the purposes of the Act:

(a) Bargain in good faith with United Mine Workers, the duly certified bargaining representative of Respondent's warehouse employees.

(b) Post at Respondent's facility at St. Louis, Missouri, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of of this Order, what steps Respondent has taken to comply herewith.

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

International Photographers of the Motion Picture Industries, Local No. 644 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL–CIO *and* James F. Maher, Esq., and King-Hitzig Productions, Party to the Contract and Jessica M. Burstein, Party in Interest. Case 2–CB–7361

February 4, 1982

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On March 13, 1981, Administrative Law Judge George F. McInerny issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions, supporting briefs, and answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge as modified herein.

The Administrative Law Judge found that Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act in July 1978. We agree for the following reasons. As the Administrative Law Judge found, Respondent tabled Jessica M. Burstein's application for membership in April 1978. In July 1978, it pressured King-Hitzig Productions, a firm which wished to hire Burstein, first, to seek Respondent's approval for Burstein to work on a film as a nonunion employee and, second, to hire a union still photographer in place of Burstein. Respondent thereby interfered with the employment relationship between Burstein and King-Hitzig because she was not a member while it simultaneously refused to admit her to membership. These actions clearly restrained and coerced Burstein in the exercise of her Section 7 rights and caused King-Hitzig to discriminate against her with regard to her employment on a ground other than her refusal or failure to tender union dues and fees. *International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 7, AFL (Seattle Construction Council)*, 92 NLRB 753, 763 (1950). We therefore find it unnecessary additionally to rely, as did the Administrative Law Judge, on his finding that Respondent had discriminatorily refused membership to Burstein.[2]

Amended Remedy

Having found that Respondent has violated Section 8(b)(1)(A) and 8(b)(2) by requiring that it approve Burstein's presence on King-Hitzig's film set and by subsequently causing King-Hitzig to remove her from its payroll, we shall order that it cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In accordance with our recent decisions in *Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL–CIO (Pittsburgh Des Moines Steel Company)*, 257 NLRB No. 78 (1981), and *Sheet Metal Workers' Union Local 355, Sheet Metal Workers' International Association, AFL–CIO (Zinsco Electrical Products)*, 254 NLRB 773 (1981), we shall require that Respondent (1) make Jessica M. Burstein whole for all losses of wages and benefits suffered as a result of Respondent's discrimination against her from the date of Respondent's unlawful conduct until she is reinstated by King-Hitzig to her former or substantially equivalent position or until she obtains substantially equivalent employment elsewhere;[3] (2) notify King-Hitzig in writing, with a copy to Jessica M. Burstein, that it has no objection to her hiring or employment; and (3) affirmatively request that King-Hitzig hire her for the employment which she would have had were it not for Respondent's unlawful conduct, or for substantially equivalent employment.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge concluded that Respondent violated Sec. 8(b)(1)(A) in April 1978 by discriminatorily denying membership to Burstein. Respondent excepts to this conclusion, relying partly on the fact, as noted by the Administrative Law Judge, that there was no showing that its conduct had an adverse impact on Burstein's employment in April 1978. It also contends that the matter was not fully litigated, and notes that the General Counsel did not allege such a violation until his post-hearing brief. We find it unnecessary to pass on the Administrative Law Judge's finding of this additional violation since, in light of the other violations found herein and Burstein's subsequent admission to Respondent's membership, the finding of such an additional violation would not materially affect our Order.

[3] Loss of earnings, if any, shall be computed in the manner set forth in *F. W. Woolworth Company*, 99 NLRB 289 (1950), with interest thereon computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

We recognize that, due to the nature of employment in the film industry, the facts of this case may present issues concerning the proper application of the remedy herein. We leave the resolution of any such issues to the compliance stage of these proceedings. In agreement with the Administrative Law Judge, we also leave to the compliance stage the determination of the effect, if any, of a letter from Herbert Burstein, counsel for Jessica M. Burstein, to the Administrative Law Judge, dated March 19, 1979.

259 NLRB No. 185

We have also found, in agreement with the Administrative Law Judge, that Respondent violated Section 8(b)(1)(A) by maintaining in its contracts union-security clauses which do not provide for the statutory 30-day waiting period before requiring union membership. Since not all of the parties to Respondent's contracts are before us, however, we shall not adopt the Administrative Law Judge's recommendation that Respondent be ordered to revise the union-security provisions of its contracts. Rather, we shall order Respondent to notify each employer with whom it has a contract, by mailing each a copy of the attached notice marked "Appendix" that the provisions found herein to be violative of the Act will be given no further force or effect. See *American Guild of Variety Artists, AFL–CIO (Fontainebleau Hotel Corporation, d/b/a Fontainebleau Hotel)*, 163 NLRB 457, 474 (1967).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Photographers of the Motion Picture Industries, Local No. 644 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL–CIO, New York, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause King-Hitzig Productions to cease paying Jessica M. Burstein for her work or otherwise discriminate against her because of her nonmembership in Respondent.

(b) Requiring King-Hitzig Productions to obtain permission from Respondent before allowing employees of King-Hitzig Productions on its sets or filming locations.

(c) Maintaining in its contracts with producers of feature films and commercials union-security provisions which do not provide the statutory 30-day waiting period before requiring union membership.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make Jessica M. Burstein whole for all losses of wages and benefits suffered as a result of its discrimination against her in the manner set forth in the "Amended Remedy" herein.

(b) Notify all employers with which it has a collective-bargaining agreement, by mailing each a copy of the attached notice marked "Appendix," that the union-security provisions, found herein to be violative of the Act, will be given no further force or effect.

(c) Post at its offices and meeting rooms copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Deliver to the Regional Director for Region 2 signed copies of the notice for posting by King-Hitzig Productions, if willing, in places where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Following a hearing at which all parties had an opportunity to present evidence and cross-examine witnesses, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post and distribute this notice. We intend to abide by the following:

WE WILL NOT cause or attempt to cause King-Hitzig Productions to cease paying Jessica M. Burstein for her work or otherwise discriminate against her because of her nonmembership in Local No. 644.

WE WILL NOT require King-Hitzig Productions to obtain permission from Local No. 644 before allowing employees of King-Hitzig Productions on its sets or filming locations.

WE WILL NOT maintain in our contracts with employers union-security provisions which do not provide the statutory 30-day waiting period before requiring union membership.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Jessica M. Burstein whole, with interest, for all losses of wages and benefits suffered as a result of our discrimination against her until she is either reinstated by King-Hitzig Productions to her former or a substantially equivalent position or until she obtains substantially equivalent employment elsewhere.

WE WILL affirmatively request that King-Hitzig Productions hire Jessica M. Burstein for the employment which she would have had were it not for our unlawful conduct, or for substantially equivalent employment.

WE WILL notify all employers with which we have collective-bargaining agreements that the union-security provisions found by the Board to be violative of the Act will be given no further force or effect.

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL NO. 644 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge: On July 25, 1978, the charge in this case was filed by James F. Maher.[1] The charge alleged that International Photographers of the Motion Picture Industries, Local No. 644 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, herein referred to as the Union, Local 644, or Respondent, had discriminated against Jessica Burstein in violation of Section 8(b)(1)(A), 8(b)(2), and 8(b)(5) of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.*, herein referred to as the Act.

Thereafter, on September 13, 1978, the Regional Director for Region 2 of the National Labor Relations Board, herein referred to as the Board, issued a complaint alleging that the Union had discriminated against Jessica Burstein by denying her the opportunity to be employed by King-Hitzig Productions, herein referred to as King-Hitzig or the Employer, and by maintaining an initiation fee which in all the circumstances is excessive and discriminatory. Respondent filed an answer in which it denied the commission of any unfair labor practices.

Pursuant to notice accompanying the complaint herein, a hearing was held before me in new York, New York.[2] The hearing opened on February 27, 1979. At that time it appeared that the parties had arrived at an informal settlement of the issues. The hearing was accordingly adjourned until April 2, 1979. In the meantime the Union and Jessica Burstein worked out their differences. Miss Burstein was given full membership rights in the Union and, in a letter to me dated March 19, 1979, from her attorney and father, Herbert Burstein, stated that she waived any remedy which the Board could ultimately award. In addition, Mr. Burstein requested that I permit the instant charge to be withdrawn either in its entirety or, alternatively, those portions of the charge alleging violations of Section 8(b)(1)(A) and 8(b)(2) of the Act. On March 22, 1979, counsel for the Union wrote me a letter setting forth a similar description of the agreement between Miss Burstein and the Union, and requesting that I permit the charges in this case to be withdrawn. The General Counsel, in turn, sent me a telegram voicing his opposition to the proposed withdrawal on the basis that the informal settlement did not settle "questions of closed shop practices" affecting "more than just an individual filing a charge at the Board." In addition, the General Counsel mentioned that another charge had been filed with the New York Regional Office[3] which might be consolidated with the instant case.[4]

The hearing resumed on April 2, 1979. At that time I denied the requests of the Union and the Charging Party to withdraw the charges (and to dismiss all or part of the complaint).

The hearing was then adjourned, *sine die*,[5] to allow the Union to appeal my ruling to the Board. On July 20 the Union addressed a letter to the Board requesting permission to appeal from my decision. The General Counsel duly filed an opposition to this request. The request was denied in a telegram from Associate Executive Secretary George A. Leet.[6]

Following receipt of the Board's ruling, and by agreement of the parties, the hearing resumed on September 7, 1979, at which time I reviewed with the parties subpenas issued by the General Counsel to Respondent and a petition to revoke the subpenas filed by Respondent. I made a number of rulings on these matters and at the close of the day adjourned the hearing, again *sine die* to allow the General Counsel to appeal those rulings, in the instances adverse to him, to the Board, and to move in the United States district court to enforce a subpena requiring Jessica Burstein to appear and testify in this matter.[7] The

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[1] Maher is or was a lawyer employed in the firm of Zelby, Burstein, Bernstein and Hartman. Herbert Burstein, a member of that firm, is the father of Jessica M. Burstein, the Party in Interest in this case.

[2] Respondent's motion to correct the transcript is granted.

[3] Case 2-CB-7742 (Warner Bros., Inc.).

[4] This did not happen. I am unaware of the disposition of Case 2-CB-7742.

[5] At that time it seemed probable that an informal settlement between the parties could be reached. It did not, however, work out.

[6] The telegram noted that then Board Member Murphy would have granted the appeal and approved the settlement.

[7] Miss Burstein had notified the General Counsel that she would not appear voluntarily and testify in this proceeding.

Union filed an opposition to the General Counsel's appeal of my rulings. That appeal was denied, again telegraphically, over the signature of Associate Executive Secretary Enid Weber, under date of November 9, 1979.

On March 21, 1980, the General Counsel filed an "Application for Order Requiring Obedience to *Subpoena ad Testificandum*" in the United States District Court for the Southern District of New York (Case M-18-304). As a result of this application, the court (Canella, J.) issued a consent order on March 31, 1980, ordering that Jessica M. Burstein appear before me in this hearing.[8]

After this, the hearing resumed on May 27, 1980,[9] continued on May 28, and concluded on May 29. At the hearing all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. Following the hearing the Union and the General Counsel filed briefs, which have been carefully considered.

Based upon the entire record in this case including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The jurisdiction of the Board over the Employer herein is not in question. I find that the Employer, King-Hitzig Productions, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The International Alliance of Theatrical Stage Employees (IATSE) is a union established along craft lines, with jurisdiction over technical craft and support phases of the motion picture, stage, and television industries. The record in this case shows that IATSE comprises 38 crafts, trades, and occupations organized into separate locals.

Those employees who are members of IATSE and who actually engaged in photography, whether on tape or film, and auxiliary equipment necessary for the operations of cameras are gathered into three locals in the United States. Local 659, located in Hollywood, is the largest of the three, representing about 3,000 employees, and has jurisdiction over the western States. Local 666 is headquartered in Chicago. It is the smallest of the three, and has jurisdiction over 22 States in the central part of the country. Local 644, Respondent here, has something over 800 members, and has jurisdicton over the east coast from Maine to Georgia. Local 644 is based in New York City and much of the work its members do is performed there, although the record indicates that camera crews who are members of Local 644 may be dispatched to other parts of the United States, or abroad, with some frequency.

Local 644 has collective-bargaining agreements with a number of companies engaged in the production of films produced to be shown either in theaters or on television. The contract in effect during the times material here contains a union-security provision requiring:

> 2(c) All cameramen in the employ of the Producer on the date hereof, and all cameramen hereafter hired shall, as a condition of continued employment, be or become members of Local 644 not later than the 31st day following the beginning of their first employment as hereinafter defined, or the effective date of this sub-paragraph, whichever is later, and all such cameramen, upon being or becoming members of Local 644 as aforesaid, shall be required, as a condition of continued employment, to maintain such membership in good standing during the life hereof.
>
> (d) "First employment" as referred to in subparagraph (c) hereof shall (unless and until determined by the General Counsel of the National Labor Relations Board, the Board, or a court of competent jurisdiction) mean the first such employment for producers under contract with Local 644 on or after the execution of this agreement, within any of the classifications covered hereby.[10]

Article 7 of the contract is a general provision covering, among other matters, crew size and composition on feature films.[11] Article 7(j) provides:

> "On all features (theatrical or television) and on production of Television Series, the photographic working crew shall consist of a First Cameraman, Operative Cameraman, First Assistant Cameraman and Second Assistant Cameraman."

Section (n) states:

> On all feature productions (theatrical or television) a Still Cameraman shall be a mandatory part of the crew when all or a major (at least two-thirds) portion of the production is being photographed within the jurisdiction of Local 644. If less than all or a major portion of the feature is being photographed in Local 644's jurisdiction, the Still Cameraman shall be a part of the crew so long as the shooting continues with any featured member of the cast. In all other cases where still photography of any kind

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[8] Judge Canella's order required Miss Burstein to appear at this hearing which was then scheduled for April 7, 1980. Due to a transit strike in New York, the matter was postponed by agreement of all parties until May 27, 1980, at which time Miss Burstein did appear and testified.

[9] David Kapelman, who had been serving as counsel for the General Counsel, resigned from the Regional Office in April 1980. He was succeeded at these last 3 days of the hearing by Carole Sobin.

[10] Substantially the same provisions govern employment under a separate agreement between Local 644 and producers of television commercials.

[11] King-Hitzig Productions is a joint venture organized to produce a feature film for television under an arrangement with the American Broadcasting Company (ABC).

is used in connection with a production, a Still Cameraman shall be a part of the crew.

Section (i) of the same article states:

> "Operation of still cameras shall be performed only by Still Cameramen represented by Local 644."

By way of explanation, the record in this case shows that feature films consume anywhere from 3 weeks to several months in actual filming time. Still pictures (as opposed to the moving pictures which are being taken as part of the production) are used to record the actors' makeup, as well as the arrangement of the set, at the end of each day, so that uniformity of appearance and arrangement can be maintained. Still photographs are also used for advertising and publicity purposes.

The collective-bargaining agreement also sets out wage scales and classifications for the period covered by the facts in this case as follows:

Director of photography (first cameraman)	$249 per day
Operative and additional cameraman	$195 per day
Assistant cameramen	$115 per day
Second assistant cameraman	$91 per day
Still cameraman	$146 per day

It should be noted further that the contract specifically permits individual employees to negotiate better terms and conditions than those set out therein. It is manifest from all the testimony on the subject herein that Local 644 perceives itself as an elite organization, made up of members possessing unique and precious artistic talent. Thus, Respondent's business representative, Darwin Deen, testified that directors of photography, entitled under the terms of the contract to $1,245 per week, average $6,000 for the same period in Local 644's jurisdiction (and $15,000 a week in the Hollywood Local 659). Most other classifications, according to Deen, similarly negotiate arrangements at varying amounts above the scales set out in the contract.

This fortunate state of things is more than offset by chronic and severe unemployment in the industry. According to the testimony of Darwin Deen, and in communications from Deen and Union President Larry Racies to the membership printed in the Union's bulletin, the problem, caused in part by the employment of aliens on films made in the United States, the use of nonunion crews, and the incursions of a rival union, Local 15 of the National Association of Broadcast Employees and Technicians, AFL-CIO (NABET), affected the majority of Respondent's members.[12] The attitude of Local 644 and its officers toward Local 15 NABET as expressed in Local 644's bulletins, and in Deen's comments at the hearing, was one of unremitting hostility.

Aside from these external causes for the serious unemployment among Respondent's members, the membership and the leadership recognized another, internal, cause; namely, the number of members on Local 644's roster. The perception of the membership in the spring of 1978 was that there were too many members, and that to process more applications and admit more new members would work to the disadvantage of the existing membership by further reducing opportunities for work. This view was opposed by President Racies and Business Representative Deen, at least as reported in the Union's bulletin, but on March 27, 1978, the Union's executive board voted to table all applications for membership until a membership policy committee appointed to recommend a new policy acceptable to the executive board and the membership did so. The committee report was due by May 15, 1978, but apparently no mutually acceptable plan was forthcoming until October 1978 when the bulletin for that month announced that at a meeting in September a new membership policy was adopted. This policy required prospective applicants to be issued an "information sheet" rather than an application. This sheet would then be screened by union officials to ascertain if the member was qualified to receive an application. In addition, the new policy tied the reception of new members to the percentage of current members unemployed during a given period.

This new policy was adopted despite the vehement objections of President Racies as expressed in the June 1978, summer 1978, and October 1978 bulletins, and remained in effect until at least the first half of 1979.

Meanwhile, Jessica M. Burstein, on whose behalf the charge in this case was filed, had been employed in the late 1970's by the National Broadcasting Company (NBC) as a still photographer. While she was employed at NBC, Burstein participated in a union organizing campaign. In this campaign both Local 644 and Local 15 NABET were competing for the loyalties of the employees. Burstein was approached by representatives of Local 644[13] both as a member of the employees' group, and individually, in efforts to persuade her to support Local 644. But she declined and instead threw her support to NABET, which became the representative for the employees involved, including Burstein.[14]

In March 1978 Jessica Burstein had started working for herself as a photographer. In pursuance of her career objectives she went to the offices of Local 644 to apply for membership. There she spoke with Business Representative Darwin Deen. According to Burstein's testimony, which I credit and which was corroborated by Deen, he told her that her membership application would not be processed at that time. She mentioned her experience at NBC and Deen replied that the fact that she had worked for NBC in a unit sought by Local 644, and that the unit had rejected Local 644, might hurt her chances for getting into Local 644. He said "people" in the Union were angry about the NBC situation. Burstein was not admitted into membership at that time.

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[12] In a letter to Senator Daniel P. Moynihan of New York, reprinted in the June 1978 edition of the bulletin, Deen estimated that unemployment at 75 percent but revised that figure downward in his testimony. There is no dispute that the unemployment rate was inordinately high.

[13] Since those representatives were not identified in the complaint, nor alleged to be agents of Local 644, I have not considered statements attributed to them by Burstein, but I do credit her testimony, which was credible and undenied, that she was approached by those representatives.

[14] Further details of the relations between this group of employees of NBC are not important to the issues in this case. Apparently there was an unsuccessful strike and, possibly as a result, Burstein left NBC in the early spring of 1978.

It is in this context that the facts in this case developed.

B. *The Alleged Discrimination Against Jessica Burstein*

During her employment with NBC Jessica Burstein had met, and apparently impressed, Rupert Hitzig, president of Rupert Productions and a film producer of some 15 years' experience. Sometime in the spring of 1978 Hitzig formed a joint venture with Alan King Productions, Inc., which took the name of King-Hitzig Productions (King-Hitzig). One purpose of the joint venture was to produce a film to be shown on ABC television and to be entitled "How To Pick Up Girls." Despite the title, this was to be a serious effort by a number of presumably talented individuals and budgeted at $1,100,000. Actual production was to start on July 10.

Toward the end of June, Hitzig and Jessica Burstein discussed her employment on the film as a still photographer. Beyond the usual requirements for the still photographer on this production, the script called for a principal character, who was himself a photographer, to use photographs taken on the set as a part of the plot. Thus, a portion of the still photographer's work product would become an integral part of the film. As the result of these discussions between Hitzig, Burstein, and King-Hitzig's production manager, Bruce Pustin, Burstein was hired on June 30 as the still photographer for "How To Pick Up Girls" at the Union's scale which was then $146 per day.

There was some conversation between Pustin, Hitzig, and Burstein concerning the fact that she was not a member of Local 644. It is clear from Hitzig's testimony that Burstein was hired as the still photographer on the set; that he was aware that she was not a member of Local 644; and that Local 644 required that a still photographer be on the set of a feature film.[15] Hitzig's motivations in all of this are not so clear. For example, he testified that the film, "How To Pick Up Girls," was budgeted for only one still photographer. Then, on July 6, he wrote to Darwin Deen requesting permission to use Burstein as "a still photographer" on the set, and setting out the "unique situation" present in this film and Burstein's ability to fill these production needs. He closed with the statement that he understood the matter would have to be discussed with the Union's executive board, and that King-Hitzig would have "a Local 644 still photographer on the set as well." Burstein testified that Hitzig told her he would back her right to be on the set, and would be supportive of her as long as the Union did not pull its crew off the set. She further stated that Pustin told her to go and check with Deen to find out whether she could actually work on the film.

After this last conversation Burstein did call Deen and asked him if she would be prevented by the Union from working. Deen told her that "by law we can't prevent you from working" and told her the matter of whether she could come on the set as a nonunion person with a standby would have to be decided by the Union's executive board.[16]

It is thus evident that Burstein knew what she wanted to do—to be the still photographer on the set of "How To Pick Up Girls." Hitzig's motivations are not so clear. On the one hand he assured Burstein that she was to be the still photographer on the film. On the other hand he stated in his letter to Deen that he understood that he would be required to hire a Local 644 member as still photographer for the file. At the same time Hitzig knew that he was budgeted for only one still photographer.

Burstein reported for work on July 10 at the beginning of the production and she worked, alone, as the still photographer on the set.

On that same evening the Union's executive board met and considered King- Hitzig's request regarding Burstein's employment. Dean testified that he had gained the impression that Hitzig's request and Burstein's call indicated that what they wanted was for Burstein to be a "special" photographer on the film. Special photographers were described in the record as people possessing special, even unique, talents and who may be used to perform specific functions on a set. However, Dean's testimony was contradicted by an excerpt from the minutes of the Union's executive board for July 10. The minutes submitted in evidence show that the board considered a request from King-Hitzig to "use applicant[17] Jessica Burstein as Still Cameraman and has requested permission for her to work . . . ." The minutes went on to record that the board voted to "get a full five man crew and allow Ms. Burstein to do actor's point of view pictures only." I accept the executive board minutes as accurately reflecting what occurred at the meeting, and I reject Deen's testimony that Burstein was actually seeking to be a special photographer on the film.

The next morning another still photographer, Curtis Kaufman,[18] reported to the set. According to Hitzig, they had to hire Kaufman because they were required to have a still photographer on the set when shooting a union film. He added that Burstein was not a member of the Union so they had to hire Kaufman. If Burstein had been a union member it would not, according to Hitzig, have been necessary to hire another still photographer. Bruce Pustin informed Burstein on July 11 that since she was not a member of Local 644 the Company had to put a union person on the set. Pustin told Burstein that Kaufman had to be paid, but she was not, since they could afford one still photographer.

Burstein continued to work on the film even though she was not paid until the filming was concluded, a period of 4 weeks. The evidence shows that she did receive a check for 1 week's pay, but that she returned that money to King-Hitzig. Kaufman was paid for 5 full weeks. There was no evidence on what either Burstein or Kaufman actually did during the filming.[19]

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[15] The actual agreement between King-Hitzig and Local 644 was not executed by Hitzig until July 5, 1978, and by the Union on July 26, 1978. However, Hitzig is a producer with 15 years' experience. I infer and find for that reason that he was aware of local 644's contractual requirements.

[16] This was substantially corroborated by Deen.

[17] An excerpt from the executive board minutes of April 10, 1978, shows that Burstein's application had been tabled.

[18] Respondent maintains that there is no evidence that Kaufman is a member of Local 644. However, he was identified as such by Hitzig, and an exhibit prepared by Local 644 and received in evidence herein shows that Curtis H. Kaufman was initiated as a member of Local 644 as a still photographer on July 1, 1976.

Reviewing these facts in consideration of the several allegations of the complaint, I first will consider the question of Respondent's refusal to grant membership to Jessica Burstein in March 1978. While this is not alleged in the complaint as discriminatory, the General Counsel does claim in her brief that this action by Respondent was discriminatory and did violate Section 8(b)(l)(A) and 8(b)(2) of the Act. The matter was fully litigated at the hearing and I feel in the circumstances there is no prejudice to any party in my deciding the issue.

The facts on this point are clear and undisputed. Jessica Burstein went to Respondent's offices and spoke to Business Representative Deen. Deen informed her that her chances for getting into the Union were not good, and he mentioned that her past affiliation with Local 15, NABET, and her concurrent rejection of overtures by Local 644 would be held against her. Deen's own hostility to NABET was manifest in his demeanor while testifying, and the feelings Respondent President Racies as expressed in the columns of its newsletter I find accurately reflect the views of Respondent toward NABET.

Respondent maintains that Burstein's failure to gain membership resulted from its policy, uniformly applied from March 27, 1978, on, to table and refuse to act on all applications for membership. However, the list submitted in evidence listing new members of Respondent shows that from March 28, 1978, the day after the executive board voted to table all membership applications to July 10, 1978, when Burstein began working for King-Hitzig, 23 people were accepted into membership. From July 10 until the end of 1978 10 more members were accepted.

Because of this contradiction between what Respondent says and what the evidence shows, and the undenied existence of a discriminatory motivation, I find the action of Respondent in denying union membership to Burstein at the executive board meeting of April 10, 1978, to be a violation of Section 8(b)(l)(A) of the Act. There is, however, no evidence in this record that Burstein sought employment anywhere else between April and her talks with Hitzig in late June. Thus, I cannot find a violation of Section 8(b)(2) in this matter in that time period.

Based upon the facts outlined above, there is no question but that Jessica Burstein was hired by King-Hitzig to be the still photographer on the film "How To Pick Up Girls" in late June 1978. The film was budgeted for one still photographer and the check and the payroll slip entered in evidence show that Burstein was on the payroll, and was paid, for 1 week. On July 5 there was a conversation between Darwin Deen and King-Hitzig's production manager, Bruce Pustin. There is no direct evidence on this conversation. Deen did not mention it during his extensive testimony, and Pustin was not available as a witness during the hearing in May 1980. The substance of the conversation can, nevertheless, be reconstructed from documents in evidence and from other testimony. For example, it appears from Rupert Hitzig's letter of July 6, 1978, to Darwin Deen that the letter was written as a result of that conversation. It further appears that Deen required that the letter be written as a formal request from the Employer to be permitted to use Jessica Burstein as the still photographer on the film "How To Pick Up Girls." Thus, I infer and find that Respondent, acting through Deen, required King-Hitzig formally to request permission for Burstein to work on the film.

The last paragraph of the July 6 letter likewise furnishes an insight into the substance of the conversation of July 5 between Deen and Pustin. In that paragraph Hitzig wrote, "It is our understanding that this matter will be discussed by the Executive Board and, if approved, we will also have a Local 644 still photographer on the set as well [sic]." This agreement to employ a Local 644 still photographer runs contrary to the testimony of both Burstein and Hitzig to the effect that Burstein was to be the only still photographer on the set. The film was budgeted for only one still photographer. There was no indication from the reported conversations between Hitzig and Burstein that a standby photographer was to be hired. But both knew that Burstein was not a member of Local 644, and Hitzig had assured Burstein that he would back her until the Union started to pull the crew off the set. Therefore, even in the absence of direct testimony, I infer and find from the hostility shown to Burstein by Deen because of her former association with NABET; the fact that Hitzig had hired Burstein with the warning that he would not back her, i.e., continue her employment, if he were threatened with a walkout by Respondent; and the statement in the July 6 letter, contrary to Hitzig's prior statements, that a Local 644 still photographer would be hired; that this shift resulted from pressure applied by Deen in his conversation with Pustin on July 5. The natural and probable result of such a conversation was exactly what happened; Burstein was advised that she would not be paid for her work.

In accord with these findings and inferences, I find that Respondent has violated Section 8(b)(1)(A) and 8(b)(2) by requiring that it approve the presence of Burstein on the set. *International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 7, AFL (Seattle Construction Council)*, 92 NLRB 753 (1950). Respondent's arguments that it is responsible for keeping the set or filming area free from "papparazzi"[20] or other unwanted intruders rings hollow. There is no indication in the collective-bargaining agreement, or elsewhere in the record, that the Union has any right or obligation to ensure the tranquility of an employer's set or filming location.

I find further that Respondent has violated Section 8(b)(1)(A) and 8(b)(2) in that it caused King-Hitzig to remove Burstein from its payroll, since Respondent had, as I have found, discriminatorily refused to admit her to membership. *Western Gillette, Inc.*, 201 NLRB 662 (1973).

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[19] Hitzig testified that the photographs which he had hoped would be an "integral part of the film" in the end were not used at all.

[20] Papparazzi are freelance photographers whose business consist of taking photographs of celebrities which they may later sell to newspapers or magazines.

C. *Respondent's Union-Security Clause*

The General Counsel maintains that the union-security provisions, quoted above, in the collective-bargaining agreement between King-Hitzig and Respondent are unlawful and discriminatory within the meaning of Section 8(b)(1)(A) of the Act.

In evaluating this allegation, I am not unmindful of the problems which the Union faces due to the transient nature of the film production business; the woeful level of unemployment among its members; the fact that many of those members may make individual arrangements with employers both in terms of compensation and periods of employment; and intense competition for jobs with NABET, with foreigners, and with nonunion producers. The evidence here shows that employees may work for a number of different employers over the course of a year. Some of these employers maybe, as King-Hitzig apparently was, established for the purpose of making only one or two films. The evidence further shows that the shooting of a feature film usually lasts for only 3 to 5 weeks. It is thus understandable that the Union would take steps to assume continuity in membership and to preserve its integrity as a factor promoting and preserving the interests of its members in the industry.

The Union is not entitled to take measures which tend to interfere with the rights bestowed by the Act on employees and those who seek to be employees alike. Here, the definition of "first employment" contained in section 2(c) and (d) of the collective-bargaining agreement, requiring the accumulation of 31 days, even if that time is spent in working for different employers, and thereafter requiring union membership, clearly contravenes the statutory intent of Section 8(a)(3) of the Act governing such agreements.

There is no indication here, as in *International Photographers of the Motion Picture Industries, Local 659 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (MPO-TV of California Inc., Y-A Productions, Inc.)*, 197 NLRB 1187 (1972), of the existence of a multiemployer bargaining unit which might, even in the absence of continuous employment, provide some theoretical basis for legality to Respondent's union-security provisons. Here, even if there is a multiemployer unit, it is evident that King-Hitzig signed the contract as an individual employer. In this case, if an employee came to work for King-Hitzig with, say, 10 days of experience with another producer covered by the contract, he or she would be required to join Respondent no later than the 21st day of employment with King-Hitzig. Thereafter, this hypothetical employee could not go to work for any producer unless he or she continued as a member in good standing, through the duration of the contract or as long as this clause was perpetuated from contract to contract.

In the light of these conclusions I find that, by entering into and maintaining these union-shop provisions, Respondent has violated and is violating Section 8(b)(1)(A) of the Act. *Convair, A Division of General Dynamics Corporation*, 111 NLRB 1055 (1955). Indeed, with respect to any employee who, during the tine such provisions are in effect, has completed 31 days of employment with any employer subject to its provisions, the provision constitutes a closed shop and a bar to employment unless that employee continues to remain a member of the Union in good standing. *American Guild of Variety Artists (Fontainebleau Hotel)*, 163 NLRB 457 (1967).[21]

D. *Respondent's Initiation Fee*

The constitution and bylaws of Local 644, as revised on March 1, 1971, set the initiation fee for admission to membership in any classification[22] at four times the highest regular weekly scale for that classification.[23]

The General Counsel alleges in the complaint that the fee is excessive and discriminatory within the proscription of Section 8(b)(5) of the Act. Section 8(b)(5) reads, in pertinent part, as follows:

> [It shall be an unfair labor practice] "to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances . . . .

In construing this subsection, the Board has defined the applicability of the subsection "to situations only where a valid union shop contract covering the employees is in effect." *Ferro Stamping and Manufacturing Co.*, 93 NLRB 1459 (1951).

Since I have already found that the union shop provisions of the contract here are invalid, this condition is not met. Accordingly, I can find no violation of Section 8(b)(5) and I need not consider the other arguments put forward by Respondent and the General Counsel on this issue.

Having found that Respondent violated Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent discriminated against Jessica Burstein on April 10, 1978, when its executive board voted to table her membership application, not admitting her to membership until March 21, 1979, I shall recommend that her admission be backdated to April 10, 1978, the date of the discrimination against her.

Since I have found that Respondent's actions discriminated against Jessica Burstein by denying her the wages due her in her employment with King-Hitzig Productions, I shall recommend that Respondent make Burstein whole for any loss of earnings suffered by her by reason of the discrimination against her.[24] Loss of earnings, if any, shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

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[21] Sec. 7(i) of the contract, quoted above, would also lead to the conclusion that Respondent maintained a closed shop, at least for still photographers, but this portion of the contract was not litigated and it may be that its intent is quite different from its tenor. I make no findings on this sec. 7(i).

[22] The Union admits members in the several classifications noted in the wage scales quoted above.

[23] There are exceptions to this applicable to children of members, who pay only 25 percent of the fee, and in cases where new classifications are being organized, upon a vote of two-thirds of the members at a regular or special meeting.

Having further found that Respondent has maintained invalid and unlawful union-security clauses in violation of Section 8(b)(1)(A) and (2), I shall recommend that it cease and desist enforcing such clauses, and that it immediately revise those union-security clauses to conform to the strictures of Section 8(a)(3) of the Act. Further, I will recommend that Respondent notify all producers with whom these contractual provisions are in effect[25] of the terms of this order together with revised language conforming the union-security provisions of the contract to the law.

The General Counsel has requested that I order the reimbursement of union dues paid under the unlawful union-security provisions. In this case, however, the evidence shows that many members had held their membership for years[26] and there was no evidence to show that any member was coerced or had not acted voluntarily in affiliating themselves with the Union. Thus, I will not recommend that Respondent be ordered to reimburse dues. *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO [Mechanical Handling Systems]* v. *N.L.R.B.*, 365 U.S. 651 (1961).

CONCLUSIONS OF LAW

1. Respondent Local 644 is a labor organization within the meaning of Section 2(5) of the Act.

2. King-Hitzig Productions is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By denying Jessica Burstein union membership because of her activities on behalf of another labor organization, Respondent has violated Section 8(b)(1)(A) of the Act.

4. By requiring Jessica Burstein's employer to obtain permission of the Union to enter upon the employer's premises or filming location, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

5. By causing Jessica Burstein's employer to cease paying her wages, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

6. By maintaining union-security provisions which do not allow the statutory 30-day waiting period, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

[Recommended Order omitted from publication.]

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[24] I leave for the compliance stage of the proceedings the effect, if any, on this recommended order of the letter from Herbert Burstein, Esquire, to me, dated March 19, 1979, copies of which are in evidence in this case.

[25] This will include all producers of feature films and commercials, since it was stipulated that the latter contracts contain union-security provisions substantially identical to those in the feature producers' contracts.

[26] Note the length of service of many members mentioned in the Union's newsletters in evidence.

Transcon Lines *and* Transport and Local Delivery Drivers, Warehousemen and Helpers, Local Union No. 104, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 28-CA-5662

February 5, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 14, 1981, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Unlike our dissenting colleague, we agree with the Administrative Law Judge's conclusion that the General Counsel has not established by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by discharging casual truckdriver James Haynes, Jr., on December 18, 1979. Thus, we agree with the Administrative Law Judge's findings that the General Counsel has not demonstrated that Respondent's termination of Haynes was motivated by its desire to defend against the EEOC charge that had been filed against the Company by employee Black rather than by its desire to enforce its legitimate rules regarding accidents. And, in so finding, we point out, as did the Administrative Law Judge, that Haynes admitted that he had been involved in a vehicle accident which was preventable by him. Furthermore, we emphasize that it is undisputed that Respondent, at all relevant times, maintained unambiguous written rules which provided for the immediate termination of a casual truckdriver involved in an accident which was preventable by that driver.

As found by the Administrative Law Judge, there is clearly no evidence to establish that Respondent had a pattern of granting exceptions to its accident rules and that, under the circumstances, the failure of Respondent's agent, Carl Johnson, to report Haynes' accident in accordance with Respondent's rules does not denigrate from this finding. Thus, with the exception of Johnson, the record is devoid of evidence that Respondent has ever declined to report or condoned, forgiven, or otherwise failed to act upon any accident which was preventable by a casual driver. Additionally, as noted by the Administrative Law Judge, Chetkauskas, Respondent's terminal manager, and Kentros, Respondent's chief of terminal operations, testified without contradiction that they both acted according to company procedures on all accidents and that they knew of no unreported or ignored accidents. As further noted by the Administrative Law Judge, Chetkauskas credibly testified that he would have acted as he did upon learning of Haynes' accident even if he had not discovered the pending EEOC charge. We further note that there is no evidence that Johnson's conduct in failing to act upon Haynes' accident was either pursuant to any real or apparent authority from Respondent. To the contrary, and as noted by the Administrative Law Judge, Johnson had for several months prior to the termination of his employment with Respondent displayed inattentiveness to his work and had generally been negligent in following Respondent's procedures regarding personnel matters, including accident recording. Therefore, unlike our colleague, we emphasize, as did the Administrative Law Judge, that substantive weight should not be accorded the fact that Johnson failed to report Haynes' accident as required by Respondent's rules.

Furthermore, contrary to our colleague, we do not regard as significant Chetkauskas' discussion with employees Walters and Westbrook wherein they alleged that Haynes had been involved in an accident. In this regard, we note Chetkauskas' position that he took no immediate action concerning the allegations of these employees since they made it clear that they had not witnessed the event and they further refused to reveal the identity of the person who they claimed had been a witness thereto. Under these circumstances, the allegations of Walters and Westbrook amounted to nothing more than rumor and we can draw no adverse inferences from Respondent's decision not to institute an investigation based thereon.

Finally, our dissenting colleague relies heavily on his view that the EEOC charge was "on [Chetkauskas'] mind" during the meeting with Union Business Agent Barton which was arranged for the purpose of discussing Haynes' termination. In this respect, our colleague emphasizes the fact that, during this meeting, Chetkauskas mentioned the EEOC charge more than once.[2] Even were we to find that the EEOC charge was, in fact, on Chetkauskas' mind during this meeting, that finding would not be controlling since it is undisputed that it was Respondent's investigation of the EEOC charge which prompted Haynes to admit his involvement in an accident and any discussion of Haynes' termination would therefore necessarily include some reference to the EEOC charge. Such a finding, however, would be insufficient to establish that Respondent acted unlawfully in discharging Haynes.

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[1] Since we agree with the Administrative Law Judge's conclusion that Respondent terminated James Haynes, Jr., because he violated Respondent's uniform rules against retaining probationary or casual drivers who have been involved in preventable accidents, we find it unnecessary to pass on the Administrative Law Judge's additional finding that James Black's action in filing an Equal Employment Opportunity Commission charge constituted protected concerted activity within the purview of the Act.

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In sum, while we recognize, as did the Administrative Law Judge, that there exists some circumstantial evidence tending to discount the reason asserted by Respondent for its discharge of Haynes, such evidence cannot serve as proof of a violation. Rather, the General Counsel has the burden of establishing unfair labor practices by a preponderance of all the relevant evidence. Based on the record as a whole, we agree with the Administrative Law Judge that the General Counsel has not met his burden here.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, dissenting:

Contrary to my colleagues and the Administrative Law Judge, I find that the facts surrounding Respondent's discharge of employee James Haynes, Jr., establish that the motivating cause for Haynes' discharge was the protected concerted activity of another employee, John Black. Accordingly, I find that Haynes' discharge violated Section 8(a)(1) of the Act. A full analysis of the facts reveals the following:

Respondent, the operator of a truck terminal, asserted that its policy is that all employees involved in vehicle accidents must report them to management, who in turn report them to the Company's safety office. Pursuant to Respondent's rules, a determination by its safety office that an accident was preventable by a casual truckdriver results, *inter alia*, in that driver's immediate termination.

In May 1979,[3] James Haynes, Jr., a white employee employed as a casual truckdriver, reported to Respondent's then chief of terminal operations, Carl Johnson,[4] that he had been involved in an accident which was preventable by him. Apparently, Johnson never reported the accident to any other official of Respondent. On December 10, Respondent hired Haynes as a permanent employee. In contrast, on or about October 12, John Black, a black employee who was also employed by Respondent as a casual truckdriver, was involved in an accident which Respondent classified as preventable by him. On October 15, Respondent, pursuant to its rule, discharged Black.

On December 12, 2 days after Haynes started full-time employment, two of Respondent's permanent drivers, Walters and Westbrook, told B. J. Chetkauskas, Respondent's terminal manager and the highest ranking management official at the plant, that there was a witness to Haynes' accident and that it was unjust for Respondent to have terminated Black, a black man, when Haynes, a white man, was retained despite the fact that both men had been involved in similar accidents. Chetkauskas admitted that he became "irate" at Walters and Westbrook because they had taken company time to alert him to a matter "that was [not their] concern . . . ." Chetkauskas testified that he then specifically told Walters, the employee who had done most of the talking, that the matter "didn't concern him . . . it was none of his business . . . [and] he had better get back to work." Chetkauskas did not investigate or take any other action concerning the report given by these employees.

Later that same day, Black filed a charge of race discrimination with the Equal Employment Opportunity Commission (EEOC) against Respondent. The charge alleged that Black was terminated because of his involvement in an accident while an unnamed white employee who had a similar accident was not terminated but, rather, was being considered for a permanent position.

Respondent was first notified of the existence of this charge on December 17 when Chetkauskas received a copy. While the charge did not mention Haynes, Chetkauskas immediately gave instructions to have Haynes report to his office "as soon as possible." Haynes, however, was absent from work that day and did not meet with Chetkauskas until his return to work the following morning. Although apparently not considered by the Administrative Law Judge, Chetkauskas admitted at the hearing that, soon after receiving notice of the pending EEOC charge, he telephoned Respondent's corporate office to discuss the EEOC charge.

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[2] We are constrained to note that, during this meeting, Chetkauskas also specifically stated that Haynes' discharge resulted from his involvement in a preventable accident.

[3] All dates hereinafter refer to 1979.

[4] At the hearing, Haynes identified Johnson as his immediate supervisor and the Administrative Law Judge found that Johnson was Respondent's agent.

Upon reporting for duty on the following morning, Haynes was again summoned to Chetkauskas' office where the latter asked him, *inter alia*, if he had ever had an accident while working for the Company. Haynes hesitated but then admitted, and related, the circumstances of his accident in May. The Administrative Law Judge found that Respondent's chief of terminal operations, Kentros,[5] who was also present, then attempted to coach Haynes into modifying his account of the accident by suggesting to him that he claim that the accident had occurred while he was working for another company. However, Chetkauskas interrupted and reminded Kentros that Haynes' report could not be changed because the meeting was being tape recorded. (The conversation had been recorded on a tape recorder that was prominently displayed.) Chetkauskas then discharged Haynes.

Later that day, Chetkauskas and the Union's business agent, Barton, met to discuss Haynes' termination. The record indicates that Chetkauskas immediately explained the facts surrounding the EEOC charge that had been filed by Black against the Company. While Chetkauskas told Barton that Respondent's rule on accidents was the ground for Haynes' discharge, Chetkauskas also told Barton about the discussion that he had had with Walters and Westbrook 6 days prior to receiving notification of the pending EEOC charge wherein they had reported Haynes' involvement in an accident. The Administrative Law Judge omitted entirely from his discussion the further testimony that during this meeting Chetkauskas revealed to Barton that only recently an EEOC charge filed by another employee against the Company had been resolved in favor of that employee. Furthermore, Chetkauskas agreed with Barton that Haynes' discharge was unfair. In this regard, Chetkauskas testified that he told Barton, *inter alia*, that, if he were Haynes, he would file NLRB charges and "scream it to the highest rooftop." The Administrative Law Judge also apparently failed to consider the evidence that in his report to his superior, dated December 18, Chetkauskas explained the circumstances surrounding Haynes' termination and additionally described the December 12 discussion that he had with Walters and Westbrook wherein they had, in essence, accused Respondent of race discrimination. Further, Chetkauskas attached a copy of the EEOC charge to this report.

The General Counsel contended that Respondent's discharge of Haynes violated Section 8(a)(1) of the Act. He argued that Respondent's termination of Haynes was motivated by its desire to defend against Black's EEOC charge rather than because of any legitimate interest in enforcing its rules regarding accidents. Although the Administrative Law Judge found that the Act would protect Haynes from any discriminatory action by Respondent motivated by the EEOC charge filed by Black, or by any discrimination intended to improve Respondent's defense to that charge, he declined to find that the discharge was for either of these reasons. In so doing, the Administrative Law Judge reasoned that, with the exception of Johnson, the evidence did not establish a pattern on the part of Respondent's agents of granting exceptions to its rules on accidents, and that Respondent should not be held bound by Johnson's decision to ignore or forgive Haynes' accident. He further found that Respondent's accident rules were uniformly applied since Chetkauskas and Kentros testified that, unlike Johnson, they acted consistent with company procedure whenever and however they learned of an accident. Further, the Administrative Law Judge apparently credited Chetkauskas, whose testimony was elicited in response to a leading question asked by the Administrative Law Judge, that he would have acted as he did upon learning of Haynes' accident on December 18 even if he had not discovered that Black had filed an EEOC charge. The Administrative Law Judge therefore concluded that Respondent had not violated the Act.

After considering the entire set of circumstances surrounding the discharging of Haynes, I am convinced that the reason asserted by Respondent for his discharge was pretextual and that the discharge was unlawful. Simply stated, Respondent's position that Haynes' discharge was based entirely upon the enforcement of its accident rules is contradicted by the evidence. Thus, the record is devoid of support for the Administrative Law Judge's finding that substantial weight should not be accorded Johnson's decision not to report Haynes' accident. Haynes identified Johnson as his immediate supervisor and, as found by the Administrative Law Judge, Johnson was an agent of Respondent. Indeed, Respondent admitted at the hearing that, as chief of terminal operations, Johnson was the second highest ranking official at the terminal. Moreover, undisputed testimony established that Respondent had delegated to its chief of terminal operations, *inter alia*, the specific task of receiving accident reports from employees. Neither Board law nor the law of agency requires that an employer expressly authorize its agent's specific conduct. Thus, it is sufficient that, at the time that Johnson decided that Haynes' accident did not warrant further action, Johnson was an agent for whose conduct Respondent was responsible.

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[5] Johnson, who voluntarily resigned on August 2, was replaced by Kentros as chief of terminal operations.

Respondent's position is additionally undercut by the fact that Chetkauskas declined to take action in response to the reports by Walters and Westbrook that Haynes had been involved in an accident. Indeed, Respondent was spurred to action only after being notified of the pending EEOC charge. Moreover, in light of the evidence that Respondent had direct knowledge that Johnson had on prior occasions been lax in enforcing its rules, it is significant that Chetkauskas, despite the report by Walters and Westbrook, not only failed to investigate the matter, but also irately told the employees that the matter was none of their business. Had Chetkauskas been genuinely concerned with acting in accordance with company procedure, as he contended, he undoubtedly would have been more receptive to the information offered by Walters and Westbrook and he certainly would have initiated some investigation in response thereto. This he did not do. Furthermore, any lingering doubt about Respondent's true motive is dispelled by the fact that, even after Haynes admitted to Chetkauskas and Kentros that he, in fact, had been in a preventable accident, Kentros attempted to coach him into retracting that admission. And this from an employer who claims that it strictly adheres to company procedures on all accidents and that it would have terminated Haynes upon learning of his accident irrespective of its knowledge of a pending EEOC charge.

Finally, the fact that the EEOC matter was very much on Respondent's mind is clear from the Administrative Law Judge's finding, which both the majority and I have adopted, that at the meeting immediately after Haynes' termination which was arranged for the purpose of discussing that termination with the Union, Chetkauskas, rather than dealing with Haynes' accident, spent an extraordinary amount of time telling Barton about the pending EEOC charge, the unrelated EEOC charge that had recently been resolved against the Company, and the earlier report from Westbrook and Walters concerning Haynes' involvement in an accident. Moreover, during that meeting, Chetkauskas agreed with Barton that Haynes had been unjustly discharged and encouraged Barton to protest that discharge by filing an unfair labor practice charge with the Board. Under the circumstances, the only explanation consistent with the facts is that Respondent's asserted reason for discharging Haynes was contrived and that Respondent is attempting to hide its true motivation for the discharge. Indeed, the true reason for the discharge is evident from the timing and manner in which it occurred. As detailed above, the record is replete with substantial and credible evidence that Respondent's discharge of Haynes was motivated by the race discrimination charge filed by Black with the EEOC and its desire to defend against that charge. I therefore conclude that Respondent's discharge of Haynes was violative of Section 8(a)(1) of the Act and I dissent from my colleagues' failure to so find.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This matter came to hearing before me on February 12, 1981, at Phoenix, Arizona, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 28 of the National Labor Relations Board on August 7, 1980, based upon a charge filed by Transport and Local Delivery Drivers, Warehousemen and Helpers, Local Union No. 104, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union, on January 10, 1980, against Transcon Lines, herein Respondent.

The complaint, as orally amended at the hearing, alleges that Respondent terminated its employee James E. Haynes, Jr. and thereafter refused to reinstate him because of his and other employees' protected concerted activities in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, herein the Act. Respondent admits the discharge and subsequent refusal to reinstate Haynes but denies that Haynes or any other employee or employees were engaged in protected concerted activities or that Haynes' discharge was for reasons other than the consistent application of permissible rules of employee conduct.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file post-hearing briefs.

Upon the entire record herein, including briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT[1]

I. JURISDICTION

Respondent is now, and has been at all times material herein, a California corporation with an office in Phoenix, Arizona, where it is engaged in the business of interstate and local transportation of linehaul freight and other commodities. Respondent annually enjoys gross revenues in excess of $50,000 resulting from the transportation of freight and other commodities from the State of Arizona directly to points outside the State.

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[1] The facts were largely undisputed. Except where otherwise noted, these findings are based on the pleadings, admissions, stipulations of the parties, or uncontradicted credible testimonial or documentary evidence.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Events

1. *Background*

Respondent operates a terminal in Phoenix, Arizona, from which it picks up and delivers freight by truck. At all relevant times B. J. Chetkauskas was Respondent's terminal manager. Until August 1979, when he left Respondent's employ, Carl Johnson was chief of terminal operations—second in charge of the terminal. On August 2, 1979, Peter D. Kentros replaced Johnson and thereafter served as chief of terminal operations.

At all relevant times the Union has represented Respondent's terminal drivers and has entered into a series of collective-bargaining agreements with Respondent covering these employees. Respondent maintains a complement of permanent drivers. As its needs require, Respondent utilizes casual drivers who are procured through the Union's hiring hall. Although such employees may be repeatedly utilized, they are employed on a short-term or temporary basis. When a driver is hired as a full-time or permanent employee, he or she is subject to a probationary period. Probationary employees have lesser rights under the contract and under Respondent's rules of conduct than permanent employees who have completed their probationary period.

Respondent's policy is that all vehicle accidents must be reported by employees to management, who in turn report them to their safety office. Respondent has a separate office located in Oklahoma City, Oklahoma, which evaluates reported accidents and classifies them as preventable or not preventable by the driver. Striking a stationary object, absent mitigating circumstances, is a preventable accident. A determination that an accident was preventable results in the driver-employee being "charged" with the accident. Respondent's rules provide for differing actions against an employee charged with an accident: A nonprobationary permanent employee receives a warning letter stating that additional chargeable accidents may require greater discipline; a casual employee or a probationary employee is immediately terminated.[2]

2. The actions of Haynes prior to his termination

James E. Haynes, Jr., was employed by Respondent as a casual truck driver commencing in May 1979.[3] Save for the accident asserted as the cause of his termination, there is no dispute that throughout his employment with Respondent Haynes was considered an excellent employee and was highly regarded by Respondent.

In the latter part of May, while driving a truck for Respondent, Haynes scraped the top of his trailer against the eave of a building doing no apparent damage to the building but making a slight scratch in the skin of the trailer. Haynes immediately notified the appropriate agent of the building owner at the site, who after inspecting the eave told Haynes the incident was of no consequence and to forget it. When Haynes returned to the terminal he reported the accident to Johnson who inspected the trailer with Haynes and told him the matter did not warrant further action. Apparently Johnson never reported the incident to any other agent of Respondent. There is no contention that Haynes' conduct following the accident either in reporting to the building agent or to Johnson was other than in full accord with Respondent's required procedures.

Haynes was informed on December 7, 1979, that his work was good and that he was to be made a permanent employee on December 10. Commencing on December 10 until his termination on December 18, 1979, Haynes worked without event as a full-time employee for Respondent although in his probationary period.

3. The EEOC allegation, its investigation, and Haynes' termination

John D. Black, a black man, had been employed as a casual employee by Respondent. Apparently on or about October 12, he had an accident involving the separation of his tractor from its trailer which Respondent classified as chargeable against him. Respondent discharged Black on October 15 for that reason and did not thereafter reemploy him. Black contacted David M. Barton, the Union's assistant business agent, regarding his discharge; however, the Union after contacting Respondent determined nothing could be done on Black's behalf.

On or about December 12, soon after the commencement of the work shift, Chetkauskas was approached in his office by two of Respondent's employees who told him it was unjust for Respondent to have fired Black, a black man, when Haynes was retained even though Haynes, a white man, had had an accident similar to Black's accident. The men professed to have a witness to Haynes' accident whose name they would not divulge. Chetkauskas told the employees the matter was none of their concern and, since they were talking to him on company time, they should return to work. Chetkauskas took no immediate action on the matter.

That same day Black filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against Respondent alleging his discharge in October was because of his race. The charge contained the following assertion:

> My accident on October 12, 1979, was mechanical while a similarly situated White employee had the identical accident through negligence on October

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[2] Respondent produced substantial credible and essentially unchallenged testimony and documentation of the existence of the rules and their application to reported accidents.

[3] All dates hereinafter refer to 1979 unless otherwise indicated.

15, 1979, and was allowed to complete his 30 days probation to be considered on a permanent basis.

A copy of this charge was received by Chetkauskas on December 17. It was his first notification of the existence of the charge. Chetkauskas, thinking the charge reference to the similarly situated employee referred to Haynes, tried to talk to Haynes that same day but Haynes could not be reached. The next morning, December 18, Haynes was summoned to Chetkauskas' office where he spoke with Chetkauskas and Kentros. Their conversation was openly recorded on Respondent's tape recorder. Chetkauskas asked Haynes if he had ever had an accident involving a separation from a tractor. Haynes said no. Chetkauskas then asked Haynes if he had ever seen anybody damage Respondent's property. Haynes said no. Chetkauskas then asked if Haynes had ever had an accident with Transcon. Haynes said no, hesitated a moment, and then related the circumstances of the May events described above.

Chetkauskas told Haynes that company policy provided that if a casual employee has an accident that employee cannot thereafter be employed by Respondent. Kentros asked Haynes if the accident had perhaps occurred when he was driving for another company. Before Haynes could answer Chetkauskas told Kentros—pointing to the running tape recorder—that Haynes' remarks were on tape including the statement that he had reported the accident to Johnson. Chetkauskas told Haynes that Respondent could not use him anymore and that he was terminated. The meeting ended.[4]

4. Post-termination events

Haynes left Respondent's premises after his termination and reported the events to Barton at the union office. Barton phoned Chetkauskas and a meeting was arranged for that afternoon. Chetkauskas, Barton, and Haynes met at Chetkauskas' office. Almost immediately Haynes was asked to step outside and did so. Barton and Chetkauskas continued the meeting alone.

Chetkauskas told Barton of the EEOC charge, the two employees who had earlier confronted him regarding the matter, and his meeting with Haynes in which Haynes had admitted he had had an accident. The two men disagreed on the propriety of Haynes' termination. Barton asserted that Haynes was being used as a "sacrificial lamb" and that "the whole thing stinks." Chetkauskas agreed that it might be unfair but that the matter was out of his hands. Barton several times claimed the discharge was not because of the accident. Chetkauskas rejoined on each occasion that casuals who had accidents could not be used by the Company and that this rule was the reason for Haynes' discharge.

Barton again asserted that Haynes was being denied his rights and that charges would be filed against the Company with the NLRB and EEOC Chetkauskas responded that he did not disagree with Barton's assertions of injustice and that, if he were Haynes, he would file NLRB charges and "scream it to the highest rooftop." Chetkauskas suggested Barton try and secure other employment for Haynes but Barton asserted he would obtain the return of Haynes to his employment with Respondent. The conversation then turned to Haynes' work qualities. Chetkauskas made reference to the uniformly good attributes of Haynes and offered to recommend Haynes for employment elsewhere. Haynes was brought in to the meeting at this point. Barton explained his own position regarding the dispute and that he was going to file a grievance on Haynes' behalf and inquire into the possibility of EEOC and NLRB charges. The meeting ended.[5]

On January 24, 1980, the State of Arizona's department of law, civil rights division issued a no cause order on Black's charge after investigating the matter pursuant to the deferral procedures of the Equal Employment Opportunity Commission. The order stated there was no reasonable cause to believe an unlawful employment practice had occurred as alleged and dismissed the charge.

A grievance was filed by the Union concerning Haynes' discharge which came before the Joint State Committee for the Trucking Industry of Arizona and New Mexico (the Committee)—the dispute resolution forum established under the contract—on or about January 28, 1980. The minutes of those proceedings reflect that the Union presented the argument to the Committee that Haynes was discharged because he was a union member and because of "reverse discrimination due to the circumstances surounding his termination." In support of its argument the Union presented to the Committee the factual background resulting in Haynes' termination. Respondent asserted that in investigating the merits of the EEOC complaint it first determined Haynes had had an accident and then applied its firm policy not to employ casuals who had had a chargable accident. The Committee decision minutes contain the following resolution:[6]

> The motion was made and seconded that there is no violation of Article 41; therefore, the termination of Mr. Haynes is proper. The motion carried.

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[4] These findings are a composite of the essentially corrobative versions of each participant in the conversation. Two points were in dispute. First, Chetkauskas and Kentros testified that there was a break in the meeting during which time Haynes was asked to leave the room and Chetkauskas consulted by telephone with his Los Angeles based industrial relations department. Haynes did not recall such a hiatus. Each witness exhibited a sound demeanor. The telephone call is not implausible for Chetkauskas may well have sought guidance in this unforseen situation. Such an occurrence is not likely to be incorrectly recalled by an honest witness. Since Haynes may have simply forgotten the interruption, I credit Chetkauskas and Kentros and find that the telephone call occurred as they described. Second, Haynes denied that he ever told Respondent's agents in this meeting that he knew of a company rule that an accident by a probationary or casual employee required his discharge. While this remark was attributed to Haynes by Kentros, Chetkauskas does not corroborate Kentros on this point nor does the written statement of Chetkauskas' or Kentros' own minutes of this meeting.

[5] These findings are based upon the credited testimony of Barton. Barton had a sound demeanor and demonstrated a detailed recollection of events. Chetkauskas had essentially no recollection of the details of this conversation but what he did recall generally corroborated Barton. While there is some evidence Kentros was present briefly at the conclusion of the conversation, he did not testify concerning this conversation.

[6] Insofar as the record reflects, the minutes are the only written record of the Committee's ruling or the basis of its decision.

Article 41(a) of the current collective bargaining agreement states in part that during an employee's probationary period:

> [H]e may be discharged without further recourse, provided however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members.

B. *Analysis and Conclusions*

1. The threshold issue—deferral to the determination of a contractually established grievance resolution procedure

Respondent urges deferral of the instant case to the ruling of the contractually established Committee under the Board's doctrine established in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). The General Counsel opposes such deferral. Each party argues its position is consistent with the Board's holding in *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980). In that case the Board, overruling prior law, stated:

> In specific terms, we will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. In accord with the rule formerly stated in *Airco Industrial Gases,*[7] we will give no deference to an aribration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions.

In the instant case the minutes of the Committee's decision state only that Haynes' discharge was not in violation of article 41 of the collective-bargaining agreement, which article only protects against employer discrimination based on employee union membership or discrimination based on contract evasion. Neither subject is the specific issue herein. The decision does not indicate that the protected concerted activity theory of the General Counsel advanced in the instant case was in any way considered by the Committee. There being no evidence that the Committee ruled on this statutory issue,[8] it follows that no deference may be paid to its holding. Accordingly, I decline to defer to the award and shall turn to the merits of the case.

2. The discharge on its merits

The General Counsel's case may be roughly divided into two elements. The first element is the legal argument that Haynes was protected by the Act from discrimination against him intended to improve Respondent's defense to Black's charge. The second element of the General Counsel's case is the factual argument that Respondent discharged Haynes not because of his accident but rather because of Black's EEOC allegation. The elements and Respondent's defenses thereto are considered separately.

a. *Do the protections of the Act apply to single employees who file charges with the EEOC and, if so, do these protections extend to other employees to protect them against employer discrimination motivated by the EEOC charge?*

The General Counsel argues that the filing by Black of the EEOC charge is protected concerted activity under the Board's recent articulated constructive concert doctrine which attributes a collective or concerted purpose to single employee actions in dealing with governmental agencies concerning employment regulations.[9] The General Counsel then analogizes such protected activity to the situations where an employer illegally discriminates against otherwise uninvolved employees in an attempt to conceal other discrimination against union activity. A second discharge to hide an initial illegal discharge is also illegal.[10] The General Counsel also calls attention to the Board's decision in *Sioux City Foundry*, 241 NLRB 481 (1979), as persuasive of his position. Following the General Counsel's theory here the Board found in that case that an employer discharged two employees in violation of Section 8(a)(1) of the Act when it fired them for the purpose of avoiding or defending against an unrelated job applicant's threats to file charges with the EEOC. The Board found the single job applicant's threat to file sexual discrimination charges with the EEOC constructively concerted and hence protected activity. That protection extended to the two individuals whose terminations were undertaken by the employer in an attempt to meet the threatened EEOC charges.

Respondent defends against the General Counsel's argument by noting the statement by the General Counsel at the hearing that the Government's theory is dependent on the continuing vitality of the constructive concert theory of *Alleluia Cushion* and its progeny. Respondent notes that this Board doctrine has been rejected by various courts of appeals including the Ninth Circuit in whose jurisdiction this action lies. Thus, argues Respondent, the General Counsel has conceded his case rests on a doctrine specifically rejected by the Ninth Circuit. Second, Respondent notes that the protections which may arguably extend to Black in filing his charge with the EEOC do not necessarily attach to Haynes who did not himself engage in or have any connection to conduct protected by the Act. Nor, in Respondent's view, would employee Section 7 rights be chilled were discrimination of the type contended by the General Counsel to have occurred. This is so, Respondent asserts, because the person whose activities are to be protected—the filer of the EEOC charge—has "no common interests or sympathies" with those who might be adversely affected by the employer. Thus, here, Black is not aligned in interest with Haynes.

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[7] *Airco Industrial Gases—Pacific, a Division of Air Reduction Company, Incorporated*, 195 NLRB 676 (1972).

[8] Respondent argued that the fact that the Committee, contrary to normal practice, met several times during the hearing of the dispute, supports the inference that the General Counsel's theory was considered. I reject this view. I rely only on the decision itself and decline to infer from circumstances that a particular argument was considered, and ruled on, *sub silentio*, by the Committee.

[9] See the fountainhead case, *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975), and its progeny.

[10] The General Counsel cites: *Jack August Enterprises, Inc.*, 232 NLRB 881 (1977); *Armor Industries, Inc.*, 227 NLRB 1543 (1977), and *Haynie Electric Co., Inc.*, 225 NLRB 353 (1976).

For the reasons hereinafter stated, I agree with the General Counsel that the protections of the Act extend to shelter uninvolved employees from discrimination by employers motivated by discrimination charges filed with government agencies by single employees alleging discrimination based on race.

I reach the above result guided by the general principles contained in the cases cited by the General Counsel and, more particularly, due to the holding of the Board in *Sioux City Foundry, supra*. The legal theory of that case differs from the theory asserted by the General Counsel in the instant case only in that (1) the initiating protected action was a threat to file a discrimination charge by a job applicant, not the actual filing of a charge and, (2) the discrimination allegation involved sex rather than race. These differences are of no legal consequence. The filing of a charge with a government agency is no less protected than the threat to do so. Employees and job applicants are equally protected by the Act. Finally, the Board makes no distinction between racial and sexual discrimination but finds the protest of each to be protected activity in appropriate situations. Without addressing Respondent's assertions regarding the degree of acceptance of the Board's constructive concert theory in the courts of appeals, it is sufficient to note that as an administrative law judge I am bound to follow Board precedent which has not been reversed by the Supreme Court. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1965). Accordingly, it is appropriate to turn to the second element of the General Counsel's case, the issue of Respondent's motive in terminating Haynes.

b. *Was Haynes' discharge motivated by Black's EEOC charge?*

In examining the evidence adduced by the General Counsel in support of its discharge allegation, it is important to note what the General Counsel is not arguing. It is undisputed that Respondent fired Haynes based upon its interrogation of him as part of its investigation of the EEOC charge filed by Black. It is reasonable to believe that Respondent would not have learned of Haynes' May accident as opposed to the contended later accident had it not been for Black's charge and the subsequent investigation. If the General Counsel were arguing that information gained in the investigation of an EEOC charge could not be the basis of actions against other employees, i.e., some form of immunity, then the General Counsel would be arguing for an automatic violation here irrespective of Respondent's motives.[11] Rather the General Counsel is arguing that Respondent took the action it did, not because of any legitimate interest in enforcing its rules regarding accidents, but rather because of Black's charge. The General Counsel's theory then depends on a finding that the motive of Respondent in discharging Haynes was to defend against Black's charge rather than other legitimate business reasons such as enforcing its rules concerning employees who have accidents. Respondent argues that its discharge of Haynes was based entirely upon its uniform enforcement of permissible rules of employee conduct.

Respondent at all relevant times had unambiguous rules concerning employee vehicle accidents. Its Oklahoma City, Oklahoma, safety division evaluates accidents reported to it by Respondent's various terminals and renders a judgment on whether they are "chargeable" to the driver because they were preventable. There is no doubt and I find that Respondent's rules, which require the termination of casual and probationary employees who have chargable accidents, are not impermissible rules of employee conduct. It follows therefore that if Respondent terminated Haynes because of his violation of the rules and not because of Black's EEOC charge, his discharge is not impermissible.

The General Counsel's argument does not challenge the validity of Respondent's rules but rather disputes their application to the Haynes events. In his brief counsel for the General Counsel calls Haynes' accident "extremely minor" and adds:

> Such an "accident" could not seriously be envisioned by the Respondent as the type of accident which would constitute a dischargable offense.

The General Counsel buttresses his argument by noting that when the accident was reported to Johnson, Respondent's admitted agent, he told Haynes no further action was warranted and did not require Haynes to fill out an accident report. The General Counsel further argues that Respondent's concern on December 18 was the EEOC charge rather than the May accident. He notes that Chetkauskas dismissed the report by the two employees of the occurrence of a preventable accident by Haynes without even a cursory investigation at a time when he had not yet had notice of the EEOC charge. It was only when the charge was received, the General Counsel argues, that Respondent became interested in an accident by Haynes.

Respondent introduced evidence showing it has regularly enforced its rules regarding accidents. Each accident declared preventable by Respondent's Oklahoma City office in recent times was the basis of subsequent employee discipline consistent with Respondent's rules. Some of these accidents were relatively minor in terms of physical damage to vehicles. No written rule addresses the question of minor accidents. While the Oklahoma City office did not have an opportunity to rule on the Haynes accident, for Chetkauskas fired Haynes immediately upon learning of the accident from him, the record is clear and I find that any accident involving striking a building[12] would have been classified by Oklahoma City as a preventable accident and that Chetkauskas so knew when he fired Haynes.

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[11] Nor would such an argument if made have prevailed. The Board has specifically ruled that even testimony in an unfair labor practice hearing may provide the basis of not otherwise improper adverse action against a wrongdoing employee. *Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Electronic and Space Technicians Local 1553, AFL-CIO (Hughes Helicopters, Division of Summa Corporation)*, 224 NLRB 350 (1976).

[12] No issue of mechanical failure was raised.

To meet the General Counsel's arguments that Haynes accident did not rise to the level of a reportable accident Respondent introduced two types of evidence. First it elicited uncontradicted evidence that Johnson, during the period from May, the month of Haynes' accident, until his separation from Respondent in August, was lax and inattentive to his work particularly as to paperwork and procedure. Respondent also demonstrated that Johnson had not followed approved procedures as to personnel matters such as attendance recordkeeping and accident reporting. I find this evidence persuasive of the proposition that Johnson was negligent in following Respondent's procedures and that no substantial weight should be accorded the fact that Johnson did not report Haynes' accident consistent with procedure. Johnson was not doing what was required by Respondent. No pattern of granting exceptions to the rules is thus established. Second, Respondent showed its accident rules were uniformly applied. Repondent's agents Chetkauskas and Kentros testified without contradiction that each reported and acted according to procedure on all accidents they learned of by whatever means and that they knew of no unreported or ignored accidents. Chetkauskas also testified that he would have acted as he did on learning of Haynes' accident on December 18 irrespective of the circumstances of the discovery—EEOC charge or not.

It is not implausible that an employer's agents would let pass unreported minor transgressions which violated the letter but not the spirit of a company rule. This may be particularly true where the rule, if invoked, could be foreseen as requiring a draconian punishment out of all apparent proportion to the transgression. If such is the case here, i.e., Haynes' accident was a minor matter not worthy of formal treatment which would cause Haynes' discharge, Respondent's later invocation of the accident rule during the EEOC investigation would indicate the asserted reason for the discharge was pretext. Such an overreaction to an event earlier forgiven would not be a normal or customary act but rather the exaggerated and defensive manifestation of an employer determined to defend itself against an EEOC charge by creating, *post hoc*, a strict, invariable rule against accidents, however minor. The General Counsel's evidence, noted *supra*, tends to support this view. So, too, do the statements of Chetkauskas to Barton immediately after Haynes' termination that Chetkauskas too would protest the termination in similar circumstances. Further, Chetkauskas spent a great deal of time telling Barton about the EEOC charge rather than dealing exclusively with Haynes' accident, thus revealing the EEOC matter was much on his mind.

It may also be argued that Chetkauskas did not fire Haynes because of a motivation to defend Respondent against the EEOC charge, but rather because Haynes' report of the accident was made at a time when his remarks were being recorded on tape and, presumably, the tape would be subject to review by higher officials in other locations as part of their investigation of the EEOC charge. Minor matters could perhaps be forgiven at the local level, but Respondent's agents outside the terminal could not with confidence be expected to be forgiving to either the driver or the agent who failed to rigidly apply the rules. Chetkauskas thus would feel compelled to fire Haynes because the accident report was not subject to be ignored with the confidence that no one outside the terminal would ever learn of the matter. Under this analysis, it was the presence of the tape recorder and the official nature of the EEOC inquiry which caused Haynes' accident to be treated as a rule violation rather than ignored or forgiven—Haynes was fired because he had the misfortune to speak at the wrong time. This scenario is supported by Chetkauskas' remarks to Kentros in the termination meeting. Kentros attempted to coach Haynes into modifying his earlier report of the accident by claiming the accident occurred while working for another employer. Chetkauskas interrupted and, pointing to the running tape recorder, noted that Haynes' report could not be changed because it was on tape. Such a motive by Chetkauskas would explain his remarks to Barton in which he agreed with Barton's protestations of injustice in Haynes' discharge but asserted the matter was out of his hands.[13]

What is critically lacking in the General Counsel's proof as to either discharge theory, however, is even a scintilla of evidence that any accident, however minor, was condoned, forgiven, or otherwise unreported or not eventually acted upon by Respondent's agents save Johnson. Respondent has done all it could to prove the negative proposition that it allowed no exceptions in the application of its accident rules other than unwillingly and unknowingly through the unreliable Johnson. Respondent's witnesses credibly testified that they knew of no exceptions allowed under the rules. Respondent produced substantial documentation showing that its accident reporting procedures are regularly utilized and the rules uniformly applied. Thus, while the General Counsel has adduced some circumstantial evidence tending to discount Respondent's assertions, the General Counsel offered no direct evidence of exceptions to the accident reporting and rule enforcement procedures other than through Johnson. If Repondent has condoned or forgiven accidents by employees of the type Haynes described to Chetkauskas, employees or other witnesses or records should have been produced by the General Counsel to so indicate. Evidence of a minor accident ignored or forgiven would have been direct evidence of a *de minimis* or threshold standard required to trigger Respondent's enforcement of the rules. Without such evidence, on this record, I cannot but find that Respondent has established by a preponderance of the evidence that its rules were uniformly enforced and that Chetkauskas would have taken the action he did in firing Haynes under any circumstances whether or not the EEOC charge had been filed against Respondent. The General Counsel's circumstantial evidence does not meet Respondent's evidence here. Even assigning the burden of proof to Respondent on this issue, I find that Respondent, through Chetkauskas, would have terminated Haynes upon learning of the accident as Haynes reported it to him on December 18, 1979, even if Black had never filed his charge with the EEOC.[14] I find therefore that the termination of Haynes was not because of the protected concerted activity of Black. Thus, no violation of Section 8(a)(1) of the Act has occurred as alleged in the complaint. Accordingly, I shall dismiss the complaint in its entirety.

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[13] Since this latter view of the facts was not argued by the General Counsel, it is not clear whether the General Counsel's theory of a violation includes the situation where Haynes was terminated not because of the contentions of the EEOC charge but rather because his disclosure of the accident occurred during the investigation of the EEOC charge and therefore was treated formally and was not excused or forgotten as it would have been if the accident was revealed in another context. In view of my additional findings, *infra*, it is unnecessary to decide if such a factual resolution supports a violation.

C. *Summary*

I have considered Respondent's motion to defer this matter to the Committee decision rendered under the contractually established grievance resolution process. I have declined to defer because of my determination that the Committee decision did not indicate on its face that the Committee had considered the statutory issues here presented in reaching its decision. I have determined that Black's action in filing an EEOC charge constitutes protected concerted activity within the purview of the Act which protection extends to all those who might suffer discrimination motivated by Respondent's desire to defend against the charge. Such protection applies to protect Haynes from discrimination by Respondent motivated by Black's charge. Notwithstanding all of the above, I have also found that Respondent fired Haynes because he violated Respondent's permissible and uniformly enforced rule against retaining probationary or casual drivers who have had a preventable accident. Therefore, I have found the allegations of the complaint are without merit and should be dismissed.

Upon the foregoing findings of fact and the entire record herein I make the the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not commit any unfair labor practices as alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[15]

The complaint shall be, and it hereby is, dismissed in its entirety.

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[14] Such a determination precludes the necessity of deciding if the General Counsel's evidence rises to the level of a *prima facie* case of illegal motivation. This is so for, even if such a case is made, a subsequent conclusion that Respondent would have taken the action it did even in the absence of the protected activity requires a finding that the activity was not illegal. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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